BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Hearing Stream 07 – Chapter 37 Designations

CASEBOOK FOR QUEENSTOWN LAKES DISTRICT COUNCIL

HEARING STREAM 07 – CHAPTER 37 DESIGNATIONS

7 October 2016

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Babington v Invercargill City Council

The Planning Tribunal: His Honour Planning Judge Skelton, presiding; Mrs R Grigg and Mr T W Smallfield.

2, 3 November 1992; 29 April 1993 Decision No C 26/93

Designation/Acquisition — Designation — Community health centre for discharged former psychiatric patients in Residential 2 zone — People suffering acute depression, schizophrenia or other personality disorders — Whether requirement to provide for community health care centre should be revoked — Town and Country Planning Act 1977, s 118 — Resource Management Act 1991, ss 171, 174(4).

Transitional provisions — Designations — Proceedings commenced under Town and Country Planning Act 1977, s 118 — Primary hearing which commenced before 1 October 1991 followed by Tribunal hearing which commenced after 1 October 1991 — Whether provisions of Resource Management Act 1991 applicable — Resource Management Act 1991, ss 171, 174(4), 422.

In July 1991 the Southland Area Health Board gave notice to the Invercargill City Council under s 118 of the Town and Country Planning Act requiring the Council to make provision for a community health centre at 62 Thomson Street, Invercargill, by way of designation. After public notification and the receipt of objections, a hearing followed in which the Planning and Regulatory Committee of the Council recommended that the requirement be revoked. The Area Health Board rejected this recommendation and an appeal to the Tribunal followed.

The intention was to provide a day care facility in a residential environment where discharged psychiatric patients could come together to learn basic life skills. The group were not intellectually handicapped, but were people who had suffered from acute depression, schizophrenia or other personality disorders. Each participant would be individually assessed for suitability to participate in the programme. There were approximately 50 potential participants living largely unsupervised in the community in Invercargill. A daily attendance of between 18 and 25 people would be expected.

The premises would be used for the designated purposes between 8 am and 5 pm and occasionally until 9 pm for evening meals. Apart from this, no activities would take place in the evening. No medical treatment would occur on the site and no medicines or drugs would be kept there.

Neighbours raised concerns about traffic, parking, and the hours of operation proposed for the centre. They were also concerned at the introduction of what they saw as an incompatible non-residential activity into the residential area.

Held (dismissing the appeal):

(1) Because the hearing before the Council's committee commenced before 1 October 1991, the Town and Country Planning Act 1977 continued to apply. However, because the Tribunal hearing did not commence until after 1 October 1991, it fell to be dealt with under the Resource Management Act, and in particular s 171 of that Act.

(2) The criteria to which the Tribunal was required to have regard were met. The designation was reasonably necessary for achieving the objective of the Area Health Board, which was to provide a day care centre in a residential environment for people suffering mental health disabilities. It was not for the Tribunal to pass judgment on the merits or otherwise of this objective, but rather to have "particular regard" to whether the proposed designation was reasonably necessary for achieving the objective. Adequate consideration had been given by the applicant to alternative sites to satisfy s 171(1)(b) and (c).

(3) The critical issues in the case arose out of the matters in s 171(d) and (e). The only relevant instrument in terms of s 171(d) of the Act was the district Plan, which zoned the area Residential 2. The proposal was not, as asserted by the objectors, incompatible with the objectives and policies of that zone. It came very close to being within the specification "Educational facilities including community use thereof, but excluding boarding hostels", which was a permitted use in the zone. It could not be said that the proposal was incompatible with the kind or classes of activities provided for in the Residential 2 zone as several other activities provided for as discretionary within the zone would also give rise to significant "people activity". In terms of Part II of the Act, the proposal was not inconsistent with s 5, but it was more difficult to accept that it would maintain and enhance amenity values or the quality of the environment in the area.

(4) Although the choice was a difficult one, on balance, with the controls and safeguards specified, authorisation should be given for the site to be used as a community health centre.

Observation

It was strange that the Tribunal should be required to evaluate a requirement for a designation by reference to matters that were not considered by the requiring authority when it made the requirement, particularly as the authority involved was no longer a requiring authority in terms of the Resource Management Act 1991.

Case considered

Stop Action Group v Auckland Regional Authority, High Court, Wellington, 31 July 1987 (M 515/85) Chilwell J.

Appeal under s 118(7) of the Town and Country Planning Act 1977.

R J Russell for the Southland Area Health Board
R H Ibbotson for the first appellant
A M Babington for himself and other appellants.

The decision of the Tribunal was delivered by His Honour Judge Skelton.

DECISION

On or about 1 July 1991 the Southland Area Health Board (the Area Health Board) gave notice to the Invercargill City Council (the Council) pursuant to s 118 of the Town and Country Planning Act 1977, requiring the Council to make provision by way of designation in its district scheme for a community health centre at 62 Thomson Street, Invercargill. [A legal description of the land followed.]

This land (the appeal site) is situated at the corner of Thomson Street and Thames Street in Invercargill City. It is zoned Residential 2 in the Council's former district scheme, now transitional district Plan.

The Area Health Board's requirement was duly publicly notified by the Council and ten objections in opposition were received. Following a hearing the Council's Planning and Regulatory Committee recommended to the Area Health Board that the requirement be revoked. Acting pursuant to s 118(6) of the Town and Country Planning Act 1977, the Area Health Board rejected this recommendation. This appeal by several of the original objectors has followed.

The Area Health Board's decision was delivered on 6 November 1991 and received by the appellants on 8 November 1991. However, because a hearing before the Council's Committee had commenced before 1 October 1991, the provisions of the Town and Country Planning Act 1977 continued to apply — see s 422(2)(a) of the Resource Management Act 1991. Then, the present appeal was brought in accordance with s 422(7) of the Resource Management Act 1991, but because the hearing did not commence until after 1 October 1991, it now falls to be dealt with under the Resource Management Act 1991 — see s 422(8)(e) of that Act. We will have something more to say about this aspect of the matter later.

We turn now to consider the Area Health Board's proposal in more detail and to discuss the evidence we heard both in support of and in opposition to that proposal.

Mr L R Boon, who is the manager of the Area Health Board's Health Development and Community Services Division, told us that there is a nationwide health care policy to retain psychiatric patients in the community wherever possible. [Funding was available for the proposal.]

The intention is to provide a type of day care facility in a residential environment where former psychiatric patients who have been discharged into the community can come together as a group on a voluntary basis to learn fairly basic but necessary daily living skills.

Mrs Deirdre Kokich, who is employed by the Area Health Board as the co-ordinator of mental health day care centres and would be directly and personally responsible for the conduct of the centre on the appeal site, told us that currently there are approximately 50 potential participants living in the community in Invercargill. She would expect a regular daily attendance of between 18 and 25. Currently, she is running a similar type

of centre in temporary premises in the Southland Hospital grounds. It is called "Our Place". It was formerly a three bedroom dwelling used for doctors' accommodation. However, it is not large enough and because it is not in a residential environment it is also inappropriately located.

By contrast, the appeal site contains a large two storey dwelling that has six rooms, together with a kitchen and washing facilities. It also has adequate space in the grounds to provide an opportunity for members of the group to learn about domestic gardening and glasshouse activities and to undertake physical exercise.

Mrs Kokich said that each member of the group is individually assessed for suitability to participate in the programme and has a two week trial period during which further assessment is made. The intention is to provide a "safe" environment for the weakest member of the group. Any person found to be unsuitable is dismissed from the group.

Mr Boon also told us there would be two full time staff on duty throughout the day. Members of the group would attend between 9 am and 4.30 pm but the premises would be used for the designated purpose between the hours of 8 am and 5 pm and occasionally in the evenings until 9 pm when the group would have an evening meal together. There will be no other meetings, courses or evening activities of any kind. There will be no medical treatment given on site and no medicines or drugs of any description will be kept there.

It was stressed by both Mr Boon and Mrs Kokich that the people who are likely to attend this centre are all living largely unsupervised in Invercargill City, at the present time. There is another day care centre of a similar kind known as Rata House that is also in a residential zone and it has been operating for some four years without incident. Generally, it caters for an older age group than the one proposed for the appeal site. This group will be aged between 18 and 35-40. Some are unemployed, some have part time jobs, some live in flats or in group homes, and others are living in marriage relationships in their own homes.

We also heard evidence from Mrs Catherine Eketone, a home support worker, who confirmed much of the evidence just discussed. She made the point that the group for whom this proposal is intended are not intellectually handicapped. They are people who have suffered from acute depression, schizophrenia or other personality disorders.

We also had the benefit of seeing and hearing from a member of the proposed group. She was a young woman aged 22 who currently attends Our Place. She told us that she finds this very worthwhile. She is learning various home skills and is being given an opportunity to socialise as part of a group.

Both Mr Boon and Mr R Driver-Burgess, a social worker employed by the Area Health Board, gave evidence about investigations they had made into possible alternative sites. Mr Boon said that ten residential properties were investigated. Of these only three were considered to have any real potential as a suitable site for this proposal, and of those three the appeal site was considered to be the most appropriate. It is reasonably large, handy to the main shopping and commercial area of Invercargill and readily accessible by public transport.

Mr Driver-Burgess investigated several commercial properties, that is to say, properties in commercial zones where the proposal is probably a

permitted activity. However, once again these properties did not prove to be suitable. Mr Driver-Burgess looked at a commercial building in The Crescent, Wrightson's warehouse, a warehouse in Mersey Street, the former Clyde Tavern premises, a Seventh Day Adventist Hall and a former night club on the corner of Tay Street and Dee Street. He said that none were suitable because they did not have anything approaching a homely or residential environment. In many instances there was insufficient space, rooms were too small, there was no provision for offstreet parking and members of a group such as the one being catered for here would find it distressing to have to come to a commercial area.

Those opposing the Area Health Board's requirement, all of whom are nearby residents, raised several issues. They were concerned about an increase in traffic, and particularly about problems associated with onstreet parking. They were also concerned about the hours of operation, particularly if there are to be evening activities.

Two of them, Mr R J King and Mr I W C Keen who live at 66 Thomson Street and 68 Thomson Street respectively, expressed concerns about bringing together a group of people suffering from various mental health disabilities. Mr Keen was particularly concerned about this.

All those who gave evidence, including Mr A M Babington and Mrs L R Morton, also said that one of their major concerns was the introduction of what they saw as an incompatible non-residential activity into this residential area. They asserted that this would seriously affect the existing residential environment and create pressure to extend commercial activities. The appeal site is close to a commercial zone to the west.

Some of the residents who gave evidence accepted that a residential environment was at least desirable, if not necessary, for the kind of facility here proposed, but as we said earlier, Mr King and Mr Keen did not accept that proposition at all. [Traffic matters were considered.]

Near the beginning of this decision we said that these proceedings are now to be continued and completed as if this appeal had been commenced under the Resource Management Act 1991 — see s 422(8)(e) of that Act. Nobody, including ourselves, realised this during the hearing, which proceeded to completion in the belief that s 118 of the Town and Country Planning Act 1977 still applied. However, on closer examination it became apparent to the presiding Planning Judge that this was incorrect and on 9 November 1992 he issued a minute to parties, copy of which is annexed to the judgment as Appendix "1".

In response to this minute Mr R J King said that he accepted the position outlined therein and asked for a decision favourable to the neighbours and residents of Thomson Street. Mr Ibbotson, counsel for the Council, also accepted that the relevant provisions of the Resource Management Act 1991 are now applicable. He advised that there were no additional matters or evidence that the Council wished to place before the Tribunal.

On 23 November 1992 Mr Russell, counsel for the Area Health Board, lodged a memorandum in which he also agreed that the Resource Management Act 1991 is now applicable. He then addressed the matters in s 171 of that Act to which the Tribunal is required to have particular regard — see s 174(4) of the Act. These are five in number and before going any further we will set out the whole of s 171. It reads as follows:

(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.

(2) After considering a requirement 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 (including any conditions relating to the operation or design of the public work, or project or work, where full details are not available at the time of considering the requirement); or
  (b) Withdraw the requirement.

(3) The territorial authority shall give reasons for a recommendation made under subsection (2).

It will be noticed that the first two matters in subs (1)(a) and (b) are very similar to two of the matters that were contained in s 118(8) of the Town and Country Planning Act 1977, namely those in subss (1)(a) and (d). However, the matters in s 171(1)(c), (d) and (e) are new.

We begin this part of our decision by commenting that it seems strange that we should now be required to evaluate a requirement for a designation by reference to matters that were not considered by the requiring authority when it made that requirement. This is all the more so when it is realised that authority involved is no longer a requiring authority in terms of the Resource Management Act 1991. We refer to the meaning of the term "requiring authority" in s 166 of the Act. The Area Health Board is not a Minister of the Crown, nor is it a local authority in terms of s 2 of the Act. So far as we are aware it is not a network utility operator. There was no evidence that it is and we think it unlikely that it could be. Under the Town and Country Planning Act 1977 it was authorised to make a requirement and we accept that the proposed activity, which was a public work under the former legislation, remains a public work in terms of the Resource Management Act 1991.

However, the relevant transitional provisions of this Act to which we have already referred, appear to contemplate such a situation arising and

no party sought to argue that the Area Health Board is no longer authorised to maintain the requirement that it made under the earlier legislation.

We remind ourselves that this requirement is to designate the appeal site for a "community health centre". At the hearing we expressed concern about what that term might authorise the appeal site to be used for in the future but Mr Boon said that it was of some importance to the Area Health Board that it remain unaltered. The Board has agreed that if the designation proceeds it can be subject to conditions, one of which will be that the use of the premises is to be limited to those persons suffering mental health disabilities. There are other restrictive conditions to which we will refer later. Given that, we are no longer concerned about terminology.

[The Tribunal then set out the terms of the proposed ordinance that the Area Health Board and the Council agreed could be included in the district Plan under s 175(1)(d) of the Act.]

We have carefully considered all the arguments for and against this requirement. We are satisfied that the designation is reasonably necessary for achieving the Area Health Board's objective, which is to provide a form of day care centre for people suffering mental health disabilities in a residential environment. We stress as we did many times when dealing with similar cases under the former Town and Country Planning Act 1977 — and we do not understand the law to have changed in this regard — that it is not for us to pass judgment on the merits or otherwise of this objective. What we are required to do is to have *particular regard* to whether the proposed designation is reasonably necessary for achieving it. As we have just said, we think it is.

We are also satisfied that adequate consideration has been given to alternative sites. For this finding we rely on the evidence given by Mr Boon and by Mr Driver-Burgess. Again, we do not understand the law to have changed in this regard with the passage of the Resource Management Act 1991.

In respect of both the above matters one of the leading cases under the former legislation was *Stop Action Group v Auckland Regional Authority*, High Court, Wellington, 31 July 1987 (M 515/85) Chilwell J, and we have relied on that judgment in reaching the conclusions just recorded.

It is a little unclear what Parliament meant when it enacted s 171(1)(c) of the Resource Management Act 1991. It might be expected, for example, that when deciding whether there are truly alternative sites for the purposes of considering whether adequate consideration has been given to them it would be necessary to have regard to the nature of the public work. However, assuming the intention to be that given that there are alternative sites, they can be disregarded because it would be unreasonable to expect them to be used for the particular public work, again for the reasons given particularly by Mr Boon and Mr Driver-Burgess, we think that is the case here. We add, however, with regard to the other residential sites, that there was a paucity of evidence about why they were inappropriate or unsuitable. Nevertheless as we have already said, Mr Boon gave sufficient evidence to satisfy us that the appeal site is from a locational point of view, a very satisfactory site upon which to establish this proposed public work.

Before we leave this particular topic, and we bear in mind that the matters

we are now having regard to are not criteria that *have* to be fulfilled, rather they are, as the section says, matters to which we are required to have particular regard, we want to say that in another case where it might be a more crucial issue than it is in this case, if there were alternatives a requiring authority would be expected to give more detailed evidence about them than was given in this case.

The critical issues in this case arise when regard is had to the matters in s 171(1)(d) and (e). We accept Mr Russell's submissions that the only relevant instrument in terms of subs (1)(d) is the district Plan. However the appellants have claimed that the Plan protects them because it zones their properties, and indeed their immediate neighbourhood, Residential 2. They have asserted that the Area Health Board's proposal is incompatible with the objectives and policies for that zone.

With respect to them and to their strongly held views about this matter, we are unable to agree. The zone statement for the Residential 2 zone tells us that it is:

> an area providing for medium density housing within close proximity to the Central Business District of the City. Similar uses as in the Residential 1 zone are provided for with different performance standards for multi-unit housing.

One of the permitted activities, as Mr Russell pointed out, is "Educational Facilities including community use thereof, but excluding boarding hostels". We were not asked to make a declaration about this and what we are about to say should not be taken as being one, but we agree with Mr Russell that the Area Health Board's proposal comes very close to being within that specification, which we stress provides for an activity that is permitted in this zone, without the need to obtain a resource consent. It may have to comply with certain performance standards, but the point we are seeking to make is that the kind or class of activity here being considered is akin to that contemplated by the Residential 2 zoning.

Then again, one of the specified discretionary activities is "Halls, rooms and buildings used for art, recreation and places of assembly". There are several other specified discretionary activities that would also give rise to significant people activity such as garden centres, service stations, urban maraes, public and private hospitals, convalescent homes, health and fitness clinics, and medical centres. Of course, all these activities being discretionary activities would require resource consents and the appropriateness of an applicant's site would be an important factor when dealing with such applications. Again, however, we are unable to say that the Area Health Board's proposal, given its scale and the constraints intended to be placed on it, is incompatible with the kind or classes of activities provided for by the Residential 2 zoning.

Nevertheless the question remains, and it is an important question, as to whether that proposal should be authorised on the appeal site. This brings us to a consideration of some of the matters in Part II of the Act. We accept Mr Russell's submission that to make provision for this activity on the appeal site would not be inconsistent with s 5 of the Act, but we have more difficulty accepting his submission that it will maintain and enhance amenity values and the quality of the environment in this particular part of Invercargill City.

We are not really concerned about traffic matters. We do not think the appellants' case was strong in this regard and we bear in mind Mr Gray's concession. But we are concerned about the appellants' perception of the effect that introducing this activity into their neighbourhood will have on the existing environment and on amenity values.

In the end we have been faced with a hard choice. On the one hand we accept the Area Health Board's case that it needs a residential environment in which to carry out this particular public work. On the other hand, we fully respect the views of the residents, particularly those concerning safety and security. We also respect their concerns about bringing into this neighbourhood a group of people, as distinct from individuals, who are suffering from mental health disabilities.

On balance, however, we are satisfied that with the controls in the proposed ordinance set out earlier in this decision, and the safeguards that the professional witnesses told us about, which we have no doubt will be implemented, even if the actual work is contracted out, because the responsibility for this public work will rest with the requiring authority, in whatever form that might finally take, authorisation should be given for the appeal site to be used for a community health centre, but limited in the ways earlier discussed.

We remind all parties that even though this activity is authorised by a designation it may still be the subject of enforcement proceedings — see s 314(1)(a)(ii) of the Act — and those proceedings can be brought by any person, including a resident. It will be particularly important therefore, for the Area Health Board or its duly authorised agent, to ensure that the expectations that the professional witnesses hold for the success of this activity are fully realised.

For all the foregoing reasons this appeal is disallowed, except to the extent necessary to modify the Area Health Board's requirement to ensure that the designation is provided for in the Invercargill City Transitional District Plan by way of the ordinance set out earlier in this decision as further amended particularly with regard to Condition 5, in the course of the hearing.

Although the appellants, who represented themselves at the hearing, have not been wholly successful they mounted a very strong case and were fully justified in bringing this matter before us. We would not contemplate making an order for costs against them. There will be no orders for costs in these proceedings.

Appendix 1

MINUTE TO PARTIES

1 This appeal was heard at Invercargill on 2 and 3 November 1992. At the end of the hearing the Tribunal reserved its decision.

2 In his opening submissions Mr R Russell, counsel for the requiring authority, the Southland Area Health Board, submitted that in deciding this appeal, which was commenced pursuant to s 118(7) of the Town and Country Planning Act 1977, we should apply the tests provided for in subs (8) of that section. As we understood them, the other parties agreed. The presiding Planning Judge referred counsel to s 420 and

following of the Resource Management Act 1991, and asked that they consider whether the effect of those sections and in particular s 422 might be that this submission is no longer correct.

3 In his reply Mr Russell reiterated his opening submission that s 118(8) of the Town and Country Planning Act 1977 applies in this case and that matter was not taken any further at the hearing.

4 Having now read s 422 of the Resource Management Act 1991 more carefully, it seems to us that counsel's submission may not be correct – we refer particularly to subs (8). Because this is an appeal that has not been wholly or partly heard, it seems that subclause (e) of that subsection applies with the result that the provisions of the Resource Management Act 1991 are the appropriate provisions to apply in this case.

5 If we are right about this, then for the purpose of determining this appeal we should have regard to the matters in s 171 of that Act – see s 174(4). It seems that our powers would be the same as they are under the Town and Country Planning Act 1977. However, while some of the matters in s 171 are similar to those in s 118(8) of the Town and Country Planning Act 1977 there are additional matters, and we refer particularly to subclauses (c), (d) and (e).

6 The Tribunal now asks counsel in particular, but the appellants should also take advice on the matter, to advise the Tribunal whether they agree with the views just expressed, and if so, what steps they now wish us to take before determining this appeal. If additional evidence is required then of course the hearing will have to be resumed, and from a practical point of view that will cause difficulties for the Tribunal if that has to take place at Invercargill in the near future. If submissions only are required then these can be put before us by way of memoranda.

6 To ensure that there are no unnecessary delays the parties will have 14 days from the date of this minute to make their responses. If further time is required, leave is reserved to apply accordingly.

BEFORE THE ENVIRONMENT COURT

Decision No. [2012] NZEnvC 120

IN THE MATTER of appeals under Clause 14(1) of the First Schedule of the Resource Management Act 1991 **(the Act)**

BETWEEN

GAVIN H WALLACE LIMITED
(ENV-2009-AKL-000505)
(ENV-2010-AKL-000011)
(ENV-2010-AKL-000031)

MAKAURAU MARAE MAORI TRUST BOARD INCORPORATED
(ENV-2010-AKL-000024)
(ENV-2010-AKL-000027)

THE TRUSTEES OF THE ERNEST ELLETT RYEGRASS TRUST AND OTHERS
(ENV-2010-AKL-000030)
(ENV-2010-AKL-000147)

EVELYN MENDELSSOHN (BY THE EXECUTORS OF HER ESTATE)
(ENV-2009-AKL-000502)

Appellants

AND

AUCKLAND COUNCIL (as successor to Auckland Regional Council and Manukau City Council)

Respondent

Hearing: At Auckland, 28 November – 2 December 2011, 5 – 8 December 2011, 26 – 29 March 2012, 4 May 2012

Court: Environment Judge R G Whiting
Environment Commissioner M Oliver
Environment Commissioner K Prime

Counsel: Ms M J Dickey & Mr M C Allan for Auckland Council **(the Council)**
Mr P Cavanagh QC for The Trustees of the Ernest Ellett Ryegrass Trust and Others **(the Ellett Interests)**
Mr K R M Littlejohn for Evelyn Mendelssohn (by the Executors of her Estate) **(the Mendelssohn Estate)**
Mr M E Casey QC and Ms A J Davidson for Gavin H Wallace Limited **(Gavin H Wallace)**
Mr R B Enright for Makaurau Marae Maori Trust Board Incorporated and Te Kawerau Iwi Tribal Authority Incorporated (s 274 party) **(the Maori Appellants)**
Ms J Bain for the New Zealand Transport Agency (NZTA) (s 274 party)

DECISION OF THE ENVIRONMENT COURT

A. The MUL is to be extended to include the land subject to appeal;

B. The land subject to appeal is to be zoned Future Development Zone;

C. The NOR is cancelled as it affects the land subject to appeal

D. The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals:

1. A change to the Auckland Regional Policy Statement to amend the location of the MUL in accordance with A above; and

2. A change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as "Ihumātao Peninsula". The amendments to the District Plan are to provide for:

a. A succinct description and explanation of the subzone and its context which:

i. Identifies and provides for the significant characteristics of the area, including:

- Maori cultural associations with the area, including wahi tapu;
- Heritage and historic associations;
- The Otuataua Stonefields Historic Reserve;
- Landscape and amenity values;
- The Manukau Harbour and coastal environment; and
- The Auckland International Airport and business zoned lands.

ii. Requires that a future structure planning process for the subzone:

- Further identifies and recognises these significant characteristics;
- Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and
- Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).

b. The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).

c. Any consequential amendments to the District Plan.

E. The Council is to submit the changes directed under D. to the Court for confirmation by 28 September 2012.

F. Costs are reserved, but in our tentative view should lie where they fall.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

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REASONS FOR THE DECISION

INTRODUCTION

[2] This hearing concerned appeals against three planning instruments that relate to an area at the end of the Ihumātao Peninsula encompassing land to the west of Oruarangi Road and to the west of Auckland International Airport. The area was termed in the evidence as the *Western Gateway Area.* The Ihumātao Peninsula generally forms part of what is referred to as the *Mangere Gateway Heritage Area* (**MGHA**).

[3] The MGHA has recently come under increasing development pressure for a number of reasons, including:[1]

[a] Continued expansion at Auckland International Airport, including the proposed second runway, and expansion of airport commercial activities to the north of the second runway as provided for under the Airport Designation;

[b] The associated need to plan for the realignment of several public roads which will be affected by the development of the second runway;

[c] The upgrading of the Mangere Wastewater Treatment Plant and the establishment of an Odour Buffer Area, which creates the opportunity for potential development of land for business purposes in the Kirkbride Road area;

[d] The rapid development of business land in the vicinity of the Airport, and of the emerging shortage of business land available in Auckland, particularly for large-scale business uses such as distribution activities and warehousing in close proximity to major transport infrastructure; and

[e] The desire by the Council to reduce employment related trips out of the Mangere area by increasing employment opportunities within the MGHA.

[1] Reaburn, EIC, at [5.3]

[4] As a consequence of the development pressure, the then Manukau City Council initiated Plan Change 14 (**PC14**) which introduced urban zones – the Airport Activities Zone and the Mangere Gateway Business Zone. To accommodate PC14, the Manukau City Council applied to the then Auckland Regional Council for a change to the Metropolitan Urban Limit (**MUL**). Change 13 to the Auckland Regional Policy Statement was notified to give effect to the MUL change. Both PC14 and Change 13 were notified on 18 October 2007.

[5] Following the Councils' decisions there were a number of appeals to this Court. All but the appeals which are the subject of this hearing have been settled resulting in consent orders. As a consequence, the MUL has been extended out to a line along Oruarangi Road. Thus, the subject land which is to the west of Oruarangi Road is outside the MUL.

[6] The appellants wish to have their land included within the MUL and some of the appellants have sought a change of zoning of their land from the current rural zoning.

[7] In addition to the current rural zoned land of the appellants, the land to the west of Oruarangi Road contains the Otuataua Stonefields Historic Reserve (**the Stonefields or OSHR**). To the west and north, the land is bounded by the Manukau Harbour coastline.

[8] It is accepted by all that the land to the west of Oruarangi Road, as is all the land in the MGHA, is of special significance to Maori and also contains important historical associations to post-European settlement.

[9] Recognising the cultural and historical significance of the area and to protect and preserve the public open space and landscape characteristics of the appellants' land and the neighbouring Stonefields, the former Manukau City Council issued a Notice of Requirement (**NOR**) over the appellants' land on 18 October 2007. The NOR was for "*Otuataua Stonefields Passive Public Open Space and Landscape Protection Purposes*".

[10] The Council released its decision on the NOR on 27 March 2009. The appellants' whose land is subject to the NOR have appealed and seek the removal of their land from the designation and its cancellation.

[11] There are thus three major issues:

[a] The line of the MUL;

[b] The appropriate zoning of the appellants' land; and

[c] The cancellation of the NOR.

[12] It was common ground that there is a close relationship between Change 13, PC14 and the NOR. Thus it was appropriate that they be considered together. Further, there were a number of matters where we heard disputed evidence which relate to all three, such as cultural, historical, landscape, and the planning context. We propose to deal with the general matters first before assessing the merits of the competing planning options.

THE APPELLANTS AND THE SUBJECT LAND

[13] We attach as **Appendix 1** a map produced by Mr Reaburn, planning consultant for the Council, which shows the subject land.

The land belonging to the Ellett Interests

[14] Mr Ellett's family have farmed land owned by the Ellett Interests for approximately 147 years. These interests include:

[a] Mr Ellett himself;

[b] the Ernest Ellett Ryegrass Trust;

[c] Scoria Sales Limited; and

[d] Johnston Trust Quarry.

Parcel 1 – Ernest Ellett Ryegrass Trust

[15] Parcel 1 is a 5.61ha site owned by the Trust. It is relatively flat pasture land bounded by the Manukau Harbour to the west, Parcel 7 (owned by the Mendelssohn Estate) to the east, and Ihumātao Road to the south. To the north it is bounded by the Stonefields. The Elletts originally owned part of the Stonefields which were acquired by the then Manukau City Council in 1999.

[16] The land is zoned *Mangere–Puhinui Rural* and is subject to the NOR. The appellants seek a *Future Development (Ellett Holdings) Zone* or similar, the cancellation of the NOR, and that all the land be included within the MUL.

Parcel 2 – T R Ellett

[17] Parcel 2 is a 30.30ha site owned by Mr Ellett. It is generally rolling pasture land bounded by the Manukau Harbour to the west, and the Ellett land to the southeast. It is zoned *Mangere–Puhinui Rural.* The appellants seek a *Future Development (Ellett Holdings) Zone* or similar, and that all the land be included within the MUL.

Parcel 3 – Scoria Sales Limited & Parcel 4 – Johnston Trust

[18] Parcel 3 is a 24.58ha site owned by Scoria Sales Limited, Mr Ellett being the sole director. Parcel 4 is a 6.59ha site owned by the Trust. Together, these parcels contain an active quarrying operation. Parcel 3 adjoins the Ellett land to the north and extends to the coastal edge to the southwest. Parcel 4 adjoins land owned by the Auckland International Airport to the southeast, which has recently been designated for airport purposes. This land is zoned *Mangere–Puhinui Rural.* The appellants seek to rezone the land to *Future Development (Ellett Holdings) Zone*, or similar, and that all the land be included within the MUL.

Parcel 5 – T R Ellett

[19] Parcel 5 is a 14.2ha site owned by Mr Ellett. It is generally flat pasture land bounded by Ihumātao Road to the north, the quarry to the southwest, and other Ellett land to the northwest. This land is also zoned *Mangere–Puhinui Rural.* The appellants seek to have it rezoned *Future Development (Ellett Holdings) Zone*, or similar, and that it be included within the MUL.

Parcel 6 – T R Ellett

[20] Parcel 6 is a 0.45ha residential site owned by Mr Ellett, containing Mr Ellett's house. It is zoned *Mangere–Puhinui Rural.* The appellant seeks the same relief as the owners of Parcels 2 – 5.

The land belonging to the Mendelssohn Estate

Parcel 7 – E Mendelssohn Estate

[21] Parcel 7 is a 9.06ha site owned by the E C Mendelssohn Estate and has been in the Mendelssohn family for over 50 years. It is relatively flat pasture land bounded by Parcel 1 (owned by the Ellett Rygrass Trust) to the west, Ihumātao Road to the south, and the Stonefields to the north.

[22] The land was originally farmed as a 55 acre dairy block. A large part of the original farm was acquired by the then Manukau City Council in 1999 to form part of the Stonefields. The remaining 9.06ha of the land is subject to the NOR.

[23] The land is zoned *Mangere–Puhunui Rural*, but the Plan reserves a controlled activity subdivision opportunity for the land to be divided into two parcels, without which the subdivision would be non-complying. The subdivision entitlement was provided by Variation 5 as part of the agreement with the Manukau City Council acquiring the balance of the land for the Stonefields.

[24] The appellants seek the cancellation of the NOR. The Estate is not a participant in the Change 13 (MUL) or PC14 (Zoning) proceedings.

The land belonging to Gavin H Wallace

Parcel 8 (including the adjacent parcel) – Gavin H Wallace Limited

[25] Parcel 8 is a 24.2ha site owned by Gavin H Wallace Limited. The Wallace family have had a long association with the land for some 145 years. In 1999 a significant portion of the land was acquired by the then Manukau City Council for the Stonefields. This parcel is generally flat to gently rolling pasture land, bounded to the north by the Stonefields, and to the southeast by Oruarangi Road. This land is zoned *Mangere-Puhunui Rural* and is subject to the NOR.

[26] It will be noted from Appendix 1, that there is an adjacent parcel of land (identified as "Wallace") owned by Gavin H Wallace Limited which is also zoned *Mangere-Puhunui Rural*, but it is not included in the NOR. It is bounded on the east by the Papakainga Zone housing land. It was the intention of the Council to zone this adjacent parcel of land residential, but the proposal was not carried through to the notified version of PC14.

[27] By its appeal, Gavin H Wallace Limited challenged the decisions of the former Manukau City Council to designate its land, and of the former Regional Council to exclude the land from the MUL. At the hearing it was contended, subject to jurisdictional objections, that the appropriate zoning for this land was a Future Development Zone.

Other Parties

Makaurau Marae Maori Trust Board Incorporated (Makaurau)

[28] Makaurau filed two appeals relating to Change 13 (MUL) and PC14. The appeals challenged the decisions of the Auckland Regional Council and the Manukau District Council respectively. Settlement was reached on all matters, with the exception of the Western Gateway Area.

[29] Before us, Makaurau opposed any urban development on the subject land and any extension of the MUL to include the subject land.

Te Kawerau Iwi Tribal Authority Incorporated (Kawerau)

[30] Kawerau were a Section 274 party to the appeals relating to Change 13 and PC14. Before us, they also opposed any urban development on the subject land and any extension of the MUL to include the subject land.

The New Zealand Transport Agency (NZTA)

[31] The NZTA is a Section 274 party with respect to two of the appeals filed against Change 13 and PC14.

[32] The NZTA's principal concern was the potential traffic and transportation effects of the proposed re-zoning of land as Future Development Zone.

GENERAL MATTERS

[33] We now propose to deal with the general matters that pertain to all three planning instruments.

Statutory Framework

[34] Mr Reaburn, Mr Putt and Mr Jarvis (planning witnesses) analysed the rezoning of the land in terms of what is referred to as the ***Long Bay*** tests[2] and also as these are set out by the Court in ***Clevedon Cares***[3] for the post 2005 Amendment to the Resource Management Act 1991. Those cases set out fully the now well settled framework which begins with Sections 72 – 76 and incorporates, by reference, Sections 31 and 32.

[35] Those cases related only to district plan changes. In this case we are also considering a change to the Regional Policy Statement and hence Section 30 (Regional Functions) and Sections 59 – 62 (relating to Regional Policy Statements) are also relevant to the shift in the MUL.

[36] In terms of the NOR, Section 171(1) of the Act sets out a list of matters to have regard to when considering the effects on the environment of allowing the requirement.

[37] Finally, recognising the structure of the Act, Part 2 matters provide overarching directives to be considered in terms of all of the proposed planning provisions.

[38] We propose to discuss the relevant statutory provisions in more detail, where appropriate, when we deal with each of the proposed planning instruments.

Planning Documents

[39] In the Planners' Joint Witness Statement (JWS) it was agreed that the Auckland Regional Policy Statement (***ARPS***) and the Auckland Council District Plan (Manukau Section) (***District Plan***) contained the primary assessment framework for addressing the issues. The relevant provisions were included in the Agreed Bundle of

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[2] ***Long Bay Okura Great Parks Society Inc. v North Shore City Council***, A078/2008
[3] ***Clevedon Cares Incorporated & Ors v Manukau City Council*** [2010] NZEnvC211

documents prepared by the parties. Towards the end of the hearing Mr Reaburn provided an updated version of relevant provisions, particularly the recently operative version of Change 6 to the ARPS, as agreed in the Planners JWS.

[40] Reference was also made to provisions in the New Zealand Coastal Policy Statement (**NZCPS**) in relation to section 6(a) of the RMA and the natural character of the coastal environment, and to the Auckland Regional Plan: Coastal.

Auckland Regional Policy Statement (ARPS)

[41] The updated operative provisions provided to the Court were dated 21 March 2012. The Chapters referred to included:

[a] *Chapter 2 – Regional Overview and Strategic Direction, and in particular Sections 2.2 (The Setting – Auckland Today); 2.3 (The Auckland Regional Growth Strategy); and 2.6 (The Strategic Direction)*
Chapter 2 of the ARPS states that the function of that chapter is to integrate the management of the various components and specifically address growth and development issues. The subsequent chapters deal with the effects of growth and development on the natural and physical resources. These other chapters provide for the management of specific resources.

Subsequent chapters highlighted in this case were:

[b] *Chapter 3 – Matters of Significance to Iwi*
A suite of directions to give regional effect to the strong directions relating to Maori matters in Part 2 of the Act.

[c] *Chapter 6 – Heritage*
Directions aimed at protecting and providing for heritage matters as required by Part 2 of the Act.

[d] *Chapter 7 – Coastal Environment*
Directions relating to the preservation of the natural character of the coastal environment and protection from inappropriate development, and public access, as required by Part 2 of the Act.

Auckland Council District Plan (Manukau Operative Section)

[42] Relevant Chapters included in the Planners' JWS included:

[a] Chapter 2 – the City's Resources

[b] Chapter 3A – Tangata Whenua

[c] Chapter 6 – Heritage

[d] Chapter 16 – Future Development Areas

[e] Chapter 17.3 – Mangere-Puhinui Rural Area

[f] Chapter 17.13 – Mangere Gateway Heritage Area

[43] The District Plan provisions give effect to the NZCPS and the ARPS. Chapters 3A and 6 particularly recognise the significance to be accorded to Maori matters including the relationship of Tangata Whenua and their taonga, culture and traditions. The wide range of matters encompassed in the Act's definition of historic heritage is also recognised in Chapter 6. Many of these district-wide provisions are given local meaning in Chapter 17.13 – Mangere Gateway Heritage Area which contains extensive provisions detailing the significance of the area's heritage, public open space, social, cultural and natural resources and by reference to the comprehensive list of resources and features included in 17.13.1.1. Chapter 17.3 contains the current rural zone provisions applying to the subject land and Chapter 16 details the manner in which this District Plan identifies areas for future development and the structure planning process to be undertaken prior to specific zonings and development.

LANDSCAPE, CULTURE AND HERITAGE

[44] Two landscape architects gave evidence – Ms Absolum, called by the Council, and Mr Scott, called by the landowner appellants. As directed, the landscape architects caucused on 24 November 2011. As a consequence of the caucusing, they produced a joint landscape architect witness statement which set out the agreed key facts and the areas where agreement was reached.

Agreement Key Facts – Cultural, Heritage, Landscape and Context

[45] The following facts were agreed by the landscape architects:[4]

> **2 AGREED KEY FACTS**
>
> ...
>
> **Characteristics of the subject land**
>
> The majority of the land is within the Coastal Environment.
>
> The majority of the land has a gently rolling, subtle landform, with remnant volcanic cones within the OSHR and a working quarry on parcels 3 and 4, shown on Figure 1.
>
> The subject land is currently used for farming purposes, apart from the quarry, with public access provided for on the OSHR.
>
> The landscape character is open, rural, gently rolling with few buildings, extensive dry stone walling, scattered specimen trees, copses and shelterbelts. There are no permanent water courses on the subject land.
>
> The long history of occupation and use of the subject land, by both Maori and European settlers has left numerous tangible heritage features across the subject land.
>
> The history of occupation by Maori and European settlers has also left intangible associations and meanings ascribed to the land or parts of it. These are described in the evidence of other expert witnesses.
>
> **Context of the subject land**
>
> The land lies between the Manukau Harbour to the north-west, west and south-west, the Makaurau Marae and Papakainga to the north-east and recently rezoned and designated land which will, in due course, be developed for business development to the east and airport expansion to the south-east.
>
> The proposed Mangere Gateway Heritage Route passes along the boundary of the subject land and accesses the OSHR.
>
> Te Araroa Walkway passes through the subject land, utilising, the recently reinstated coastal edge of the OSHR.

[46] The cultural and heritage characteristics, although largely agreed, occupied a considerable amount of the evidence and deserves some comment. Mr Murdoch, a historian called by the Council, described how the wider Mangere-Puhunui area has rich human historical and cultural associations that have developed over eight centuries.

[47] He said:[5]

[4] Joint Landscape Architects Witness Statement
[5] Murdoch, EIC, at [3.1]

> 3.1 In my opinion the undeveloped Ihumātao portion of [the area] is collectively a cohesive cultural heritage landscape of regional significance ...

[48] Mr Murdoch then set out in some detail an historic narrative that identified both Maori and European associations with the land.

[49] We heard evidence from an archaeologist, Dr Clough. He described in detail the archaeological values of the area and concluded:[6]

> 9.1 In reviewing the archaeology and history of the general "Mangere Gateway Heritage Area", it is evident that this is a rich historic heritage landscape interweaving numerous strands of history from the earliest settlement of New Zealand, to the earliest European contact and beyond, incorporating evidence for pre-European subsistence and cultivation, the response of Maori to the introduction of European crops, animals and farming practices, for the activities of missionaries, and for those of early European farmers and their descendants still living on the land today.

[50] The Maori dimension is of particular importance. There was no dispute that the subject lands are part of a peninsula which has significance to Maori. We heard a considerable quantity of evidence telling us of the Maori perspective. A summary of that evidence is attached as **Appendix 2**.[7]

[51] As will be seen from **Appendix 2**, a number of Maori witnesses gave evidence at a special sitting of the Court on the Makaurau Marae. This included a statement of evidence by Te Warena Taua, chairman of Te Kauwerau Iwi Tribal Authority Incorporated. He outlined the Maori associations with the subject land. Importantly, Mr Taua identified a number of waahi tapu sites, some of which were situated on, or partly on, the subject land. These sites included:[8]

- The sacred mountain, Maungataketake, also known as Te Ihu a Mataoho;
- Ancient and contemporary (20th century) burials;
- Ancient and more recent (19th century) pa sites;
- Battle sites;
- Subterranean caverns that contain ancestral taonga –

...

[6] Clough, EIC, at [9.1]
[7] Appendix 2, headed "Summary of Evidence Relating to Maori Issues"
[8] Taua, EIC, at [31]

[52] He then said:[9]

> 33 Furthermore, given that the subject site is part of a wider network of sites of significance, and that it contains a number of interrelated waahi tapu, from the perspective of tangata whenua the subject area is considered waahi tapu in its entirety.

[53] We acknowledge Maori have strong associations to the land subject to these appeals and that there are particular sites of special significance. However, it is also clear from the evidence that Maori lived, worked, fought and played there. It was at all times a working and lived in landscape which seems incompatible with the whole area being of waahi tapu status.

[54] Mr Taua was cross-examined on this at the Marae. In our view his answers were general and not specific. He tended to exaggerate at times and habitually refused to make even the slightest concession. Even if the whole area is waahi tapu as he claimed, it is still a working and lived in landscape and the waahi tapu status needs to be considered in this context.

[55] Ms Absolum considered that the Ihumātao Peninsula, including the subject land, the Stonefields and the Papakainga constitutes a Heritage Landscape that is at least of regional and possibly national significance. She said:[10]

> 5.21 In my opinion the Ihumātao Peninsula, including the land subject to these appeals, the OSHR and Papakainga constitutes a heritage landscape that is of at least regional and possibly national significance. I base this opinion on the following evidence:
>
> - Both the archaeological and historical record indicate that the volcanic soils of the Ihumātao Peninsula were intensively cultivated over the generations, and that the resources of the adjoining marine environment provided a varied and bountiful harvest.
>
> - The only areas that were not cultivated were the defensive areas of the cone pa, the settlements themselves, and sacred burial areas, several of which lie within the NOR land and on the land surrounding Maungataketake.
>
> - The evidence of both Mr Murdoch and Dr Clough that the Wesleyan Mission Station, established in 1847, is significant as one of the few archaeologically intact mission sites on the Tamaki Isthmus that retains its rural context and farmstead.

[9] Taua, EIC, at [33]
[10] Absolum, EIC, at [5.21]

- Ihumātao retains a special place in the history of the Tainui people because of its direct association with Te Wherowhero and the foundation of the Kingitanga (Maori King Movement).

- The Ellett, Montgomerie (later Mendelssohn), Rennie and Wallace properties have a historical coherence in that they were all developed and farmed in a similar manner for well over a century, and remained in the ownership of the same families for most of this time.

- The large number of scheduled and listed heritage sites and items found in the area, and the range of early vernacular farm buildings, including barns and cowsheds, as well as an unusually large number of former windmill sites and cisterns.

- The high potential for archaeological remains surviving under the pasture throughout the subject land, particularly on the Ellett block (Parcels 2, 5 and 6).

- The archaeological, architectural, cultural, historic, scientific and technological values associated with the natural and physical resources of Ihumātao that relate to both the Maori and the European occupation and use of the land.

- The historic farmscape which, as well as the scheduled buildings, also contain the extensive 19th century dry stone wall field boundaries and a number of historic trees associated with existing and former house sites.

- The extensive regionally significant coastal edge which retains a high degree of natural character.

[56] It would appear from the Joint Witness Statement that there was disagreement between the landscape architects as to the extent to which the heritage, cultural and archaeological values identified by the expert witnesses, contribute to the subject land being identified as a heritage landscape. However, that apparent difference evaporated at the hearing.

[57] First, in his evidence Mr Scott acknowledged the basis of Ms Absolum's opinion.[11] He said:[12]

> 36 To this extent I support the respondent's evidence that the landscape (subject to these appeals) is dominated by its historical associations and its heritage features.

[11] Scott, EIC, at [35]
[12] Scott, EIC, at [36]

[58] He went even further in his evidence as is evidenced from this exchange from the Court:[13]

QUESTIONS FROM THE COURT:

Q. Mr Scott, listening to the cross-examination from Mr Allan and from Mr Enright, I got the clear impression that as far as you are concerned as an expert witness you are in agreement with the heritage and cultural values that have been, and archaeological values, that other witnesses had averred to?

A. Yes.

Q. And in fact you don't profess to have any of those areas of expertise?

A. No.

Q. And to the extent that there are cultural and archaeological and historical nodes in the subject land, you accept that to that extent it is a heritage landscape?

A. Yes.

Q. The next question is of course whether it is a heritage landscape which is elevated to a s 6 status, are you able to give an opinion on that?

A. I think it does have a s 6 status –

Q. Yes, thank you.

A. - yes. Well I'm sure it does, yes.

Q. You are therefore in complete agreement with Ms Absolum?

A. Yes.

Q. And you defer to Dr Clough and Mr Murdoch?

A. Yes.

Q. The difference between you and the other witnesses that I have mentioned is that it being a heritage landscape they say it should be conserved –

A. That's correct.

Q. - and conservation, total conservation should apply>

A. That's correct.

Q. Whereas you say no, some development should be allowed providing adequate protection is made for the heritage, historical, and archaeological values?

A. That is correct.

Q. So that's the difference between the two of you?

A. And it's more than protection. It's actually enhancement.

[13] Transcript, Volume 2, at pages 308 - 309

[59] Thus, there is no dispute as to the importance of the historical, cultural or heritage associations in the landscape. In addition to Ms Absolum, Mr Murdoch and Dr Clough sought that the Court determine the land, the subject of the appeals, to be part of a *Cultural Heritage Landscape*. And indeed, Mr Scott appeared to acquiesce to such a suggestion.

[60] The construct *Cultural Heritage Landscape* is of relatively recent origin. Its use as a concept in landscape analysis stems from a trial study conducted in Bannockburn, Central Otago, commonly referred to as the *Bannockburn Heritage Landscape Study* published in a monograph in September 2004.[14]

[61] The primary purpose of the Bannockburn Study was to trial a newly developed methodology for investigating heritage in a landscape scale. The monograph described its content:

> ***Identification.*** The study offers an understanding of the landscape both spatially and as it has evolved over time through human interaction. It identifies relationships between physical features in the land, both where these evolved simultaneously and where they evolved sequentially. It also provides information about the relationships between people and the landscape, both in the past and today. It attempts to identify key heritage features, stories and traditions in the Bannockburn landscape.

[62] It defines heritage landscape as:

> A **heritage landscape** is a landscape, or network of sites, which has heritage significance to communities, tangata whenua, and/or the nation.

[63] The authors of the monograph entered into a complex and detailed interdisciplinary methodology of spatial analysis, using connectivities between super-imposed layers of history.

[64] This division of the Court, although differently constituted, has held that it is open to us to find, on sufficiently probative evidence, that a landscape, or part of it, is a heritage landscape under Section 6(f) of the Act.[15] However, it was stressed that decision-makers should exercise a degree of caution before determining such a landscape to be a heritage or cultural landscape and to recognise the need to avoid

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[14] Janet Stephenson, Heather Beauchop, and Peter Petchey, *Bannockburn Heritage Landscape Study*, Wellington, Department of Conservation, Te Papa Atawhai, 2004

[15] See ***Wairakei Valley Preservation Society Incorporated & Ors v Waitaki District Council & Otago Regional Council***, C58/09, at [224] – [231], and ***Clevedon Cares Incorporated v Manukau District Council***, NZEnvC211, 2010

double counting of Maori issues. Maori issues are specifically provided for in Sections 6(e), 7(a) and 8 of the Act.

[65] Another division of the Court, led by Judge Jackson, signalled the following note of caution:[16]

> [208] The phrase 'heritage landscape' is often used when speaking of the surroundings of historic heritage ... However, we consider this usage may be dangerous under the RMA where the word 'landscape' is used only in Section 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.

[66] On reflection we have difficulty in endorsing the concept as part of the RMA process for a number of reasons, including:

[a] *Heritage Landscape* is not a concept referred to in the Act;

[b] Outstanding landscapes and features are protected from inappropriate subdivision use and development by Section 6(b) of the Act;

[c] Maori values are recognised and protected by Sections 6(e), 7(a) and 8 of the Act;

[d] Historic heritage is protected from inappropriate subdivision use and development by Section 6(f) of the Act; and

[e] There are also other important matters provided for in the Act that would apply, such as matters relating to amenity, indigenous vegetation, natural character and coastal environment, that may at times be relevant to a given situation.

[67] To introduce a new concept not recognised explicitly by the statute would in our view add to the already complex web of the Act and make matters more confusing.

[68] Suffice it to say therefore, that in this case there is no dispute as to the importance of the historical, cultural or heritage associations in the landscape. There

[16] ***Maniatoto Environmental Society Incorporated v Central Otago District Council***, C103/09, at [208]

is no dispute about the importance of the coastal edge. There is no dispute as to the open rural character and amenity.

[69] There is no dispute as to the context of the subject land. It lies between the Manukau Harbour to the northwest, west and southwest; the Makaurau Marae and Papakainga to the northeast; and recently rezoned and designated land which will, in due course, be developed for business development to the east and airport expansion to the southeast.

Areas of Disagreement

[70] What is disputed is the extent to which the acknowledged landscape, cultural and heritage values should prevent any prospect of the land being developed for urban purposes.

[71] On the one hand, the Council, supported by the Maori parties, with its suite of techniques, seek to protect landscape, heritage and amenity values by way of an overall development exclusion approach.[17] This suite of techniques will fundamentally lock up the land.

[72] On the other hand, Mr Scott identifies an opportunity to protect the sensitive characteristics of the subject land while enabling careful development through a long-term planning approach. He said:[18]

> 25 While, in my opinion, the subject land does comprise a relatively sensitive coastal and rural character, incorporating clear legibility of significant historic heritage and cultural values, therein also lies the opportunity. The opportunity, in my opinion, is that this is an appropriate time to reconsider this regressive landscape planning and management option in favour of a positive, creative and innovative approach to the long term planning and management of the subject land.

[73] Mr Scott pointed out that the current zoning enables some unacceptable development, particularly in relation to land coverage opportunities by built structures (e.g. greenhouses) given the heritage and landscape characteristics.[19] He also made the point that the subject land, in a landscape sense, is very much located within an urban context.[20] In addition to the obvious infrastructural focus of the Auckland

[17] Scott, EIC, at [24]
[18] Ibid, at [25]
[19] Ibid, at [24]
[20] Ibid, at [27]

Airport and its national importance as the nation's primary port, is the auxiliary business development provided for by PC14 and earlier District Plan zone changes on the eastern side of Oruarangi Road.[21] He concluded:[22]

> 30 I also recognise and support "fresh voices" communicating a new relevance to the current perception of the nation's landscapes, and how landscape is an important element to us all as individuals and as diverse and interacting different cultural and social groups and therefore as a society. **In this sense, I have no debate with much of the respondent's heritage and archaeological assessments, including many of the perceptions and assertions underlying the assessment of the landscape and visual issues. However, this does not require the land to be locked away.**
>
> *[our emphasis]*

[74] Mr Scott then undertook a detailed land use and landscape planning, design and management strategy which he put forward as "*a realistic development scenario*" [23] for the subject land. This strategy recognised the urban, coastal and open space contextual location; the biophysical, visual, cultural and heritage sensitivity of the land; and the effects of development. He concluded:[24]

> 119 ... This landscape is significant. The opportunity for the collective land holdings "sandwiched" between the two critical land use entities – the urban/infrastructural (airport and associated service industry) and the historic/heritage landscape of the OSHR – is yet to be imagined. Our view of the world can be too simple and so reductionist that we often avoid the exploration of loftier options. This is the interface of significant open space, heritage, private rural holdings and significant infrastructure.
>
> 120 In my opinion, to pause and preserve the NOR land as public open space does not do justice to the outstanding future use, development and management opportunity for the area. I support the requests for new zones and inclusion within the MUL as set out in the appellant's relief.

[75] Ms Absolum, Mr Murdoch and Dr Clough all supported the suite of techniques put forward by the Council to protect the subject land from development. Ms Absolum considered the protection of the land would:

> [a] be a perfect response to the relationship of the proposed heritage route and the Stonefields;[25]

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[21] Ibid, at [28]
[22] Ibid, at [30]
[23] Ibid, at [117]
[24] Ibid, at [119] – [120]
[25] Absolum, EIC, at [6.7]

[b] would ensure the retention of clear visual connections for the residents and visitors;[26]

[c] would enhance the interface between the business development zone to the east of Oruarangi Road and the Stonefields;[27] and

[d] would provide an open space frontage to the Stonefields which would ensure the open, expansive and strongly rural character of the Stonefields and enhance the relationship between the Stonefields and important heritage features.[28]

[76] In summary, Ms Absolum said:[29]

> 6.7 In summary, the NOR land forms the foreground of public views to the OSHR from the southern part of Oruarangi Road and from Ihumatao Road. As such, it complements the open pastoral character of the OSHR and in fact, carries many of the same landscape features, such as mature trees, stone boundary walls and grass paddocks. In order to protect the integrity of the OSHR it is appropriate to keep this foreground land similarly open and rural in character. In other words, the introduction of any sort of development on to the land, other than that directly related to the appreciation of the important cultural heritage characteristics of the OSHR and surrounding area, would be inappropriate.

[77] In her rebuttal evidence, Ms Absolum criticised the long-term planning approach of Mr Scott. She was of the view that despite Mr Scott's comprehensive descriptive material, at no point in his evidence does he demonstrate a causal link between his description of the subject land and its context and the Preliminary Development Opportunities exhibited to his evidence.[30]

[78] Ms Absolum concluded:[31]

> 2.20 In summary, by my reading of Mr Scott's evidence, he has concentrated his attention so strongly on the degree to which the landscape of the nine parcels of land has changed since human occupation of the area began, that he has lost sight of heritage, rural, open space and amenity values inherent in the landscape of today. While we both acknowledge the inevitable changes about to occur in the landscape context of the subject land, as a result of settled parts

[26] Ibid, at [6.3]
[27] Ibid, at [6.6]
[28] Ibid, at [6.6]
[29] Ibid, at [6.7]
[30] Absolum, Rebuttal Evidence, at [2.3]
[31] Ibid, at [2.20] – [2.21]

> of Plan Change 14 and the Airport expansion programme, Mr Scott has seen this as sufficient reason to propose extending intensive urban development across the appeal area.
>
> 2.21 I remain fundamentally opposed to this approach, because of the reasons set out in my evidence in chief.

[79] We do not agree with Ms Absolum's criticism that Mr Scott has lost sight of heritage, rural, open space and amenity values inherent in the landscape today. Those values do not necessarily mean that the landscape has to be protected from all urban type development. The Bannockburn Report, after finding the area was an important heritage landscape, then asked what the implications of such findings should be. Referring to the Conservation Act and ICOMOS, the authors observed:[32]

> The practice of conservation ... is usually applied to historic places which are limited in extent – most often a building or cluster of buildings, but occasionally a pa site or other archaeological feature. It has rarely, from our knowledge, been applied at a landscape scale except possibly where the entire area is managed for conservation purposes (e.g. Bendigo).
>
> ... We consider that it is unrealistic to expect the entire [Bannockburn] area to be 'conserved' (in the preservation sense), because it is a living landscape. People have always used the land to make a living and to live, and must be able to continue to do this. It is not possible to regard it simply as a heritage artefact – it is simultaneously a place in which people have social, economic, and cultural stakes. While there are particular features, nodes, networks, and spaces that may require a conservation approach, we believe that this is inappropriate for a whole landscape.

[80] That approach reflects the approach taken by Mr Scott. We consider that sympathetic development which protects specific heritage, cultural and historic values, and which does not detract from the Stonefields, could be undertaken under the right planning regime. Such a regime needs to ensure that the development would have to be such that the area remains an appropriate buffer to the Stonefields from the business development proposed to the east of Oruarangi Road. This would mean providing for areas of open space and protecting the coastal environment. Such a regime would reflect the fact that this is a living landscape.

Part 2 Assessment

[81] We need to be satisfied that such a finding is in accordance with the single purpose of the Act – sustainable management. This term is defined in Section 5 of the Act and that definition is informed by the remaining sections in Part 2.

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[32] Janet Stephenson, Heather Beauchop, and Peter Petchey, *Bannockburn Heritage Landscape Study*, Wellington, Department of Conservation, Te Papa Atawhai, 2004, at pages 100 - 101

[82] Part 2 of the Act involves an overall broad judgment of whether or not some form of constrained development promotes the sustainable management of natural and physical resources.

[83] In our view the protection afforded under Section 6 of the Act has been overstated by the Council witnesses. The protection is from *inappropriate subdivision, use, and development.*

[84] With regard to Section 6(a) of the Act, the protection is for the natural character of the coastal environment. A carefully and constrained development could be undertaken, that is sensitive to and protects the character of the coastal environment.

[85] The protection of Maori relationships under Section 6(e) of the Act is already largely provided for on the Stonefields Reserve. The evidence establishes that by far the majority of identified archaeological and Maori spiritual sites are located there. Those that are located on the subject land are more widely dispersed, and could be catered for by sensitive development. In fact, by cautious and thoughtful development, their status and historical association could be enhanced.

[86] Identified heritage values under Section 6(f) are similarly, in part, protected by the Stonefields Reserve. The heritage characteristics of the subject land could also be protected, provided the land is developed in a manner that is sympathetic to relevant heritage aspects.

[87] Amenity and landscape values could equally be accommodated by appropriate development. We discuss the parameters of such development later in this decision. We are satisfied that, subject to the constraints imposed by those parameters, and the need for them to be satisfied in any Plan Change or resource consent application, that future urban development could satisfy relevant directions contained in Sections 6, 7 and 8 of the Act.

[88] This would, unlike a development exclusion approach, enable the owners of the land to also provide their social and economic well-being in accordance with Section 5 of the Act. This would also enable the value of the land to reflect its potential for appropriate development.

Overall finding on Landscape, Culture and Heritage

[89] We therefore find that a degree of sensitive urban development, appropriately constrained, would better give effect to the single purpose of the Act, than a total restraint on future development. We discuss the appropriate constraints later in this decision.

SHOULD THE MUL BE EXTENDED?

[90] The ARPS, as amended by Change 6[33] provides for the containment of urban activities within the MUL. While *Urban Activities* and *Rural Activities* are defined in the Policy Statement, the case law[34] reflects a continuing debate as to what is an *Urban Activity* or a *Rural Activity*, and therefore allowed outside the MUL.

[91] The definition of MUL in the ARPS is:

> ... the boundary between the rural area and the urban area. The urban area includes both the existing built-up area and those areas committed for future urban expansion in conformity with the objectives and policies expressed in the Regional Development chapter of the RPS. The metropolitan urban limits are delineated on the Map Series 1, Sheets 1 – 20. Also see definitions of Urban area and Rural lands/area.

[92] The Strategic Policy of the ARPS provides a framework for limited extension to the MUL. Policies 2.6.2 provide the policy direction which is based upon not compromising the strategic direction of containment and intensification, supporting the integration of land use and transport, and avoiding adverse effects on the environment.[35]

[93] In accordance with *Methods 2.6.3 – Urban Containment*, the then Manukau City Council made a request to the Auckland Regional Council to change the ARPS which included, relevantly for these proceedings, extending the MUL northwards to include the Airport area and land to the north. The request was considered by the Regional Council on 27 August 2007. The Council agreed to accept the request in

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[33] Change 6 was made operative by the Council 21 March 2012

[34] See ***Roman Catholic Diocese of Auckland v Franklin District Council***, W61/04, 29 July 2004; ***Runciman Rural Protection Society Inc v Franklin District Council***, [2006] NZRMA 278; ***Roman Catholic Diocese of Auckland v Franklin District Council***, W18/07, 22 March 2007; ***Auckland Regional Council v Roman Catholic Diocese of Auckland***, [2008] NZRMA 409

[35] ARPS at page 2 – 32; *Reasons 2.6.4 – Urban Containment*

part, and Change 13 was notified on 18 October 2007 as a private change. The period for further submissions closed on 14 March 2008.

[94] A number of submissions sought that the Bianconi land (on the southeast side of Oruarangi Road) be included within the MUL, but the Council in its decision[36] decided not to include the land for the following reasons:[37]

> 4.26 We consider that the inclusion of this land in the MUL and its subsequent development will have adverse effects on the heritage resources of the area (including the Otuataua Stonefields) and will not appropriately provide for the relationship between the Makaurau Marae and its peoples relationship with their ancestral lands. We consider that the Makaurau Marae is a rare if not unique resource in the Auckland Region as its relationship with its ancestral land is largely intact. The surrounding land has not been significantly developed and we recognise that this relationship is under pressure from development in the airport area. We heard considerable evidence from the Marae about the importance of the Marae peoples' relationship with the area and its landscape that was not challenged in our view.

[95] Appeals were lodged by the Bianconi submitters, and consent orders were made, reflecting negotiated agreements, resulting in the land being brought within the MUL. The result is that the MUL line now follows Oruarangi Road. The land is thus identified for urban purposes and is now zoned *Mangere Gateway Business Zone*. This together with the expansion of the *Airport Zone*, the second runway and associated service industry development, now effectively creates a hard edge to the current open space patterns of the subject land – save for a small and, in our view, ineffective buffer area within the Bianconi land.[38]

[96] All of the land northwest of Oruarangi Road falls outside the MUL. This constitutes the land, the subject of these appeals, a small piece of land purchased by the Council to be used as a reserve contiguous to the Stonefields and the Stonefields Reserve itself.

[97] Of the appellants, the Ellett Interests and Gavin H Wallace submitted on Change 13 seeking that their land be included within the MUL. The Council in its decision decided not to include the land, for the following reasons:[39]

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[36] See Decision Report, 17 November 2009 at [4.23] – [4.29]
[37] At [4.26]
[38] See Scott EIC, at [7]
[39] At [4.36] - [4.39]

4.36 We are satisfied on the basis of the evidence that this land should remain outside of the MUL. We consider that urban development on this land has the potential to have adverse effects on the landscape and heritage values in the area.

4.37 We also consider that the inclusion of this land will have adverse effects on the heritage resources of the area and specifically on the relationship between the Makaurau Marae and its relationship (and their peoples' relationship) with their ancestral lands. We consider that the Makaurau Marae is a unique resource in the Auckland Region in that its relationship with its ancestral land is largely intact and we recognise that this relationship is under pressure from development in the Airport area. We heard considerable evidence from the Marae about this relationship that was not challenged in our view.

4.38 We also consider that the landscape values associated with the coastal edge in this area together with the location and relationship of the Otuataua Stonefields are such that inclusion of the land within the MUL is not warranted.

4.39 We are also satisfied that we were not presented with any convincing evidence concerning the need for this land to be included within the MUL and note that a portion of this land is used as a quarry, the consent for which has some time yet to run. This activity is not compatible with urban development in our view.

[98] Hence, the appeals to this Court.

[99] We note that the Council in its decision, assessed Change 13 against *Methods 2.6.3* of the ARPS, and the relevant comprehensive provisions of the ARPS. Importantly, it found:

[a] The Airport is regionally significant infrastructure;[40]

[b] Because of the synergistic nature of modern airports and the related need for a broader range of activities in the Airport area, it is appropriate that the land within the existing Airport zonings and designations should be within the MUL;[41]

[c] There is a recognised shortage of business land in Auckland, especially for activities that require large sized sites;[42]

[d] The Airport is an appropriate location for such activities;[43]

[40] At [4.2]
[41] At [4.2]
[42] At [4.3]

[e] Some expansion of the MUL is generally consistent with the criteria set out in the ARPS and Change 13;[44] and

[f] It is not appropriate to extend the MUL into the area south of the Stonefields (the Bianconi and appellant's land), as to do so would have the potential to have significant adverse effects on the Marae.[45]

[100] It is the findings from the Council's decision that relate to the subject land that form the basis of the appeals. Clearly, the Council's panel of Commissioners found that urban development on the land has the potential to have adverse effects on:

[a] Landscape and heritage values;

[b] The relationship of Maori with their ancestral lands;

[c] The landscape values of the coastal edges; and

[d] The Stonefields.

[101] It is not surprising, that before us, by far the bulk of the evidence was directed at the Maori values, heritage and landscape issues and whether a development exclusion approach should be adopted, or whether the subject land should be zoned to allow for some development while protecting the sensitivities of the landscape.

Current Zoning and Usage

[102] The land is currently zoned Mangere – Puhunui Rural. Apart from the quarry operation, the land is largely used for grazing. We are satisfied from the evidence[46] that the size of the holdings are such that the current use is far from economic.

[103] Mr Hollis, a farm management consultant and registered valuer, carried out an assessment of other land use options, including:

[a] Pastoral farming;

[43] At [4.3]
[44] At [4.5]
[45] At [4.7] – [4.10]
[46] See T R Ellett, EIC; R G Hollis, EIC; J Blackwell, EIC

[b] Dairy support;

[c] Arable;

[d] Intensive food production; and

[e] Sheep farming.

[104] We summarise his findings:

[a] Farming in such close proximity to urban development and the International Airport has significant limitations and liabilities;

[b] The scale of the activity also makes farming uneconomic;

[c] The obstacles to farming are not only financial, with high rates relative to marginal returns, but also a growing environment somewhat hostile to normal farming activities;

[d] There is no possible return on capital for any farming enterprise.

[105] He concluded:[47]

> The areas being considered are already isolated, almost trapped within an environment of urban development on one side, the harbour and Otuataua Stonefields on the other, each with their own constraints to good farming. This is not conducive to the land being utilised economically for primary production.
>
> It is my conclusion that the subject farms are uneconomic with no viability in the foreseeable future. At best their future is hobby farming only.

[106] While Mr Hollis was cross-examined, there was really no dent made on his findings, which were effectively incontestable. Further, if, as is the most feasible, some form of intensive farming was undertaken, this would give rise to large buildings, such as glasshouses, which would not ensure that an open space character would be retained on this land.

[107] We conclude that the farms are uneconomic with no viability in the foreseeable future. Clearly, with the advance north and west of the Airport related

[47] Hollis, EIC, at page 17

land to provide industrial and commercial support to the Airport, this pocket of existing rural land has become sandwiched between that expansion and the Stonefields and the coast. It is therefore an anomaly.

[108] We are satisfied on the evidence, that to keep this relatively small piece of land outside the MUL would affect its value considerably, to the detriment of the owners.

Protectionism v Sensitive Development

[109] We have already discussed this debate in some detail where we found that some form of urban development, sensitive to the special landscape characteristics of the land, could be undertaken. We discuss the bounds of such development in the next part of this decision.

[110] Suffice it to say, we found that the witnesses for the Council and Maori appellants were too narrowly and intensively focussed on the subject land's heritage, cultural, archaeological and landscape values. Other potential land use scenarios were not adequately analysed. In our view, the evidence of the Council and the Maori appellants has underplayed the scale of the Airport and commercial development in contrast to, what they considered to be the main determinant, the landscape and heritage matters.

[111] We agree with Mr Scott,[48] that the heritage route will be the future connection that opens this *cultural treasure* to public attention. Such an opportunity could be extended to accommodate a range of appropriate high quality development opportunities set within an open space framework that identifies and respects the heritage features. As we make clear in the next part of this decision, such opportunities need to be constrained by appropriate controls. We consider, keeping the land outside the MUL would be too constraining in view of the continuous debate as to what is, or is not, an *urban activity*.

Is the current MUL line defensible?

[112] Again, we agree with Mr Scott, that the MUL in its current location, creates an anomaly in landscape management and land use terms.[49] The MUL does not relate to physical constraints in the landscape, such as a coastal edge, mountain range or

[48] Scott, EIC, at [22]
[49] Ibid, EIC at [12]

prominent ridge. Its inherent instability is exacerbated by the difference in property value that is created by allowing development on one side of the line and not on the other. If the property values become significant, those outside the line inevitably strive to be included.

[113] We agree that the close proximity of the land to the nationally significant infrastructure of the Airport and other urban activities will further exacerbate the unstable nature of the MUL in this landscape.

[114] The most defensible line for the MUL in this area is the coastal edge. The Stonefields would be protected by its reserve designation. The landscape and heritage characteristics of the subject land could be protected by an appropriate zoning of the land. However, because of the jurisdictional difficulties raised by the Council,[50] we are limited in the scope of these appeals to extending the MUL to include the Ellett land and the Wallace land, unless we invoke Section 293 of the Act. We conclude that the MUL line should be extended to include all of the subject land, which also includes the Mendelssohn land for which a direction under Section 293 will be necessary.

Should a shift in the MUL be restricted without appropriate zoning in place?

[115] In her opening submissions, Ms Dickey, counsel for the Council, said:

> ... a shift in the MUL should ... be restricted where there is no clear evidence-based zoning proposed to accompany it.

[116] In reply, counsel for the Wallace interests quoted the following passage from an earlier decision of this division of the Court in ***Clevedon Cares***:[51]

> [96] We are satisfied, that looking at the ARPS as a whole, the clear direction is that new urban development outside of the MUL ... requires a two-fold procedure. A district plan change preceded or paralleled by a change to the ARPS which, if approved, would ... shift the MUL ... This two-fold procedure would reflect the integrated management approach envisaged by the ARPS.

[117] We think the position is as stated in that quote. There is no fundamental reason why a shift in the MUL should not precede a change of zoning. Nor is that

[50] The Ellett and Wallace appeals only sought the MUL to be extended to include their land. The land owned by the Council and zoned MPRZ (shown as Parcel 9 on the plan at Appendix 1 to this decision) is not part of the subject land.
[51] [2010] NZEnvC211 at [96]

approach unprecedented, with the Long Bay area having been brought within the MUL some years before the specific zonings for its development were devised.

[118] We agree with Mr Casey QC, that there are two main reasons why in this case it is appropriate that the MUL shift precede, rather than parallel, the zone change, namely:

[a] While the land is proposed to be brought within the MUL now, it is not proposed to be released for development immediately. It would be premature to write into the District Plan a highly specific structure plan when actual development might not take place for up to a decade. The particular details should be devised closer to the time when the receiving environment would be better known;

[b] The shift is not being pursued by the territorial authority, but by private land owners. Should we hold that the MUL cannot be shifted in the absence of what amounts to a fully developed structure plan exercise, it would place an insurmountable hurdle to anyone other than a Council to seek its extension; and

[c] We would add a third reason – namely, that the extension sought by the appellants arises out of Change 13 which has been preceded by the request sought by the then Manukau City Council in accordance with *Methods 2.6.3*.

Should there be a thorough assessment under Method 2.6.3.3?

[119] The general answer to this is yes. Method 2.6.3.3 is the springboard for a local authority to request a Change. It was the basis for the Council to make the request in 2007. The request was assessed by the Council before notifying Change 13. Method 2.6.3.3 was also assessed by the Commissioners appointed by the Council to hear Change 13 at the first instance hearing. The Council's decision, together with the analytical findings in the many reports that have been put before us, form the background of this hearing. There has been a cumulative aggregation of data which is available to us.

[120] The findings contained in the decision of the Council are generally accepted, save for the finding that the MUL should not extend beyond the line sought as notified

in Change 13. Even that finding has, in part, been compromised by the consent orders bringing the Bianconi land within the MUL.

[121] This leaves just the subject land in issue. The challenge to the Council's decision is focussed on one underlying issue – whether the sensitive landscape and heritage characteristics are such, that the land should be protected from any form of urban development.

[122] We are satisfied that we have sufficient information before us to make an informed decision on that fundamental issue.

Application of our findings in the context of Part 2 and the ARPS

[123] The whole focus of the ARPS, and indeed the RMA itself, is to ensure that decision makers give effect to the single purpose of the Act – sustainable management. As we have said, this term is defined in Section 5 of the Act and that definition is inferred by the remaining sections in Part 2.

[124] By achieving the purpose of the Act, any proposal would:

[a] Assist the Council to carry out its functions of achieving integrated management of the natural and physical resources of the region;

[b] Assist the council to carry out is functions in relation to any actual or potential effects of the use, development, or protection of land which is of regional significance; and

[c] Has a purpose of achieving the objectives and policies of the Regional Policy Statement.

[125] We are required to be satisfied that excluding the subject land from the MUL better achieves the purpose of the Act than bringing it within the MUL. This involves the balancing of the landowner's interests in providing for their social and economic well-being, and providing urban zoned land against locking the land up from any urban development to protect heritage and landscape characteristics.

[126] We are conscious of the strong directions contained in Part 2 protecting historic heritage from inappropriate development;[52] and recognising and providing for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.[53]

[127] These strong directions are emphasised in the Strategic Objectives and Policies and other provisions of the ARPS. However, we are satisfied that Maori values and heritage characteristics can be provided for and/or adequately protected by sensitive development with appropriate constraints. This will, at the same time, enable the landowners to provide for their social and economic needs in accordance with Section 5 of the Act. A need which cannot be achieved while this land has a rural zoning because appropriate rural uses are not a viable option.

[128] To keep the land outside the MUL, with a rural zoning, would without further constraints, offer less protection to the characteristics protected by Section 6(e) and (f) of the Act. To lock the land up might indeed provide for Maori and heritage values. But it would not provide for the economic needs and well-being of the owners. By allowing sensitive constrained development, heritage and landscape characteristics can be protected while at the same time allowing the owners to provide for their economic well-being.

[129] We are also conscious of the strong directions relating to amenity and the coastal environment in Part 2 of the Act. These directions are also emphasised in the provisions of the ARPS. Again, we are satisfied, that some urban type development with proper constraints could adequately satisfy those directions.

[130] We accordingly find that an extension of the MUL to include the subject land would reflect the sustainable management provisions provided for in the framework of Part 2 of the Act.

[131] We consider it appropriate for all the subject land to be so included. This means that the Mendelssohn land would need to be activated by a notification under Section 293 of the Act. Accordingly, we make such a direction.

[52] Section 6(f) of the Act
[53] Section 6(e) of the Act

Overall finding on MUL

[132] For the reasons given we find that the MUL should be extended to include the subject land. We direct the Council, under Section 293 of the Act, to prepare, in consultation with all other parties to these appeals, a change to the Auckland Regional Policy Statement to amend the location of the MUL accordingly.

ZONING

Jurisdictional Matters

[133] As outlined earlier in this decision not all of the parties had requested a change to the zoning for all of the land.

[134] The appeals by the Ellett Interests sought a *Future Development (Ellett Holdings) Zone* or similar, for all of Parcels 1 to 6. The Planners' Joint Witness Statement[54] noted that the only direct rezoning outcome sought in appeals was in respect of the Ellett land south of Ihumātao Road, that is excluding Parcel 1 affected by the NOR. This reflected the submissions lodged with the Council which did not seek a change to the zoning of Parcel 1.

[135] The Mendelssohn appeal (Parcel 7) did not seek a change to the zoning.

[136] For the Wallace land (Parcel 8 and the adjacent land to the east) an amendment to the MUL notice of appeal was allowed by the Court to include a consequential prayer for relief that, should the Court decide to include the land within the MUL, the Court should then consider making;

> ... appropriate orders and/or directions as to the appropriate steps to re-zone the appellant's land.

[137] In its decision allowing the amendment the Court noted that the question of whether the Court had jurisdiction to make the order sought by the amendment was a matter to be decided at the substantive hearing.[55]

[138] In terms of the appeals filed the zoning options before us were to retain the current *Mangere –Puhinui Rural Zone (***MPRZ***)* on all of the land, or apply a *Future*

[54] Joint Witness Statement Planners, 8 November 2011, at [2]
[55] [2011] NZEnvC 336

Development (Ellett Holdings) Zone, or similar (**FDZ**), to some of the Ellett land (Parcels 2 -5).

[139] During closing submissions, in response to matters raised by the Court, all Counsel agreed that if the Court found that a zoning other than the current rural zone was appropriate for all of the subject land then Section 293 would be an appropriate way forward given the jurisdictional limitations.

[140] Therefore at this stage we propose to assess the appropriate zoning for all of the subject land affected by these appeals without being restricted by the jurisdictional limitations.

Zoning Evaluation

[141] The current MPRZ rules (Rule 17.3.10) allow, as a permitted activity, one household unit, farming, greenhouses, breeding and boarding of domestic pets, farmstay accommodation, horse riding clubs/schools, pig keeping, produce stalls, production forestry (more than 500m from the coast) and open space. The front yard requirement is 10 metres, the side and rear yards are 3 metres and the coastal setback is 30 metres. The height requirement is 9 metres. Building coverage is not controlled on sites over 5,000m^2, it is 10% for sites less than 5,000m^2.

[142] Mr Reaburn noted that under this rural zoning greenhouses are a potential use and that substantial greenhousing already exists in the area, although not on the subject land. He was concerned about substantial buildings for farming activities. Ms Absolum expressed similar concerns about the possibility of greenhouses.

[143] Mr Reaburn acknowledged that the current grazing activities may not be sustainable for much longer. He noted that the rural zoning potentially allows for significant building development. He considered that the major threat to the heritage, cultural, archaeological and landscape values would arise from more intensive development of the land.

[144] In terms of public access to the coast, the rural zoning only provides for enhanced access if subdivision occurs and Mr Reaburn confirmed that there are limited subdivision possibilities under the rural zoning for this land. Mr Reaburn also held concerns about whether the current MRPZ adequately addressed heritage,

cultural, archaeological and landscape values, noting in particular that the wahi tapu rules were weak.[56]

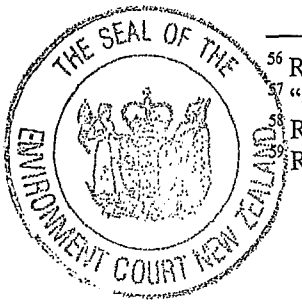
[145] Mr Reaburn advised that prior to his involvement in the plan change the Council had proposed zoning the land to FDZ. The section 32 report to PC 14 makes it clear that the then Manukau City Council's preference was for a wider area to be within the MUL and zoned for urban development. This included the Ellett land south of Ihumātao Road and the small part of the Wallace land adjacent to the Papakainga Zone. It did not include the NOR land. This expanded area was rejected by the then ARC. After lodging an appeal against the ARC decision the Manukau City Council decided to progress a reduced rezoning in line with the ARC decision rather than await the outcome of the appeal.[57]

[146] However in this hearing Mr Reaburn, whilst acknowledging the region's shortage of business land and the potential suitability of the subject land for business use from a "*purely physical and servicing point of view*"[58], stated that he

> ... came to the opinion, informed by my consultation, that the cultural, heritage and landscape values of this land made it inappropriate to continue with a Future Development Zone proposal.
>
> The same concerns have led me to the conclusion that re-zonings (and an associated MUL extension) to provide for an urban scale of development are not appropriate on any part of the land subject to these appeals. ... [59]

[147] Taking into account the research and reports which have culminated in the evidence presented at this hearing, Mr Putt proposed a FDZ as being more appropriate than the current MPRZ. In addition to a FDZ, primarily for the Ellett and Mendelssohn lands, Mr Putt also proposed specific zonings for other parts of the subject lands. This included the Main Residential Zone for the piece of Wallace land outside of the NOR and adjacent to the Papakainga Zone, and the Oruarangi Sub-Zone for the Wallace land affected by the NOR.

[148] A FDZ is already provided for in Chapter 16 of the District Plan. It is effectively a "holding" zone and it requires a structure plan to be prepared as the basis for a subsequent plan change and specific zoning provisions. The process is set out in



[56] Reaburn, EIC, at [8.5], [8.7], [9.5] – [9.7]
[57] "Special Note" at page 8
[58] Reaburn EIC at [8.8] and Rebuttal at [4.3(b)]
[59] Reaburn Rebuttal at [4.10] & [4.11]

Part 16.6.1.2 and has been used in a number of other parts of the Manuaku District to date.

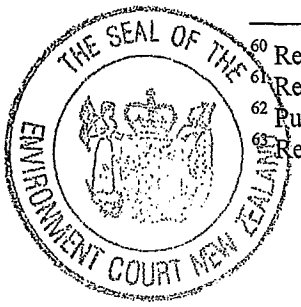
[149] We do not agree with Mr Reaburn when he states that the effects of urban zoning and development are almost certainly likely to be greater on the heritage, cultural, archaeological and landscape values of the subject area than would be the case with activities possible under the current MPRZ provisions.[60] Indeed we have some difficulty reconciling Mr Reaburn's concerns about the effects of permitted activities under the current rural zoning with his support for retaining the MPRZ on this land.

[150] Mr Reaburn accepted that visitor accommodation/tourist destination facility and clustered residential development were possibilities on some parts of the subject land, although he saw them as being at a rural or rural-residential density rather than an urban density.[61] This was repeated in his conclusion that there will likely be a future need to look at a targeted zoning for the land, as an improvement on the MPRZ, but that this would need to be more of a rural zone than an urban one.

[151] We think Mr Reaburn and Mr Jarvis exaggerate the degree of "urbanness" across all of the land that could follow on from a FDZ and a subsequent structure planning and plan change process. We are satisfied that a FDZ can adequately recognise the particular values of the land and provide for more appropriate management and development than is presently provided for under the MPRZ.

[152] On the basis of the information presented through this hearing we do not think it is appropriate to select specific urban zones for some parts of the subject land at this stage. The evidence indicates that the whole of the subject land would benefit from being included in a FDZ and made the subject of a more detailed structure planning exercise in the future.

[153] Mr Putt's amended FDZ illustrates how a set of provisions might be tailored to this land as a subzone and fit within the structure of the District Plan.[62] We recognise that Mr Putt prepared his provisions primarily for the Ellett lands but we consider that many of Mr Reaburn's criticisms are valid.[63] We agree that there needs to be a better recognition of the context of the subject land and the significant Maori, heritage,



[60] Reaburn EIC at [8.9]
[61] Reaburn, EIC, at [9.21]
[62] Putt, EIC, Appendix A
[63] Reaburn, Rebuttal, at [6.3] and [6.4]

coastal and amenity values. We do not consider it appropriate to signal that all of the subject land will be developed in the future for conventional urban activities or densities. However, neither do we consider it appropriate to signal that all of the subject land should be developed at a countryside living scale. As we have previously stated we consider that selective development will be required with some parts of the land likely to be able to be developed for urban activities and other parts managed as open space and lower intensity development. Whilst we understand the reason for the focus on traffic details included in Mr Putt's proposal, we consider that to be unnecessary and premature at this stage. It is more than sufficient to acknowledge that traffic and transport, along with other servicing matters, will be assessed, as usual, as part of a future structure planning process.

Overall finding on Zoning

[154] Accordingly, we find that all of the subject land would be more appropriately zoned FDZ; with the provisions being further amended to better recognise the significant values of the area; to provide guidance to the future structure planning process; and also to limit the interim use and management of the land. This will require amendments to the District Plan Chapter 16 – Future Development Areas.

[155] The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals, a change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as "Ihumātao Peninsula". The amendments to the District Plan are to provide for:

[a] A succinct description and explanation of the subzone and its context which:

[i] Identifies and provides for the significant characteristics of the area, including:

- Maori cultural associations with the area, including wahi tapu;
- Heritage and historic associations;
- The Otuataua Stonefields Historic Reserve;

- Landscape and amenity values;
- The Manukau Harbour and coastal environment; and
- The Auckland International Airport and business zoned lands.

[ii] Requires that a future structure planning process for the subzone:

- Further identifies and recognises these significant characteristics;
- Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and
- Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).

[b] The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).

[c] Any consequential amendments to the District Plan.

[156] A FDZ in accordance with these directions will assist the Council to carry out its functions and is the most appropriate way to achieve the single purpose of the Act, as espoused in Part 2.

SHOULD THE NOR BE CONFIRMED?

Introduction and History

[157] On 18 October 2007, the then Manukau City Council issued a Notice of Requirement (**NOR**) for a designation for *Otuataua Stonefields Passive Public Open Space and Landscape Protection Purposes.* The NOR applies to the subject land to

the west of Oruarangi Road and to the north of Ihumātao Road, bordering the Otuataua Stonefields Historic Reserve.

[158] The objective is to *create public open space adjacent to the Otuataua Stonefields ... and to protect the landscape, the cultural heritage landscape, and the visual amenity of the Mangere Gateway Heritage Area.* It is clear from the requirement that its purpose is to extend the Stonefields Reserve so that it includes all of the lands from the coast to Oruarangi and Ihumātao Roads.

[159] The land which constitutes the Stonefields Reserve was acquired from the appellants in 1999.[64] It appears from the evidence,[65] that the Stonefields Reserve has its genesis from investigations and identification of the area for protection by the New Zealand Historic Places Trust (**NZHPT**) in the early 1980s. The Stonefields was listed as an historic place – Category 2, by the NZHPT in November 1991.

[160] It would appear that the Council relied on the work done by the NZHPT and the Department of Conservation as a basis for issuing the NOR for the existing Stonefields in June 1995. The boundary of the designation was similar to, but not the same as, the boundary shown on the NZHPT Plan. The issue of the NOR was accompanied by complementary provisions in the notified version of the 1995 Proposed Manukau City District Plan.

[161] Despite opposition, including from the appellant landowners, the designation was confirmed by Council on 20 May 1998. The Council then embarked on a process of negotiation with the appellants and settled the purchase of all the Stonefields land in late 1999.

[162] Variation 5 to the then Proposed District Plan was promulgated in late 2000. The Variation rezoned the Ellett and Mendelssohn land from Mangere-Puhinui Heritage Zone to Mangere-Puhinui Rural Zone, removed the waahi tapu identification from the Ellett and Mendelssohn land, and introduced site specific land use and subdivision rules for the Ellett and Mendelssohn land. This was part of a negotiated agreement which included that Council would:[66]

[a] Take all reasonable steps, by way of consent order, to zone the residue land Mangere-Puhinui Rural Zone;

[64] There was one other landowner – Rennie
[65] See Reaburn, Supplementary Evidence, Part 3
[66] Reaburn, Supplementary Evidence at [3.6]

[b] Take all reasonable steps, by way of consent order, to permit the creation of two lots from the residue land, including one lot of 1ha; and

[c] Consult with tangata whenua requesting their consent to either remove the waahi tapu notation from the residue land or to agree to the creation of two lots referred to above, including the construction of a single dwelling and garage on the 1ha lot.

[163] In accordance with the negotiated agreement, a kaumatua of the Makaurau Marae *conducted a ceremony to uplift the waahi tapu on the site ... namely Part Allotments 170 and 171 Parish of Manurewa.*[67]

[164] All of the landowners testified to the fact that, in their view, the negotiated agreement set a price well below market value, hence the agreed concessions by Council. More importantly, an assurance was given that no more land would be taken for reserve.

[165] However, by December 2006 the Council's attitude changed. As part of the process relating to Plan Change 14, the Council sought further landscape reviews. The *Peake Design Landscape Assessment*, dated March 2006, and the *Nick Robinson Landscape and Visual Assessment*, dated November 2006, were obtained. Both attributed high values to the NOR land. Two further reports were obtained, one by Buckland and McMillan in July 2007, and one by Absolum in March 2009.

[166] Buckland and McMillan state:

> ... while previous landscape assessments have focussed on individual heritage sites and landscape units, none have focussed on the heritage value of the open space as part of a wider context, a network of high quality open space which includes the Manukau Harbour.

[167] Mr Scott, in his evidence-in-chief, had three major criticisms of the landscape reports relied upon by the Council:

[a] Other potential land use scenarios were not adequately analysed in regard to the existing and proposed zoning of the area and land titles subject to the appeals;[68]

[67] *See* Council Report introducing Variation 5, Section 1.1, Exhibit G to Reaburn Supplementary Evidence

[b] They did not adequately consider the scale of the Airport development as a primary landscape determinant beyond the natural features and/or heritage matters;[69] and

[c] The landscape qualities have been elevated beyond the status identified in the regional provisions.

[168] According to Mr Reaburn, the Council decided to initiate the NOR in November 2006. He said:[70]

> 4.3 Amendments to proposed Plan Change 14 and associated processes were considered (as confidential items) by the Council in November and December 2006. It is at that time that the Council decided to initiate the NOR. This decision was based on the landscape assessments referred to above, the November 2005 Louise Furey archaeological appraisal and a February 2006 Social and Cultural Impact Assessment Report prepared by Integrated Research Solutions Limited for the Makaurau Marae.

[169] Informal notice was given to the landowners by letter dated 30 November 2006 giving them until 11 December 2006 to communicate their views. The Urban Design Committee of the Council resolved to notify the NOR at a meeting in March 2007.

[170] It is against this contextual background that we now look at the contested issues.

Notice of Requirement

[171] Section 168A of the Act[71] relevantly provides as follows. The **bolded** portions are those which identify the contested issues:

> (1) When a territorial authority proposes to issue a notice of requirement for a designation –
>
> (a) **for a public work within its district and for which it has financial responsibility**; or
>
> (b) in respect of any land, water, subsoil, or airspace where a restriction is necessary for the safe or efficient functioning or operation of a public work –

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[68] Scott, EIC, at [19]
[69] Ibid, EIC, at [20]
[70] Reaburn, Supplementary Evidence, at [4.3]
[71] As it applied at the relevant time

It shall notify the requirement in accordance with s.93(2); and the provisions of s.168, with all necessary modifications, shall apply to such notice.

...

(3) 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 decision on the requirement.**

(4) The territorial authority may decide to—

(a) confirm the requirement:

(b) modify the requirement:

(c) impose conditions:

(d) withdraw the requirement.

[172] Under Section 174(4) of the Act, the Court is to have regard to the matters set out in Section 171 which are the same matters set out in Section 168A(3), and the Court may cancel or confirm the requirement, and may modify it or impose conditions.

Is the designation a public work?

[173] Public work is defined in the RMA as:

... the same meaning as in the Public Works Act 1981, and includes any existing or proposed public reserve within the meaning of the Reserves Act 1977 and any National Park purposes under the National Parks Act:

[174] The RMA definition expressly includes existing or proposed public reserves under the Reserves Act 1977. The NOR document needs to be considered robustly and in the round. We are satisfied that it is clear from a reading of the NOR documentation in the round, that the work proposed by the Council is an extension of the Stonefields Reserve.[72]

[175] We thus consider that the NOR is for a public work.

Does the Council have financial responsibility?

[176] As a requiring authority, the Council may notify a requirement for the designation of a public work within its district for which it has financial responsibility (Section 168A(1)(a)). Counsel for Wallace submitted, that the Council has made no financial provision for acquiring the land and has not accepted financial responsibility now or in the reasonably foreseeable future for the work on the designated land.[73]

[177] There is no evidence before us that would suggest the Council has disclaimed financial responsibility for the works. The Council continues to actively pursue the designation. Ms Bowers confirmed that the Council has always accepted, and continues to accept, financial responsibility for the NOR.[74] Council Senior Acquisitions and Disposals Adviser, Mr Alan Walton, repeats this confirmation in his rebuttal evidence.[75]

[178] We agree with the submission of counsel for the Council, that the purpose of the reference to financial responsibility in Section 168A is to avoid situations where a requiring authority issues a NOR but seeks, in some way to disclaim any responsibility for it. As the Environment Court noted in ***Re Waitaki District Council***, citing earlier High Court authority:[76]

> [31] The reason why financial responsibility is important was explained in Waiotahi Contractors Limited v Owen [(1993) 2 NZRMA 425]. There the High Court was considering an appeal from the Planning Tribunal in a case where the Whakatane District Council has refused to accept continuing financial responsibility for a public work. The High Court concluded that a designation could not be maintained in the face of a designating authority's disclaimer of financial responsibility for it. Henry J concluded:

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72 Bowers, EIC, at [5.1] and Reaburn, EIC, at [10.2] – [10.3]
73 Opening Submissions, at [50] and [51]
74 Bowers, EIC, at [4.13]
75 Walton, Rebuttal, at [3.2]
76 [2007] NZRMA 68, at [31]

> ... The provision in a District Plan for a public work such as this is directly tied to financial responsibility for it, which is something the Tribunal cannot force on an authority. *In this context the nature and extent of the financial responsibility is irrelevant. That is something that must necessarily be uncertain and may or may not involve future expenditure of a capital nature, and usually would involve maintenance expenditure. It is the existence of the responsibility which is important.* I am therefore of the view that the Tribunal erred in law in proceeding to consider this appeal on the planning merits without taking into account and giving due weight to a relevant consideration, namely the council's refusal to accept continued financial responsibility for the public work [Emphasis added].

[179] The Town and Country Planning Appeal Board put the matter well in an early decision, ***Newspaper House Limited v Wellington City Council***[77]:

> **By designating land in its district scheme, on its own motion, for a proposed public work, the council thereby records that vis a vis the owners of the land, it accepts the financial responsibility for the acquisition of the land for the proposed work.** But this Board has no jurisdiction positively to order a council to execute a proposed work. The only positive power the Board has is in certain circumstances to order the council to acquire land ... but it does not follow that the designation of the land required for a work binds the Minister or public body to execution of the proposed work. Designation of land for a public work is a planning action. Construction of a public work is an executive action.
>
> *[emphasis ours]*

[180] The acceptance of financial responsibility is evident from the fact that it is the Council (and not some other entity) that has requested the designation, and the fact that, if approved, the Council will be the party that holds the designation. The Council has not disclaimed financial responsibility for the designation.

Are the works and designation reasonably necessary to achieve Council's objectives?

[181] Under Section 171(1) of the Act, we are required to determine whether both the public work and the designation are reasonably necessary for achieving the objectives of the Council for which the designation is sought.

What are the Council's objectives?

[182] It is clear from the NOR and the submission for the Council, that the public work (reserve land) is required to achieve the objective of protecting and preserving the public open space and landscape characteristics (which include the

[77] (1977) 1 NZTPA 289

cultural/historic heritage landscape characteristics) of the land and, importantly, the adjacent Stonefields Reserve.[78]

Is the public work reasonably necessary to achieve the objective?

[183] We consider that the reasonably necessary test is an objective, but qualified one. In ***Watkins v Transit New Zealand***[79] the Court noted:

> ... In short "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.

[184] We are also aware of the limits of any enquiry into the merits of the objectives. It is now well settled that the Act neither requires or allows the merits of the objectives themselves to be judged by the Court. For instance, in ***Babington***, the Planning Tribunal said:[80]

> ... It is not for us to pass judgment on the merits or otherwise of this objective. What we are required to do is to have particular regard to whether the proposed designation is reasonably necessary for achieving it.

[185] We have already considered some of the evidence base relevant to the historic landscape, and the threat to that landscape. Ms Bowers introduces the NOR in her evidence, describes its purpose,[81] and explains the contribution the land will make in practical terms if it is added to the OSHR. Mr Reaburn discusses the need for the NOR and whether it is necessary to achieve the objectives in his evidence-in-chief.[82] The evidence of Mr Murdoch (historic heritage), Dr Clough (archaeology) and Ms Absolum (landscape), provides direct support for the NOR.

As for the protection of the Stonefields Reserve

[186] We are well aware of the value of the Stonefields as an historic reserve. Its acquisition by the Council from the landowner appellants was preceded by some 20 years or so of research and reporting of its heritage values. These reports consistently referred to the Stonefields as a nearly complete Stonefields system of about 100 acres. The boundaries of the Stonefields were defined in 1984 when Historic Places Trust gave the land a Category 2 registration under the transitional provisions of the

[78] Dickey, Opening Submissions, at [4.19] and [4.83]
[79] A54/03, at [47]
[80] (1993) 2 NZRMA 480, at [486]
[81] Bowers, EIC, at [4.8] and onwards
[82] Reaburn, EIC, at [10.11] – [10.13] and [10.4] – [10.7]

Historic Places Trust Act 1993. The acquisition followed nearly the same boundaries as the Historic Places Trust schedule.

[187] The evidence established, and this was confirmed by our observation on our site visit, that the Stonefields are very well contained, as was pointed out by counsel for Wallace.[83] From the approach to the Stonefields there is already a buffer of sorts in the remnant volcanic cones at Otuataua and Pukeiti (former quarry sites), the former water and quarry reserves and the Wallace land acquired as part of the reserve.

[188] The NOR for the Stonefields identifies that the public works may include an interpretation centre, a carpark, public toilets, and a cultural/heritage centre. Suitable areas for all of these activities were identified within the reserve, areas which had lesser remnants of the Stonefields due to the past farming practices.

[189] We are satisfied that the Stonefields themselves, well contained as they are, can be adequately protected by sensitive development that recognises and provides for their value.

As for the subject land

[190] As for the subject land itself, we are conscious that, notwithstanding the availability of a Mangere-Puhinui Heritage zoning, which is applied to some land within the Mangere-Puhinui Heritage area, the subject land was given a less restrictive *rural zoning* – a zoning that does not protect the heritage and cultural aspects espoused by all the witnesses. This would tend to indicate that the heritage aspects of this land are ranked as less important.

[191] We are also conscious that the Council arranged for a kaumatua to carry out a ceremony over part of the land to lift any tapu. While such a ceremony is not determinative or binding on all Maori, it does reflect the worth of the land in cultural terms to the Council at that time.

[192] In our view, the Council witnesses have over-emphasised the need for a reserve to protect and preserve the special characteristics of this land. By focussing on the special cultural, historical and landscape characteristics of the land, they have closed their minds to the possibility of sensitive development of the properties. In other words, they have not adequately factored in sensitive development of the

[83] Opening Submissions, at [79]

properties. Development that would need to be carried out in compliance with the Historic Places Trust Act, may well require further archaeological survey work and the obtaining of a resource consent. A well thought out Structure Plan could recognise significant features and values and could address landscape buffers, setbacks, height controls, view shafts, and access to the coastal marine area and the Stonefields.

[193] The Council Commissioners in their decision relied heavily on the landscape, heritage and archaeological reports for their finding that the designation is reasonably necessary to achieve the Council's objective of protecting the cultural, heritage and landscape values of the land and the Stonefields Reserve. We have already averred to Mr Scott's three major criticisms of these reports, namely:

[a] Other potential land use scenarios were not adequately analysed in regard to the existing and proposed zoning of the area and land titles subject to the appeals;[84]

[b] They did not adequately consider the scale of the Airport development as a primary landscape determinant beyond the natural features and/or heritage matters;[85] and

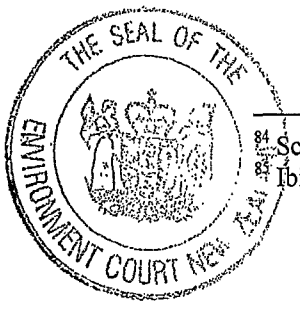
[c] The landscape qualities have been elevated beyond the status identified in the regional provisions.

Criticisms that we consider on the evidence to be valid for the reasons we have given in our discussion on the MUL line.

[194] For the above reasons, we conclude that the public work is not reasonably necessary to achieve the Council's objectives.

Has adequate consideration been given to alternatives?

[195] Where, as in this case, the requiring authority does not have a sufficient interest in the land, Section 171(1)(b) of the Act requires the Court to examine what consideration has been given by the Council to alternative sites or methods for



[84] Scott, EIC, at [19]
[85] Ibid, EIC, at [20]

achieving its objectives. In ***Bungalo Holdings Limited v North Shore City Council,*** the Environment Court observed:[86]

> [111] We understand that Section 171(1)(b) calls for a decision maker to have particular regard to whether the proponent has made sufficient investigations of alternatives to satisfy itself of the alternative proposed, rather than acting arbitrarily or giving only cursory consideration to alternatives. A proponent is not required to eliminate speculative or suppositious options.

[196] The test is whether *adequate consideration* has been given. As counsel for Wallace pointed out, the entire consideration given to alternatives in the NOR is:

> The council considers that this land is part of a cultural heritage landscape, with landscape values and a unique visual amenity. There are no other sites that meet these criteria.

No mention is made of *alternative methods* for achieving the objective, which do not involve designation and the prevention of any reasonable use of the land. He said, it is difficult to describe such an analysis as anything more than *cursory*.

[197] All counsel for the land hold appellants referred to the limited consideration by Mr Reaburn to alternatives. He devoted three paragraphs in his evidence-in-chief and one paragraph in rebuttal. In rebuttal, Mr Reaburn was dismissive of alternatives being practically achieved, but the point is, they were not considered at all, or at most in a very cursory way, prior to issuing the NOR.

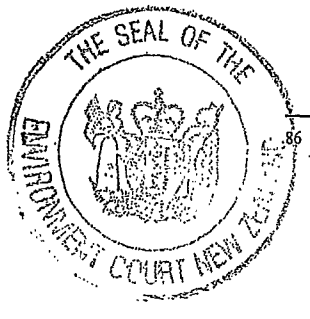
[198] The most obvious alternative methods include:

[a] To acquire the land by private treaty;

[b] To acquire the land under the Public Works Act; or

[c] To address the proper zoning of the land which could have been done as a prelude to Plan Change 14.

[199] Any one of these options could have preserved and protected the open space and landscape characteristics of the appellants' land without driving down the price of the land and disenabling the landowners from any benefit.



[86] A052/01, at [111]

[200] The lacuna left by the Council was addressed in part by the evidence of Mr Scott and Mr Putt. They advocated a *future development zone*. A matter that was peremptorily dismissed in the Council decision:[87]

> Counsel for Mr Ellett et al. suggested that there had been no real consideration of alternatives for achieving the Council's purposes and suggested that an appropriate zoning with particular controls could achieve the same result. However, the Commissioners do not consider Counsel is seriously suggesting that Council has been remiss in its choice of method to achieve its goals, noting that zoning itself provides no opportunities for the purchase of the properties. ...

[201] On the other hand, we have found that a *future development zone* would be in accordance with the purpose of the Act having regard to the relevant provisions of Part 2. This is a matter, that we have already discussed in some detail.

[202] We accordingly find that adequate consideration has not been given to alternative methods.

Overall finding on NOR

[203] For the above reasons, we cancel the requirement as it affects the subject land.

THE COUNCIL DECISIONS

[204] Under Section 290A of the Act, we are required to have regard to the decisions that are the subject of the appeals. As we have decided differently on the underlying general issue relevant to the appeals, we have, not surprisingly, come to a different conclusion.

[205] The fundament of the Council's decisions were that protection from all development was the most appropriate way:

[a] to protect the Stonefields;

[b] to protect Maori associations with the land; and

[c] to protect heritage values.

[87] Notice of Requirement Decision, Section 12, page 15

[206] We have already averred to parts of the Council's decisions in earlier sections of this decision. In the decision of the Commissioners on the NOR dated 27 March 2009, they said:[88]

> Section 6(f) The protection of historic heritage from inappropriate use and development: The NoR will ensure the protection of the Stonefields and provide a buffer from adjoining Airport and other development.

And:

> The Commissioners have carefully carried out this evaluation and accept that Maori have a relationship with the NoR land; that that relationship is no more or less important than the relationship with all of the land in the Mangere-Puhinui area, carrying as it does a rich historical narrative as described in Mr Murdoch's evidence. Given its location adjoining the Stonefields, a recognised wahi tapu, care must be taken to ensure that activities which could be 'intrinsically offensive' are avoided.
>
> The Commissioners find that maintaining this land in a rural zoning will not necessarily maintain the section 6(e) relationship; and that the only way to achieve this is through the passive public open space designation.

[207] The strong directions contained in Section 6 relating to Maori and historic heritage are not a total veto on development. They are directions to decision makers to recognise and provide for protection from inappropriate development. We are satisfied on the evidence before us that the most appropriate way of achieving the statutory directions is to provide for a mechanism that allows sensitive development, while at the same time safeguarding and protecting the special characteristics of this land.

[208] We have had the benefit of lengthy, and at times, detailed cross-examination on the major underlying issue. At all times we have been conscious of the Council's decisions. However, after careful consideration of the evidence before us, we have, for the reasons given in this decision come to a different conclusion.

[88] At page 30

DETERMINATION

[209] We make the following determination:

A. The MUL is to be extended to include the land subject to appeal;

B. The land subject to appeal is to be zoned Future Development Zone;

C. The NOR is cancelled as it affects the land subject to appeal

D. The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals:

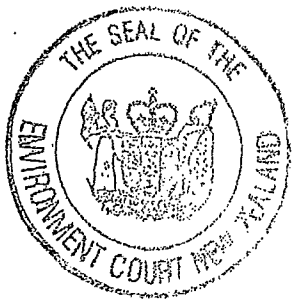
1. A change to the Auckland Regional Policy Statement to amend the location of the MUL in accordance with A above; and

2. A change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as "Ihumātao Peninsula". The amendments to the District Plan are to provide for:

a. A succinct description and explanation of the subzone and its context which:

i. Identifies and provides for the significant characteristics of the area, including:

- **Maori cultural associations with the area, including wahi tapu;**
- **Heritage and historic associations;**
- **The Otuataua Stonefields Historic Reserve;**
- **Landscape and amenity values;**
- **The Manukau Harbour and coastal environment; and**



- **The Auckland International Airport and business zoned lands.**

ii. Requires that a future structure planning process for the subzone:

- **Further identifies and recognises these significant characteristics;**
- **Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and**
- **Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).**

b. The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).

c. Any consequential amendments to the District Plan.

E. The Council is to submit the changes directed under D. to the Court for confirmation by 28 September 2012.

F. Costs are reserved, but in our tentative view should lie where they fall.

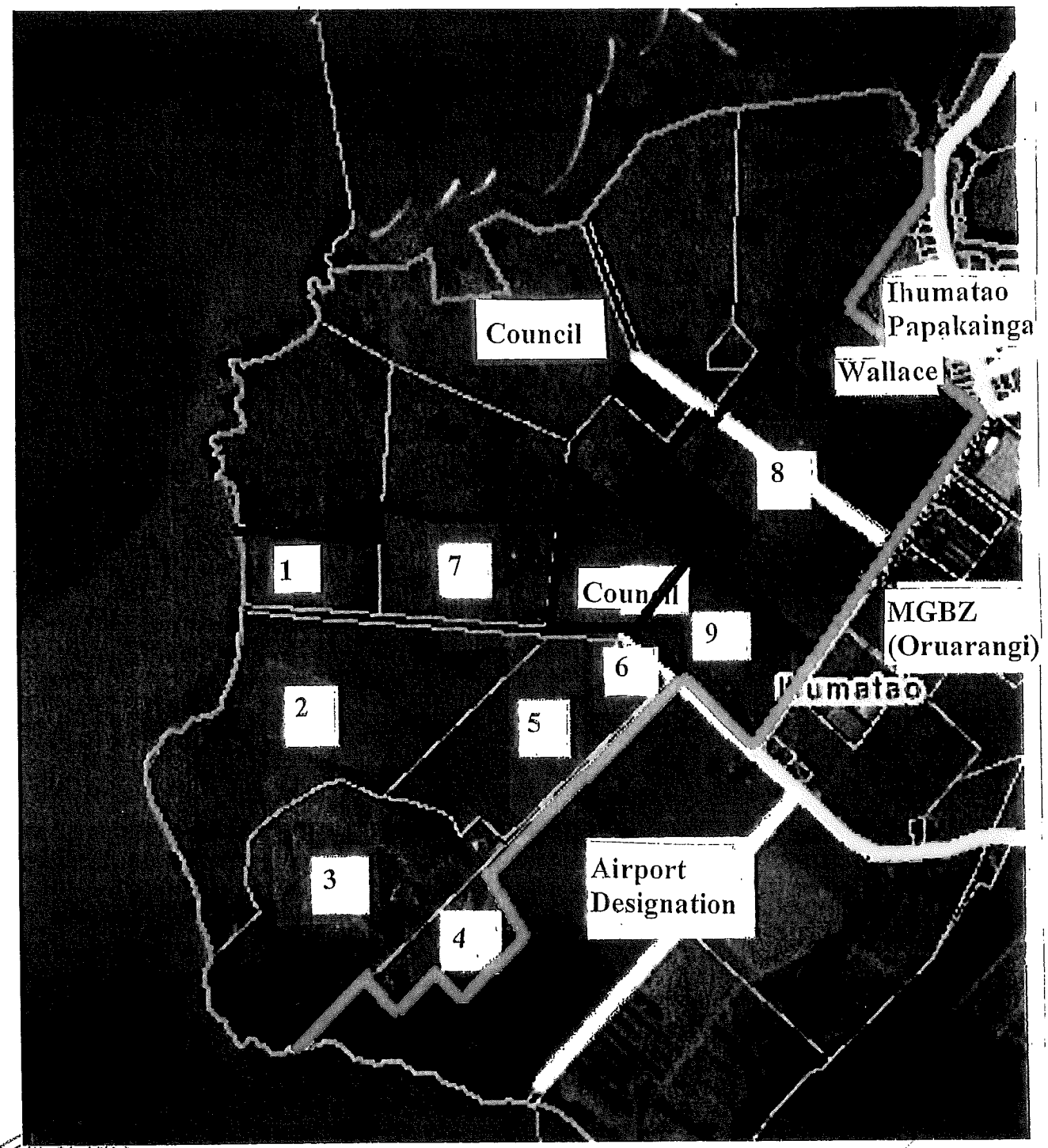
SIGNED at AUCKLAND this 15th day of June 2012

For the Court:

R G Whiting
Environment Judge.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

APPENDIX 1 – The subject land



APPENDIX 2
SUMMARY OF EVIDENCE RELATING TO MAORI ISSUES

Ko Maungataketake te maunga
Ko Rakataura te tangata
Ko Te Kawerau a Maki me Te Waiohua nga iwi
Ngati Te Ahiwaru me Te Akitai oku hapu
Ko Makaurau te Marae (Warena Taua, Mihi eic)

Maungataketake is the mountain
Rakataura is the person
Te Kawerau a Maki and Te Waiohua are the tribes
Ngati Te Ahiwaru and Te Akitai are my sub-tribes
Makaurau is the Marae

[1] Over 8 centuries several iwi and hapu have occupied the Ihumātao area and the wider Auckland Isthmus.

[2] These iwi and hapu include Ngati Rori (later called Te Ahiwaru), Te Kawerau a Maki, Ngati Te Ata, Ngai Tai, Ngati Poutukeka (abbreviated to Ngati Pou then later changed to Te Wai o Hua), Te Akitai, Ngati Paretaua, Ngati Tamaoho, Ngati Huatau, Te Aua, Ngati Tahuhu, Ngati Kaiaua plus others.

[3] There is little doubt that Ngati Ahiwaru, the inhabitants of this area in 1853, were unfairly treated by the Crown but such matters cannot be addressed through this RMA process.[1]

[4] On Wednesday 7 December we sat at the Makaurau Marae. We heard evidence on Maori issues from Mr Hori Winikerei Taua, Mr Hare Paewhiro Huia Tone, Ms Dawn Maria Matata, Mr Rapata Roberts, and Mr Te Warena Taua.

[5] **Te Warena Taua** of Te Kawerau a Maki, Ngati Te Ahiwaru, and Te Akitai of Waikato, and Chairman of Te Kawerau a Maki Tribal Authority gave evidence on their whakapapa, history and tradition which he had learnt from his grandfather and Waikato elders.

[1] Murdoch, EIC, at [6.7]

[6] Having been brought up in te ao Maori by his parents and elders, he trained as an ethnologist and has published history of the Auckland tribes, and Maori history of the Howick, Pakuranga and surrounding area.[2]

[7] His evidence is that Makaurau and Kawerau reached settlement with the landowners and Auckland International Airport Ltd regarding the rezoning of the Metropolitan Urban Limits but consider that protecting the remaining land is of critical importance to them. This land is directly adjacent to the Stonefields reserve, and contains significant wahi tapu. He states, "*Both Kawerau and Makaurau have unbroken ancestral relationships with this land and assert mana whenua over this area*" and because Maungataketake has been desecrated through quarrying they prefer minimal invasive future development on this land.[3]

[8] Mr Taua gave evidence on the historic occupation of their people in this Ihumatao area since the arrival of the Tainui waka up to present day. We received a confidential map setting out waahi tapu sites and sites of special significance within the subject land and adjacent land. This included burial sites of ancestors, sacred caves and tunnels, and other matters of importance to Kawerau and Makaurau. The numerous, and great significance of the, wahi tapu has lead them to regard the whole area as wahi tapu.[4]

[9] He was cross-examined at length regarding the wahi tapu by counsel for the appellants.

[10] When questioned by Mr Cavanagh as to whether food and tapu were able to mix, Mr Taua replied:

> ... Te Rau-anga-anga, King Potatau's father, now he was a General in the wars, and while they were eating at Kaitotehe, the old pā of theirs, they were eating food and kumara. They summoned the heads and hence, his name Te Rau-anga-anga, of 100 heads. They asked for the heads to come, be put in front of them while they ate. They have that right, they are the chiefs. They can determine whatever they wish. They can make tapu, they can break tapu. The right is solely theirs.[5]

[11] Mr Littlejohn queried the validity of the tapu lifting ceremony performed by Mr Wilson on the Mendelssohn property in 1999 given Mr Taua's earlier comments that tangata whenua were able to "*make tapu or break the tapu*". Mr Taua replied:

> ... Please understand that when he went there, it was to placate the owners of the land, because they feared somewhat that a tapu had been put over by the Māoris who were

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[2] Taua, EIC, at [6] – [7]
[3] Ibid, EIC, at [12]
[4] Ibid, EIC, at [14] – [19]
[5] Taua, Transcripts at page 450

> involved with the Stonefields. His karakia was simply to make the family feel happy, by offering a karakia... [6]

[12] Mr Enright argued that there were two separate entities represented at this hearing and that "*any waiver of wahi tapu by the Makaurau Marae kaumatua does not bind Kawerau*".[7]

[13] Mr Casey in his closing submitted that no wahi tapu or sites of significance have been identified on the current Wallace land other than part of the slopes of Puketapapa.[8]

[14] While he accepted Mr Taua's "*broad understanding of the meaning of tapu*", he submitted that this "*expansive understanding does not fit with the meaning ascribed in Section 6(e)*", citing ***Serenella Holdings Ltd v Rodney District Council***:[9]

> It is important however to record that the matters of national importance in s 6(e) that are to be recognised and provided for , should not generally include everyday activities and wide-spread but long lost random burials, with the consequence of preventing new endeavour on the land. The consequences for continuing human endeavour are obvious, it would become difficult or even impossible to obtain consents to carry out activities on land that has passed out of Maori ownership to non-Crown interests, if the principles in s 6(e) are to be considered to operate in some sort of blanket fashion based on daily general association with the land of Maori life in times past. Section 6(e) calls for proof of something more in order to attain recognition and provision as a matter of national importance.

[15] The ancestral relationship and cultural relevance of an area is often reflected in the named localities.[10] We note some of these names in the following examples: [11]

[a] Mataoho - Te Kawerau a Maki and the people of Ihumātao regard this area as part of the creation of the atua Mataoho, as portrayed in many of the landmarks of the Auckland Isthmus;

[b] Te Ihu a Mataoho (Mataoho's nose, later abbreviated to Ihumatao, then Maungataketake, then Elletts Quarry);

[c] Te Pane a Mataoho (The Head of Mataoho or Mangere mountain);

[6] Ibid, Transcripts, at page 464
[7] Points of Reply by Counsel for Makaurau Marae Maori Trust Board Inc & Te Kawerau a Iwi Tribal Authority Inc, at [1]
[8] Casey, Closing Submissions, at [38]
[9] Ibid, Closing Submissions, at [39]
[10] Murdoch, EIC, at [4.59]
[11] Taua, EIC, at [22]

[d] Kouora and Pukaki Craters are Nga Tapuwae a Mataoho (The footprints of Mataoho); and

[e] Te Kapua Kai a Mataoho (Mataoho's Food Bowl or Mt Eden Crater).

[16] Other examples include:[12]

[a] Te Tahuhu o Tainui, now called Otahuhu (alluding to the Tainui waka being carried upside down from Tamaki River to Manukau Harbour);

[b] Te Manukanuka a Hoturoa, now Manukau Harbour (where Hoturoa, the captain of the Tainui waka became anxious due to the treacherous conditions);

[c] Nga Hau Mangere, now Mangere (the lazy winds, named by Rakataura, the Tainui waka tohunga);

[d] Te Motu a Hiaroa, (Hiaroa's Island) named after Rakatarua's sister Hiaroa, now called Puketutu Island.

[17] Mr Murdoch expanded on Puketutu as follows: [13]

> What we now know as Puketutu Island is really known as Te Motu a Hiaroa, the island of Hiaroa, who was a woman on the Tainui canoe, and that's the proper name for the island. The highest point of the island was one of, I think, three or four cones and it had a very sharp pointed peak on it, and that was called Puketutu. And so Puketutu is a landmark on Te Motu a Hiaroa, and as we so often do, we shift and cut and paste Māori names and in the same way Puketapapa has become Ihumatoa [Ihumatao] and so on.

[18] The wahi tapu within the area include sacred mountains, battle sites, burial sites, Pa sites and subterranean caverns that contained taonga.[14]

> Whilst wahi tapu such as Maungataketake have been desecrated and physically destroyed, we hold fast to the tikanga that tapu associated with those sites remains intact.[15]

[19] Of significance to Te Kawerau a Maki and Makaurau is that one of the hui to select the first Maori king was held at Ihumātao and Potatau Te Wherowhero lived there prior to his accepting the mantle as king.[16]

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[12] Ibid, EIC, at [26]
[13] Murdoch, Transcripts, at page 269
[14] Taua, EIC, at [31]
[15] Ibid, EIC, at [32]
[16] Ibid, EIC, at [37] – [38], Murdoch, EIC, at [5.2.2]

[20] Mr Taua cited a number of development ventures in this area that have been detrimental to their iwi. These included:[17]

[a] the Auckland Airport;

[b] the Mangere Sewerage Treatment Facility;

[c] the destruction of Maungataketake for a quarry.

[21] The common elements of these examples are:[18]

[a] Imposition of decisions that directly impact on tangata whenua;

[b] Prioritisation of regional amenity over the values of tangata whenua;

[c] Destruction of significant landmarks;

[d] Environmental degradation, which in turn effects water quality and the availability of natural resources such as kai moana, which are fundamental to our way of life;

[e] Desecration of wahi tapu and other sites of spiritual, cultural and heritage significance;

[f] Marginalisation of tangata whenua from ownership and development opportunities; and

[g] Encroachment of development on the oldest papakainga in the Auckland region, which impacts the character of the area and the quality of lifestyle of tangata whenua.

[22] In summary, Mr Taua concluded that Te Kawerau Iwi Tribal Authority and Makaurau Marae Trust as representatives of the ahi ka:

[a] oppose urbanisation of the Ellett, Wallace and Mendelssohn lands;[19]

[b] support the acquisition of those lands as public open space;[20]

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[17] Taua, EIC, at [40]
[18] Ibid, EIC, at [41]
[19] Ibid, EIC, at [44]

[c] emphasise the significance of the area because of

[i] the number of wahi tapu;[21] and

[ii] wrongful confiscation by the Crown.

[23] **Mr Graeme Murdoch** a noted scholar and historian provided a detailed summary of the pre and post European human and cultural history of the Mangere-Puhinui, Ihumātao block and the wider Auckland region on behalf of the Auckland Council.

[24] He had the added advantage of being proficient in the Maori language and having learnt from a life long association with the elders of Ngati Ahiwaru, Te Akitai, Te Kawerau a Maki and other iwi in the greater Auckland Isthmus.

[25] Mr Murdoch opines that sacred knowledge acquired through discussion with kaumatua has "*equal validity*" and often "*greater importance*" in Section 6(e) RMA matters than academic and archaeological sources.[22]

[26] In his youth he was aware that the volcanic features of the Ihumātao were recognised as taonga by local Maori[23] and that the subsequent modification and destruction of these features have caused "*immense distress*" and "*ongoing grief*" to the tangata whenua.[24]

[27] Examples of these modifications include the creation of the sewerage ponds and the water treatment plant, the quarrying of various maunga (Maungataketake and Puketutu) and building the second runway for the Auckland International Airport.

[28] Another cultural icon, Te Kahui Tipua "*assemblage of spiritual guardians*" Haumia, Papaka and Kaiwhare were destroyed when the Mangere Wastewater Treatment Plant sewerage ponds were built.[25]

[29] Similarly Te Punga o Tainui – "*the anchor stone of Tainui*" situated just off the Oruarangi Creek was "*tragically*" destroyed during the construction of the Mangere Wastewater Treatment Plant sewerage ponds.[26]

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[20] Ibid, EIC, at [44]
[21] Taua, EIC, at [46]
[22] Murdoch, EIC, at [4.1.1]
[23] Ibid, EIC, at [4.2.3]
[24] Ibid, EIC, at [4.2.4]
[25] Ibid, EIC, at [4.2.5]
[26] Ibid, EIC, at [4.2.7]

[30] When Tainui waka left Ihumātao and ventured on to Kawhia, two "*illustrious founding ancestors*", Rakataura their leading tohunga, and a younger rangatira named Poutukeka, remained. Their direct descendants are the people of Ihumātao connected with the Pukaki and Makaurau Marae.[27]

[31] Poutukeka was the eldest son of Hoturoa the captain of the Tainui waka.[28] His descendants, Ngati Poutukeka, lived in this wider Mangere-Puhinui area.[29]

[32] Rakataura later became known as Hape. Puketapapa or Te Puketapapatanga a Hape (the hilltop resting place of Hape) "*imbues the wider Ihumatao Penninsula with particular mana, spiritual unity and significance*".[30]

[33] In spite of the Crown confiscation of the 1100 acre Ihumātao block in 1865 the hapu associated with Makaurau Marae have maintained an unbroken "*ahi ka roa*" in this area for over 6 centuries.[31]

[34] Mr Murdoch also narrated the tribal interactions and occupations arising from the musket wars,[32] and the alienation of lands in the Tamaki-Manukau area.[33]

[35] He gave evidence on the Te Waiohua practice of shifting agriculture in a seasonal cycle of gardening and resource gathering and how they left aside the defensive areas of the cone pa, the settlements and the sacred burial areas.[34]

[36] He cautioned against relying solely on archaeological site records for identifying heritage areas citing the discovery of the largest burial found in the district during earthworks for the Airport second runway as an example.[35]

> Archaeological sites and their qualities and values of course provide only one component of the historic and cultural heritage values of the Ihumatao cultural landscape of significance to Tangata Whenua.[36]

[37] Mr Murdoch emphasises the importance of Maori identity through ancestral relationships to cultural landscapes regardless of whether or not the land is in Maori ownership.[37]

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[27] Ibid, EIC, at [4.2.8]
[28] Taua, Transcripts, page 469
[29] Murdoch, EIC, at [4.3.2]
[30] Ibid, EIC, at [4.2.9]
[31] Ibid, EIC, at [4.3.1]
[32] Ibid, EIC, at [4.3.6] – [4.3.8]
[33] Ibid, EIC, at [4.4.1] – [4.4.7]
[34] Ibid, EIC, at [4.5.5]
[35] Ibid, EIC, at [4.5.8], Taua, EIC, at [42]
[36] Murdoch, EIC, at [4.5.9]

[38] In Section 5, EIC, he detailed the post European occupation of the Ihumātao area including their interactions with local iwi.

[39] With reference to Section 6(f) matters he states:

> ... the archaeological, architectural, cultural, historic, technological, and to some degree scientific qualities associated with the natural and physical resources of Ihumatao, relate to both the Maori and European occupation and use of the land. The Maori ancestral relationship that is held with the land, waters and other taonga associated with Ihumatao, forms a significant and integral component of these values. It is inextricably linked to all of these natural and physical resources, and not just to their "cultural and historical qualities".[38]

[40] He opines that the post-European component of the cultural heritage landscape of Ihumātao illustrates the early adaptation of Maori to the colonial economy and social change, adding that the Maori mission station is the finest remaining example of a nineteenth [century] complex left in the Auckland region.[39]

[41] He summarised that the cultural heritage landscape of Ihumātao is a significant example of "*a coherent and legible landscape that covers the entire continuum of human history and settlement in the region*" and that:[40]

> The Maori ancestral relationship with Ihumatao extends well beyond the nationally significant archaeological assemblage and landscape associated with the OSHR, to all parts of the Ihumatao peninsula and its natural and physical resources, including those areas modified by quarrying.

[42] He closes with the observation that the area is rich in human historical and cultural associations that have developed over nearly eight centuries that reflects the full range of Maori and post European heritage[41] and a quote from the Heritage Chapter of the District Plan:[42]

> Titiro ki nga wa o mua
> Ki te whakamarama I tenei ao
> Rapua te mea ngaro
> Hei maramatanga mo nga Ao e eke mai
>
> Look to the past to understand the present and seek answers for the future

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[37] Ibid, EIC, at [4.5.10]
[38] Ibid, EIC, at [6.3]
[39] Ibid, EIC, at [6.10]
[40] Ibid, EIC, at [6.14]
[41] Ibid, EIC, at [7.5.9]
[42] Ibid, EIC, at [7.5.10]

Meridian Energy Ltd v Central Otago District Council

High Court Dunedin CIV-2009-412-980
21, 22, 23 and 24 June; 16 August 2010
Chisholm and Fogarty JJ

Resource management – Resource consents – Wind farm – Efficient use and development of natural and physical resources – Whether consent authority required to consider alternative locations – Whether comprehensive and explicit cost-benefit analysis of proposal could be required – Resource Management Act 1991, ss 7(b), 32, 88 and 104(1)(c) and sch 4, cl 1(b).

Resource management – Resource consents – Whether having regard to effects of climate change includes considering causes of climate change – "Climate change" – Resource Management Act 1991, s 7(i) – Climate Change Response Act 2002.

Practice and procedure – Trial – Decision of Environment Court based on approach in another case decided after the hearing – Whether Court should have heard further from parties before adopting that approach – Whether breach of natural justice.

Meridian Energy Ltd applied for resource consent to operate a substantial wind farm for the generation of electricity in Central Otago. The Environment Court refused consent, holding that the project did not achieve sustainable management in terms of s 5 of the Resource Management Act 1991, principally because the nationally important positive factor of providing renewable energy was outweighed by adverse considerations, including the substantial impact on the outstanding natural landscape. Meridian appealed to the High Court, alleging that the Environment Court erred in law in the approach it took, in particular by requiring the consideration of alternatives to the Meridian site, and requiring a comprehensive and explicit cost-benefit analysis of the proposal. Meridian also claimed that it was denied a fair hearing because of the process used by the Environment Court in reaching its decision. The Court had adopted an approach to the alternative site issue based on another Environment Court decision delivered after the *Meridian* hearing. Meridian claimed it should have been given the opportunity for further submission once the other decision was released. There was also a cross-appeal claiming that the Environment Court erred in its consideration and evaluation of the effects of climate change, in terms of s 7(i) of the Resource Management Act, because it excluded consideration of the causes of climate change.

Held: 1 The consent authority, and the Environment Court on appeal, had been entitled to request that Meridian supplied a description of possible alternative locations, as part of the assessment of environmental effects under s 88 of the

Resource Management Act, because cl 1(b) of sch 4 was triggered. Consideration of alternative locations was relevant and reasonably necessary to determine the application under s 104(1)(c). However, the consent authority was not required to consider alternatives as part of the efficiency analysis under s 7(b); nor could a comprehensive and explicit cost-benefit analysis of the proposal be required to be undertaken as part of the examination of the efficiency criterion in s 7(b). Section 32(4)(b), the only section expressly requiring a cost-benefit evaluation, did not carry a mandatory requirement for all benefits and costs to be quantified in economic terms; it was simply not possible to express some Part 2 criteria and some benefits or costs in dollar terms. Decisions of consent authorities might involve a high degree of subjectivity and Parliament had not mandated that they be "objectified" by quantification (see [94], [105], [111], [116], [123]).

TV3 Network Services Ltd v Waikato District Council [1998] 1 NZLR 360 (HC) discussed.

2 There had been nothing to put Meridian on notice that the Environment Court was considering adopting the approach to alternative sites which it did, and nor had the issue been identified by the parties or addressed during the hearing. The Environment Court should have heard further from the parties, including giving an opportunity for further evidence, once the decision on which it based its approach had been released (see [133]).

3 The statutory definition of "climate change", and the Climate Change Response Act 2002 which incorporated the 1992 United Nations Framework Convention on Climate Change from which the definition was derived, reflected a statutory assumption that climate change existed. The requirement to have particular regard to the effects of climate change in s 7(i) of the Resource Management Act did not therefore include any requirement to consider the causes of climate change (see [157]).

Result: Appeal allowed; matter referred to the Environment Court for reconsideration; cross-appeal dismissed.

Observation: Part 2 of the Resource Management Act is not intended to give decision-makers the power to make judgments about whether the value achieved from the resources being utilised is the greatest benefit that could be achieved from those resources, or whether greater benefits could be achieved by utilising resources of lower value or a different set of resources. It is not open to the Environment Court to require Meridian to demonstrate that its project is "the best" in net benefit terms. However, on the facts this is not what the Court did in this case (see [120], [121]).

Other cases mentioned in judgment

Baker Boys Ltd v Christchurch City Council [1998] NZRMA 433, (1998) 4 ELRNZ 297 (EnvC).

Canterbury Regional Council v Banks Peninsula District Council [1995] 3 NZLR 189 (CA).

Central Plains Water Trust v Ngai Tahu Properties Ltd [2008] NZCA 71, [2008] NZRMA 200, (2008) 14 ELRNZ 61.

Central Plains Water Trust v Synlait Ltd [2009] NZCA 609, [2010] 2 NZLR 363.

Contact Energy Ltd v Waikato Regional Council (2007) 14 ELRNZ 128 (HC).
Dome Valley Residents Society Inc v Rodney District Council [2008] 3 NZLR 821 (HC).
Fleetwing Farms Ltd v Marlborough District Council [1997] 3 NZLR 257 (CA).
Friends & Community of Ngawha Inc v Minister of Corrections [2002] NZRMA 401 (HC).
Genesis Power Ltd v Franklin District Council [2005] NZRMA 541, (2005) 12 ELRNZ 71 (EnvC).
Genesis Power Ltd v Greenpeace New Zealand Inc [2007] NZCA 569, [2008] 1 NZLR 803.
Lower Waitaki River Management Society Inc v Canterbury Regional Council EnvC Christchurch C80/2009, 21 September 2009.
MacLaurin v Hexton Holdings Ltd [2008] NZCA 570, (2009) 10 NZCPR 1.
Meridian Energy Ltd v Wellington City Council EnvC Wellington W31/2007, 14 May 2007.
Motorimu Wind Farm Ltd v Palmerston North City Council EnvC Wellington W67/2008, 26 September 2008.
New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC).
Outstanding Landscape Protection Society Inc v Hastings District Council [2008] NZRMA 8 (EnvC).
Queenstown Lakes District Council v Hawthorn Estate Ltd [2006] NZRMA 424, (2006) 12 ELRNZ 299 (CA).
Rangitikei Guardians Society Inc v Manawatu-Wanganui Regional Council [2010] NZEnvC 14.
Unison Networks Ltd v Hastings District Council EnvC Wellington W58/2006, 17 July 2006; HC Wellington CIV-2007-485-896, 11 December 2007.
Unison Networks Ltd v Hastings District Council EnvC Wellington W11/2009, 23 February 2009.
Upland Landscape Protection Society Inc v Clutha District Council EnvC Christchurch C85/2008, 25 July 2008.
Wilson v Selwyn District Council [2005] NZRMA 76, (2004) 11 ELRNZ 79 (HC).

Appeal

This was an appeal by Meridian Energy Ltd from a decision of the Environment Court allowing an appeal by the Maniototo Environmental Society Inc, the third respondent, the Upland Landscape Protection Society Inc (in liq), the fourth respondent, J Douglas, S Douglas and A Douglas, the fifth respondents, E Laurenson, C Laurenson and the Eric and Cate Laurenson Family Trust, the sixth respondents, I Manson, S Manson and the Riverview Settlement Trust, the seventh respondents, GS Dit-Piquard, the eighth respondent, ER Carr, the ninth respondent and RP Sullivan, the tenth respondent against the grant of resource consents to Meridian by the Central Otago District Council, the first respondent, and the Otago Regional Council, the second respondent.

HB Rennie QC, *AJL Beatson* and *HJ Tapper* for Meridian.
AJ Logan for the Councils.

JBM Smith, *MC Holm* and *MJ Slyfield* for the third, fourth, fifth, eighth, and ninth respondents.
MJ Fisher and *KS Muston* for the tenth respondent.

Cur adv vult

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CHISHOLM and FOGARTY JJ.

Introduction

[1] Meridian Energy Ltd, a state-owned enterprise and major energy company, applied to the Central Otago District Council (CODC) and Otago Regional Council (ORC) for resource consents to establish and operate a substantial wind farm for the generation of electricity in Central Otago. Consents were granted. The third to tenth respondents appealed to the Environment Court. Although Meridian cross-appealed about some conditions, its cross-appeal is irrelevant in the present context.

[2] By a majority (Judge Jackson and Commissioners McConachy and Fletcher) the Environment Court decided that the project was inappropriate, being in an outstanding natural landscape under consideration, and that it did not achieve sustainable management in terms of s 5 of the Resource Management Act 1991 (the RMA). This was principally because the nationally important positive factor of providing a very large quantity of renewable energy was outweighed by adverse considerations, including the substantial impact on the outstanding natural landscape.[1] The appeals were allowed and the resource consents were cancelled. Commissioner Sutherland, who dissented, would have upheld the consents.

[3] Meridian appeals to this Court on points of law pursuant to s 299 of the RMA. It alleges that the Environment Court erred in law by:

(i) applying a "new test" for consent applicants where s 6 of the RMA is involved which requires an applicant to demonstrate to the satisfaction of the Court that the project is "the best" in net benefit terms;

(ii) requiring a comprehensive and explicit cost-benefit analysis of the proposal;

(iii) requiring consideration of alternatives to the Meridian site;

(iv) denying Meridian a fair hearing by virtue of the process it adopted when reaching its decision;

(v) arriving at conclusions when there was no evidence to support those conclusions and/or disregarding evidence that conflicted with those conclusions; and

(vi) failing to take into account the Court's ability to impose conditions to avoid, remedy or mitigate certain effects.

An order setting aside the Environment Court decision and granting the consents is sought. Alternatively, Meridian seeks to have the matter referred back to the Environment Court for reconsideration, preferably by a different division of that Court.

[4] CODC and ORC support Meridian's appeal. It is opposed by the third to ninth respondents. Mr Sullivan, the tenth respondent, has cross-appealed in relation to the Environment Court's approach to climate change. His argument before us was limited to that issue.

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1 *Maniototo Environmental Society Inc v Meridian Energy Ltd* EnvC Christchurch C103/2009, 6 November 2009 at [757].

Background

[5] The Meridian site (which is also referred to as the Hayes site and Hayes Project) is approximately 70 km to the north-west of Dunedin, 40 km to the south of Ranfurly and 15 km west of Middlemarch. It comprises the uplands section of five high country stations (of which one is now owned by Meridian). The site is generally more than 900 m above sea level. In total the site envelope of the proposed wind farm is about 135 km^2. This land is zoned rural under the operative district plan and is used for low-level sheep and cattle grazing.

[6] Meridian's proposed wind farm would have up to 176 wind turbines which, depending on the type of turbine finally selected, would be capable of generating up to 630 megawatts of electricity. This would be sufficient to supply power for 280,000 average homes. Each turbine would have a maximum height of 160 m to the tip of the rotor. Five substations would be required to connect the wind turbines to the transmission grid. Electricity produced by the wind farm would be fed into the existing transmission line that runs across the southern end of the site. The estimated cost of the project is $2b.

[7] On 12 July 2006 Meridian applied to CODC for land use consents to construct and operate a wind farm of up to 176 turbines and related infrastructure on the Meridian site. This was the company's fourth application for development of a wind farm in New Zealand. It had already commissioned a wind farm in Manawatu, obtained consent for another project in Southland, and made application for a further project near Wellington.

[8] At the time the application was made the CODC Proposed District Plan had passed the stage where it could be subject to submissions or references. Thus it was regarded as the primary district planning instrument. The Proposed Plan became operative on 1 April 2008 (shortly before the Environment Court hearing began). Under that Plan the proposed activity is an unrestricted discretionary activity.

[9] Outstanding landscapes are identified in the plan that became operative on 1 April 2008. It is common ground that the Meridian site does not come within the landscapes identified in the Plan.

[10] During the hearing before the Environment Court Plan Change 5 was notified by CODC. This proposed plan change did not alter the status (discretionary) of the wind farm. However, it adds to the description of features and landscapes in the District Plan by identifying a number of landscapes which are areas of "extreme or high sensitivity". These constitute outstanding natural landscapes in terms of s 6(b) of the RMA. The Meridian site does not come within these areas.

[11] Plan Change 5 also identified landscapes of "significant sensitivity". Under the proposed plan change these landscapes are protected from the adverse effects of inappropriate subdivision, use and development. The Lammermoor Range, which includes the Meridian site, is a landscape of significant sensitivity in terms of this plan change.

[12] On 1 November 2006 Meridian sought consents from ORC pursuant to the Regional Council's Water Plan, which had become operative on 1 January 2004. In broad terms these consents related to construction activities that were capable of affecting water bodies. Land use consents, discharge permits and water permits to take and divert water were sought.

These proposed activities fell to be considered (depending on the particular activity) as controlled activities, restricted discretionary activities or unrestricted discretionary activities.

[13] We pause to note that after these applications had been lodged, and before they were considered, TrustPower (a competitor of Meridian) lodged an application with the Clutha District Council and ORC for consent to establish a wind farm (the Mahinerangi wind farm) at the southern end of the Lammermoor Range. At its closest point the Mahinerangi site is 15 km from the Meridian site. It was proposed that the Mahinerangi wind farm would have up to 100 turbines. A District Council decision granting consent for that wind farm was released about a month before the District Council decision granting consent for the Meridian wind farm. Subsequently the Mahinerangi consents were confirmed by the Environment Court (not the same division that heard the Meridian appeal).

[14] Returning to the Meridian applications, the two consent authorities appointed five Commissioners to hear and determine the applications. The applications were supported by an "all of Government" submission by the Minister for the Environment and opposed by the third to tenth respondents. On 30 October 2007 the Commissioners released their decision granting the consents, subject to conditions. The chairman, Mr JG Matthews, dissented. He would have refused consent primarily because of the effect of the activity on the landscape.

[15] The third to tenth respondents then appealed to the Environment Court. In addition several parties, including the Minister for the Environment, gave notice pursuant to s 274 of the RMA that they intended to appear.

[16] Parties to the appeal were required to specify the issues they wished to pursue on appeal and those issues were recorded in a Minute issued by Judge Jackson on 31 January 2008. A further Minute issued on 10 April 2008 required each party to lodge a memorandum finalising its list of experts and the issues on which they were to give evidence. On 8 August 2008 (part-way through the hearing) leave was granted for further evidence to be called, following which there was an exchange between counsel for Meridian and Judge Jackson as to what evidence the Court was seeking in relation to efficiency in terms of s 7(b). We mention these matters because they are relevant to Meridian's fourth ground of appeal alleging that it was denied a fair hearing.

[17] The hearing before the Environment Court commenced on 19 May 2008. It occupied three blocks of time totalling more than seven weeks and concluded on 17 February 2009. Site inspections were also undertaken. Numerous witnesses, many of them expert, were called.

Environment Court decision

[18] The Environment Court's decision was delivered on 6 November 2009. Except at [34] below, we confine this summary to the judgment of the majority, which occupies 348 pages divided into eight chapters.

[19] After providing an introductory background and description of the facts in the first two chapters, the Court addresses "The Law" in ch 3. Obviously this chapter is particularly relevant. Having addressed s 104(1) of the RMA,

provisions of the district plan, and various other matters, the Court focused on Part 2 of the Act, especially s 6(b) – the protection of outstanding features and landscapes – and s 7(b) – the efficient use and development of natural and physical resources.

[20] The Court was critical of earlier Environment Court decisions which had reasoned that because wind energy is presently an untapped resource, use of that resource to produce electricity by a non-polluting process is an efficient use of the resource in terms of s 7(b). Having indicated[2] that it was uncomfortable with "a cherry-picking approach to efficiency", the Court said that it preferred to follow *Lower Waitaki River Management Society Inc v Canterbury Regional Council*,[3] in which it was stated:

> [196] ... efficiency in section 7(b) of the RMA requires a consent authority to consider the use of all the relevant resources and, preferably, their benefits and costs. It is nearly meaningless to consider the benefits of only some of the resources involved in the proceeding because the artificial weighting created by sections 5 to 8 of the Act will not be kept within the statutory proportions if the only matters given the "particular regard to" multiplier (see *Baker Boys Ltd v Christchurch City Council*) in section 7(b) are those which are not identified elsewhere in section 7. Further, it is very helpful if the benefits and costs can be quantified because otherwise the section 7(b) analysis merely repeats the qualitative analysis carried out elsewhere in respect of sections 5 to 8 of the Act.

Then the Court focused on two matters: first, how efficiency in terms of s 7(b) is to be determined; secondly, whether alternative locations are relevant.

[21] As to the first matter the Court said that for economic reasons the "specific costs and benefits of a proposal should be examined and if possible quantified", especially where a matter of national importance is raised under s 6.[4] It concluded:

> [230] While in an engineering sense efficiency means the ratio of outputs to inputs, in economic terms it is not an absolute but a relative concept. We hold that under section 7(b) of the Act there are two questions to answer when determining the efficiency of the use of resources:
>
> (1) is the value achieved from the resources utilised the greatest benefit that could be achieved from those resources?
>
> (2) could that same benefit be produced utilising resources of lower value if they were organised differently, or if a different set of resources was used?
>
> The first point is about maximising the benefits achieved from the resources being utilised; and the second is about minimising the resource costs of achieving a given benefit. ...

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2 At [226].

3 *Maniototo Environmental Society Inc v Meridian Energy Ltd*. This decision was issued by the Environment Court on 24 September 2008 after the Meridian hearing had concluded. Judge Jackson also presided in the *Lower Waitaki* case.

4 At [229].

This analysis, coupled with [242], which is mentioned in the next paragraph, has given rise to the first ground of appeal alleging that the Court adopted a "new test" requiring an applicant to demonstrate that its project is "the best" in net benefit terms.

[22] Then the Court considered the second point – whether alternative locations are relevant. After discussing relevant case law the Environment Court summarised its conclusions:

> [242] ... section 7(b) requires a comprehensive and explicit cost-benefit analysis of the proposal. In that analysis:
>
> (a) where market valuations are not available, non-market techniques may be used; and
> (b) where the values of the market are different from those of society, alternative societal values maybe applied.
>
> The idea behind the cost-benefit analysis is to assess, firstly, whether the proposal has a positive net benefit, and then whether there are credible alternative uses of the resources, or credible alternative resources that could produce the desired output, which have a greater net benefit. In doing so, we need to have regard for whether (environmental) compensation is being given, and the adequacy of that compensation. The outcome of this assessment of efficiency is then one matter in the overall assessment under section 5. We hold that alternatives can be considered where section 6 matters are concerned. It is possible, but we do not decide, that alternatives should also be considered in other cases where there are significant environmental effects.

The statement that s 7(b) requires a comprehensive and explicit cost-benefit analysis gives rise to the second ground of appeal. And the conclusion reached later in the judgment that in this case alternatives should have been considered by Meridian has triggered the third ground of appeal.

[23] Chapter 4 is devoted to a detailed analysis of landscape issues. As already mentioned, the district plan specifically identified outstanding landscapes within its district, and it is common ground that the Meridian site does not fall within the areas so identified. Nevertheless, the Environment Court decided that it was not bound by the categorisations in the district plan and concluded that the site was part of an outstanding natural landscape for the purposes of s 6(b) of the RMA. In that respect the Court's decision is consistent with the decision of this Court in *Unison Networks Ltd v Hastings District Council*.[5] Meridian accepts this finding, and does not seek to challenge it in this appeal.

[24] The next chapter addresses potential effects (both positive and negative) of the proposed wind farm. Positive effects in terms of meeting the demand for more electricity, placing downward pressure on electricity prices, reducing carbon emissions, complementing hydro-power and providing employment (during the construction phase) were accepted. On the negative side the Court saw the effect of the proposed wind farm on the landscape as "[p]ossibly the

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5 HC Wellington CIV-2007-485-896, 11 December 2007.

most important single question in these proceedings".[6] It considered that the wind farm "is so large that it will have the effect of creating a new, not unattractive, wind farm landscape of much less naturalness than the larger landscape"[7] and that the wind farm could not be absorbed into the landscape.[8] The Court also considered that the visual effects on the amenities of the users of the landscape would be major and that the proposed wind farm would have a significant negative impact on the heritage surrounding or associated with the area.[9]

[25] In ch 6 the Environment Court attempts to quantify the potential costs and benefits of the Meridian proposal. The Court summarised the "measured net benefit" of the wind farm:[10]

- A regional benefit from construction activity with a medium likelihood of being about $800m (one-off), and a very likely regional benefit of about $13m/year from on-going operation, although these have no net benefit at a national level.
- A one-off cost to the economy of upgrading the electricity grid in the lower South Island very likely to be about $100m.
- A benefit to the economy very likely to be about $107m/year from the generation of electricity, and from reduced CO_2 emissions with a medium likelihood of being about $20m/year, for the 30-year life of the wind farm.
- A cost to the economy with a medium likelihood of about $16m/year to accommodate the variability of wind energy.

Against those measured benefits, the Court said it had to put "the very real, but unmeasured, costs in terms of landscape, heritage and recreation and tourism that will not be remedied or mitigated".[11] Although the Court accepted that there was a net benefit, it considered that the unmeasured costs were significant and that the net benefit was not nearly as substantial as the numbers might indicate.

[26] The next chapter (ch 7) is also important to most, if not all, the grounds of appeal. It addressed the issue: "Should the power generation facility be approved under the operative district plan?"

[27] After a detailed discussion of the objectives and policies of the District Plan, the Regional Policy Statement, the decision of the hearing Commissioners and "other matters" under s 104(1)(c) of the Act, the judgment provides a summary to that point:

> [693] If the matters in the previous sections of this chapter were all we had to consider we would agree with the planner called by the District Council ... that we should grant consent to Meridian ...

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6 At [424].
7 At [492].
8 At [493]–[500].
9 At [507] and [532].
10 At [649].
11 At [650].

But the Court then found it necessary to further assess the proposal under ss 5–8 of the Act (the purpose and principles in Part 2). It did so under three heads: whether the proposal would be an efficient use of resources in terms of s 7(b); "other matters" that the Court was required to have particular regard to under s 7; and, finally, a weighing of all relevant matters.

[28] As to whether the proposal would be an efficient use of resources in terms of s 7(b), the Court found[12] that the evidence on the benefits and costs to recreation "was inadequate" and for tourism was "minimal"; there was an absence of evidence "quantifying the value of the landscape ... or of the costs of the project to the heritage values of the Old Dunstan Road"; there were "large gaps" in the Court's cost-benefit analysis; it was extraordinary that in a $2b project more effort had not been made by Meridian and the two government departments "to value more of the costs and benefits much more thoroughly"; and given the scale of the project the Court would have expected proportionate evidence "on what were clearly always going to be key issues – the potential adverse effects on heritage and, especially, landscape values".

[29] Then the Court discussed[13] whether it should consider alternatives when assessing efficiency in terms of s 7(b). It concluded that alternatives needed to be considered in this case because costs in terms of landscape and heritage values had not been "internalised" to Meridian, there was no "competitive market" and "an outstanding natural landscape and historic heritage" constituted "matters of national importance" which the Court was obliged to "recognise and provide for".

[30] Having reached that conclusion the Court then considered whether alternatives existed. It decided that realistic alternatives to Meridian's wind farm "do exist and should have been considered" and that failure to do so would be taken into account later in the judgment.[14] The Court noted that New Zealand is a "wind rich country" with "many 'untapped' wind resources of specific places" as shown on a plan attached to the judgment.[15] Given that the proposal affected matters of national importance under s 6(b) and the concept of stewardship under s 7(aa), the Court considered that the Meridian proposal should be "put on hold until other wind resources with lesser potential effects on landscape and heritage have been considered" and that the "failure to consider alternatives properly is a factor going towards turning the proposal down".[16] The Court commented that on the evidence before it the question "is the proposal an efficient use of resources?" could not be answered.[17]

[31] Several s 7 matters were then addressed by the Court:[18] stewardship under s 7(aa); maintenance and enhancement of amenity values under s 7(c); intrinsic values of eco-systems under s 7(d); maintenance and enhancement of the quality of the environment under s 7(f); any finite characteristics of natural and physical resources under s 7(g); and the effects of climate change and the

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12 At [697] and [701].
13 At [702]–[704].
14 At [706].
15 At [707].
16 At [709].
17 At [710].
18 At [711]–[722].

benefits of renewal energy under s 7(i) and (j). The weight attached to each factor was indicated. The evaluation by the Court was truncated in part by the fact that some of these criteria had already been incorporated in its s 7(b) analysis.[19]

[32] Then the Court concluded its analysis by weighing all matters. It found that the Meridian proposal achieved the district plan policy for development of power generation facilities.[20] However, it did not meet a district plan policy seeking to reduce the environmental impact of power generation.[21] Proposed Plan Change 5 was seen as neutral, as were the provisions of the Otago Regional Policy Statement.[22] Although substantial weight was given to the likely contribution to the national grid, it was "not as much as we would [have given] if we had been given a thorough cost-benefit analysis".[23] Other positive effects were given weight according to their net contribution.[24]

[33] On the negative side, effects on the landscape in terms of s 6(b) were a "very large factor against the proposal" and were given "very substantial weight".[25] This reflected the Court's assessment that the Lammermoor was "nearly unique"[26] within New Zealand and "worthy of protection".[27] The need to protect heritage values under s 6(f) was also taken into account on the negative side, albeit to "a much lesser extent".[28]

[34] Those considerations led the majority to the conclusion that the scales came down on the side of refusing consent.[29] While the dissenting member of the Court agreed with the majority that Meridian's s 7(b) analysis was inadequate, his overall assessment favoured granting the application "by a small margin".[30]

[35] We only need to make brief reference to ch 8 at this stage. It records the conclusion of the majority that the Meridian project was inappropriate in the outstanding natural landscape and did not achieve sustainable management in terms of s 5.[31] That reflected the majority's view that the positive benefit of supplying a very large quantity of renewable energy was outweighed by five adverse consequences: substantial impact on the outstanding natural landscape; uniqueness of the landscape; the possibility of alternative sites not located in outstanding natural landscapes; the site is nearly surrounded by public land; and failure to put full evidence before the Court in respect of the efficient use of all the natural and physical resources and the likely benefits and costs of "reasonable" alternatives.[32]

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19 At [717] – s 7(c); [720] – s 7(f); and [722] – s 7(i) and (j).
20 At [653] and [725].
21 At [654] and [725].
22 At [728]–[729]
23 At [732].
24 At [732].
25 At [734].
26 At [739].
27 At [746].
28 At [744].
29 At [750].
30 At [763].
31 At [757].
32 At [757].

The Meridian appeal

[36] As set out at [3] of this judgment, Meridian has advanced six grounds of appeal. Oral argument was dominated by grounds (ii) and (iii), centering on the Environment Court's conclusion at [242] of its decision which is quoted at [22] above. This is the Court's finding that s 7(b) requires a comprehensive and explicit cost-benefit analysis of the proposal and that alternatives can be considered where s 6 matters are involved. Ground (i) arises from that paragraph and at [230], which is set out at [21] above. In relation to that ground Meridian claims that it was required to demonstrate to the satisfaction of the Court that its project was "the best" in net benefit terms.

[37] The second, but lesser, part of the oral argument focused on the contention that Meridian was denied a fair hearing. This was in three respects. First, no opponent raised the issue of alternatives in its appeal or notice of issues. Secondly, the Court applied the efficiency test developed in the *Lower Waitaki* case even though that decision was delivered after the Meridian hearing had concluded and without Meridian being warned that the Court intended to adopt the *Lower Waitaki* approach. Thirdly, the way the Environment Court applied the consent granted for the Mahinerangi wind farm.

[38] There was little to no argument on the fifth and sixth grounds of appeal.

First three grounds of appeal

[39] We have grouped these grounds because they are interwoven. But we find it convenient to alter the order. After considering a number of preliminary matters we will address the issue of alternatives (ground (iii)), then consider the issue of the cost-benefit analysis (ground (ii)), and conclude by considering Meridian's allegation that it was required to demonstrate that its project was "the best" (ground (i)).

Respondents' primary arguments in relation to all three grounds

[40] The third to ninth respondents' principal argument is that it should not be the role of the High Court in an appeal on points of law to revisit issues which are primarily contested factual matters upon which the Environment Court has made findings. They argue that the Meridian appeal does not identify specific points of law. Rather, Meridian's argument is essentially a complaint about losing consents that Meridian believes it should have secured. The respondents argue that in reality the case was decided on factual landscape issues.

[41] Inasmuch as there might be any legal errors in the application of the efficiency consideration in s 7(b), the respondents' overarching case is that the errors do not matter. They say the Environment Court found the Hayes landscape to be such an outstanding landscape, and the proposed "huge" wind farm to be so adverse to that landscape, that the landscape was worthy of protection on its own merits. Their submission is that even if this Court found that Meridian was not obliged to provide a more thorough net benefit analysis or to have canvassed alternatives, that conclusion would not be material because the Court's evaluation was driven by the need to protect this landscape.

[42] With specific reference to the issue of alternative sites, the respondents contend that the Environment Court did not find that alternatives must, as a matter of law, be considered. Rather it found that they *could* be considered. Although the Court received some evidence about other sites that Meridian had

investigated, in the end the Court was unable to test possible alternatives meaningfully because Meridian elected not to provide any contestable evidence about the portfolio of sites it had evaluated.

[43] As to the cost-benefit analysis, the respondents claim that Meridian has misconstrued what the Court actually did. They say that the Court properly weighed the landscape matters against other positive factors. Sustainable management, rather than efficiency, ultimately guided the Court's decision. Rather than laying down any hard and fast approach, the Court was indicating a preferred approach. And in the circumstances of Project Hayes there was no reason in law why a cost-benefit approach could not be utilised under s 7(b) to ensure that the "negative" side of the ledger was properly weighed.

[44] Finally, the respondents deny that the Environment Court required Meridian to demonstrate that its site was "the best". They say that nowhere in its judgment did the Court enunciate or apply that test.

The Environment Court's summation

[45] In support of their argument the respondents rely on the Environment Court's summation at [757] of its decision:

> [757] After weighing all the relevant matters identified in earlier chapters, we judge that the Meridian project is inappropriate in the outstanding natural landscape of the Eastern Central Otago Upland Landscape and does not achieve sustainable management of the Lammermoor's resources in terms of s 5 of the Act. That is principally because the nationally important positive factors of enabling economic and social welfare by providing a very large quantity of *renewable* energy are outweighed by the most important adverse consequences, that:
>
> (1) a wind farm with a site envelope of about 135 km^2 with 176 turbines each up to 160 metres high spread over a length of over 20 kilometres must on most objective measures have a substantial impact on the outstanding natural landscape of the Lammermoor and the heritage surroundings of the Old Dunstan Road across it. We have found it is likely to create its own wind farm landscape, which will be within 17 kilometres of, and sometimes visible with, another (approved) wind farm (Mahinerangi);
>
> (2) the Eastern Central Otago Upland Landscape is one of the very few places in New Zealand where citizens can experience a wide, high peneplain under a big sky (a relatively common experience in Australia and on other continents) in a highly natural and near endemic environment that also contains a heritage trail;
>
> (3) wind farms are in their comparative youth in New Zealand and there may still be many potential sites which are not located in outstanding natural landscapes. We consider that it would be preferable for current wellbeing and for future generations and would give effect to the RPS if other sites were to be investigated more fully first. In the regional context it would also be preferable for the communities of Otago if sites which have a resource consent and do not affect section 6 values were implemented first – especially the Mahinerangi site;

(4) the Meridian site is nearly surrounded by the public land we identified in Chapter 2.0, especially the Rock and Pillar Conservation Park and its recent extensions, the Logan Burn Reservoir, Te Papanui and the various Taieri River reserves, so the effect of the wind farm on landscape and amenities is even more important than it would have been if surrounded by private land;

(5) As we have analysed in detail Meridian, the Central Otago District Council, and the Crown failed to put full evidence before the Court in respect of the efficient use of all the relevant natural and physical resources of the Lammermoor. Such an examination not only of all the benefits of the proposal (which we did receive) but also of all the costs would have further increased the objectivity of this decision, as would have an analysis of the likely benefits and costs of reasonable alternatives to the Meridian proposal.

Is Meridian's appeal simply revisiting issues of fact?

[46] For a number of reasons it is appropriate to deal with this, one of the respondents' key arguments, at the outset. First, it is potentially determinative of the appeal, for there is a long-standing policy not to set aside decisions for errors of law which are not material. Secondly, it is the principal argument in opposition to the appeal. It reflects, we think, an implicit acknowledgment that the Environment Court's approach to the s 7(b) efficiency criterion was novel and potentially in error of law. Finally, whether or not that approach is in error of law is in itself a question of considerable complexity and importance. Such an issue should not be examined and pronounced on by this Court if it is essentially a moot point because of immateriality. Rather, in that situation such issues should await a day when they are clearly going to be central to the determination of the appeal.

[47] We are left with no doubt that [757] accurately summarises the reasons behind the Environment Court's decision that the various consents and permits should be cancelled. We infer that points (1) and (2) listed by the Court are at the forefront of its summary because for it they loomed largest. We therefore accept the respondents' underlying argument that the case was primarily decided upon landscape issues, which were factual and evaluative.

[48] That said, we think that the third conclusion that there might be other potential sites was of considerable importance to the Environment Court's final determination. Moreover, on the face of that Court's decision this issue assumed such importance that on appeal this Court could not responsibly conclude that it was an immaterial consideration. As the Court said in its decision,[33] the failure to consider alternatives properly was a factor going towards turning the proposal down. If errors of law are embedded in a significant aspect of the Court's reasoning they must be addressed. And if they are upheld they will provide grounds for at least sending the case back to the Environment Court for further consideration.

[49] Point (4) effectively supports the first and second points and does not warrant any further comment. On the other hand, the fifth point reflects the

33 At [709].

many criticisms recorded earlier in the Court's decision about the failure of Meridian to provide a comprehensive cost-benefit analysis, including an analysis of alternative sites. It is not just an afterthought. Indeed, the topic of alternative sites/cost-benefit analysis occupies a significant part of the 348 pages of reasoning. Again, it cannot be dismissed as immaterial to the decision.

Was it an error of law for the Environment Court to call for a consideration of alternative locations?

[50] We turn then to the contentions of legal error, starting with whether or not the Environment Court erred in law by severely criticising Meridian for not providing evidence about alternative locations. (As a separate issue, we will later consider Meridian's subordinate argument that, if it was obliged to consider alternative locations, there was a breach of natural justice because the Court did not adequately inform Meridian, before the Court reached its decision, that this was considered to be a requirement.)

[51] Section 104(1) of the RMA sets out the matters that consent authorities are obliged to have regard to when considering applications for resource consents:

> **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;
>
> (vi) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application. ...

This section does not require a consent authority to have regard to alternatives to the proposed activity. However, s 104(1)(c) enables a consent authority to have regard to any other matter that it considers relevant and reasonably necessary to determine the application.

[52] Before a consent authority can consider any application for a resource consent under s 104, the application must comply with the requirements of s 88, which relevantly provides:

> **88. Making an application –**
>
> ...
>
> (2) An application must —
>
> ...
>
> (b) include, in accordance with Schedule 4, an assessment of environmental effects in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment.

From this point in the judgment we will refer to the assessment of environmental effects as the "AEE".

[53] In the present context cl 1(b) of sch 4 has particular significance. It provides:

> **1. Matters that should be included in assessment of effects on the environment –** Subject to the provisions of any policy statement or plan, an assessment of effects on the environment for the purposes of section 88 should include —
>
> ...
>
> (b) where it is likely that an activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking the activity ...

We note the imperative is "should", in the sense of imposing an obligation. The subparagraph contains within it a judgment as to whether "it is likely" that the activity will result in "any significant adverse effect on the environment". If so, a description of any possible alternative locations or methods for undertaking the activity should be included.

[54] Section 92 of the RMA enables the consent authority to request further information (in addition to that supplied with the application for a resource consent):

> **92. Further information, or agreement, may be requested –** (1) A consent authority may, at any reasonable time before the hearing of an application for a resource consent or before the decision to grant or refuse the application (if there is no hearing), by written notice, request the applicant for the consent to provide further information relating to the application.

Subsection (3) of that section requires the consent authority to notify the applicant in writing of the reasons for its request. Unless the applicant refuses to provide the information, subs (3A) requires the information to be provided no later than 10 days before the hearing.

[55] An applicant is permitted by s 92A(1)(c) to refuse a request for further information:

> **92A. Responses to request –** (1) An applicant who receives a request under section 92(1) must, within 15 working days of the date of the request, take one of the following options:
>
> ...
>
> (c) tell the consent authority in a written notice that the applicant refuses to provide the information.

Even if the applicant refuses to provide the information sought, the consent authority is nevertheless obliged to consider the application: subs (3).

[56] With the benefit of that summary of the statutory background we turn to the requests for further information in this case.

[57] In the AEE accompanying its application Meridian made three key points with reference to alternatives (as summarised to us by its counsel):

> (a) In terms of site selection, the most important factor is high and consistent wind speeds, which at the Hayes site are exceptionally good

even by world standards. Over time, Meridian has collected extensive wind meteorological monitoring mast data throughout New Zealand. This data indicates that there are few (if any) alternative sites available to any applicant to match Project Hayes in terms of wind speed, duration and scale.

(b) Wind speed is not the only criterion that is applicable to the development of a viable wind farm. Other factors include: a smooth laminar air flow (low turbulence); proximity to the local electricity grid; site accessibility; proximity to load centre; availability of privately owned, cleared, freehold land with supportive landowners; national landscape classifications; and elevation.

(c) Once these factors are considered in total, the Project Hayes site is one of the few areas within the Otago region which is appropriate for development, and in Meridian's assessment (not contradicted in evidence) the best.

After considering Meridian's application and the accompanying AEE, CODC made two s 92 requests for further information.

[58] The first request noted that alternatives were only briefly discussed in the AEE and asked Meridian to address alternative methods for renewable energy generation and alternative locations for wind farms "elsewhere in New Zealand". Meridian responded, stating (relevantly):

> *Response*
> Meridian advises pursuant to section 92A(1)(a) and (c) that it refuses to provide this information to the extent it is not provided below.
>
> *Comment*
> Meridian, as above, cannot see how this request is relevant to undertaking an assessment of this proposal. The RMA envisages that an applicant may seek consent for any particular proposal. That proposal must then be considered by a consent authority. A comparative assessment of hypothetical alternatives that are not being pursued by the applicant is of no assistance, nor are the details of such "alternatives" known to the consent applicant or Council. In the abstract it is impossible to provide a meaningful assessment of the effects of such hypothetical alternatives.
>
> In addition, Meridian considers it is incorrect to describe other locations as "alternatives" to the present proposal. There is a substantial and increasing demand for electricity in New Zealand, including the South Island and there needs to be generation of electricity from many renewable energy sources.
>
> Where a potential wind farm site has all of the necessary attributes for consenting it is able to be progressed through the consent process. Where another site has attributes that also make it suitable for consenting it cannot be described as "an alternative" site – it is in fact "another" potential site.

This response led to the second request. It asked Meridian to provide an explanation of its process of evaluation and site selection, and to give the reason why the Hayes site was preferred to others.

[59] In its response to the second request Meridian emphasised three points:

(a) Meridian would provide further elaboration of the process it followed to identify potential sites and how those sites are selected and shaped for development;
(b) Meridian would include an outline of the key factors in the selection and development of Project Hayes; and
(c) there was no obligation on an applicant to provide a consent authority with alternatives.

Several attachments were forwarded with this response. Attachment 1 relates to the consideration of alternative locations and the suitability of the Project Hayes site. This was presented in the form of a short report (the Report).

[60] The Report provided an overview, outlining the following key points:

(a) Over 17 years of investigating and evaluating the potential for wind generation in New Zealand, Meridian has investigated over 100 sites and holds data from 90 historic wind-monitoring masts and approximately 30 existing masts throughout New Zealand.
(b) Meridian is currently carrying out detailed analysis on approximately 25 sites with the best generation potential known to Meridian. Some or all of these will be progressively advanced through to consent based on a detailed assessment of their performance against a range of parameters including constructability, commercial viability and consentability. The decision to advance Project Hayes was made against this background of knowledge arising from all sites known to Meridian over New Zealand.
(c) Proposals were advanced based on the results of that analysis coupled with further assessments of the environmental and [other] factors associated with each site. Meridian advanced the sites that were expected to perform most highly across this range of environmental, social and economic factors.
(d) Project Hayes had a number of characteristics (quality of wind resource, proximity to transmission and scale) that in combination made it the best site Meridian is aware of in the South Island for wind energy generation.

These points were supplemented by a history of studies involving the Project Hayes site and reference to a number of additional parameters that led Meridian to conclude that the Project Hayes site was "exceptional" in the South Island.

[61] However, at no time did Meridian specifically provide information about alternative locations. In this respect Meridian effectively refused the first request by CODC for further information. Arguably, however, Meridian complied with the second request.

[62] The failure to provide information about alternative locations was not significantly addressed by Meridian's evidence in the Environment Court. Mr Muldoon, the wind development manager of Meridian whose role included the evaluation of other locations, acknowledged that an evaluation of the other locations was not referred to in his brief of evidence. Nor was this information included in the evidence of other witnesses called by Meridian, or, for that matter, by opponents of the application.

[63] Having concluded[34] that alternatives could be considered, the Environment Court ultimately decided[35] that they should have been considered in this case and that failure to do so was a factor going towards turning down the application. Was the Environment Court entitled to call for consideration of alternative locations in this case?

[64] Meridian contends that if an applicant refuses to provide further information pursuant to s 92A then its application will stand or fall on the evidence before the consent authority. It says that in this case there was evidence that Meridian had considered alternative locations before deciding on the Hayes site and that its application should have been determined on the strength of that evidence. That approach, which Mr Smith described as a "trust us" approach, was challenged by the respondents. They contend that the Environment Court was entitled to test the validity of Meridian's assessment of alternative locations and that it could only do so by obtaining further information about the alternative locations.

[65] In our view the critical issue is whether, in terms of s 104(1)(c), consideration of alternative locations was "relevant and reasonably necessary to determine the application". Given the history and circumstances of the Meridian application, including the size of the project, we are satisfied that the issue of alternative locations came within those words. We will now explain how we have arrived at that conclusion.

[66] Upon receiving Meridian's application CODC was entitled to proceed on the basis that for the purposes of cl 1(b) of the Fourth Schedule it was likely that the wind farm would result in a significant adverse effect on the environment and that under those circumstances the AEE should have included a description of any possible alternative locations for undertaking the activity. Thus it was entitled to make a s 92 request for the applicant to supply "an explanation of any possible alternative locations ... for undertaking the activity".[36] Even though this request was effectively refused by Meridian, CODC was nevertheless required by s 92A(3) to consider Meridian's application under s 104, and it did so.

[67] Once the matter was appealed to it, the Environment Court had the same powers and discretions as CODC: s 290(1). Consequently it was entitled to revisit the alternative locations issue. Having done so, it was open to the Court to conclude that the Meridian application triggered cl 1(b) of the Fourth Schedule and that under those circumstances the Court could seek a description of any alternative locations under s 92(1). Given that context further information about alternative locations was both relevant and reasonably necessary to determine the application in terms of s 104(1)(c).

[68] We are therefore satisfied that, subject to a qualification we are about to mention, the Environment Court did not err in law when it called for consideration of alternative locations. A qualification is that, as a creature of statute, the Court was confined to the powers conferred by the RMA. With

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34 At [242].
35 At [702]–[704].
36 For reasons that we will give later at [93] we believe that CODC overstepped the mark when it asked for alternative locations "elsewhere in New Zealand", but that is of no immediate moment.

reference to alternative locations, cl 1(b) of sch 4 (in conjunction with s 104(1)(c)) only permitted the Court to seek from Meridian *a description* of any possible alternative locations. We will have more to say about this later in the judgment.

[69] However, the point of law raised by Meridian in relation to alternatives has a different focus. It challenges the Court's approach to alternatives *in the context of s 7(b).*

Was it an error of law for the Environment Court to call for an analysis of alternative locations as part of its examination of the efficiency criterion in s 7(b)?

[70] Meridian's argument challenges the underlying purpose behind the Environment Court seeking an assessment of alternatives, namely, for use as part of a cost-benefit analysis under s 7(b). We should explain at the outset why we accept that the Court was seeking the information for the purpose of applying s 7(b), notwithstanding the references it had made to s 6.

[71] The Environment Court started with the proposition at both [234][37] and [242][38] that "alternatives can be considered where s 6 matters are concerned".[39] Later this was interpreted by the Court on two occasions. First, at [696] the Court referred to "the requirement we identified in Ch 3.0 to look at alternative sites under s 7(b)" and at [702] it said "in Ch 3.0 (The law) we decided that in certain circumstances s 7(b) leads to a requirement to consider alternatives". Thus it is clear that by the time the Court came to applying s 7(b) it did so on the basis that in the circumstances of this case it was *required* to consider alternatives, the existence of a s 6 matter (outstanding natural landscape) having been one of the triggers for that requirement.

[72] Thus we are brought squarely to Meridian's principal complaint, that the Environment Court fell into error of law in the way it sought to apply the efficiency criterion contained in s 7(b), which provides:

> **7. Other matters –** In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to —
>
> ...
>
> (b) The efficient use and development of natural and physical resources ...

While that alleged error of law has two interwoven dimensions (cost-benefit analysis and alternative locations), the discussion that follows will be confined to the issue of alternative locations.

[73] We begin our discussions by examining the Court's reasoning.

[74] Under the subheading "Are alternative locations relevant?", the Court explained its starting point:

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37 Which we quote at [74].
38 Which we quoted at [22].
39 At [242].

[234] We note what the Environment Court recently stated in *Lower Waitaki River Management Society Inc v Canterbury Regional Council*:[40]

> "Economic efficiency generally requires that all credible alternatives to a proposal should be identified and included within a cost-benefit analysis[41] to reduce the risk of choosing projects ahead of alternatives that contribute more to society. Not only should the benefits of a project be greater than the costs, but the least cost way of producing those benefits should be implemented.[42] However, there is a real issue as to whether that is required by the RMA."

The Court then went on to find that the RMA does require consideration of alternatives in certain circumstances. It concluded:[43]

> "... it is not usually necessary to consider alternative uses of the resources in question, or the use of alternative resources to obtain a similar benefit. However, there are at least three exceptions:
>
> (1) where the costs cannot be fully internalised to the consent holder;
> (2) where there is no competitive market (eg, in congestion on roads where the relevant resource is the land near those roads; we also note there is a very limited market in water permits); or
> (3) where there is a matter of national importance in Part 2 of the Act involved and the cost-benefit analysis requires comparing measured and unmeasured benefits and costs (as is usually the case) so that the consent authority has to rely principally on its qualitative assessment, eg *TV 3 Network Services Ltd v Waikato District Council*."

We take that as a starting point, but in these proceedings we heard rather more legal argument on the issue. So we now turn to consider the case law.

Although the *Lower Waitaki* case was described as the starting point, it effectively became the finishing point as well.

[75] The next paragraph of the decision under appeal refers to cl 1(b) of sch 4 and then goes on to cite *TV3 Network Services Ltd v Waikato District Council*[44] to support the proposition that where matters of national importance are raised, the question whether there are viable alternative sites for the prospective activity can be relevant. After discussing some other decisions the Environment Court commented "if an alternative site does not raise any matter of national importance then a fine grained analysis may not be necessary",[45] which suggests that the Court was looking for a "fine grained" analysis on this

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40 *Lower Waitaki River Management Society Inc v Canterbury Regional Council* EnvC Christchurch C80/2009, 21 September 2009 at [197].
41 James R Kahn *The Economic Approach to Environmental & Natural Resources* (3rd ed, Thompson South-Western, Ohio, 2005) at 155.
42 Ibid at 154–155.
43 *Lower Waitaki River Management Society Inc v Canterbury Regional Council* above, n 40 at [201].
44 *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360 (HC).
45 At [241].

occasion. Later, Meridian was criticised for not providing such an analysis. Ultimately the Court concluded[46] that Meridian should have provided an analysis of "the likely benefits and costs of reasonable alternatives to the Meridian proposal".

[76] We find it significant that the Environment Court approached the issue of alternatives on the basis that if any of the three situations described in *Lower Waitaki* arise, s 7(b) imposes *a requirement* to consider alternatives. Thus the Environment Court has superimposed on s 7(b) an imperative that alternatives *must* be considered if any of the three situations arise. For the following reasons we consider that this interpretation of s 7(b) is erroneous in law.

[77] First, it seems to us that the Environment Court's approach is incompatible with the approach to alternatives expressly adopted by the RMA. We consider that by imposing a requirement to consider alternatives in terms of *Lower Waitaki*, the Environment Court has not paid sufficient regard to the scheme of the Act. On each occasion the RMA has imposed an obligation on a consent authority to consider alternative locations or methods, that obligation has been carefully spelled out in the Act. We will now make brief reference to those occasions.

[78] We have already quoted cl 1(b) of sch 4,[47] which states that an AEE should include a description of any possible alternative locations or methods for undertaking the activity when it is likely that the activity will result in any significant adverse effect on the environment. This is a very precise statement of the circumstances triggering the requirement (where it is likely that an activity will result in *any significant adverse effect on the environment*) and what is required (*a description* of any possible alternative locations or methods for undertaking the activity). That can be contrasted with the three triggers adopted by the Environment Court in *Lower Waitaki* (and in this case) and the requirement for a "fine grained" analysis of the likely benefits and costs of reasonable alternatives.

[79] Another example is s 105(1)(c), which requires that in the case of discharge or coastal permits the consent authority must, in addition to the matters in s 104(1), have regard to:

> (c) Any possible alternative methods of discharge, including discharge into any other receiving environment.

Once again there is a very precise description of the circumstances triggering the obligation (an application for a discharge or coastal permit) which can be contrasted with the triggers used by the Environment Court. We also find it significant that the legislature has spelled out that this requirement is in addition to the matters in s 104.

[80] Section 107A provides a further example. It imposes restrictions on the granting of resource consents that will, or are likely to, have a significant adverse effect on a recognised customary activity. Under s 107A(2)(f) the consent authority must consider whether an alternative location or method

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46 At [757], which we quoted at [45] above.
47 See [53] above.

would avoid, remedy or mitigate any significant adverse effects. Again we note the precise description of the circumstances where the obligation arises and the matters are to be considered.

[81] Next we have ss 168A(3) and 171(1)(b) concerning designations. These are mirror provisions, and it will suffice if we quote the relevant parts of s 171(1)(b):

> **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 —
>
> ...
>
> (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 ...

Over time the courts have taken a relatively narrow approach to this provision. If the Environment Court is called upon to review the decision of the territorial authority, it is required to consider whether alternatives have been properly considered rather than whether all possible alternatives have been excluded or the best alternative has been chosen. See, for example, the decision of this Court in *Friends & Community of Ngawha Inc v Minister of Corrections*.[48]

[82] Finally, there is s 32, which carries the heading "Consideration of alternatives, benefits, and costs". We will discuss that section in greater detail with reference to the requirement for a cost-benefit analysis.

[83] The second matter that counts against the Environment Court's interpretation is the wording of s 7(b) itself. The section requires particular regard to be had to "the efficient use and development *of natural and physical resources*" (emphasis added), which are defined in s 2:

> **Natural and physical resources** includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures ...

While the definition is not exhaustive, it clearly focuses on *tangibles*. Thus the issue is whether there will be an efficient use of the (tangible) natural and physical resources involved in the application, namely, the wind and land.

[84] This analysis can be contrasted with what we perceive to be the Environment Court's approach. When criticising Meridian for failing to provide an analysis of the likely benefits and costs of reasonable alternatives, landscape values (which the Environment Court saw as possibly the most important single

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48 *Friends & Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC) at [20].

question in the proceeding)[49] were clearly at the forefront of the Court's thinking. We infer that the Court was expecting an analysis that would include a comparison of intangible landscape values. In our view this misconstrues the intended focus of s 7(b).

[85] The third matter concerns earlier court decisions. We were not referred to any decisions supporting the proposition that s 7(b) requires consideration of alternative locations in the circumstances envisaged by the Environment Court. Clearly, the Environment Court's approach on this occasion is novel.

[86] Of the decisions cited, *TV3 Network Services* probably offers the greatest support for the Environment Court's approach. In that case Hammond J accepted that as "a matter of common sense" consideration of alternatives "strikes me" as a fundamental planning concern.[50] He went on to say:

> I can understand Mr Brabant's practical concern that an applicant for a resource consent should not have to clear off all the possible alternatives. But I do not think that that is what the Court was suggesting. It is simply that, when an objection is raised as to a matter being of "national importance" on one site, the question of whether there are other viable alternative sites for the prospective activity is of relevance.[51]

Those observations did not reflect any analysis of the RMA and in our view they fall well short of supporting the proposition that a consent authority is *obliged* to consider alternative locations as part of its efficiency analysis under s 7(b) in the circumstances envisaged by the Environment Court. Indeed, s 7(b) was not in issue. We will have more to say about the *TV3 Network Services* decision later.

[87] A decision of the Court of Appeal, *MacLaurin v Hexton Holdings Ltd*,[52] was used by the Environment Court[53] to support the proposition that the Court of Appeal appeared to be comfortable with alternatives being looked at in RMA proceedings. We make two observations. First, that case involved questions of access to landlocked land and can have little, if any, relevance to the situation under consideration. Secondly, at best that case supports the proposition that alternatives *can* be looked at in some situations, not that they *must* be used as part of the s 7(b) analysis if any of the three situations described in *Lower Waitaki* arise.

[88] On the other side of the ledger, and at odds with the Environment Court's approach, are the other Environment Court decisions concerning wind farms.[54] We make the following observations about those decisions. First, none

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49 At [424].
50 At 373.
51 At 373.
52 [2008] NZCA 570, (2009) 10 NZCPR 1.
53 At [239].
54 *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541 (EnvC); *Unison Networks Ltd v Hastings District Council* EnvC Wellington W058/2006, 17 July 2006; *Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 (EnvC); *Meridian Energy Ltd v Wellington City Council* EnvC Wellington W31/2007, 14 May 2007; *Motorimu Wind Farm Ltd v Palmerston North City Council* EnvC Wellington W067/2008, 26 September 2008; *Upland Landscape Protection Society Inc v Clutha District Council* EnvC Christchurch C85/2008, 25 July 2008; *Unison Networks Ltd v Hastings District Council* EnvC Wellington W11/09, 23 February 2009; and *Rangitikei Guardians Society Inc v Manawatu-Wanganui Regional Council* [2010]

interpreted s 7(b) in the way that it was interpreted in the Meridian appeal. Secondly, there were no less than five different Environment Court judges involved in those cases. Thirdly, in most of the cases there were landscape issues. Fourthly, on the occasions that s 7(b) has been specifically addressed, efficiency was considered with reference to the otherwise wasted wind resource, and on some occasions with reference to the underlying use of the land. So the s 7(b) efficiency criterion came down to a relatively straightforward exercise in all of those cases.

[89] The question of alternative locations was only considered in three of the wind farm cases. In *Genesis Power* the Court considered that the issue of alternatives was "not really an important issue in the present case".[55] The Court accepted that Meridian had "clearly explored" alternative locations in *Meridian Energy Ltd*[56] and did not seek to examine that aspect any further. A similar approach was adopted in *Unison Networks Ltd*, with the Court accepting the evidence of the Unison chief executive that the company had "duly investigated possible alternatives to the present site".[57] It should be added that alternatives were not considered as part of the s 7(b) analysis in any of those cases.

[90] Supporting those wind farm cases is the decision of this Court in *Dome Valley Residents Society Inc v Rodney District Council*.[58] In that case Priestley J said that he was not aware of any authority suggesting that "as part and parcel of the consideration of a resource consent application, alternative sites have to be considered or cleared out".[59] And when refusing leave to appeal[60] he repeated that both he and the Environment Court rejected the proposition that there was any obligation on Skywork (the applicant for a resource consent in that case) to search for and clear out alternative sites.[61]

[91] Our fourth matter arises from the observations of Greig J in *New Zealand Rail Ltd v Marlborough District Council*.[62] With reference to Part 2 of the RMA his Honour stated at 86:

> This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way.

It is difficult to reconcile the Environment Court's approach of superimposing an alternative location factor on s 7(b) with the approach to Part 2 matters described by Greig J.

NZEnvC 14.
55 At [211].
56 At [341].
57 *Unison Networks Ltd v Hastings District Council* EnvC Wellington W11/09, 23 February 2009 at [70].
58 [2008] 3 NZLR 821 (HC).
59 At [98].
60 HC Auckland CIV-2008-404-587, 8 December 2008.
61 At [33].
62 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

[92] Finally, we are troubled by the wider implications of the Environment Court's approach. It seems that the analysis of "reasonable" alternatives the Court was expecting would not be restricted to the CODC district. The Court said:

> [671] The Commissioners concluded that if a wind farm was not allowed on this site "... [we] find it hard to see where in Central Otago a wind farm" might locate. That is despite having as evidence a report from the Planner for the CODC – Mr Whitney – in which he wrote that he considered there were potentially suitable sites "elsewhere in the Central Otago District *and elsewhere in Otago* including in locations south and west of the Clutha River" ... [Emphasis added]

Later[63] the Court concluded that realistic alternatives to the Meridian wind farm did exist and should have been considered. It then went on to say that "New Zealand is a wind rich country and that there are still many untapped wind resources of specific places as shown on attachment 'B'".[64] That attachment is a wind resources study for the whole of the South Island.

[93] Given that the functions of territorial authorities listed in s 31 are "for the purpose of giving effect to this Act *in its district*" (emphasis added) we do not think that Parliament intended that applicants could be called upon to describe alternative sites beyond the relevant district. We should also add that while we doubt that the Environment Court had in mind that alternatives throughout the country would have to be considered, if that was in fact the intention there would be further problems. For a company like Meridian seeking a major wind farm site *in the South Island* (because the bulk of its customers are located in that island) a comparison of alternative sites in the North Island would be largely meaningless.

[94] We therefore conclude that the Environment Court erred in law when it decided that in this case s 7(b) required alternatives to be considered. In our view no such requirement can be lawfully superimposed on that provision. Now we turn to the other component of Meridian's argument based on s 7(b).

Was it an error of law for the Environment Court to call for a comprehensive and explicit cost-benefit analysis of the proposal as part of its examination of the efficiency criterion in s 7(b)?

[95] Building on the formulation in *Lower Waitaki* that economic efficiency generally requires all credible alternatives to a proposal to be identified and included within a cost-benefit analysis, the Court decided:

> [242] ... section 7(b) requires a comprehensive and explicit cost-benefit analysis of the proposal. In that analysis:
>
> (a) where market valuations are not available, non-market techniques may be used; and
> (b) where the values of the market are different from those of society, alternative societal values may be applied.
>
> The idea behind the cost-benefit analysis is to assess, firstly, whether the proposal has a positive net benefit, and then whether there are credible

63 At [706] and [707].
64 At [707].

> alternative uses of the resources, or credible alternative resources that could produce the desired output, which have a greater net benefit ...

According to Meridian that interpretation of s 7(b) is not only novel, it is also wrong in law.

[96] It is not, of course, an error of law to adopt a novel approach. It can take many years for a statute to be fully understood. While the approach adopted by the Environment Court in this case can be described as novel, we are also aware that divisions of the Environment Court chaired by Judge Jackson have been pursuing the underlying theme for some time, but with less specificity. Evolution of this thinking can be traced back to *Baker Boys Ltd v Christchurch City Council*.[65]

[97] The fact that other divisions of the Environment Court have not endorsed that approach does not mean, or demonstrate, that the Meridian decision involves an error of law. Indeed, counsel for Meridian could not point to any cases examining and despatching this approach as an error of law. So we need to examine whether the Environment Court's proposition that s 7(b) requires a comprehensive and explicit cost-benefit analysis is in conformity with the Act.

[98] A theme of seeking to maximise the *quantification* of values through s 7(b) can be traced through the Environment Court's decision. The Court explained:

> [226] We are uncomfortable with a cherry-picking approach to efficiency. We prefer to follow the decision of the Court (slightly differently composed) in *Lower Waitaki River Management Society Inc v Canterbury Regional Council*:[66]
>
> > "We consider that efficiency in section 7(b) of the RMA requires a consent authority to consider the use of all the relevant resources and, preferably, their benefits and costs. It is nearly meaningless to consider the benefits of only some of the resources involved in the proceeding because the artificial weighting created by sections 5 to 8 of the Act will not be kept within the statutory proportions if the only matters given the 'particular regard to' multiplier (see *Baker Boys Ltd v Christchurch City Council*)[67] in section 7(b) are those which are not identified elsewhere in section 7. *Further, it is very helpful if the benefits and costs can be quantified because otherwise the section 7(b) analysis merely repeats the qualitative analysis carried out elsewhere in respect of sections 5 to 8 of the Act* [Emphasis added]."

In the *Lower Waitaki* case the Court had gone on to say in the next paragraph that "the potential power of s 7(b) is in giving a relatively more objective measure of the efficiency of the proposal".[68]

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65 [1998] NZRMA 433 (EnvC).
66 *Lower Waitaki River Management Society Inc v Canterbury Regional Council* EnvC Christchurch C80/09, 21 September 2009 at [196].
67 *Baker Boys Ltd v Christchurch City Council* [1998] NZRMA 433 (EnvC) at [98].
68 At [197].

[99] Later in its judgment in this case[69] the Environment Court recorded an acknowledgment by Dr Layton (a Meridian expert witness) that the impact of the wind farm on recreational activities and the loss of flora, fauna, heritage sites and landscape values would not be revealed by markets and that the value of these impacts could only be inferred indirectly by non-market techniques. Dr Layton had described such techniques. The Court also noted that Dr Layton had stated such techniques are "complex and often contentious" and that he had not made any attempt to utilise the non-market techniques he had identified.

[100] Then the Court went on to lament the lack of quantitative evidence, saying: "in the absence of any quantitative assessment of the costs to recreation, tourism and the environment in general we can only make a qualitative assessment";[70] "The qualitative assessments by Meridian's experts should have been supported by the quantitative assessments of the costs through the methods that Dr Layton identified are available";[71] "There are significant costs that we have not been able to quantitatively assess due to lack of appropriate evidence (costs in terms of recreation and tourism) and others that are less amenable to quantitative assessment (heritage and intrinsic landscape costs)";[72] and "We neither read evidence in chief nor heard further evidence quantifying the value of the landscape in which the proposed wind farm is to be placed, or of the costs of the project to heritage values".[73]

[101] Finally, when deciding whether the wind farm should be approved under the operative district plan the Court said:

> [745] The most objective way of testing whether the wind farm would be sustainable management of the Lammermoor's resources is whether it would be an efficient use of those resources under section 7(b) of the Act. On the evidence that has been presented, we find that the use of the wind resource is efficient, but consider it of at least medium likelihood that addressing the evidential deficiencies identified would lead us to conclude that a wind farm on the Lammermoor was not an efficient use and development of natural and physical resources. Further, Meridian has also failed in the backup to that, in that it has not sufficiently analysed relevant alternatives.

The application was refused. In part this reflected the Court's view that Meridian, CODC and the Crown had failed to put full evidence before the Court about all the costs of the proposal which "would have further increased the objectivity of this decision".[74]

[102] The Environment Court's comments at [745] provide considerable insight into the Court's thinking. Clearly its desire for quantification and objectivity had significantly influenced its approach to the s 7(b) efficiency criterion (and to the ultimate issue of sustainable management). On the evidence actually presented the Court would have found that the use of the

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69 At [623].
70 At [625].
71 At [639].
72 At [649].
73 At [697].
74 At [757(5)].

Lammermoor wind resource *was efficient*. Nevertheless the Court decided that if the evidential deficiencies (which we interpret as the lack of evidence applying the non-market techniques and alternative societal values mentioned by Dr Layton) had been remedied there was at least a "medium likelihood" the Court would have concluded that the wind farm was *not efficient.*

[103] This reasoning prompts us to look at Dr Layton's evidence more closely. In his supplementary evidence Dr Layton told the Environment Court:

> 8.24 Because the displacement of recreational activities or other environmental impacts, such as on flora or fauna, are intangible and not traded in markets, the value of such impacts is not revealed in market prices and can only be inferred indirectly through other means. Non-market valuation techniques include:
>
> (a) Cost-based valuation – for example, valuing environmental attributies at the cost of preventing or repairing damage to them;
>
> (b) Revealed preference methods – for example, inferring the value of parks, views or other desirable environmental attributes by identifying a premium in nearby house prices or by analysing the travel costs people incur in visiting a park; and
>
> (c) Stated preference methods – for example, direct questioning of a sample of respondents on how much they would pay to secure a given outcome, as if it could be secured through market transactions.
>
> 8.25 Non-market valuation techniques are complex and often contentious. Where there are no such valuations available, the weighting of market and non-market impacts is undertaken by consent authorities as part of their broad overall judgement of applications under Part II of the RMA. My understanding is that the relevant experts providing evidence for Meridian Energy have assessed the environmental effects of the wind farm as having an acceptable impact.

No doubt this is the source of the Court's statement at [242][75] that the comprehensive and explicit cost-benefit analysis it had in mind should use non-market techniques where market values are not available and that alternative societal values could be applied when the values of the market differ from those of society.

[104] As the Environment Court noted, Dr Layton had not carried out a cost-benefit analysis utilising non-market techniques. Nor had any other expert witness. When Judge Jackson questioned Dr Layton about [8.24] of his evidence with reference to recreational and landscape values Dr Layton said:

> DR LAYTON: The answer[s] in this particular method and you will notice I have not pursued them because they all end up contentious.
>
> HIS HONOUR: Yes.
>
> DR LAYTON: Are complex and often contentious what I describe them as, because people will say, "well, is that really the value?"

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75 Quoted at [22] above.

Given that the Environment Court appears to have been relying on Dr Layton to justify its call for a cost-benefit analysis utilising non-market valuation techniques, Dr Layton's answers (coupled with [8.25] of his supplementary evidence) must call into question the potential utility of such evidence, had it been presented.

[105] On the evidence before it, the Court had extensive *qualitative* evidence from various experts about the potential adverse effects of the wind farm. But it did not have the *quantitative* evidence that it would have liked. Obviously this counted heavily against Meridian when the Court came to apply the s 7(b) efficiency criterion. In our view this approach to s 7(b) was not in conformity with the RMA, as we will now explain.

[106] Section 32 of the Act is the only section expressly requiring a cost-benefit evaluation (of proposed policies or other methods before a decision is made on a plan or plan change). Subsections (3) and (4) of s 32 are of particular relevance:

> **32. Consideration of alternatives, benefits, and costs –**
> ...
> (3) An evaluation must examine —
> (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
> (4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account —
> (a) *the benefits and costs of policies, rules, or other methods; and*
> (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods. [Emphasis added.]

Section 32(4)(a) does not carry any mandatory requirement for all the benefits and costs to be quantified in economic terms, and no such requirement can be reasonably inferred.

[107] The issue whether s 32 requires a strict economic theory of efficiency or a more holistic approach was raised before Woodhouse J in *Contact Energy Ltd v Waikato Regional Council*.[76] He declined to interfere with the Environment Court's conclusion that while economic evidence can be useful, a s 32 analysis requires a wider exercise of judgment. This reflects that it is simply not possible to express some benefits or costs in dollar or economic terms. For example, the loss of an ecosystem such as a wetland hosting a large bird population which is going to be overwhelmed by land reclamation may not be capable of expression in dollar terms.

[108] Likewise it would be difficult, if not impossible, to express some of the criteria within Part 2 of the Act (ss 5–8) in terms of quantitative values. We take by way of example the following paragraphs in s 7:

> (c) the maintenance and enhancement of amenity values:
> (d) intrinsic values of ecosystems:

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76 (2007) 14 ELRNZ 128 (HC) at [47]–[51] and [88]–[92].

> ...
> (f) maintenance and enhancement of the quality of the environment ...

If any of these matters are relevant, the consent authority "shall have particular regard to" them even if they are only capable of expression in *qualitative,* as opposed to *quantitative,* terms. As Dr Layton said, in this situation it is necessary for the consent authority to weigh market and non-market impacts as part of its broad overall judgment under Part 2 of the RMA. We have not been referred to any provision stating that this process should be exercised or expressed in dollar terms or by some other economic formula.

[109] While it is true that resource consent decisions under the RMA might be described as subjective, that is inherent in the statutory process. In this respect we note that in *Canterbury Regional Council v Banks Peninsula District Council*[77] the Court of Appeal said:[78]

> ... the Act provides what may be described as a hierarchy of instruments, to the extent that regional policy statements must not be inconsistent with national policy statements and certain other instruments (s 62(2)), and district plans must not be inconsistent with national policy statements and the other instruments, nor with a regional policy statement or regional plan (s 75(2)). It does not follow, however, that there can be no overlap between the functions of regional authorities and territorial authorities. The functions of the latter are set out in s 31, and there is no need to read that section in any restricted way. To the extent that matters have been dealt with by an instrument of higher authority, the territorial authority's plan must not be inconsistent with the instrument. Beyond that, the territorial authority has full authority in respect of the matters set out in s 31 ...

Decisions relating to resource consents are within the "full authority" vested in territorial authorities.

[110] Such decisions involve an evaluation of the merits by committees of elected councillors, or a panel of commissioners (as here), and, if there is an appeal, by the Environment Court. A degree, even a relatively high degree, of subjectivity is virtually inevitable. It needs to be kept in mind that the scheme of the RMA is that decisions are made by a number of persons acting together. Persons on the Regional or District Council, or Committee, or panel of the Environment Court, discuss these "subjective" evaluations and reach a consensus. The outcome is not one person's evaluation, except in simple cases of delegation to a single commissioner.

[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

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77 [1995] 3 NZLR 189 (CA).
78 At 194.

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.

[112] Before leaving this cost-benefit issue we should briefly comment on the Environment Court's approach to internalising costs. The Court found[79] that costs in terms of landscape and various other matters had not been internalised to Meridian.

[113] With this concept of internalisation comes the notion that external costs arising from the private use of natural and physical resources should be internalised and reflected in the cost and benefit analysis. Externalities are those consequences, both beneficial and adverse, which flow from the use of the resources. Regulatory statutes controlling private use of land developed from the common law of nuisance, which has long understood and responded to the fact that private use of land can cause a nuisance to the neighbourhood. Reforms culminating in the RMA are discussed in this Court's decision in *Wilson v Selwyn District Council*.[80]

[114] The underlying purpose of internalising these externalities is to enable all the benefits and costs to be quantified so that a net benefit or net loss, as the case may be, can be calculated. The problem is that where all the benefits and costs are not the subject of market transactions there is no readily quantifiable financial sum reflecting the demand or price to be paid for such benefits or the imposition of detriments. To put dollars on them requires some sort of imputing of demand. Sometimes this can be achieved by way of surveys: "*How much would you pay to visit a national park*?" Sometimes it is not possible to put dollar terms on them.

[115] But it is all very controversial, as Dr Layton confirmed. We cannot accept that it was within the contemplation of the RMA that failure to fully internalise costs would carry the consequences that the Environment Court contemplated.

[116] While we can understand the Environment Court's desire to maximise objectivity in the decision-making process, it is our view that the Court went too far when it decided that s 7(b) required a comprehensive and explicit cost-benefit analysis in this case. We believe this resulted in s 7(b) being overplayed. Rather than dominating any other relevant Part 2 criteria, s 7(b) was intended to be weighed and balanced alongside them. In particular Parliament did not intend other criteria in s 7 to receive a truncated evaluation because the subject-matter had already been evaluated in the s 7(b) analysis.

Did the Environment Court require Meridian to demonstrate that its project was "the best" in net benefit terms, and if so was this an error of law?

[117] When discussing alternatives the Environment Court said:

> [230] While in an engineering sense efficiency means the ratio of outputs to inputs, in economic terms it is not an absolute but a relative concept. We hold that under section 7(b) of the Act there are two questions to answer when determining the efficiency of the use of resources:

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79 At [703].
80 [2005] NZRMA 76 (HC) at [66]–[68].

(1) is the value achieved from the resources utilised the greatest benefit that could be achieved from those resources?
(2) could that same benefit be produced utilising resources of lower value if they were organised differently, or if a different set of resources was used?

The first point is about maximising the benefits achieved from the resources being utilised; and the second is about minimising the resource costs of achieving a given benefit.

As we have already said, Meridian contends that this concept was applied in a way that required it to demonstrate that its project was "the best" in net benefit terms and that this was wrong in law.

[118] The RMA is a regulatory statute restraining full rights of private property ownership and freedom of contract. Amongst other things, the Act limits the exercise of those rights by requiring certain conduct to have resource consents. But it would be extremely surprising if the statute granted to agencies, be they elected councils or the courts, the power to impose upon owners of resources and parties to contracts some duty to make *the best use* of the subject resources, as construed by a council or court.

[119] We think the correct interpretation of the RMA is that it is up to individuals and groups of individuals to decide what they want to do with their resources (where those resources are in private hands). However, that right is tempered by the fact that private use of resources can impose adverse effects on neighbours and upon the wider community. Hence the justification for the national, regional and district planning instruments, and the associated concept of resource consents, all of which lie at the heart of the RMA.

[120] In addition to those matters are the principles and purposes in Part 2 of the Act, including s 7(b). However, we do not think s 7(b) (or Part 2 generally) was intended to give to decision makers under the RMA the power to make judgments about whether the value achieved from the resources that are being utilised is the greatest benefit that could be achieved from those resources or whether greater benefits could be achieved by utilising resources of lower value or a different set of resources. To go that far would be to assert a planning function beyond the scope of the RMA. The Act effectively represents a compromise between values of planning and respect for private developments.

[121] Having concluded that as a matter of statutory interpretation it was not open to the Environment Court to require Meridian to demonstrate that its project was "the best" in net benefit terms, we have to decide whether the Environment Court actually imposed that requirement on Meridian. We agree with the respondents that this ground has not been made out. Nowhere in the judgment has the Court stated in explicit terms that it expected Meridian to demonstrate that the Hayes site was the best. Nor can this be safely inferred from the judgment as a whole. While the question of alternative sites loomed large in the Court's reasoning, we do not believe the Court has gone as far as Meridian contends.

[122] This ground has not been made out.

Summary

[123] In the circumstances of this case the Environment Court was, subject to the qualifications mentioned in this judgment, authorised to call for a

description of alternative sites as part of its s 104 analysis. But it erred in law when it went further and proceeded on the basis that s 7(b) required consideration of alternative locations and an explicit and comprehensive cost-benefit analysis. These errors led the Court to apply s 7(b) in a way that was not intended by Parliament. This resulted in the Court not analysing the merits of the application in the way intended by Parliament. The issue of relief will be addressed shortly.

Fourth ground

[124] As already mentioned, this ground of appeal alleges that the Environment Court denied Meridian a fair hearing by virtue of three matters: the issue of alternatives was not raised by opponents; there was no forewarning that the Court intended to apply *Lower Waitaki*; and the Court took into account the Mahinerangi wind farm consent. Given that the first matter is effectively a component of the second, we will go straight to the second matter.

Did the Court's application of Lower Waitaki *impose an obligation to hear further from Meridian?*

[125] It was in the *Lower Waitaki* decision that the Environment Court first specifically advanced the proposition that s 7(b) might require a cost-benefit analysis. That proposition was then utilised in the case under appeal, with the Court reasoning:

> [702] In Chapter 3.0 (The law) we decided that in certain circumstances section 7(b) leads to a requirement to consider alternatives. After considering the submissions and cases, we held that we should follow the recent Waitaki North Bank Tunnel Concept decision[81] where the Court concluded:[82]
>
> > "... that the consideration of alternative uses of resources, or the use of alternative resources to achieve the same or similar benefit, is not usually required under the RMA, and, secondly that there are at least three exceptional situations where considerations of efficiency under section 7(b) may require consideration of alternatives. These situations are:
> >
> > 1. where the costs cannot be fully internalised to the consent holder;
> > 2. where there is no competitive market for the relevant resources; or
> > 3. where there are matters of national importance in Part 2 of the Act involved and the cost-benefit analysis requires comparing measured and unmeasured benefits and costs, such that the consent authority has to rely principally on a qualitative assessment."
>
> Although the consideration of alternatives may be required, this does not necessarily mean that alternatives should be considered in all cases. The

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81 *Lower Waitaki River Management Society Inc v Canterbury Regional Council* EnvC Christchurch C80/09, 21 September 2009.

82 Ibid at [201].

Waitaki NBTC decision stated[83] that whether and which alternatives should be considered can only be decided in the context of the specific facts of each case.

[703] Considering the extent to which the situations 1–3 above apply to a Lammermoor wind farm we find:

1. The costs in terms of landscape, heritage in respect of the Old Dunstan Road and the heritage surroundings in which it sits, and recreation and tourism have not been internalised to the consent holder. There may be some possible remedy or mitigation in respect of recreation and tourism, although none has been proposed to us. The evidence before us was that the landscape and the Old Dunstan Road heritage costs could not be remedied or mitigated. Therefore they have not been (and in respect of landscape and the heritage of the Old Dunstan Road, cannot be) internalised to the consent holder.
2. There is no competitive market for the landscape or heritage resources. The "market" for recreation or tourism resources has not been adequately explored by the applicant. The issue of alternative recreational opportunities was mentioned in evidence and discussed (briefly) in cross-examination. The issue of tourism was barely mentioned.
3. There are two matters of national importance involved: an outstanding natural landscape[84] and historic heritage[85] – which we must recognise and provide for their protection from inappropriate use and development.

We have considered whether in the interests of fairness we should hear from the parties further on the issue of categories 2 and 3 since the *Lower Waitaki* decision has only recently been issued. However, we have decided that there is no need to do so because *TV3 Network* applies – matters of national importance are raised – and we heard argument about that.

We do not accept that the decision of the High Court in *TV3 Network Services* put Meridian on notice that the test deployed in *Lower Waitaki* would be utilised in the decision under appeal. This reflects the particular issues in *TV3 Network Services* and the way they were addressed by this Court.

[126] TV3 wanted to install a television translator on a hill on the west side of Raglan Harbour. Its application for a resource consent was granted by the District Council. An opponent, Tainui, then appealed to the Environment Court on the grounds that the hill was sacred to Maori and the presence of the translator would offend Maori heritage and waahi tapu. The Environment Court reversed the Council's decision on the basis that granting the consent would not respond to the strong direction in s 6(c) to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands

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83 Ibid at [548].
84 Section 6(b) of the Act.
85 Section 6(f) of the Act.

and waahi tapu. On the question of alternative sites the Environment Court considered that "other possible translator sites may be nearly as effective even though they may involve greater costs".[86]

[127] An appeal to this Court followed.[87] In support of TV3's appeal Mr Brabant argued that the Environment Court had erred by considering whether the proposed activity might be undertaken on another site where it would not offend a matter of national importance. He argued that the Act is "effects based" and that s 92(1) and sch 4 identify when alternative sites can be considered (where it is likely that an activity will result in a significant adverse effect on the environment). Thus, Mr Brabant submitted, it was wrong in law to consider alternative sites when the Court had not found that there were any adverse effects.

[128] Hammond J did not directly respond to Mr Brabant's argument. Rather he proceeded on the basis that the Environment Court was not requiring the applicant for resource consent to clear off all possible alternatives:

> But I do not think that is what the Court was suggesting. It is simply that, when an objection is raised as to a matter being of "national importance" on one site, the question of whether there are other viable alternative sites for the prospective activity is of relevance.[88]

On our reading of the *TV3 Network Services* decision there was nothing in it to alert Meridian to the possibility that the Environment Court would interpret and apply s 7(b) in the way that it did.

[129] Nor had the previous history of the Meridian proceeding foreshadowed that possibility. The issue of alternatives had not been included in the list of issues provided by any of the parties in response to the pre-hearing directions issued by the Court on 31 January 2008 and 10 April 2008. While it is true that there was some cross-examination on the issue of alternatives, we do not consider that this should have alerted Meridian to the s 7(b) test that the Court ultimately adopted.

[130] On 8 August (well into the hearing which had started on 19 May) the Maniototo Environmental Society sought to call further evidence, first, on the cumulative effects of the Mahinerangi wind farm and Project Hayes and, secondly, on efficiency issues. Maniototo's application had been made after another division of the Environment Court released its decision upholding planning consent for the windfarm at Mahinerangi.

[131] When granting the adjournment,[89] the Environment Court concluded with these comments:

> [16] ... To the extent that this proceeding is about efficiency, it is about the overall efficiency in terms of section 7(b) and section 7(ba) of the Resource Management Act of Project Hayes, and we ask that the evidence reflects that ...

Later the following exchange took place between Judge Jackson and Mr Beatson, counsel for Meridian:

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86 *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360 (HC) at 367.
87 [1998] 1 NZLR 360.
88 Ibid at 373.
89 *Maniatoto Environmental Society Inc v Central Otago District Council* EnvC Christchurch C89/08, 8 August 2008.

HIS HONOUR: Mr Beatson, what are your thoughts on the way forward please?

[Discussion about how to proceed with aspects of the case not affected by the request to call new evidence.]

HIS HONOUR: Thank you. And a timetable?

MR BEATSON: I have not thought about specific dates but I would request a simultaneous exchange giving time for rebuttal rather than a three stage timeframe.

I would seek some further guidance from the Court about the question of efficiency that it is interested in.

HIS HONOUR: Well, we need help from you on that.

MR BEATSON: Well, we have outlined the benefits of the project from a broader perspective and we have signalled that, from Meridian's perspective, it is the next best option available to it. We have had an explanation from the Crown about how the market works and that it is competitive and it is up to generators to make commercially sensible decisions about where they locate next.

And we have talked about the benefits to, or we will be talking about, the benefits to the individual landowners and the benefits to the system as a whole and we have deliberately indicated we think the viability question is one for Meridian but we are saying that there is checks and balances on that as well.

I think there is no [sic] much more than can really be said about transmission either.

HIS HONOUR: Fine, well, if there is no more to be said you do not have to say it, do you?

MR BEATSON: No, but I am seeking some guidance about what it is that that Court is –

HIS HONOUR: Well, we have said what we have said, I am not going to elaborate.

All right, so you want simultaneous exchange?

MR BEATSON: Yes.

HIS HONOUR: All right, thank you.

We do not know how advanced Judge Jackson's thinking on the efficiency test was when that exchange took place.

[132] Had Mr Beatson known about the *Lower Waitaki* decision at this time he would have been alerted to the possibility that the Court might apply that decision. In that event it is likely that Meridian would have responded by providing more evidence about alternative sites and/or legal argument about the scope of s 7(b). As matters developed, however, there was nothing at that stage to alert Meridian to the possibility that the Court would adopt the novel approach to s 7(b) that it did.

[133] We accept that as a matter of fairness the Court should have heard further from the parties after the *Lower Waitaki* decision was delivered. If further information about alternatives was required, the Environment Court

should have then provided a reasonable opportunity for further evidence to be presented. Thus we are satisfied that this ground has also been made out. We will shortly address the consequences of this conclusion.

The Mahinerangi issue

[134] For the Environment Court the relevance of the wind farm consent at Mahinerangi was one of cumulative effects:

> [482] We have described how the hearing was further adjourned so that the Court could hear evidence about any impact of a wind farm at Mahinerangi on this proposal. At the 2009 resumption of the hearing Meridian produced some new photosimulations[90] of the area. These included those views in which both a Meridian wind farm and a Mahinerangi wind farm, 15 kilometres apart at the closest points and with some 28 kilometres between their centroids, could both be seen.
>
> [483] There is some doubt as to whether Mahinerangi will proceed. Mr Gleadow said in answer to Mr Todd that TrustPower had been quoted in the media as stating that "... under the present policy settings [it] may well not construct Mahinerangi". That is of course hearsay, and we do not know what current settings are of concern to them. Further, it has taken us so long to finalise this decision that more recent media reports suggest that Mahinerangi is likely to proceed. We make no finding either way: as we stated (in Chapter 3.0) if Mahinerangi proceeds then the Meridian project may cause accumulative effects, and if it does not then the Mahinerangi site may be an alternative which we should consider.
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> ...
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> [490] In our view the likely strength of the cumulative effects is somewhere between Mr Rough's and Ms Steven's views. We consider that the addition of the Meridian wind farm to a Mahinerangi wind farm will have a moderate adverse extra effect on the natural qualities of the landscape. Having said that, it is clearly the placement of the huge Meridian wind farm in the landscape which generates the major effects to be considered.

[135] Later the Court returned to Mahinerangi in the context of a permitted baseline analysis:

> [674] In relation to the existing environment there are various suggestions[91] that Meridian may have been disadvantaged because (a different division of) the Court heard and decided the smaller Mahinerangi application by TrustPower Ltd first (see *Upland Landscape Protection Society Inc v Clutha District Council*),[92] even though TrustPower's application was lodged with the relevant local authorities later than Meridian's. We consider there is no disadvantage. First, we hope it is unnecessary to point out that this is not a "priority of hearing" case under the principle (first in time, first in right) in *Fleetwing Farms Ltd v*

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90 Mr CG Coggan, part of his evidence-in-chief (Environment Court document 49).

91 For example, Mr Todd, submissions 16 February 2009 (Environment Court document 85).

92 *Upland Landscape Protection Society Inc v Clutha District Council* EnvC Christchurch C85/08, 25 July 2008.

Marlborough District Council.[93] From a procedural point of view this case involves different resources within two different districts. Secondly, we consider the point is irrelevant. The possibility of generating energy from wind at Mahinerangi is, for the reasons we stated in Chapter 3.0, relevant as:

- either a part of the existing environment as it falls within the definition allowed by *Queenstown Lakes District Council v Hawthorn Estate Ltd*[94] (or as an accumulative effect); or
- an alternative.

[675] We hold that the existing environment must include the potential effects of a wind farm above Lake Mahinerangi. We consider the accumulative effects of adding a wind farm on the Lammermoor to those effects will be at least moderate on the heritage surroundings about the Old Dunstan Road even on the scale of the two landscapes being considered.

With particular reference to [674] and [675] Meridian submits that the Environment Court was wrong in law when it declined to apply the *Fleetwing* principle and that it should not have taken the Mahinerangi wind farm into account.

[136] The *Fleetwing* principle is that where there are competing applications for a resource the priority of the hearings will be determined in favour of the first applicant to file a complete application. Once the priority of hearings has been determined the application having priority is decided on its merits and without having regard to the other application/s.

[137] The Court of Appeal developed the *Fleetwing* principle on the basis that the members of the Court thought it implicit:

> ... [T]hat if another applicant applies for a similar resource consent while the first application remains undecided, that does not justify comparing one against the other and failing to give a timely decision on the first application on its merits and without regard to the other.[95]

Then the Court identified five possible policies which might reflect that implicit policy and concluded that on its reading of the RMA Parliament had used the approach of "first come first served".[96]

[138] As far as we are aware the *Fleetwing* principle has never been applied so as to require a consent authority to disregard *an existing* resource consent for the reason that the application resulting in the existing consent was not completed until after the application under consideration. Nor has it been applied as part of a baseline analysis where there are effectively different resources (the Meridian site is 15 km from the Mahinerangi site).

[139] Currently there is considerable uncertainty surrounding the future of the *Fleetwing* principle. It has been challenged in *Central Plains Water Trust v Ngai Tahu Properties Ltd* [97] and *Central Plains Water Trust v Synlait Ltd*,[98] both of which involved competing claims for the same water resource. The

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93 *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 (CA).
94 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).
95 *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 (CA) at 264.
96 Ibid at 265.
97 [2008] NZCA 71, [2008] NZRMA 200.

Supreme Court granted leave for both decisions to be appealed to it. In *Ngai Tahu Properties* the Supreme Court invited a reconsideration of *Fleetwing* and appointed an amicus curiae. The case then settled. Although leave to appeal *Central Plains Water Trust* was granted, it also settled. There can be little doubt that the Supreme Court wished to hear argument about whether the *Fleetwing* principle is sound.

[140] Under those circumstances we do not think this Court could responsibly extend the ratio of *Fleetwing* in the way sought by Meridian, especially in a novel situation like this. We therefore reject Meridian's proposition that the Environment Court erred in law when it declined to apply *Fleetwing* vis-à-vis the Mahinerangi wind farm consent.

[141] It follows that the Mahinerangi wind farm was potentially a relevant consideration in the baseline analysis. Meridian criticised the Environment Court for relying on post-hearing media reports suggesting that the Mahinerangi project might go ahead.[99] We will take that matter up when considering the relief that should be granted.

Grounds 5 and 6

[142] Given the conclusions that we have already reached in relation to grounds (ii), (iii) and (iv) and the directions that will follow in the next section of our judgment, we find it unnecessary to comment further on these grounds.

Relief

[143] Meridian not only seeks to have the Environment Court decision quashed, it also wants the consents and permits originally granted by the Councils to be reinstated by this Court without any further consideration by the Environment Court. We are unaware of this step ever having been taken previously.

[144] Meridian relies on two findings in its favour which, it contends, demonstrate that the benefits of the project outweigh the costs and that the project is worthy of consent:

> [650] Against these measured benefits must be put the very real, but unmeasured, costs in terms of landscape, heritage and recreation and tourism that will not be remedied or mitigated. We note that the large regional benefits will be at the expense of some other region that does not gain, at this time, a large electricity construction project if Lammermoor goes ahead. The landscape, heritage and tourism costs of the project will be both national and regional. Although our cost-benefit analysis is on a national basis, the regional effects are a part of this. *On balance we conclude that there is a net benefit arising from the Lammermoor wind farm*. However, we consider that the unmeasured costs are significant and that the size of the net benefit is not nearly as substantial as the numbers above might indicate.
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> ...

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98 [2009] NZCA 609, [2010] 2 NZLR 363.
99 See [483] already quoted at [134] above.

[693] *If the matters in the previous sections of this chapter were all we had to consider we would agree with the planner*[100] *called by the District Council, Mr D R Anderson, that we should grant consent to Meridian*. However, s 104(1) of the RMA begins:

> "When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to —
> ..."
>
> We now consider whether we should look at Part 2 of the Act. [Emphasis added].

For the respondents Mr Smith claims that these paragraphs cannot be construed as a finding in favour of Meridian justifying reinstatement of the consents/permits by this Court.

[145] We agree with Mr Smith. Paragraphs [650] and [693] cannot be read in isolation. In our view it is too simplistic to say that because the benefits of the project outweigh its costs, the project must therefore be worthy of consent. While that might be a very significant step towards gaining consent, a wider assessment is required. On its wider assessment of the Meridian application the Environment Court concluded that the project did not achieve sustainable management in terms of s 5 of the Act. Under those circumstances the proper course is for the Court to reconsider that conclusion in light of the errors of law that we have identified.

[146] Meridian's alternative submission was that if the case is to be referred back to the Environment Court, it should be referred to a different division of that Court. This suggestion was opposed by the third to ninth respondents. The Councils adopted a relatively neutral stance. We accept that this option would again be most unusual, and that it would impose a considerable burden on the parties opposing the Meridian application. It is our judgment that the appropriate course is to follow normal practice and refer the case back to the same division of the Court that heard the application, with specific directions.

[147] The principal direction must, of course, be to reconsider the matter in the light of our findings as to error of law in the decision. But that is insufficient on its own. It is important that the corollaries to our findings are also taken into account on the reconsideration.

[148] We will therefore set out specific directions for the Environment Court's reconsideration of the matter:

(a) Meridian is to be given a reasonable opportunity to present further evidence on the question of alternative locations. The respondents are also to be given a reasonable opportunity to call evidence in response to Meridian's evidence.

(b) Once any further evidence has been presented all parties are to be given a reasonable opportunity to present further submissions about the evidence referred to in (a) as well as the overall implications of this decision for the findings and conclusions reached by the Environment Court.

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100 Mr DR Anderson, evidence-in-chief (Environment Court document 62).

(c) Meridian is not obliged to go beyond *a description* of any possible alternative locations for undertaking the proposed wind farm (in terms of cl 1(b) of sch 4). As indicated at [93] these locations will need to be within the CODC district. Given the size of the Meridian proposal and its potential impact on the environment, we anticipate that a reasonably detailed description of alternative sites would be provided by Meridian.

(d) Any further evidence concerning alternative locations will form part of the Court's s 104 analysis of the Meridian proposal (not part of the s 7(b) assessment). The inquiry will be whether, if the same or a similar wind farm could be placed on any identified alternative site/s, it would generate less adverse effects on the environment. That consideration will, however, need to be weighed against any diminution in the benefits of the project (for example, poorer quality of mean wind velocity, distance from the grid etc), and any other relevant considerations such as the availability of the alternative site/s to Meridian.

(e) As the Environment Court acknowledged, and our analysis of the other wind farm cases demonstrates, consideration of alternative sites is relatively unusual. While it will be for the Environment Court to undertake any further analysis of the evidence before it, we emphasise that consideration of alternative sites should not be pushed too far. We have rejected the proposition that Meridian must demonstrate that the Hayes site is "the best". Rather than being a search for "the best" site, consideration of alternative sites is only part of the evaluation of the merits of the application in the context of s 104 and the focus needs to be on the merits of *Meridian's proposal.*

(f) The Court is also to reconsider the application of the efficiency criterion on the basis that s 7(b) requires an assessment of the efficient use and development of the natural and physical resources involved in the application, namely, the wind and the land. In other words, the Environment Court is to apply the s 7(b) test utilised in the other wind farm cases in which s 7(b) has featured.

(g) Given the opportunity that is now available for the Court to receive further evidence about whether the Mahinerangi wind farm project is likely to proceed, the parties will also be entitled to present further evidence to the Environment Court on that topic.

(h) Nothing that we have said is intended to indicate that the Environment Court is precluded from utilising the cost-benefit findings that it reached as part of its s 104 evaluation. However, that evaluation is not to penalise Meridian for failing to provide non-market valuation evidence in relation to landscape or heritage values.

(i) The parties will also be entitled to make submissions about any conditions that might be lawfully imposed by the Environment Court to avoid, remedy or mitigate adverse effects on the environment if the application is granted. The Court will also have power to impose such conditions.

[149] We will take the precaution of reserving leave for the parties to seek clarification of any of these directions. Any such request, containing a description of the clarification sought, must however, be filed and served within 28 days of the date of this judgment.

Mr Sullivan's cross-appeal – climate change

[150] In 2004 s 7 of the RMA was amended by requiring all persons exercising functions and powers under the Act to have particular regard to:

> (i) the effects of climate change;
> (j) the benefits to be derived from the use and development of renewable energy ...

These amendments were made by the Resource Management (Energy and Climate Change) Amendment Act 2004 (the amendment Act).

[151] Additional definitions were included in the RMA by the amendment Act. At the heart of the cross-appeal is the definition of "climate change":

> **climate change** means a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods ...

A definition of "renewable energy" was also added by the amendment Act. Energy produced from wind comes within that definition.

Environment Court decision with reference to climate change

[152] When analysing its role in relation to climate change, the Court proceeded on the basis that Parliament had directed persons exercising functions and powers under the Act to assume there is climate change attributable to human causes "and to move on from there".[101] This reflected the Court's analysis of the definition of climate change and its assumption that Parliament intended scientific discussion about the existence and extent of anthropogenic changes (from human activities) was to be avoided.[102]

[153] Then the Court considered whether there was evidence indicating changes to the site envelope and the surrounding area as a result of climate change. It concluded that there was none. On the other hand, the Court accepted that anthropogenic-induced increases in carbon dioxide concentrations in the atmosphere contribute to climate change and that using wind generation rather than carbon-emitting generation would reduce climate change and its effects. This led the Court to conclude that Meridian's proposal would contribute to reducing the effects of climate change as defined in the Act.[103] Reduction in CO_2 emissions was later factored into the Court's cost-benefit analysis.[104]

Mr Sullivan's cross-appeal

[154] Two grounds of appeal were advanced by Mr Sullivan:

> (1) The Environment Court erred in its interpretation of s 7 of the

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101 At [351].
102 At [221].
103 At [354].
104 At [641].

Resource Management Act by determining that s 7 requires the decision maker to exclude from its consideration and evaluation of the effects of climate change a consideration of the causes of climate change.

(2) The Environment Court erred by ignoring the uncontested evidence of Dr Kesten Green when evaluating the integrity of the Intergovernmental Panel on Climate Change's climate models.

His cross-appeal is advanced on the basis that if Meridian's appeal succeeds and the matter is remitted for a rehearing, then at the rehearing the Environment Court should be directed to reconsider the climate change issues "in accordance with the law".

First ground of cross-appeal

[155] For Mr Sullivan, Mr Fisher argued that before a consent authority can have particular regard to the effects of climate change, as required by s 7(i):

> ... it must first determine that it is satisfied in terms of the definition of "climate change" that a party has *reasonably attributed* human activity to alterations in the composition of the global atmosphere that is in addition to natural climate variability observed over comparable periods ...

Having failed to take that step, submitted Mr Fisher, the Environment Court had no jurisdiction to take into account the effects of climate change or to include the benefits arising from the savings in CO_2 emissions in its cost-benefit analysis.

[156] We are satisfied that the Environment Court did not err in law and that this ground of appeal is untenable. This reflects a number of matters.

[157] First, the definition of climate change. Like the Environment Court we find it significant that Parliament has used the word "attributed" rather than "caused by". We consider that the definition has been framed in this way to reflect the statutory assumption that climate change is occurring. We also agree with the Environment Court's comment[105] that climate change is an extremely complex subject and that in the absence of a clear direction from Parliament the Court should not enter into a discussion of its causes, directions and magnitude.

[158] Secondly, it is significant that the definition of "climate change" comes from the 1992 United Nations Framework Convention on Climate Change (to which New Zealand is a signatory). That Convention is incorporated in the Climate Change Response Act 2002: see the First Schedule to that Act. In that Convention it is abundantly clear that climate change *as defined* is assumed to exist. For example, cl 1 of art 3 states that "... developed country Parties should take the lead in combating climate change and the adverse effects thereof", and cl 3 of the same article states that the Parties to the Convention "should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects". The commitments entered into by the parties under art 4 includes taking steps "to mitigate climate change".[106] There are numerous other examples.

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105 At [351].
106 Article 1(b).

[159] Thirdly, the stated purpose of the amendment Act is only explicable on the basis that climate change exists:

> **3. Purpose –**
> The purpose of this Act is to amend the principal Act —
> (a) to make explicit provision for all persons exercising functions and powers under the principal Act to have particular regard to —
> ...
> (ii) the effects of climate change ...
> (b) to require local authorities —
> (i) to plan for the effects of climate change ...

Similarly the new para 7(i) requiring those exercising functions and powers under the RMA to have particular regard to the effects of climate change only makes sense if the underlying premise is that climate change exists.

[160] Fourthly, we see major practical difficulties with the interpretation advanced on behalf of Mr Sullivan. It would mean that scientific evidence would have to be adduced on the complex issue of climate change every time persons exercising functions and powers under the RMA were obliged to have particular regard to s 7(i). In the context of resource consents an impossible burden would be imposed on applicants. Climate change issues would be endlessly relitigated and inconsistencies would be virtually inevitable. And if a consent authority (or the Environment Court) found that there was insufficient evidence to enable it to have particular regard to effects of climate change, how would it discharge its obligation under s 7(i)?

[161] Finally, Mr Sullivan's argument is not supported by *Genesis Power Ltd v Greenpeace New Zealand Inc*,[107] in which William Young P stated when delivering the judgment of the Court:

> [37] Section 7(i) anticipates that there will be climate change and requires regional councils to take into account, in exercising their functions under the Act, the effects of climate change ...

While that appeal involved a discharge permit and s 7(i) was not directly in issue, the observation of the Court justifies considerable weight.

[162] This ground of cross-appeal fails.

Second ground of cross-appeal

[163] The allegation that the Environment Court overlooked Dr Green's evidence arises from the following paragraph of the Environment Court's decision:

> [133] Evidence on climate change was presented principally by Dr D S Wratt for Meridian and Professor R M Carter for the appellant Mr Sullivan. Others who addressed climate change were Professor C R de Freitas for Mr Sullivan and Mr P F Gurnsey for the Crown.

Given that Dr Green is not mentioned in that paragraph or, as far as we can see, elsewhere it is certainly possible that his evidence was overlooked. In this regard we were told from the Bar that Dr Green's statement of evidence on behalf of Mr Sullivan was admitted by consent and Dr Green did not appear in person.

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107 [2007] NZCA 569, [2008] 1 NZLR 803 (CA).

[164] Dr Green gave scientific evidence about whether forecasts of dangerous man made global warming are valid. He concluded that they were not valid and there is currently no more reason to believe that temperatures will increase over the coming century than there is to believe that they will decrease. However, even if his evidence has been overlooked, our conclusions in relation to the first ground of appeal mean that it could not have materially affected the outcome.
[165] Under those circumstances this ground of cross-appeal must also fail.

Result

[166] Meridian's appeal is allowed. The matter is referred to the Environment Court for reconsideration in accordance with the directions at [148]. The cross-appeal by Mr Sullivan is dismissed.
[167] If agreement cannot be reached as to costs counsel should file and serve memoranda so that that issue can be determined by the Court.

Appeal allowed; matter referred to the Environment Court for reconsideration; cross-appeal dismissed.

Solicitors for Meridian: *Bell Gully* (Wellington).
Solicitors for Central Otago District Council: *Macalister Todd Phillips* (Queenstown).
Solicitors for Otago Regional Council, the Laurenson Family Trust and the Mason and Riverview Settlement Trust: *Ross Dowling Marquet Griffin* (Dunedin).
Solicitors for the Societies: *Atkins Holm Joseph Majurey* (Auckland).

Reported by: Graeme Palmer, *Barrister*

Palmerston North City Council v Motor Machinists Ltd

High Court Palmerston North CIV 2012-454-0764; [2013] NZHC 1290
13, 20 March; 31 May 2013
Kós J

Resource management — Appeals — Proposed district plan change — Whether submission "on" a plan change — Whether respondent's submission addressed to or on the proposed plan change — Procedural fairness — Potential prejudice to people potentially affected by additional changes — Whether respondent had other options — Resource Management Act 1991, ss 5, 32, 43AAC, 73, 74, 75 and 279 and sch 1; Resource Management (Simplifying and Streamlining) Amendment Act 2009.

The Council notified a proposed district plan change (PPC1). It included the rezoning of land along a ring road. Four lots at the bottom of the respondent's street, which ran off the ring road, were among properties to be rezoned. The respondent's land was ten lots away from the ring road. The respondent filed a submission that its land too should be rezoned. The Council said the submission was not "on" the plan change, because the plan change did not directly affect the respondent's land. The Environment Court did not agree. The Council appealed against that decision.

Held: (allowing the appeal)

The submission made by the respondent was not addressed to, or "on", PPC1. PPC1 proposed limited zoning changes. All but a handful were located on the ring road. The handful that were not on the ring road were to be found on main roads. In addition, PPC1 was the subject of an extensive s 32 report. The extension of the OBZ on a spot-zoing basis into an isolated enclave within Lombard Street would have reasonably required s 32 analysis to meet the expectations of s 5 of the Act. It involved more than an incidental extension of the proposed rezoning. In addition, if incidental extensions of this sort were permitted, there was a real risk that people directly or potentially directly affected by additional changes would be denied an effective opportunity to respond as part of a plan change process. There was no prejudice to the respondent because it had other options including submitting an application for a resource

consent, seeking a further public plan change, or seeking a private plan change under sch 1, pt 2 of the Act (see [47], [49]).

Clearwater Resort Ltd v Christchurch City Council HC Christchurch AP34/02, 14 March 2003 approved.

Other cases mentioned in judgment

Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145 (HC).

General Distributors Ltd v Waipa District Council (2008) 15 ELRNZ 59 (HC).

Halswater Holdings Ltd v Selwyn District Council (1999) 5 ELRNZ 192 (EnvC).

Naturally Best New Zealand Ltd v Queenstown Lakes District Council EnvC Christchurch C49/2004, 23 April 2004.

Option 5 Inc v Marlborough District Council (2009) 16 ELRNZ 1 (HC).

Appeal

This was an appeal by the Palmerston North City Council against a decision of the Environment Court in favour of the respondent, Motor Machinists Ltd.

JW Maasen for the appellant.

B Ax in person for the respondent.

KÓS J. [1] From time to time councils notify proposed changes to their district plans. The public may then make submissions "on" the plan change. By law, if a submission is not "on" the change, the council has no business considering it.

[2] But when is a submission actually "on" a proposed plan change?

[3] In this case the Council notified a proposed plan change. Included was the rezoning of some land along a ring road. Four lots at the bottom of the respondent's street, which runs off the ring road, were among properties to be rezoned. The respondent's land is ten lots away from the ring road. The respondent filed a submission that its land too should be rezoned.

[4] The Council says this submission is not "on" the plan change, because the plan change did not directly affect the respondent's land. An Environment Court Judge disagreed. The Council appeals that decision.

Background

[5] Northwest of the central square in the city of Palmerston North is an area of land of mixed usage. Much is commercial, including pockets of what the public at least would call light industrial use. The further from the Square one travels, the greater the proportion of residential use.

[6] Running west-east, and parallel like the runners of a ladder, are two major streets: Walding and Featherston Streets. Walding Street is part of a ring road around the Square.[1] Then, running at right angles between

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1 Between one and three blocks distant from it. The ring road comprises Walding, Grey, Princess, Ferguson, Pitt and Bourke Streets. See the plan excerpt at [11].

Walding and Featherston Streets, like the rungs of that ladder, are three other relevant streets:

(a) *Taonui Street:* the most easterly of the three. It is wholly commercial in nature. I do not think there is a house to be seen on it.
(b) *Campbell Street:* the most westerly. It is almost wholly residential. There is some commercial and small shop activity at the ends of the street where it joins Walding and Featherston Streets. It is a pleasant leafy street with old villas, a park and angled traffic islands, called "traffic calmers", to slow motorists down.
(c) *Lombard Street:* the rung of the ladder between Taonui and Campbell Streets, and the street with which we are most concerned in this appeal. Messrs Maassen and Ax both asked me to detour, and to drive down Lombard Street on my way back to Wellington. I did so. It has a real mixture of uses. Mr Ax suggested that 40 per cent of the street, despite its largely residential zoning, is industrial or light industrial. That is not my impression. Residential use appeared to me considerably greater than 60 per cent. Many of the houses are in a poor state of repair. There are a number of commercial premises dotted about within it. Not just at the ends of the street, as in Campbell Street.

MML's site

[7] The respondent (MML) owns a parcel of land of some 3,326 m^2. It has street frontages to both Lombard Street and Taonui Street. It is contained in a single title, incorporating five separate allotments. Three are on Taonui Street. Those three lots, like all of Taonui Street, are in the outer business zone (OBZ). They have had that zoning for some years.

[8] The two lots on Lombard Street, numbers 37 and 39 Lombard Street, are presently zoned in the residential zone. Prior to 1991, that land was in the mixed use zone. In 1991 it was rezoned residential as part of a scheme variation. MML did not make submissions on that variation. A new proposed district plan was released for public comment in May 1995. It continued to show most or all of Lombard Street as in the residential zone, including numbers 37 and 39. No submissions were made by MML on that plan either.

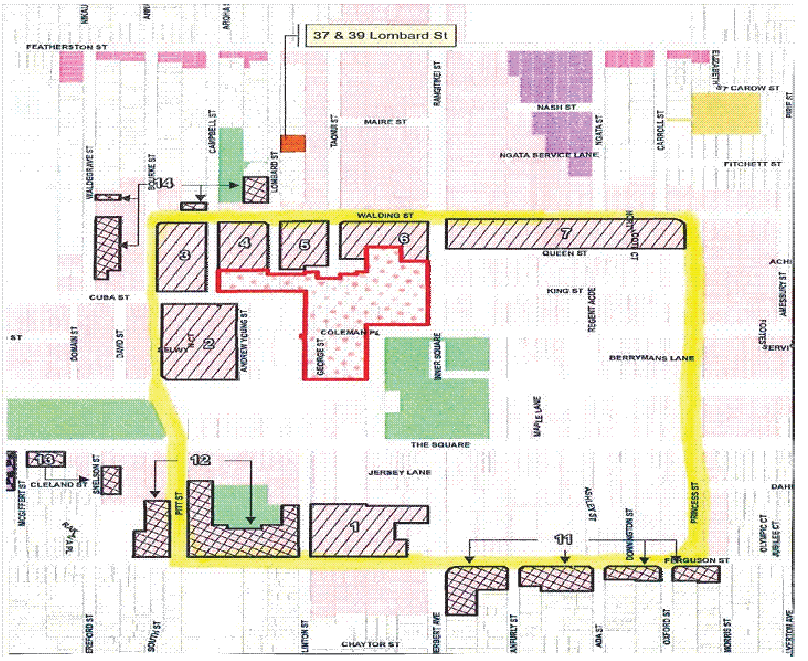
[9] MML operates the five lots as a single site. It uses it for mechanical repairs and the supply of automotive parts. The main entry to the business is on Taonui Street. The Taonui Street factory building stretches back into the Lombard Street lots. The remainder of the Lombard Street lots are occupied by two old houses. The Lombard Street lots are ten lots away from the Walding Street ring road frontage.

Plan change

[10] PPC1 was notified on 23 December 2010. It is an extensive review of the inner business zone (IBZ) and OBZ provisions of the District Plan. It proposes substantial changes to the way in which the two business zones manage the distribution, scale and form of activities. PPC1 provides for a less concentrated form of development in the OBZ, but

does not materially alter the objectives and policies applying to that zone. It also proposes to rezone 7.63 ha of currently residentially zoned land to OBZ. Most of this land is along the ring road.

[11] Shown below is part of the Council's decision document on PPC1, showing some of the areas rezoned in the area adjacent to Lombard Street.



[12] As will be apparent[2] the most substantial changes in the vicinity of Lombard Street are the rezoning of land along Walding Street (part of the ring road) from IBZ to OBZ. But at the bottom of Lombard Street, adjacent to Walding Street, four lots are rezoned from residential to OBZ. That change reflects long standing existing use of those four lots. They form part of an enterprise called Stewart Electrical Limited. Part is a large showroom. The balance is its car park.

MML's submission

[13] On 14 February 2011 MML filed a submission on PPC1. The thrust of the submission was that the two Lombard Street lots should be zoned OBZ as part of PPC1.

[14] The submission referred to the history of the change from mixed use to residential zoning for the Lombard Street lots. It noted that the current zoning did not reflect existing use of the law, and submitted that the entire site should be rezoned to OBZ "to reflect the dominant use

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2 In the plan excerpt above, salmon pink is OBZ; buff is residential; single hatching is proposed transition from IBZ to OBZ; double hatching is proposed transition from residential to OBZ.

of the site". It was said that the requested rezoning "will allow for greater certainty for expansion of the existing use of the site, and will further protect the exiting commercial use of the site". The submission noted that there were "other remnant industrial and commercial uses in Lombard Street" and that the zoning change will be in keeping with what already occurs on the site and on other sites within the vicinity.

[15] No detailed environmental evaluation of the implications of the change for other properties in the vicinity was provided with the submission.

Council's decision

[16] There were meetings between the Council and MML in April 2011. A number of alternative proposals were considered. Some came from MML, and some from the Council. The Council was prepared to contemplate the back half of the Lombard Street properties (where the factory building is) eventually being rezoned OBZ. But its primary position was there was no jurisdiction to rezone any part of the two Lombard Street properties to OBZ under PPC1.

[17] Ultimately commissioners made a decision rejecting MML's submission. MML then appealed to the Environment Court.

Decision appealed from

[18] A decision on the appeal was given by the Environment Court Judge sitting alone, under s 279 of the Resource Management Act 1991 (Act). Having set out the background, the Judge described the issue as follows:

> The issue before the Court is whether the submission ... was on [PPC1], when [PPC1] itself did not propose any change to the zoning of the residential land.

[19] The issue arises in that way because the right to make a submission on a plan change is conferred by sch 1, cl 6(1): persons described in the clause "may make a submission on it". If the submission is not "on" the plan change, the council has no jurisdiction to consider it.

[20] The Judge set out the leading authority, the High Court decision of William Young J in *Clearwater Resort Ltd v Christchurch City Council*.[3] He also had regard to what might be termed a gloss placed on that decision by the Environment Court in *Natural Best New Zealand Ltd v Queenstown Lakes District Council*.[4] As a result of these decisions the Judge considered he had to address two matters:

(a) the extent to which MML's submission addressed the subject matter of PPC1; and
(b) issues of procedural fairness.

[21] As to the first of those, the Judge noted that PPC1 was "quite wide in scope". The areas to be rezoned were "spread over a comparatively wide area". The land being rezoned was "either contiguous

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3 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

4 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

with, or in close proximity to, [OBZ] land". The Council had said that PPC1 was in part directed at the question of what residential pockets either (1) adjacent to the OBZ, or (2) by virtue of existing use, or (3) as a result of changes to the transportation network, warranted rezoning to OBZ.

[22] On that basis, the Judge noted, the Lombard Street lots met two of those conditions: adjacency and existing use. The Judge considered that a submission seeking the addition of 1619 m^2 to the 7.63 ha proposed to be rezoned was not out of scale with the plan change proposal and would not make PPC1 "something distinctly different" to what it was intended to be. It followed that those considerations, in combination with adjacency and existing use, meant that the MML submission "must be *on* the plan change".

[23] The Judge then turned to the question of procedural fairness. The Judge noted that the process contained in sch 1 for notification of submissions on plan changes is considerably restricted in extent. A submitter was not required to serve a copy of the submission on persons who might be affected. Instead it simply lodged a copy with the local authority. Nor did cl 7 of sch 1 require the local authority to notify persons who might be affected by submissions. Instead just a public notice had to be given advising the availability of a summary of submissions, the place where that summary could be inspected, and the requirement that within 10 working days after public notice, certain persons might make further submissions. As the Judge then noted:

> Accordingly, unless people take particular interest in the public notices contained in the newspapers, there is a real possibility they may not be aware of plan changes or of submissions on those plan changes which potentially affect them.

[24] The Judge noted that it was against that background that William Young J made the observations he did in the *Clearwater* decision. Because there is limited scope for public participation, "it is necessary to adopt a cautious approach in determining whether or not a submission is on a plan change". William Young J had used the expression "coming out of left field" in *Clearwater*. The Judge below in this case saw that as indicating a submission seeking a remedy or change:

> ... which is not readily foreseeable, is unusual in character or potentially leads to the plan change being something different than what was intended.

[25] But the Judge did not consider that the relief sought by MML in this case could be regarded as falling within any of those descriptions. Rather, the Judge found it "entirely predictable" that MML might seek relief of the sort identified in its submission. The Judge considered that sch 1 "requires a proactive approach on the part of those persons who might be affected by submissions to a plan change". They must make inquiry "on their own account" once public notice is given. There was no procedural unfairness in considering MML's submission.

[26] The Judge therefore found that MML had filed a submission that was "on" PPC1. Accordingly there was a valid appeal before the Court.

[27] From that conclusion the Council appeals.

Appeal

The Council's argument

[28] The Council's essential argument is that the Judge failed to consider that PPC1 did not change any provisions of the District Plan *as it applied to the site* (or indeed any surrounding land) at all, thereby leaving the status quo unchanged. That is said to be a pre-eminent, if not decisive, consideration. The subject matter of the plan change was to be found within the four corners of the plan change and the plan provisions it changes, including objectives, policies, rules and methods such as zoning. The Council did not, under the plan change, change any plan provisions relating to MML's property. The land (representing a natural resource) was therefore not a resource that could sensibly be described as part of the subject matter of the plan change. MML's submission was not "on" PPC1, because PPC1 did not alter the status quo in the plan as it applied to the site. That is said to be the only legitimate result applying the High Court decision in *Clearwater*.

[29] The decision appealed from was said also by the Council to inadequately assess the potential prejudice to other landowners and affected persons. For the Council, Mr Maassen submitted that it was inconceivable, given that public participation and procedural fairness are essential dimensions of environmental justice and the Act, that land not the subject of the plan change could be rezoned to facilitate an entirely different land use by submission using Form 5. Moreover, the Judge appeared to assume that an affected person (such as a neighbour) could make a further submission under sch 1, cl 8, responding to MML's submission. But that was not correct.

MML's argument

[30] In response, Mr Ax (who appeared in person, and is an engineer rather than a lawyer) argued that I should adopt the reasoning of the Environment Court Judge. He submitted that the policy behind PPC1 and its purpose were both relevant, and the question was one of scale and degree. Mr Ax submitted that extending the OBZ to incorporate MML's property would be in keeping with the intention of PPC1 and the assessment of whether existing residential land would be better incorporated in that OBZ. His property was said to warrant consideration having regard to its proximity to the existing OBZ, and the existing use of a large portion of the Lombard Street lots. Given the character and use of the properties adjacent to MML's land on Lombard Street (old houses used as rental properties, a plumber's warehouse and an industrial site across the road used by an electronic company) and the rest of Lombard Street being a mixture of industrial and low quality residential use, there was limited prejudice and the submission could not be seen as "coming out of left field". As Mr Ax put it:

> Given the nature of the surrounding land uses I would have ... been surprised if there were parties that were either (a) caught unawares or (b) upset at what I see as a natural extension of the existing use of my property.

Statutory framework

[31] Plan changes are amendments to a district plan. Changes to district plans are governed by s 73 of the Act. Changes must, by s 73(1A), be effected in accordance with sch 1.

[32] Section 74 sets out the matters to be considered by a territorial authority in the preparation of any district plan change. Section 74(1) provides:

> A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, a direction given under section 25A(2), its duty under section 32, and any regulations.

[33] Seven critical components in the plan change process now deserve attention.

[34] First, there is the s 32 report referred to indirectly in s 74(1). To the extent changes to rules or methods in a plan are proposed, that report must evaluate comparative efficiency and effectiveness, and whether what is proposed is the most appropriate option.[5] The evaluation must take into account the benefits and costs of available options, and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter.[6] This introduces a precautionary approach to the analysis. The s 32 report must then be available for public inspection at the same time as the proposed plan change is publicly notified.[7]

[35] Second, there is the consultation required by sch 1, cl 3. Consultation with affected landowners is not required, but it is permitted.[8]

[36] Third, there is notification of the plan change. Here the council must comply with sch 1, cl 5. Clause 5(1A) provides:

> A territorial authority shall, not earlier than 60 working days before public notification or later than 10 working days after public notification was planned, either —
>
> (a) send a copy of the public notice, and such further information as a territorial authority thinks fit relating to the proposed plan, to every ratepayer for the area where that person, in the territorial authority's opinion, is likely to be directly affected by the proposed plan; or
>
> (b) include the public notice, and such further information as the territorial authority thinks fit relating to the proposed plan, and any publication or circular which is issued or sent to all residential properties and Post Office box addresses located in the affected area – and shall send a copy of the public notice to any other person who in the territorial authority's opinion, is directed affected by the plan.

Clause 5 is intended to provide assurance that a person is notified of any change to a district plan zoning on land adjacent to them. Typically territorial authorities bring such a significant change directly to the attention of the adjoining land owner. The reference to notification to persons "directly affected" should be noted.

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5 Resource Management Act 1991, s 32(3)(b). All statutory references are to the Act unless stated otherwise.

6 Section 32(4).

7 Section 32(6).

8 Schedule 1, cl 3(2).

[37] Fourth, there is the right of submission. That is found in sch 1, cl 6. Any person, whether or not notified, may submit. That is subject to an exception in the case of trade competitors, a response to difficulties in days gone by with new service station and supermarket developments. But even trade competitors may submit if, again, "directly affected". At least 20 working days after public notification is given for submission.[9] Clause 6 provides:

> **Making of submissions**(1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.
>
> (2) The local authority in its own area may make a submission.
>
> (3) Any other person may make a submission but, if the person could gain an advantage in trade competition through the submission, the person's right to make a submission is limited by subclause (4).
>
> (4) A person who could gain an advantage in trade competition through the submission may make a submission only if directly affected by an effect of the proposed policy statement or plan that —
>
> (a) adversely affects the environment; and
>
> (b) does not relate to trade competition or the effects of trade competition.
>
> (5) A submission must be in the prescribed form.

[38] The expression "proposed plan" includes a proposed plan change.[10] The "prescribed form" is Form 5. Significantly, and so far as relevant, it requires the submitter to complete the following details:

> The specific provisions of the proposal that my submission relates to are:
>
> [*give details*].
>
> My submission is:
>
> [*include —*
>
> - *whether you support or oppose the specific provisions or wish to have them amended; and*
> - *reasons for your views*].
>
> I seek the following decision from the local authority:
>
> [*give precise details*].
>
> I wish (*or* do not wish) to be heard in support of my submission.

It will be seen from that that the focus of submission must be on "specific provisions of the proposal". The form says that. Twice.

[39] Fifthly, there is notification of a summary of submissions. This is in far narrower terms – as to scope, content and timing – than notification of the original plan change itself. Importantly, there is no requirement that the territorial authority notify individual landowners directly affected by a change sought in a submission. Clause 7 provides:

> **Public notice of submissions**(1) A local authority must give public notice of —

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9 Schedule 1, cl 5(3)(b).
10 Section 43AAC(1)(a).

(a) the availability of a summary of decisions requested by persons making submissions on a proposed policy statement or plan; and
(b) where the summary of decisions and the submissions can be inspected; and
(c) the fact that no later than 10 working days after the day on which this public notice is given, the persons described in clause 8(1) may make a further submission on the proposed policy statement or plan; and
(d) the date of the last day for making further submissions (as calculated under paragraph (c)); and
(e) the limitations on the content and form of a further submission.

(2) The local authority must serve a copy of the public notice on all persons who made submissions.

[40] Sixth, there is a limited right (in cl 8) to make further submissions. Clause 8 was amended in 2009 and now reads:

> **Certain persons may make further submissions**(1) The following persons may make a further submission, in the prescribed form, on a proposed policy statement or plan to the relevant local authority:
> (a) any person representing a relevant aspect of the public interest; and
> (b) any person that has an interest in the proposed policy statement or plan greater than the interest that the general public has; and
> (c) the local authority itself.
>
> (2) A further submission must be limited to a matter in support of or in opposition to the relevant submission made under cl 6.

[41] Before 2009 any person could make a further submission, although only in support of or opposition to existing submissions. After 2009 standing to make a further submission was restricted in the way we see above. The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 sought to restrict the scope for further submission, in part due to the number of such submissions routinely lodged, and the tendency for them to duplicate original submissions.

[42] In this case the Judge contemplated that persons affected by a submission proposing a significant rezoning not provided for in the notified proposed plan change might have an effective opportunity to respond.[11] It is not altogether clear that that is so. An affected neighbour would not fall within cl 8(1)(a). For a person to fall within the qualifying class in cl 8(1)(b), an interest "in the proposed policy statement or plan" (including the plan change) greater than that of the general public is required. Mr Maassen submitted that a neighbour affected by an additional zoning change proposed in a submission rather than the plan change itself would not have such an interest. His or her concern might be elevated by the radical subject matter of the submission, but that is not what cl 8(1)(b) provides for. On the face of the provision, that might be so. But I agree here with the Judge below that that was not Parliament's intention. That is clear from the select committee report proposing the amended wording which now forms cl 8. It is worth setting out the relevant part of that report in full:

> Clause 148(8) would replace this process by allowing councils discretion to seek the views of potentially affected parties.

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11 See at [25] above.

> Many submitters opposed the proposal on the grounds that it would breach the principle of natural justice. They argued that people have a right to respond to points raised in submissions when they relate to their land or may have implications for them. They also regard the further submission process as important for raising new issues arising from submissions, and providing an opportunity to participate in any subsequent hearing or appeal proceedings. We noted a common concern that submitters could request changes that were subsequently incorporated into the final plan provisions without being subject to a further submissions process, and that such changes could significantly affect people without providing them an opportunity to respond.
>
> Some submitters were concerned that the onus would now lie with council staff to identify potentially affected parties. Some local government submitters were also concerned that the discretionary process might incur a risk of liability and expose councils to more litigation. A number of organisations and iwi expressed concern that groups with limited resources would be excluded from participation if they missed the first round of submissions.
>
> We consider that the issues of natural justice and fairness to parties who might be adversely affected by proposed plan provisions, together with the potential increase in local authorities' workloads as a result of these provisions, warrant the development of an alternative to the current proposal.
>
> We recommend amending clause 148(8) to require local authorities to prepare, and advertise the availability of, a summary of outcomes sought by submitters, and to allow anyone with an interest that is greater than that of the public generally, or representing a relevant aspect of the public interest, or the local authority itself, to lodge a further submission within 10 working days.

[43] It is, I think, perfectly clear from that passage that what was intended by cl 8 was to ensure that persons who are directly affected by submissions proposing further changes to the proposed plan change may lodge a further submission. The difficulty, then, is not with their right to lodge that further submission. Rather it is with their being notified of the fact that such a submission has been made. Unlike the process that applies in the case of the original proposed plan change, persons directly affected by additional changes proposed in submissions do not receive direct notification. There is no equivalent of cl 5(1A). Rather, they are dependent on seeing public notification that a summary of submissions is available, translating that awareness into reading the summary, apprehending from that summary that it actually affects them, and then lodging a further submission. And all within the 10-day timeframe provided for in cl 7(1)(c). Persons "directly affected" in this second round may have taken no interest in the first round, not being directly affected by the first. It is perhaps unfortunate that Parliament did not see fit to provide for a cl 5(1A) equivalent in cl 8. The result of all this, in my view (and as I will explain), is to reinforce the need for caution in monitoring the jurisdictional gateway for further submissions.

[44] Seventhly, finally and for completeness, I record that the Act also enables a private plan change to be sought. Schedule 1, pt 2, cl 22, states:

> **Form of request**

> (1) A request made under clause 21 shall be made to the appropriate local authority in writing and shall explain the purpose of, and reasons for, the proposed plan or change to a policy statement or plan [and contain an evaluation under section 32 for any objectives, policies, rules, or other methods proposed].
> (2) Where environmental effects are anticipated, the request shall describe those effects, taking into account the provisions of Schedule 4, in such detail as corresponds with the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change, policy statement, or plan.

So a s 32 evaluation and report must be undertaken in such a case.

Issues

[45] The issues for consideration in this case are:

(a) Issue 1: When, generally, is a submission "on" a plan change?
(b) Issue 2: Was MML's submission "on" PPC1?

Issue 1: When, generally, is a submission "on" a plan change?

[46] The leading authority on this question is a decision of William Young J in the High Court in *Clearwater Resort Ltd v Christchurch City Council*.[12] A second High Court authority, the decision of Ronald Young J in *Option 5 Inc v Marlborough District Council*,[13] follows *Clearwater*. *Clearwater* drew directly upon an earlier Environment Court decision, *Halswater Holdings Ltd v Selwyn District Council*.[14] A subsequent Environment Court decision, *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*[15] purported to gloss *Clearwater*. That gloss was disregarded in *Option 5*. I have considerable reservations about the authority for, and efficacy of, the *Naturally Best* gloss.

[47] Before reviewing these four authorities, I note that they all predated the amendments made in the Resource Management (Simplifying and Streamlining) Amendment Act 2009. As we have seen, that had the effect of restricting the persons who could respond (by further submission) to submissions on a plan change, although not so far as to exclude persons directly affected by a submission. But it then did little to alleviate the risk that such persons would be unaware of that development.

Clearwater

[48] In *Clearwater* the Christchurch City Council had set out rules restricting development in the airport area by reference to a series of noise contours. The council then notified variation 52. That variation did not alter the noise contours in the proposed plan. Nor did it change the rules relating to subdivisions and dwellings in the rural zone. But it did introduce a policy discouraging urban residential development within the 50 dBA Ldn noise contour around the airport. *Clearwater's* submission

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12 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.
13 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).
14 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
15 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch 49/2004, 23 April 2004.

sought to vary the physical location of the noise boundary. It sought to challenge the accuracy of the lines drawn on the planning maps identifying three of the relevant noise contours. Both the council and the airport company demurred. They did not wish to engage in a "lengthy and technical hearing as to whether the contour lines are accurately depicted on the planning maps". The result was an invitation to the Environment Court to determine, as a preliminary issue, whether *Clearwater* could raise its contention that the contour lines were inaccurately drawn. The Environment Court determined that *Clearwater* could raise, to a limited extent, a challenge to the accuracy of the planning maps. The airport company and the regional council appealed.

[49] William Young J noted that the question of whether a submission was "on" a variation posed a question of "apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case".[16] He identified three possible general approaches:[17]

(a) a literal approach, "in terms of which anything which is expressed in the variation is open for challenge";
(b) an approach in which "on" is treated as meaning "in connection with"; and
(c) an approach "which focuses on the extent to which the variation alters the proposed plan".

[50] William Young J rejected the first two alternatives, and adopted the third.

[51] The first, literal construction had been favoured by the commissioner (from whom the Environment Court appeal had been brought). The commissioner had thought that a submission might be made in respect of "anything included in the text as notified", even if the submission relates to something that the variation does not propose to alter. But it would not be open to submit to seek alterations of parts of the plan not forming part of the variation notified. William Young J however thought that left too much to the idiosyncrasies of the draftsman of the variation. Such an approach might unduly expand the scope of challenge, or it might be too restrictive, depending on the specific wording.

[52] The second construction represented so broad an approach that "it would be difficult for a local authority to introduce a variation of a proposed plan without necessarily opening up for relitigation aspects of the plan which had previously been [past] the point of challenge".[18] The second approach was, thus, rejected also.

[53] In adopting the third approach William Young J applied a bipartite test.

[54] First, the submission could only fairly be regarded as "on" a variation "if it is addressed to the extent to which the variation changes the pre-existing status quo". That seemed to the Judge to be consistent with

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16 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [56].
17 At [59].
18 At [65].

the scheme of the Act, "which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans".

[55] Second, "if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected", that will be a "powerful consideration" against finding that the submission was truly "on" the variation. It was important that "all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate".[19] If the effect of the submission "came out of left field" there might be little or no real scope for public participation. In another part of [69] of his judgment William Young J described that as "a submission proposing something completely novel". Such a consequence was a strong factor against finding the submission to be on the variation.

[56] In the result in *Clearwater* the appellant accepted that the contour lines served the same function under the variation as they did in the pre-variation proposed plan. It followed that the challenge to their location was not "on" variation 52.[20]

[57] Mr Maassen submitted that the *Clearwater* test was not difficult to apply. For the reasons that follow I am inclined to agree. But it helps to look at other authorities consistent with *Clearwater*, involving those which William Young J drew upon.

Halswater

[58] William Young J drew directly upon an earlier Environment Court decision in *Halswater Holdings Ltd v Selwyn District Council*.[21] In that case the council had notified a plan change lowering minimum lot sizes in a "green belt" sub-zone, and changing the rules as to activity status depending on lot size. Submissions on that plan change were then notified by the appellants which sought:

(a) to further lower the minimum sub-division lot size; and
(b) seeking "spot zoning" to be applied to their properties, changes from one zoning status to another.

[59] The plan change had not sought to change any zonings at all. It simply proposed to change the rules as to minimum lot sizes and the building of houses within existing zones (or the "green belt" part of the zone).

[60] The Environment Court decision contains a careful and compelling analysis of the then more concessionary statutory scheme at [26]–[44]. Much of what is said there remains relevant today. It noted among other things the abbreviated time for filing of submissions on plan changes, indicating that they were contemplated as "shorter and easier to digest and respond to than a full policy statement or plan".[22]

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19 At [69].
20 At [81]–[82].
21 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
22 At [38].

[61] The Court noted that the statutory scheme suggested that:[23]

> ... if a person wanted a remedy that goes much beyond what is suggested in the plan change so that, for example, a submission can no longer be said to be "on" the plan change, then they may have to go about changing the plan in another way.

Either a private plan change, or by encouraging the council itself to promote a further variation to the plan change. As the Court noted, those procedures then had the advantage that the notification process "goes back to the beginning". The Court also noted that if relief sought by a submission went too far beyond the four corners of a plan change, the council may not have turned its mind to the effectiveness and efficiency of what was sought in the submission, as required by s 32(1)(c)(ii) of the Act. The Court went on to say:[24]

> It follows that a crucial question for a Council to decide, when there is a very wide submission suggesting something radically different from a proposed plan as notified, is whether it should promote a variation so there is time to have a s 32 analysis carried out and an opportunity for other interested persons to make primary submissions under clause 6.

[62] The Court noted in *Halswater* the risk of persons affected not apprehending the significance of submissions on a plan change (as opposed to the original plan change itself). As the Court noted, there are three layers of protection under cl 5 notification of a plan change that do not exist in relation to notification of a summary of submissions:[25]

> These are first that notice of the plan change is specifically given to every person who is, in the opinion of the Council, affected by the plan change, which in itself alerts a person that they may need to respond; secondly clause 5 allows for extra information to be sent, which again has the purpose of alerting the persons affected as to whether or not they need to respond to the plan change. Thirdly notice is given of the plan change, not merely of the availability of a summary of submissions. Clause 7 has none of those safeguards.

[63] Ultimately, the Environment Court in *Halswater* said:[26]

> A submissions on a plan change cannot seek a rezoning (allowing different activities and/or effects) if a rezoning is not contemplated by a plan change.

[64] In *Halswater* there was no suggestion in the plan change that there was to be rezoning of any land. As a result members of the public might have decided they did not need to become involved in the plan change process, because of its relatively narrow effects. As a result, they might not have checked the summary of submissions or gone to the council to check the summary of submissions. Further, the rezoning proposal sought by the appellants had no s 32 analysis.

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23 At [41].
24 At [42].
25 At [44].
26 At [51].

[65] It followed in that case that the appellant's proposal for "spot rezoning" was not "on" the plan change. The remedy available to the appellants in that case was to persuade the council to promote a further variation of the plan change, or to seek a private plan change of their own.

Option 5

[66] *Clearwater* was followed in a further High Court decision, *Option 5 Inc v Marlborough District Council*.[27] In that case the council had proposed a variation (variation 42) defining the scope of a central business zone (CBZ). Variation 42 as notified had not rezoned any land, apart from some council-owned vacant land. Some people called McKendry made a submission to the council seeking addition of further land to the CBZ. The council agreed with that submission and variation 42 was amended. A challenge to that decision was taken to the Environment Court. A jurisdictional issue arose as to whether the McKendry submission had ever been "on" variation 42. The Environment Court said that it had not. It should not have been considered by the council.

[67] On appeal Ronald Young J did not accept the appellants' submission that because variation 42 involved some CBZ rezoning, any submission advocating further extension of the CBZ would be "on" that variation. That he regarded as "too crude". As he put it:[28]

> Simply because there may be an adjustment to a zone boundary in a proposed variation does not mean any submission that advocates expansion of a zone must be on the variation. So much will depend on the particular circumstances of the case. In considering the particular circumstances it will be highly relevant to consider whether, as William Young J identified in *Clearwater*, that if the result of accepting a submission as on (a variation) would be to significantly change a proposed plan without a real opportunity for participation by those affected then that would be a powerful argument against the submission as being "on".

[68] In that case the amended variation 42 would change at least 50 residential properties to CBZ zoning. That would occur "without any direct notification to the property owners and therefore without any real chance to participate in the process by which their zoning will be changed". The only notification to those property owners was through public notification in the media that they could obtain summaries of submissions. Nothing in that indicated to those 50 house owners that the zoning of their property might change.

Naturally Best

[69] Against the background of those three decisions, which are consistent in principle and outcome, I come to consider the later decision of the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*.[29]

[70] That decision purports to depart from the principles laid down by William Young J in *Clearwater*. It does so by reference to another

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27 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).
28 At [34].
29 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

High Court decision in *Countdown Properties Ltd v Dunedin City Council*.[30] However that decision does not deal with the jurisdictional question of whether a submission falls within sch 1, cl 6(1). The Court in *Naturally Best* itself noted that the question in that case was a different one.[31] *Countdown* is not authority for the proposition advanced by the Environment Court in *Naturally Best* that a submission "may seek fair and reasonable extensions to a notified variation or plan change". Such an approach was not warranted by the decision in *Clearwater*, let alone by that in *Countdown*.

[71] The effect of the decision in *Naturally Best* is to depart from the approach approved by William Young J towards the second of the three constructions considered by him, but which he expressly disapproved. In other words, the *Naturally Best* approach is to treat "on" as meaning "in connection with", but subject to vague and unhelpful limitations based on "fairness", "reasonableness" and "proportion". That approach is not satisfactory.

[72] Although in *Naturally Best* the Environment Court suggests that the test in *Clearwater* is "rather passive and limited", whatever that might mean, and that it "conflates two points,"[32] I find no warrant for that assessment in either *Clearwater* or *Naturally Best* itself.

[73] It follows that the approach taken by the Environment Court in *Naturally Best* of endorsing "fair and reasonable extensions" to a plan change is not correct. The correct position remains as stated by this Court in *Clearwater*, confirmed by this Court in *Option 5*.

Discussion

[74] It is a truth almost universally appreciated that the purpose of the Act is to promote the sustainable management of natural and physical resources.[33] Resources may be used in diverse ways, but that should occur at a rate and in a manner that enables people and communities to provide for their social, economic and cultural wellbeing while meeting the requirements of s 5(2). These include avoiding, remedying or mitigating the adverse effects of activities on the environment. The Act is an attempt to provide an integrated system of environmental regulation.[34] That integration is apparent in s 75, for instance, setting out the hierarchy of elements of a district plan and its relationship with national and regional policy statements.

[75] Inherent in such sustainable management of natural and physical resources are two fundamentals.

[76] The first is an appropriately thorough analysis of the effects of a proposed plan (whichever element within it is involved) or activity. In the context of a plan change, that is the s 32 evaluation and report: a comparative evaluation of efficiency, effectiveness and appropriateness of options. Persons affected, especially those "directly affected", by the

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30 *Countdown Properties Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
31 At [17].
32 At [15].
33 Section 5(1).
34 Nolan (Ed) *Environmental and Resource Management Law* (4th ed, Lexis Nexis, Wellington 2011) at 96.

proposed change are entitled to have resort to that report to see the justification offered for the change having regard to all feasible alternatives. Further variations advanced by way of submission, to be "on" the proposed change, should be adequately assessed already in that evaluation. If not, then they are unlikely to meet the first limb in *Clearwater.*

[77] The second is robust, notified and informed public participation in the evaluative and determinative process. As this Court said in *General Distributors Ltd v Waipa District Council*:[35]

> The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area.

A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, under cls 6 and 8, thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially under cl 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.

[78] Where a land owner is dissatisfied with a regime governing their land, they have three principal choices. First, they may seek a resource consent for business activity on the site regardless of existing zoning. Such application will be accompanied by an assessment of environment effects and directly affected parties should be notified. Secondly, they may seek to persuade their council to promulgate a plan change. Thirdly, they may themselves seek a private plan change under sch 1, pt 2. Each of the second and third options requires a s 32 analysis. Directly affected parties will then be notified of the application for a plan change. All three options provide procedural safeguards for directly affected people in the form of notification, and a substantive assessment of the effects or merits of the proposal.

[79] In contrast, the sch 1 submission process lacks those procedural and substantial safeguards. Form 5 is a very limited document. I agree with Mr Maassen that it is not designed as a vehicle to make significant changes to the management regime applying to a resource not already addressed by the plan change. That requires, in my view, a very careful approach to be taken to the extent to which a submission may be said to satisfy both limbs 1 and 2 of the *Clearwater* test. Those limbs properly reflect the limitations of procedural notification and substantive analysis required by s 5, but only thinly spread in cl 8. Permitting the public to enlarge significantly the subject matter and resources to be addressed through the sch 1 plan change process beyond the original

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35 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [54].

ambit of the notified proposal is not an efficient way of delivering plan changes. It transfers the cost of assessing the merits of the new zoning of private land back to the community, particularly where shortcutting results in bad decision making.

[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in *Clearwater* serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.

[81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change. That is one of the lessons from the *Halswater* decision. Yet the *Clearwater* approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision makers under sch 1, cl 10(2). Logically they may also be the subject of submission.

[82] But that is subject then to the second limb of the *Clearwater* test: whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process. As I have said already, the 2009 changes to sch 1, cl 8, do not avert that risk. While further submissions by such persons are permitted, no equivalent of cl 5(1A) requires their notification. To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources. Given the other options available, outlined in [78], a precautionary approach to jurisdiction imposes no unreasonable hardship.

[83] Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed in the existing s 32 analysis. Nor if the submitter takes the initiative and ensures the direct notification of those directly affected by further changes submitted.

Issue 2: Was MML's submissions "on" PPC1?

[84] In light of the foregoing discussion I can be brief on Issue 2.

[85] In terms of the first limb of the *Clearwater* test, the submission made by MML is not in my view addressed to PPC1. PPC1 proposes limited zoning changes. All but a handful are located on the ring road, as

the plan excerpt in [11] demonstrates. The handful that are not are to be found on main roads: Broadway, Main and Church Streets. More significantly, PPC1 was the subject of an extensive s 32 report. It is over 650 pages in length. It includes site-specific analysis of the proposed rezoning, urban design, traffic effects, heritage values and valuation impacts. The principal report includes the following:

> 2.50 PPC1 proposes to rezone a substantial area of residentially zoned land fronting the Ring Road to OBZ. Characteristics of the area such as its close proximity to the city centre; site frontage to key arterial roads; the relatively old age of residential building stock and the on-going transition to commercial use suggest there is merit in rezoning these sites.
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> ...
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> 5.8 **Summary Block Analysis** – Blocks 9 to 14 are characterised by sites that have good frontage to arterial roads, exhibit little pedestrian traffic and have OBZ sites surrounding the block. These blocks are predominately made up of older residential dwellings (with a scattering of good quality residences) and on going transition to commercial use. Existing commercial use includes; motor lodges; large format retail; automotive sales and service; light industrial; office; professional and community services. In many instances, the rezoning of blocks 9 to 14 represents a squaring off of the surrounding OBZ. Blocks 10, 11, 12 and 13 are transitioning in use from residential to commercial activity. Some blocks to a large degree than others. In many instances, the market has already anticipated a change in zoning within these blocks. The positioning of developer and long term investor interests has already resulted in higher residential land values within these blocks. Modern commercial premises have already been developed in blocks 10, 11, 12 and 13.
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> 5.9 Rezoning Residential Zone sites fronting the Ring Road will rationalise the number of access crossings and will enhance the function of the adjacent road network, while the visual exposure for sites fronting key arterial roads is a substantial commercial benefit for market operators. The location of these blocks in close proximity to the Inner and Outer Business Zones; frontage to key arterial roads; the relatively old age of the existing residential building stock; the ongoing transition to commercial use; the squaring off of existing OBZ blocks; and the anticipation of the market are all attributes that suggest there is merit in rezoning blocks 9 to 14 to OBZ.

[86] The extension of the OBZ on a spot-zoning basis into an isolated enclave within Lombard Street would reasonably require like analysis to meet the expectations engendered by s 5. Such an enclave is not within the ambit of the existing plan change. It involves more than an incidental or consequential extension of the rezoning proposed in PPC1. Any decision to commence rezoning of the middle parts of Lombard Street, thereby potentially initiating the gradual transition of Lombard Street by instalment towards similar land use to that found in Taonui Street, requires coherent long term analysis, rather than opportunistic insertion by submission.

[87] There is, as I say, no hardship in approaching the matter in this way. Nothing in this precludes the landowner for adopting one of the three

options identified in [78]. But in that event, the community has the benefit of proper analysis, and proper notification.

[88] In terms of the second limb of *Clearwater*, I note Mr Ax's confident expression of views set out at [30] above. However I note also the disconnection from the primary focus of PPC1 in the proposed addition of two lots in the middle of Lombard Street. And I note the lack of formal notification of adjacent landowners. Their participatory rights are then dependent on seeing the summary of submissions, apprehending the significance for their land of the summary of MML's submission, and lodging a further submission within the 10-day time frame prescribed.

[89] That leaves me with a real concern that persons affected by this proposed additional rezoning would have been left out in the cold. Given the manner in which PPC1 has been promulgated, and its focus on main road rezoning, the inclusion of a rezoning of two isolated lots in a side street can indeed be said to "come from left field".

Conclusion

[90] MML's submission was not "on" PPC1. In reaching a different view from the experienced Environment Court Judge, I express no criticism. The decision below applied the *Naturally Best* gloss, which I have held to be an erroneous relaxation of principles correctly stated in *Clearwater.*

Summary

[91] To sum up:

(a) This judgment endorses the bipartite approach taken by William Young J in *Clearwater Christchurch City Council*[36] in analysing whether a submission made under sch 1, cl 6(1) of the Act is "on" a proposed plan change. That approach requires analysis as to whether, first, the submission addresses the change to the status quo advanced by the proposed plan change and, secondly, there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

(b) This judgment rejects the more liberal gloss placed on that decision by the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council,*[37] inconsistent with the earlier approach of the Environment Court in *Halswater Holdings Ltd v Selwyn District Council*[38] and inconsistent with the decisions of this Court in *Clearwater* and *Option 5 Inc v Marlborough District Council*.[39]

(c) A precautionary approach is required to receipt of submissions proposing more than incidental or consequential further changes to a notified proposed plan change. Robust, sustainable

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36 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

37 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

38 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).

39 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).

management of natural and physical resources requires notification of the s 32 analysis of the comparative merits of a proposed plan change to persons directly affected by those proposals. There is a real risk that further submissions of the kind just described will be inconsistent with that principle, either because they are unaccompanied by the s 32 analysis that accompanies a proposed plan change (whether public or private) or because persons directly affected are, in the absence of an obligation that they be notified, simply unaware of the further changes proposed in the submission. Such persons are entitled to make a further submission, but there is no requirement that they be notified of the changes that would affect them.

(d) The first limb of the *Clearwater* test requires that the submission address the alteration to the status quo entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change, unless the change is merely incidental or consequential.

(e) The second limb of the *Clearwater* test asks whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.

(f) Neither limb of the *Clearwater* test was passed by the MML submission.

(g) Where a submission does not meet each limb of the *Clearwater* test, the submitter has other options: to submit an application for a resource consent, to seek a further public plan change, or to seek a private plan change under sch 1, pt 2.

Result

[92] The appeal is allowed.

[93] The Council lacked jurisdiction to consider the submission lodged by MML, which is not one "on" PPC1.

[94] If costs are in issue, parties may file brief memoranda.

Reported by: Carolyn Heaton, *Barrister and Solicitor*

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

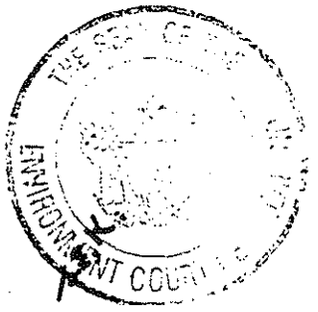
Mr S Ryan for Quay Property Management Limited and Westshore Motor Camp Partnership

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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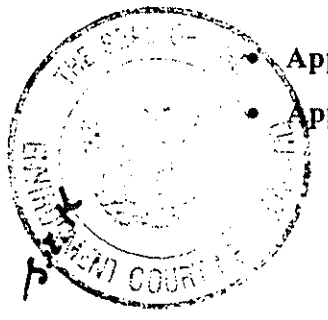

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Introduction

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.

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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.

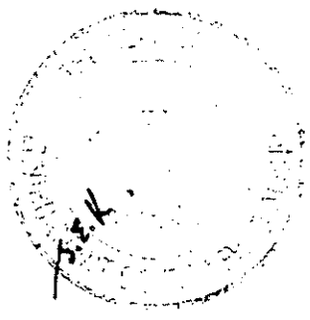
360. The matter of a friction course surface on the section of the motorway adjacent to the camp site as a mitigation measure to further reduce traffic noise levels was examined in Mr Hunt's evidence but Mr Hegley's comment on this was that the cost was beyond what the project could economically justify 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:

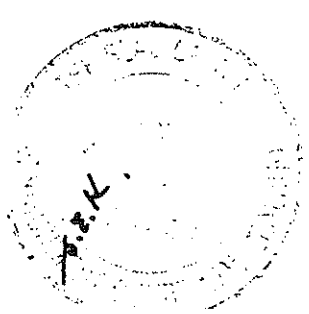
Site 1 – 55.8 dBA

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.

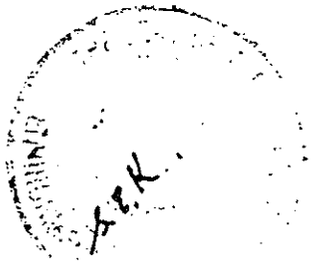
487. Mr Barker also pointed out that in terms of location the motorcamp is within 700 metres walk of Westshore Beach and Surf Lifesaving Club. There is a service station and hotel almost opposite on SH2 and neighbourhood shopping facilities within 500 metres.

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.

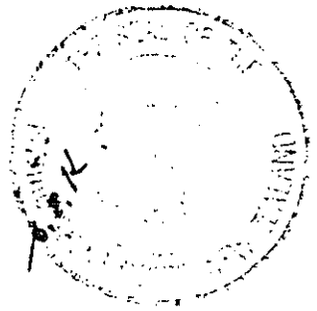
518. Messrs Remmerswaal and Milne and Barker all made the point that the Westshore Motorcamp is an older style camp and trades to that market. Both Messrs Remmerswaal and Mr Barker agreed that nevertheless a number of the old buildings need upgrading with Mr Remmerswaal stating that it would be difficult 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.

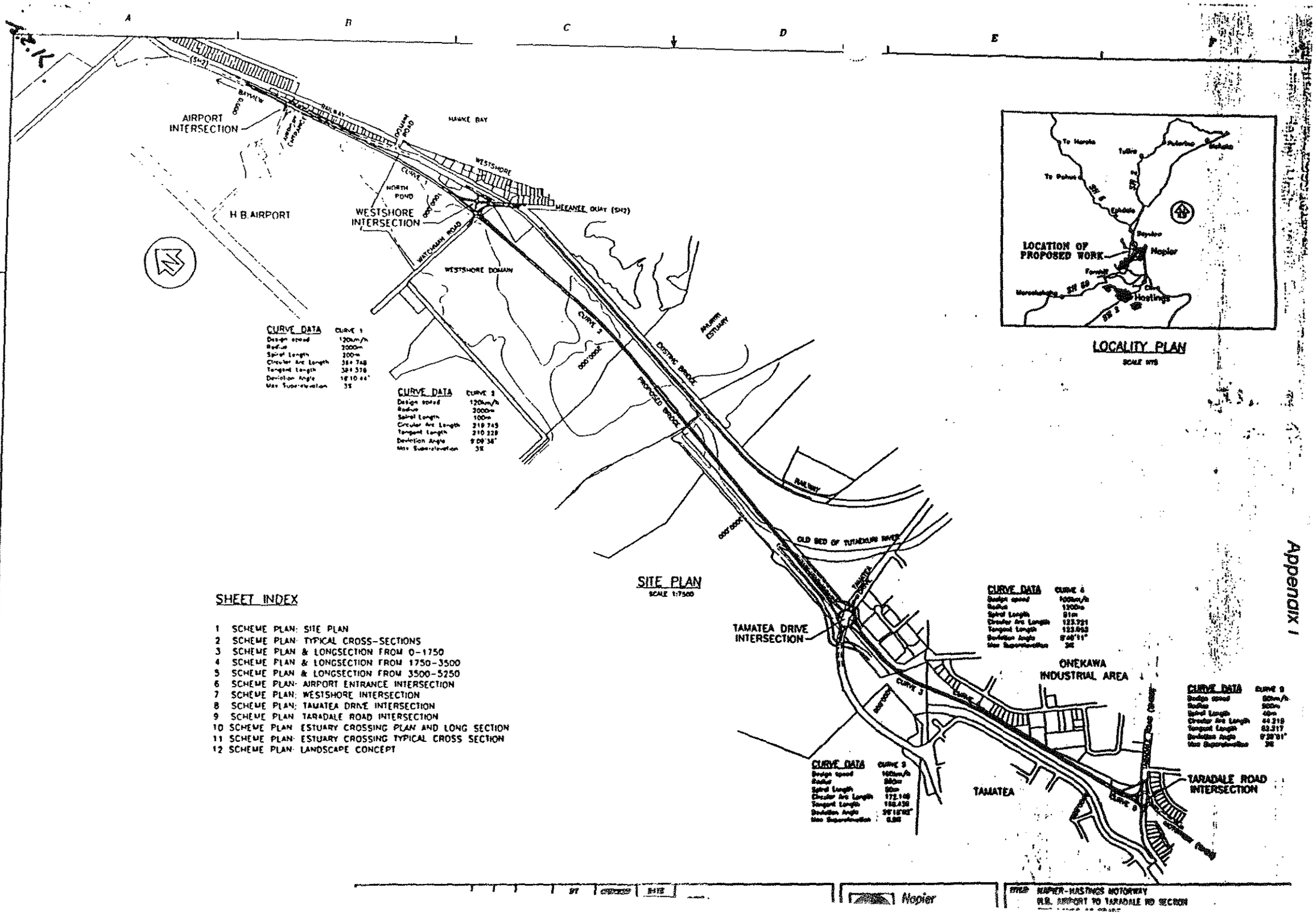
551. Leave is hereby granted for the parties to seek clarification of any of these issues if necessary. Otherwise if the parties are in agreement we require a memorandum of consent a month from the date this decision is received resolving all of the above.

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

1 SCHEME PLAN: SITE PLAN
2 SCHEME PLAN: TYPICAL CROSS-SECTIONS
3 SCHEME PLAN & LONGSECTION FROM 0-1750
4 SCHEME PLAN & LONGSECTION FROM 1750-3500
5 SCHEME PLAN & LONGSECTION FROM 3500-5250
6 SCHEME PLAN: AIRPORT ENTRANCE INTERSECTION
7 SCHEME PLAN: WESTSHORE INTERSECTION
8 SCHEME PLAN: TAMATEA DRIVE INTERSECTION
9 SCHEME PLAN: TARADALE ROAD INTERSECTION
10 SCHEME PLAN ESTUARY CROSSING PLAN AND LONG SECTION
11 SCHEME PLAN: ESTUARY CROSSING TYPICAL CROSS SECTION
12 SCHEME PLAN: LANDSCAPE CONCEPT

Napier

NAPIER-HASTINGS MOTORWAY
H.B. AIRPORT TO TARADALE RD SECTION

Appendix I

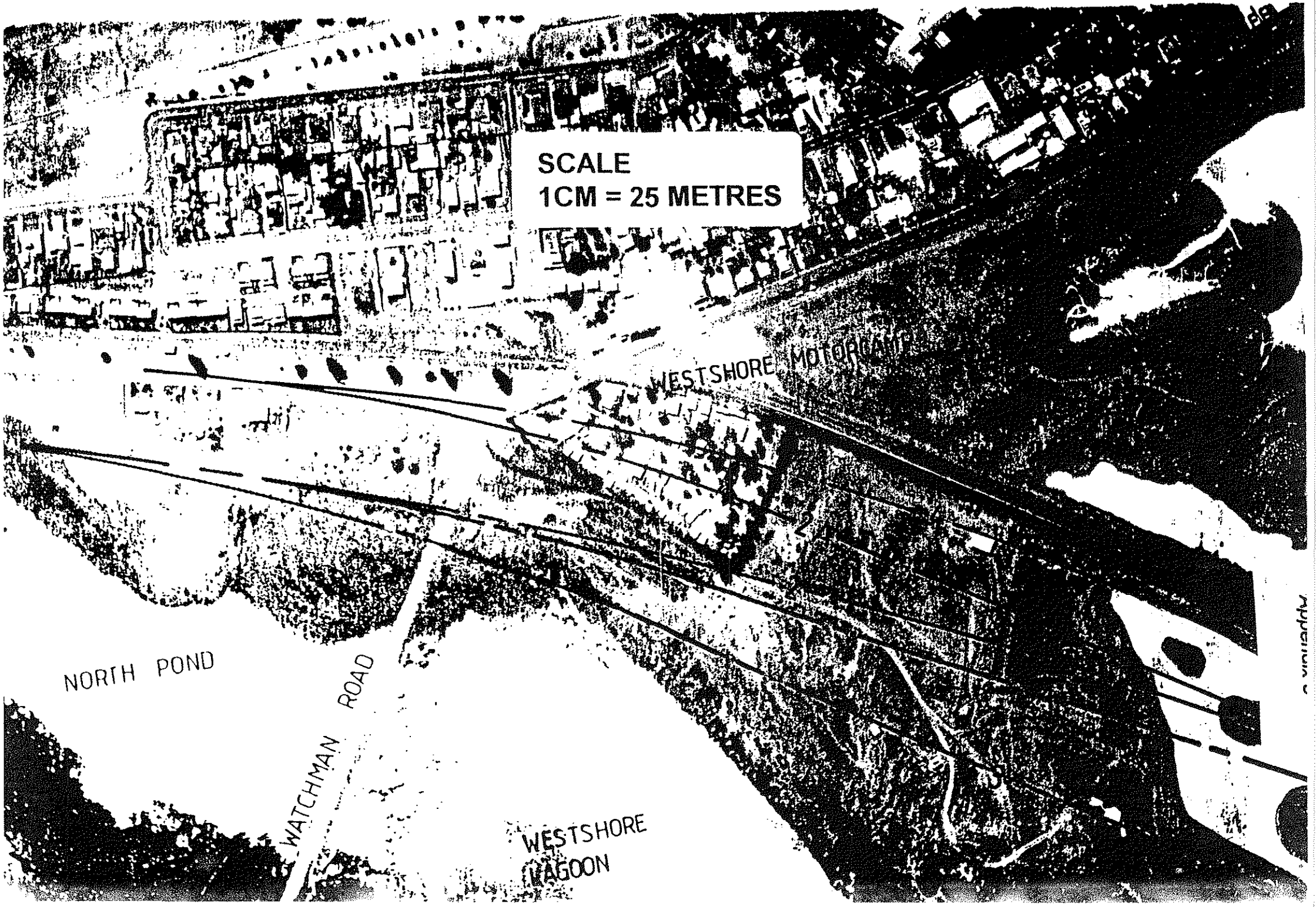
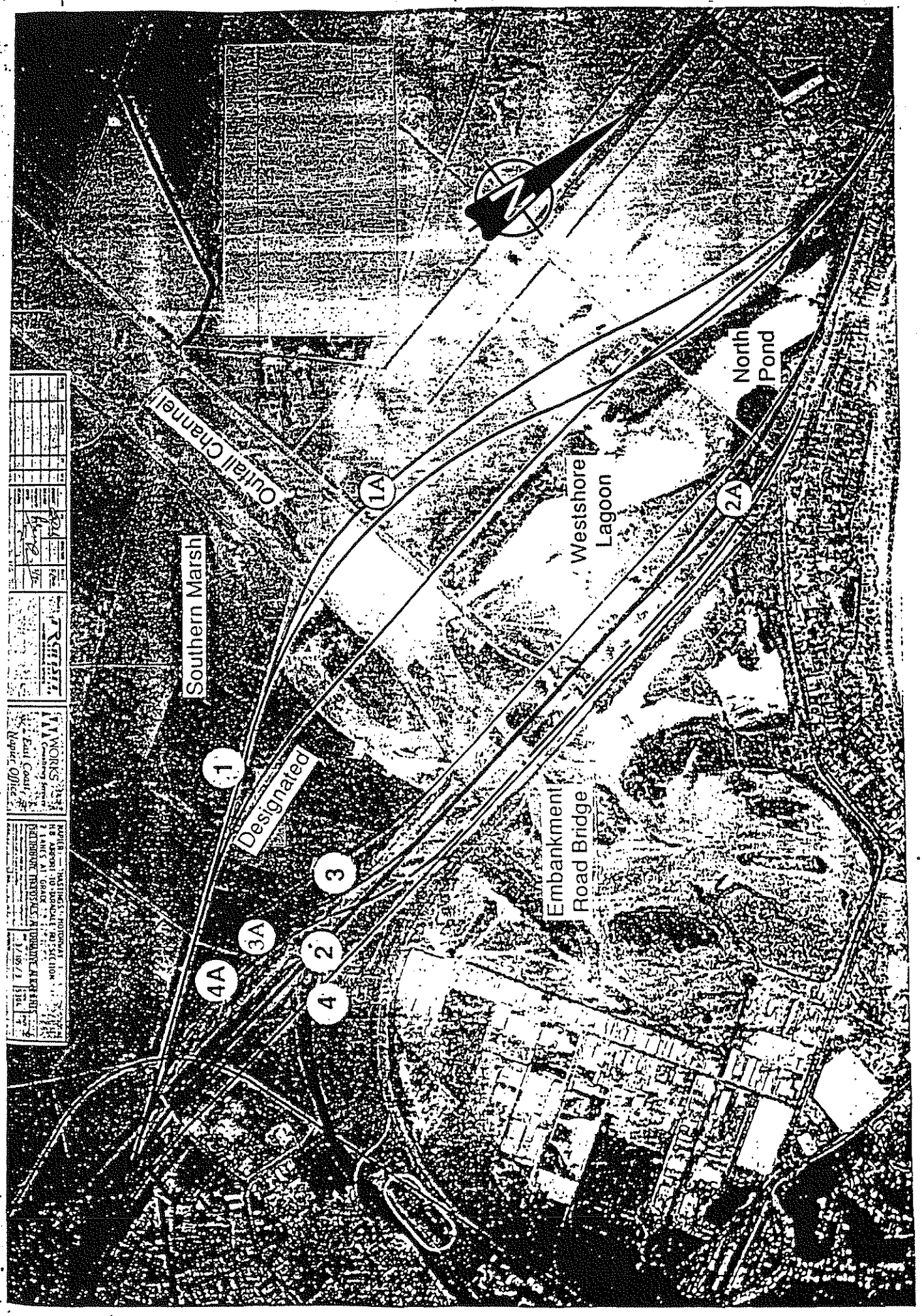
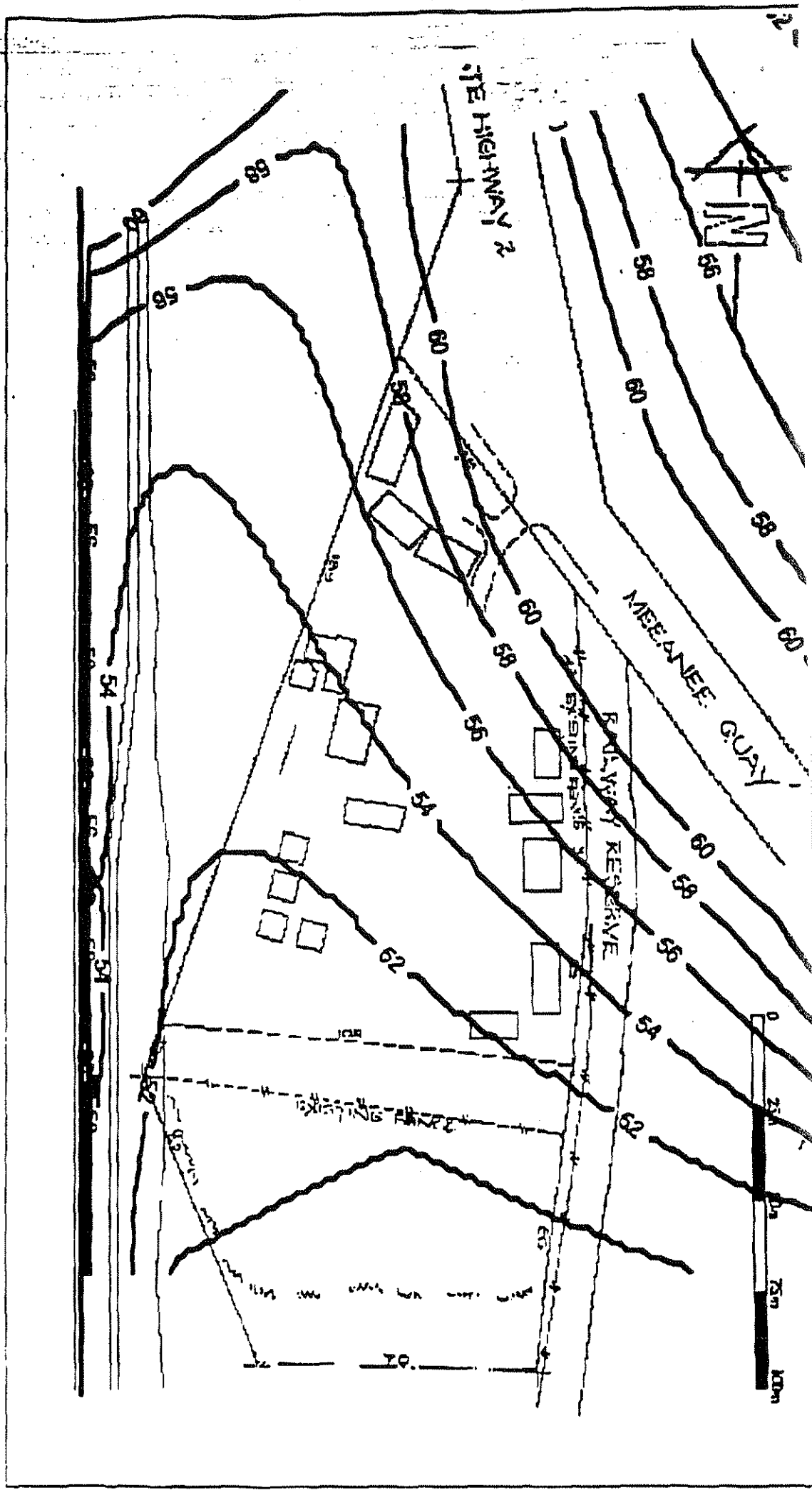

SCALE
1CM = 25 METRES
WESTSHORE MOTORCAUT
NORTH POND
WATCHMAN ROAD
WESTSHORE
LAGOON

Figure 1



Napier - Hastings Motorway: Hawke's Bay Airport to Taradale Road Section:
Alternative Alignments

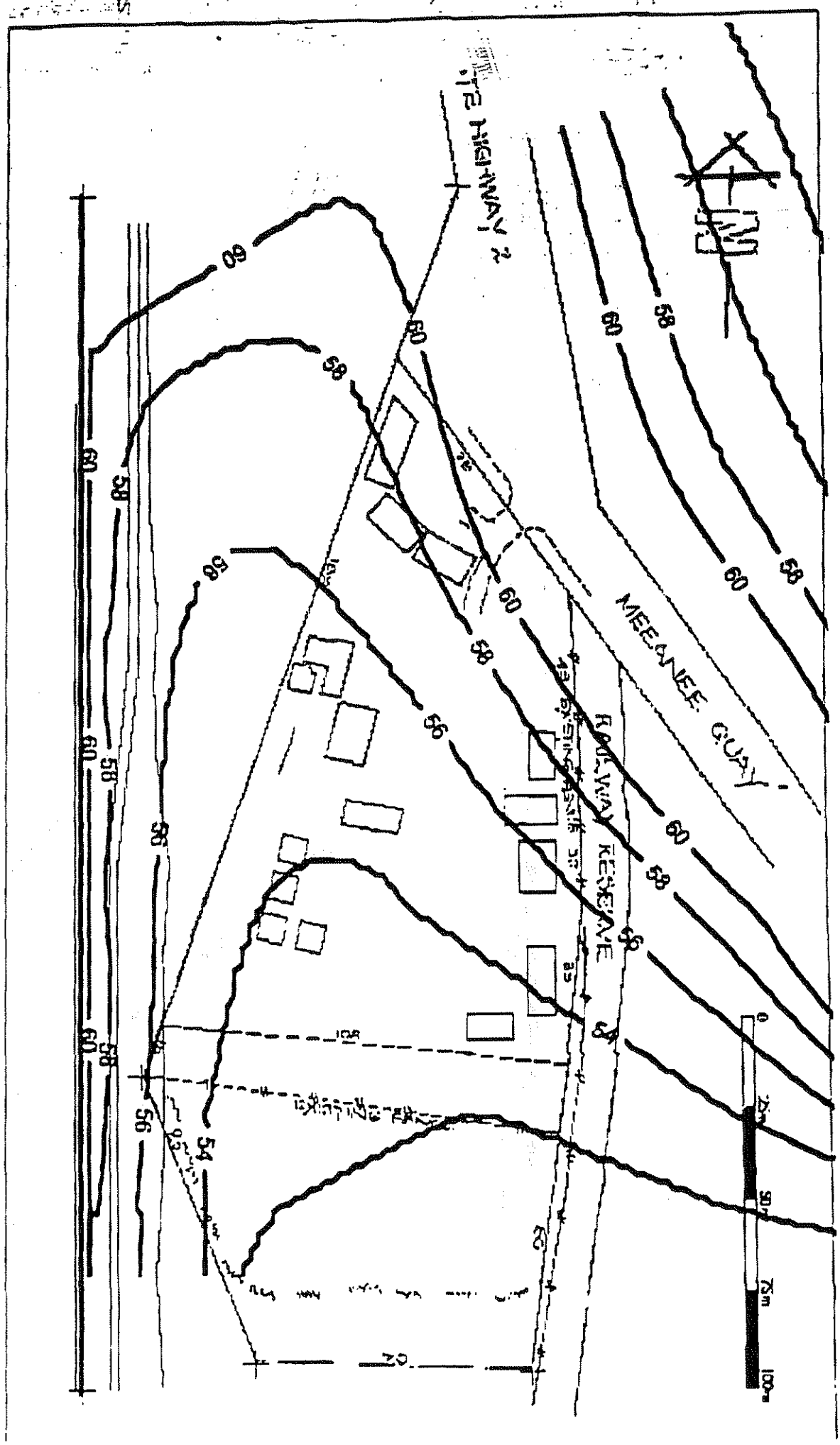
APPENDIX 7



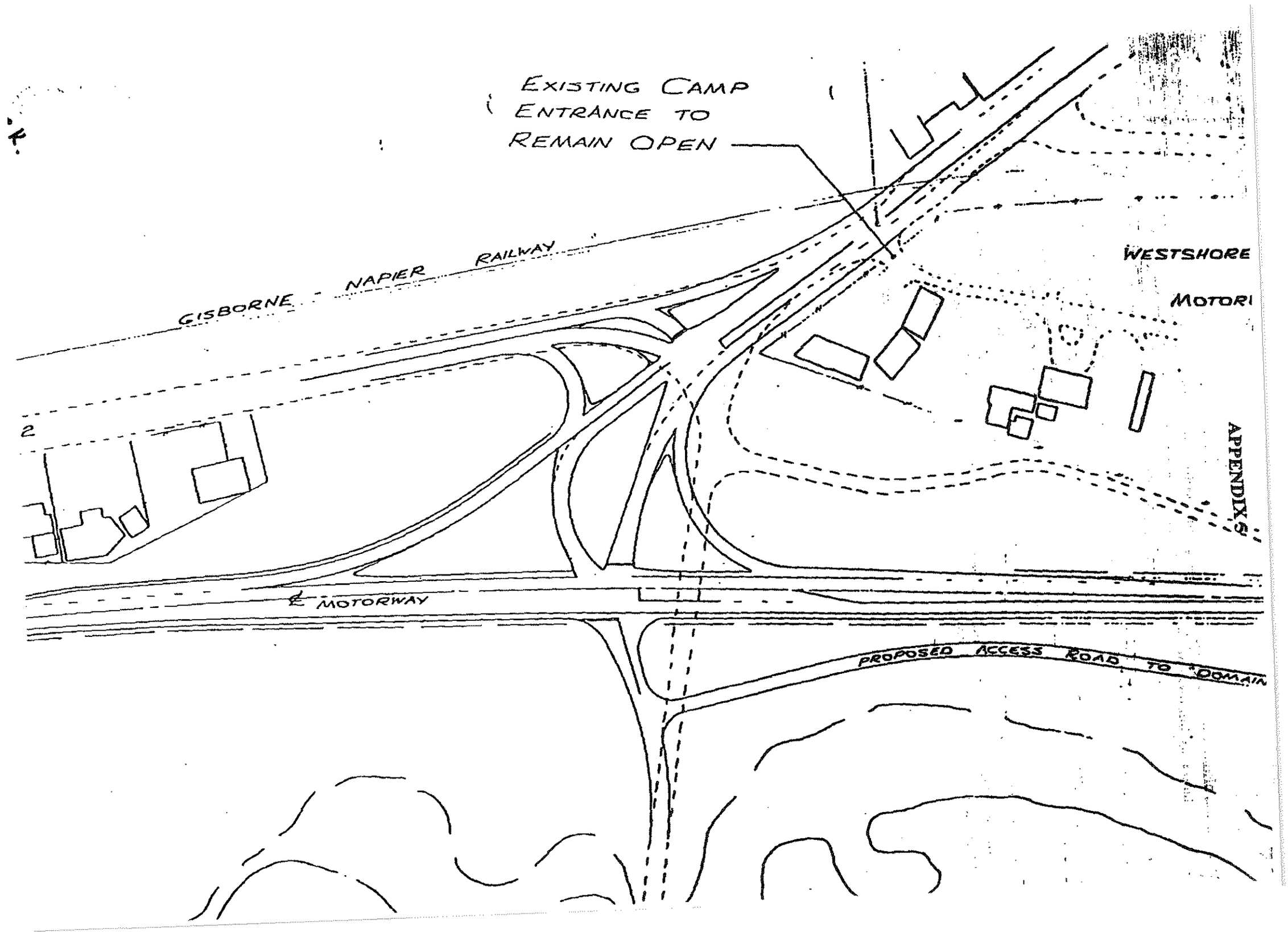
Predicted Traffic Noise Level Contours (dBA Leq(24 hour))
Motorway with Friction Course

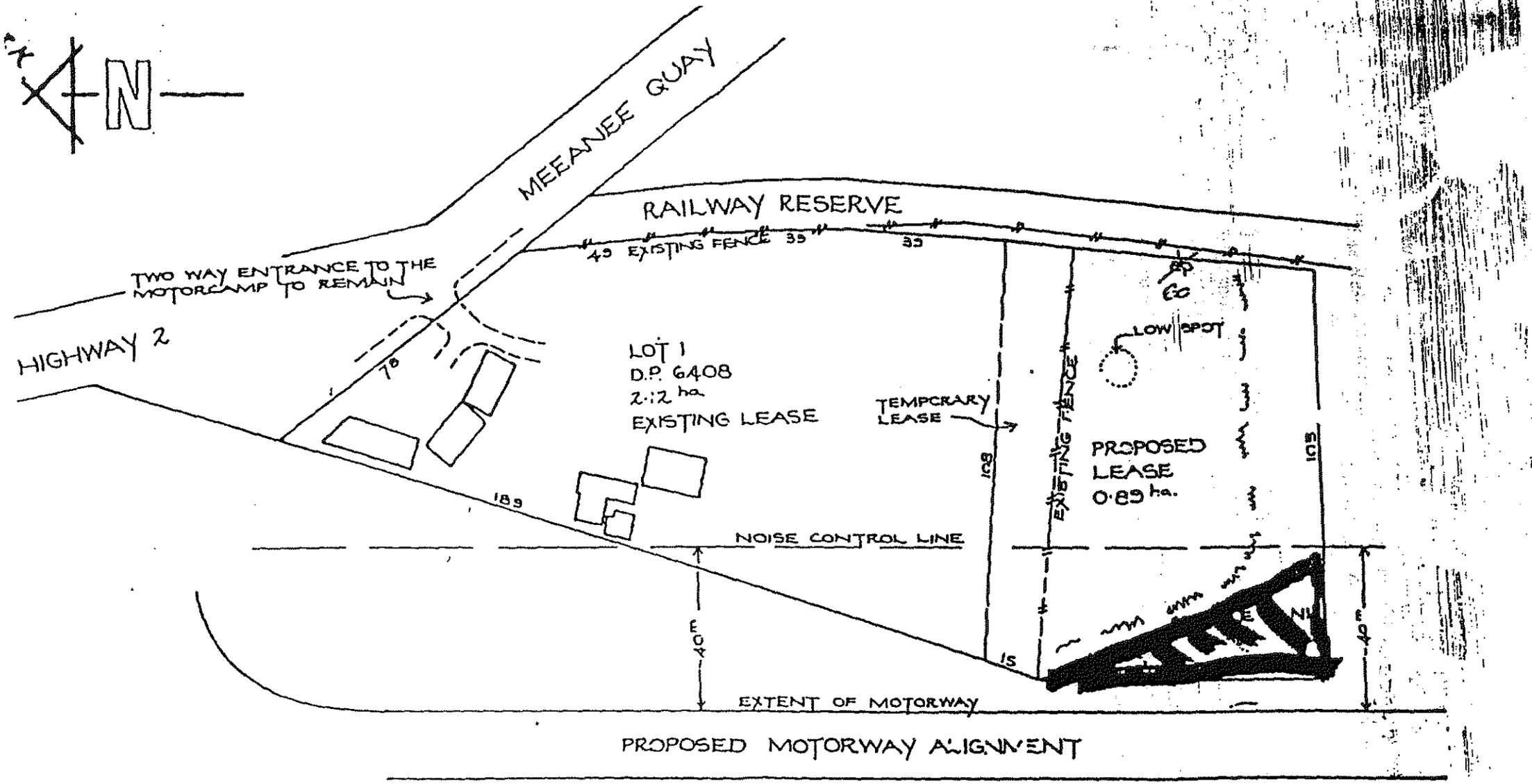
S.E.K.

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.

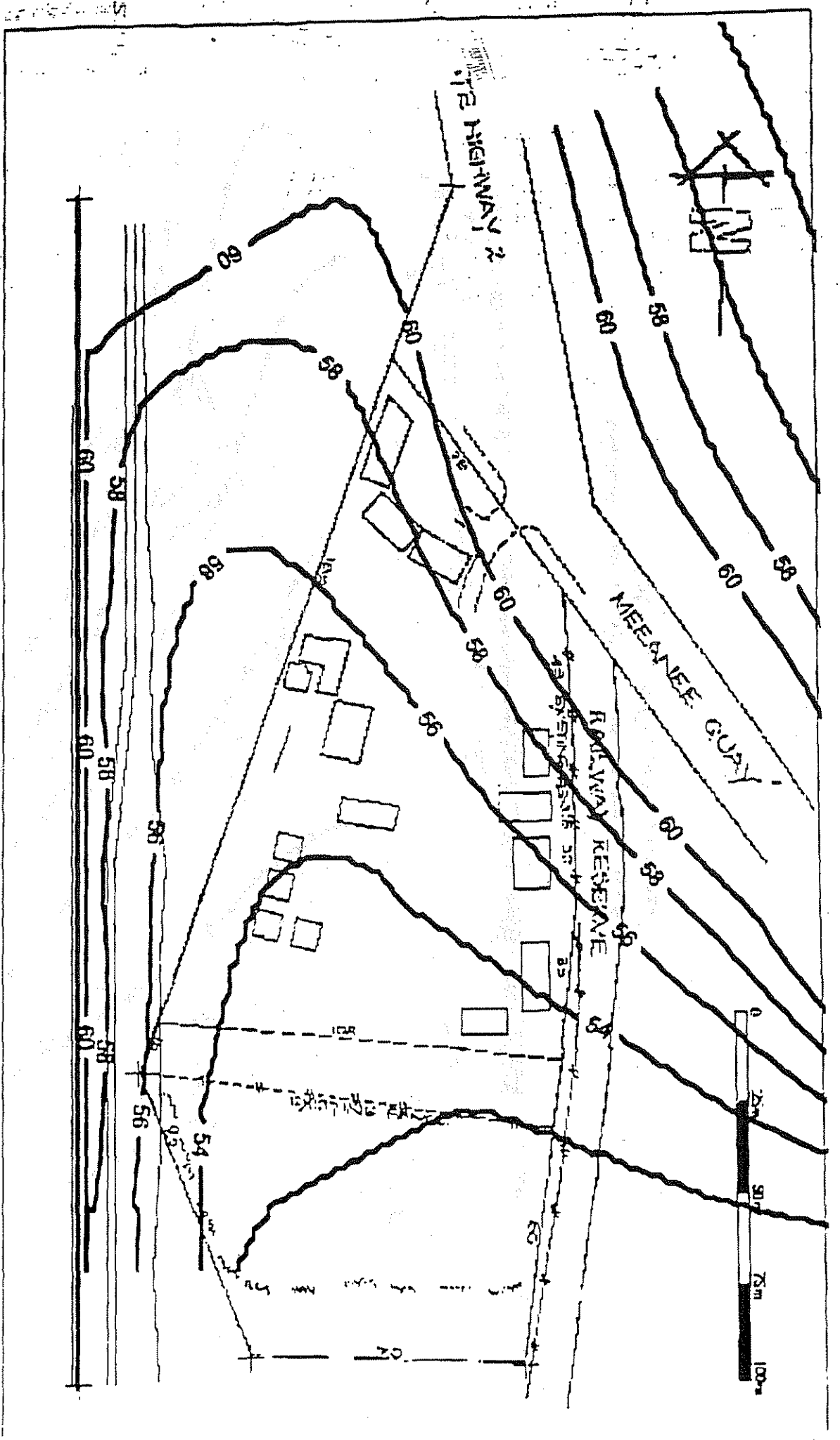
NAPIER CITY COUNCIL

Notice of Recommendation

Hearing of Notice of Requirement pursuant to Section 171 of the Resource Management Act 1991.

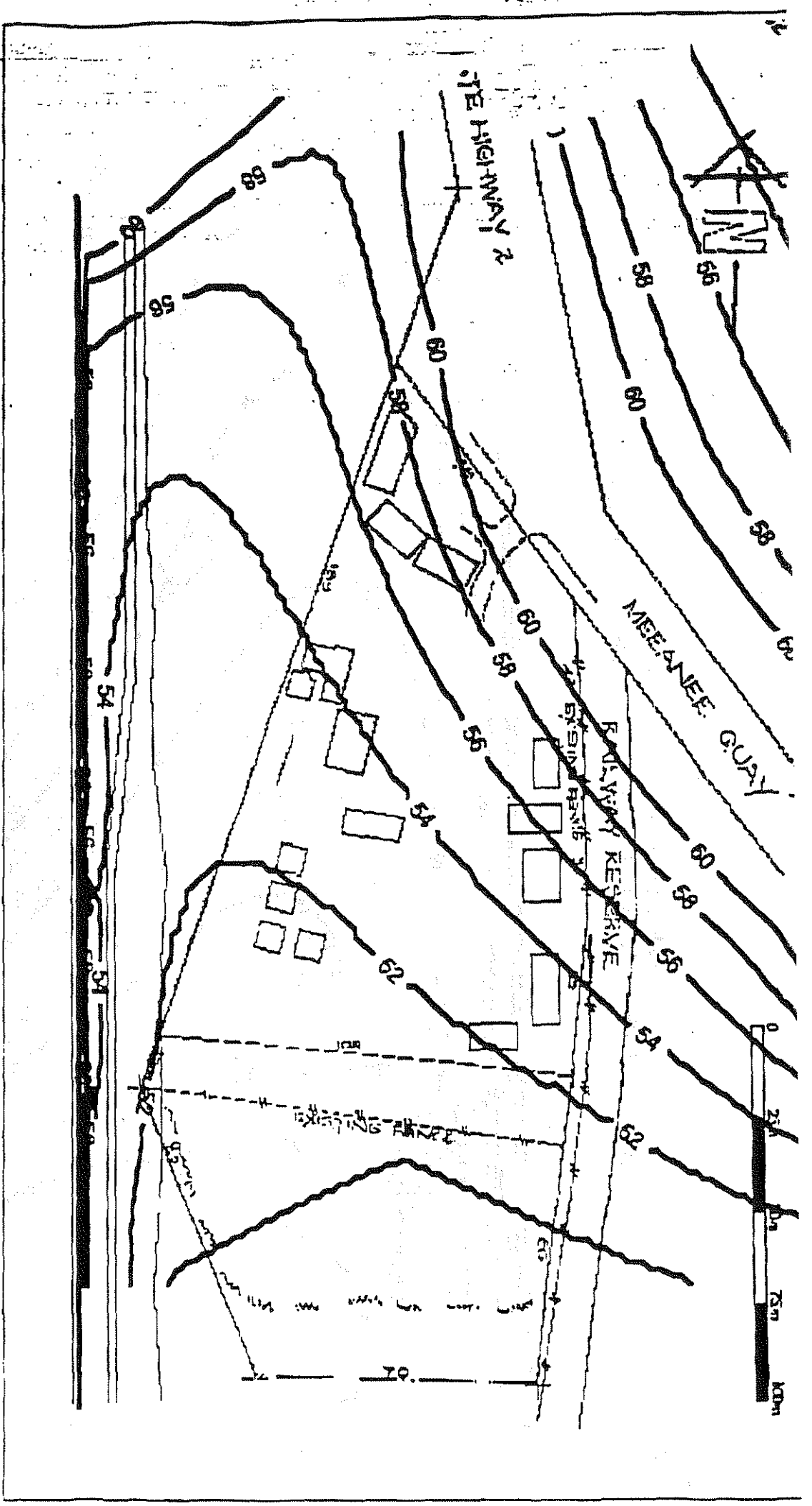
REQUIRING AUTHORITY:	Transit New Zealand
APPLICATION:	Notice of Requirement for an alteration to the designation of the Proposed Motorway extension between Hawkes Bay Airport and Taradale Road.
SITE:	Generally a strip of land totalling 5.5 kms in length between the Hawkes Bay Airport and Taradale Road 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



Predicted Traffic Noise Level Contours (dBA Leq(24 hour))
Motorway with Chipseal Surface

APPENDIX 7



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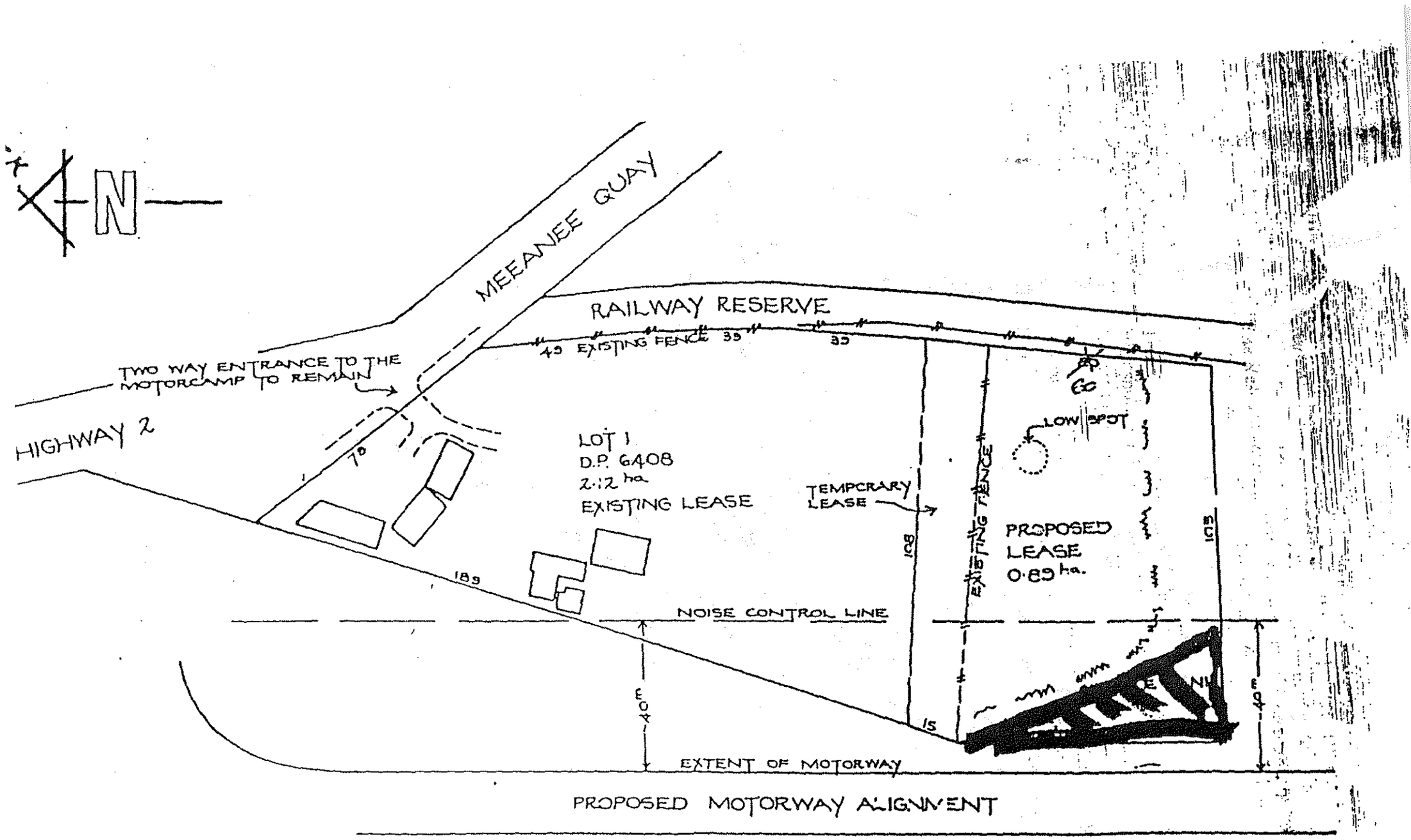
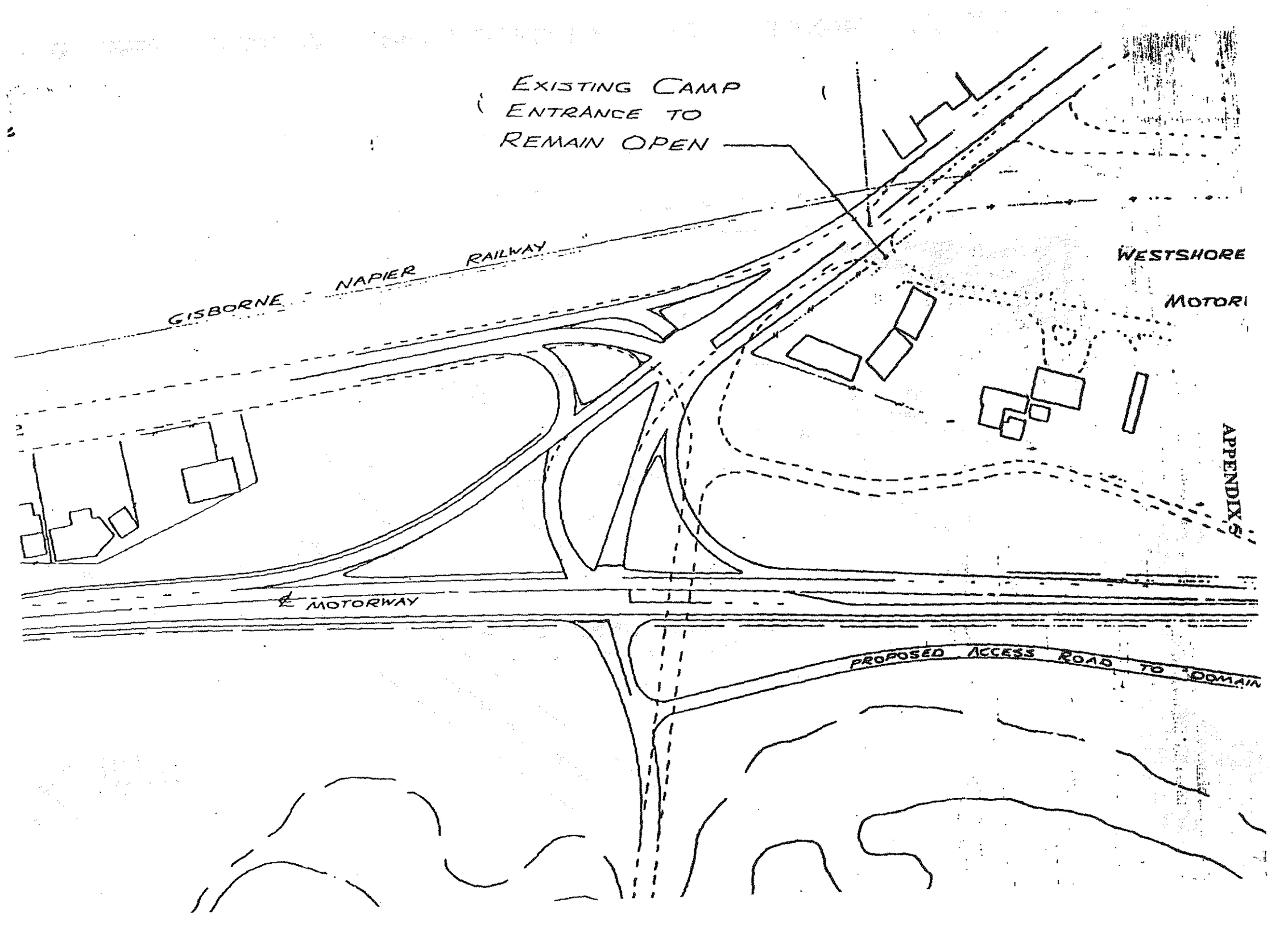
S.E.K.



NOTE: NOISE CONTROL LINE RELATES TO [illegible] ATTACHED TO

PROPOSED EXTENDED LEASE

PREPARED: LANCE LEIKIS ENVIRONMENTAL PLANNING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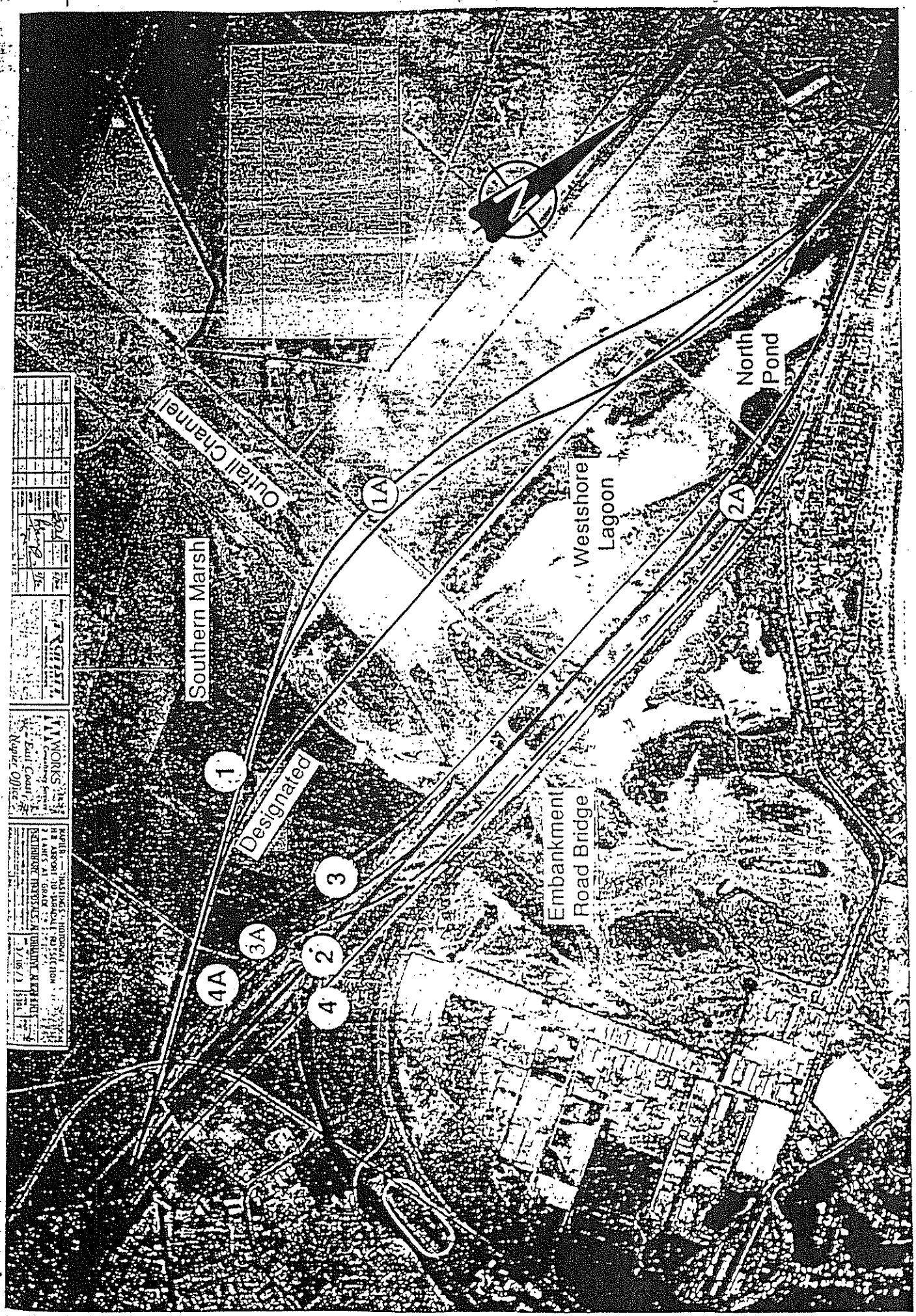

Napier - Hastings Motorway: Hawke's Bay Airport to Taradale Road Section:
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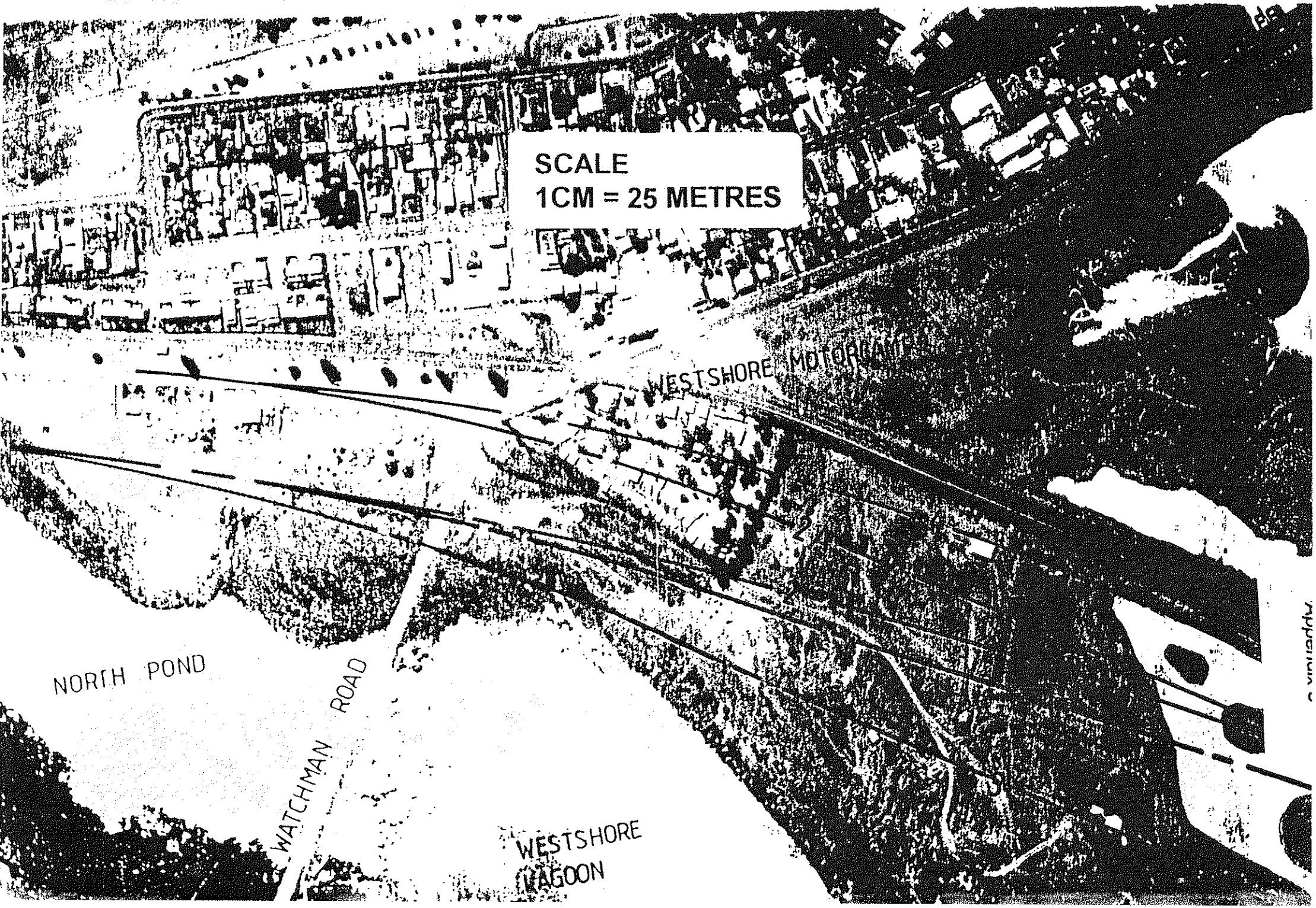
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NAPIER CITY COUNCIL

Notice of Recommendation

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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:

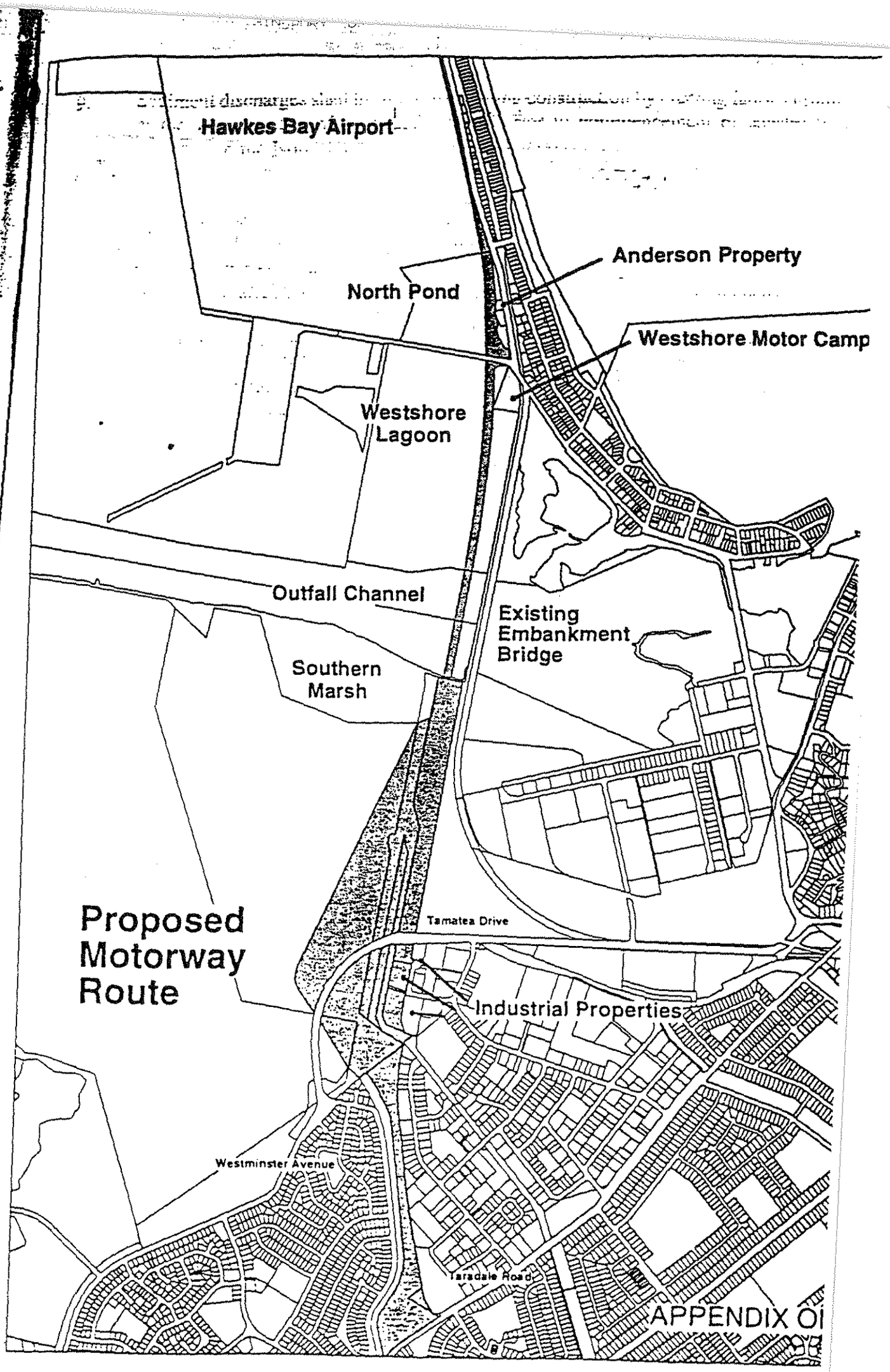
(aa) The period of construction, and
(bb) Either the maintenance period under the construction contracts or three years following completion of construction whichever is the longer;

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

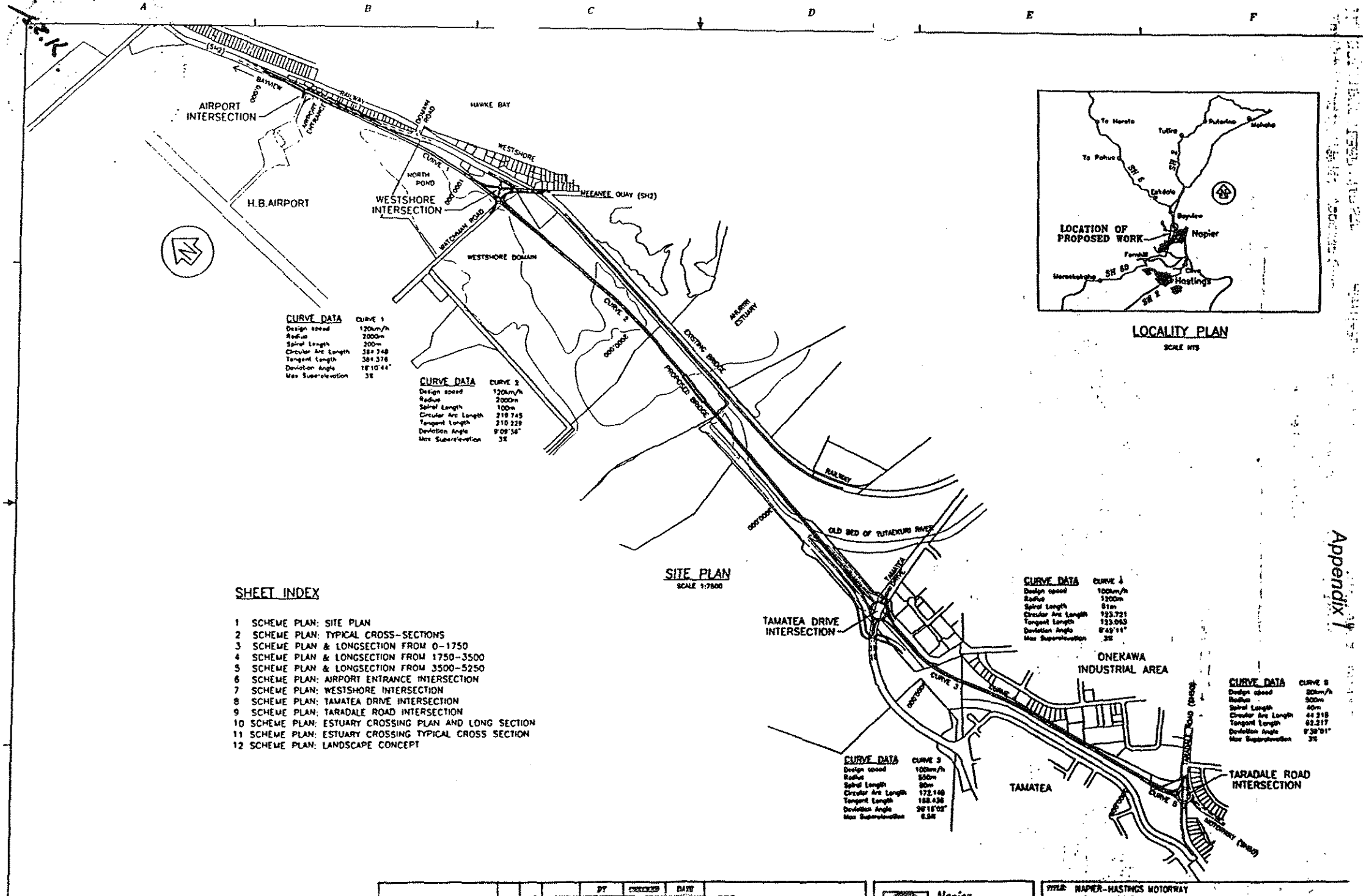
(bb) Either the maintenance period under the construction contracts or three years following completion of construction whichever is the longer;

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

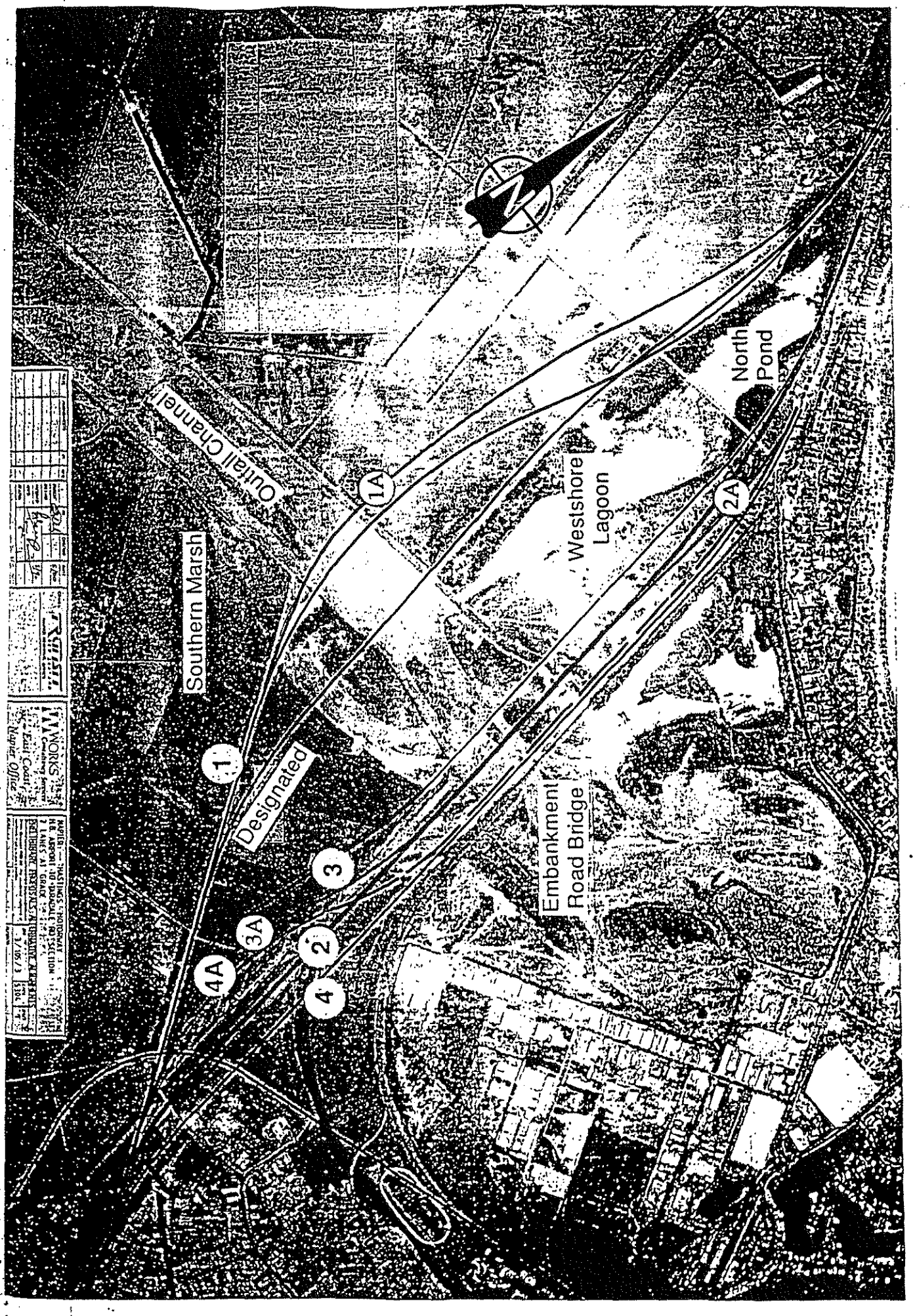
1 SCHEME PLAN: SITE PLAN
2 SCHEME PLAN: TYPICAL CROSS-SECTIONS
3 SCHEME PLAN & LONGSECTION FROM 0-1750
4 SCHEME PLAN & LONGSECTION FROM 1750-3500
5 SCHEME PLAN & LONGSECTION FROM 3500-5250
6 SCHEME PLAN: AIRPORT ENTRANCE INTERSECTION
7 SCHEME PLAN: WESTSHORE INTERSECTION
8 SCHEME PLAN: TAMATEA DRIVE INTERSECTION
9 SCHEME PLAN: TARADALE ROAD INTERSECTION
10 SCHEME PLAN: ESTUARY CROSSING PLAN AND LONG SECTION
11 SCHEME PLAN: ESTUARY CROSSING TYPICAL CROSS SECTION
12 SCHEME PLAN: LANDSCAPE CONCEPT

Napier

TITLE: NAPIER-HASTINGS MOTORWAY
H.B. AIRPORT TO TARADALE RD SECTION
TWO LANES AT GRADE

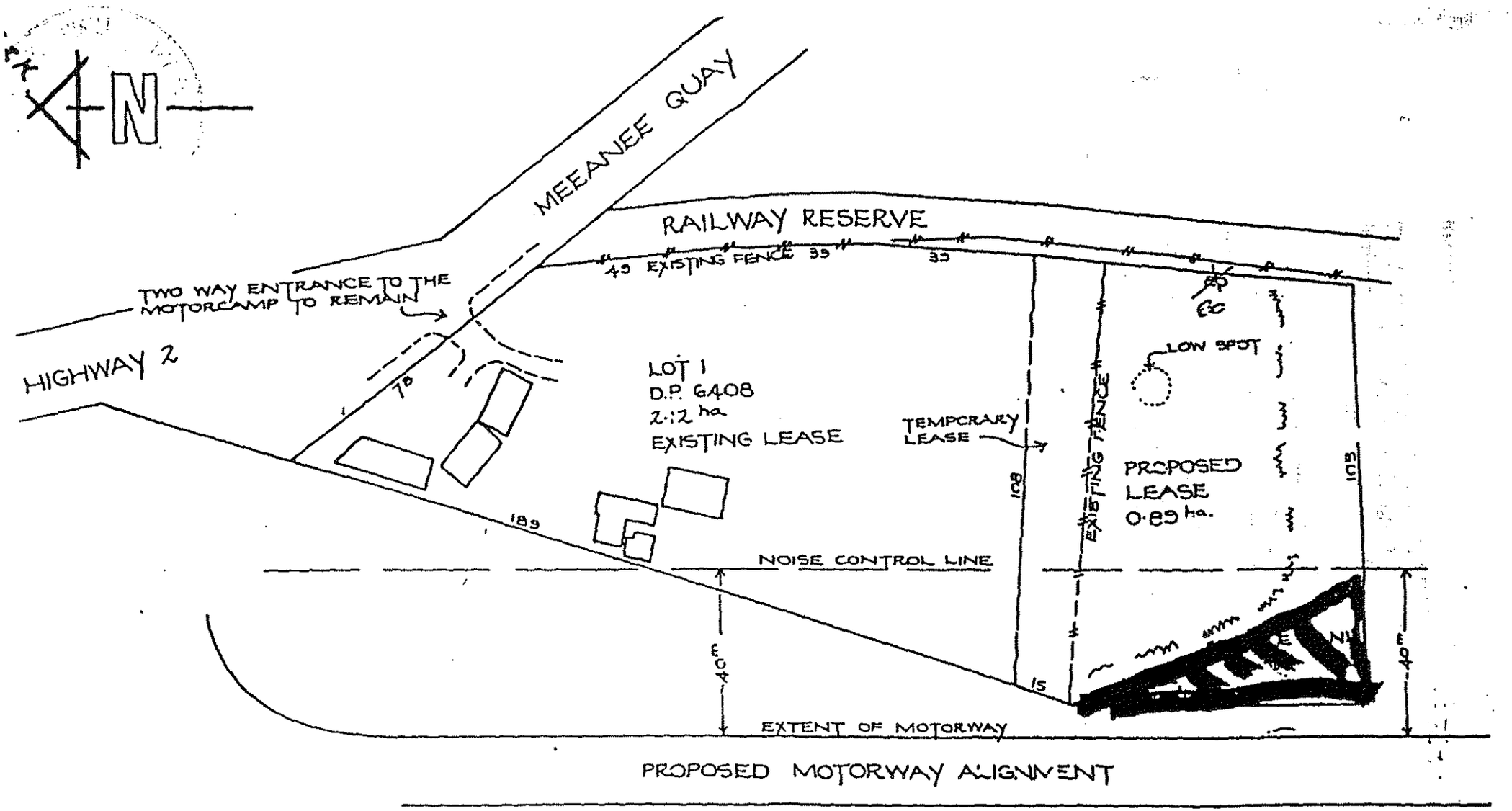
Appendix 1

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

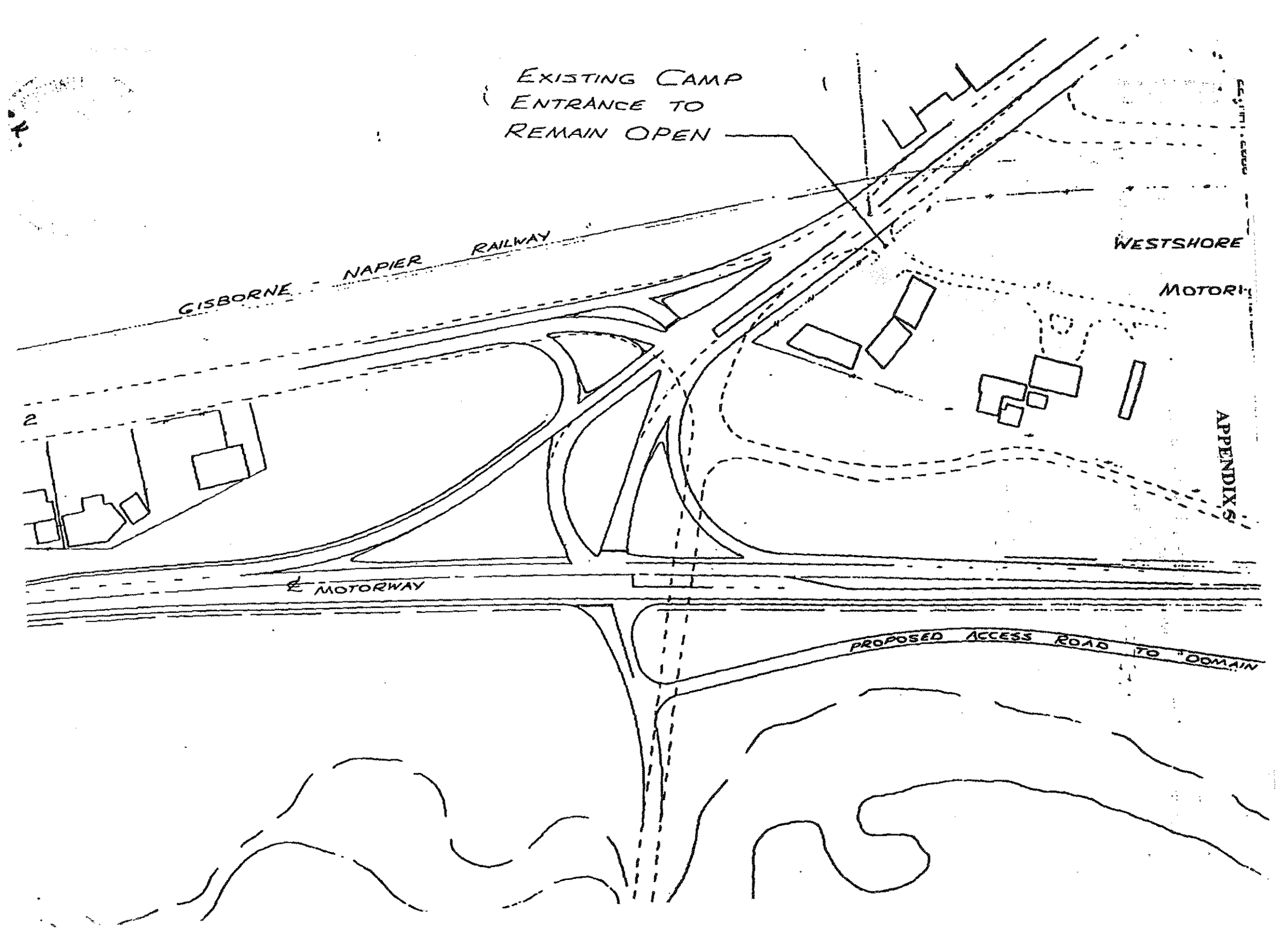


NOTE: NOISE CONTROL LINE RELATES TO A CONDITION ATTACHED TO THE DESIGNATION OF THE

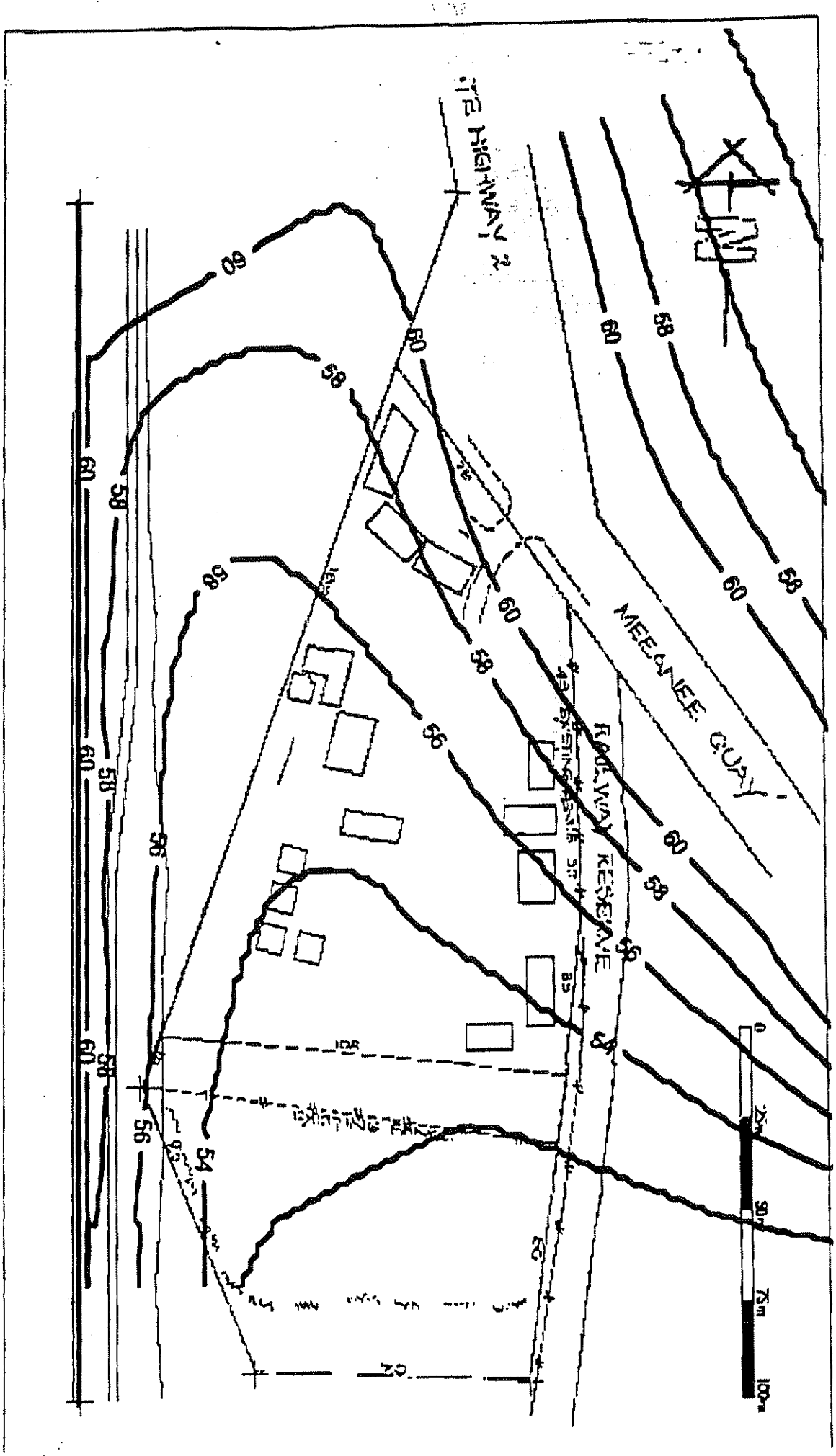
PROPOSED EXTENDED LEASE FOR WESTSHORE MOTORCAMP

PREPARED: LANCE LEIKIS ENVIRONMENTAL PLANNING & ASSESSMENT

Appendix 4

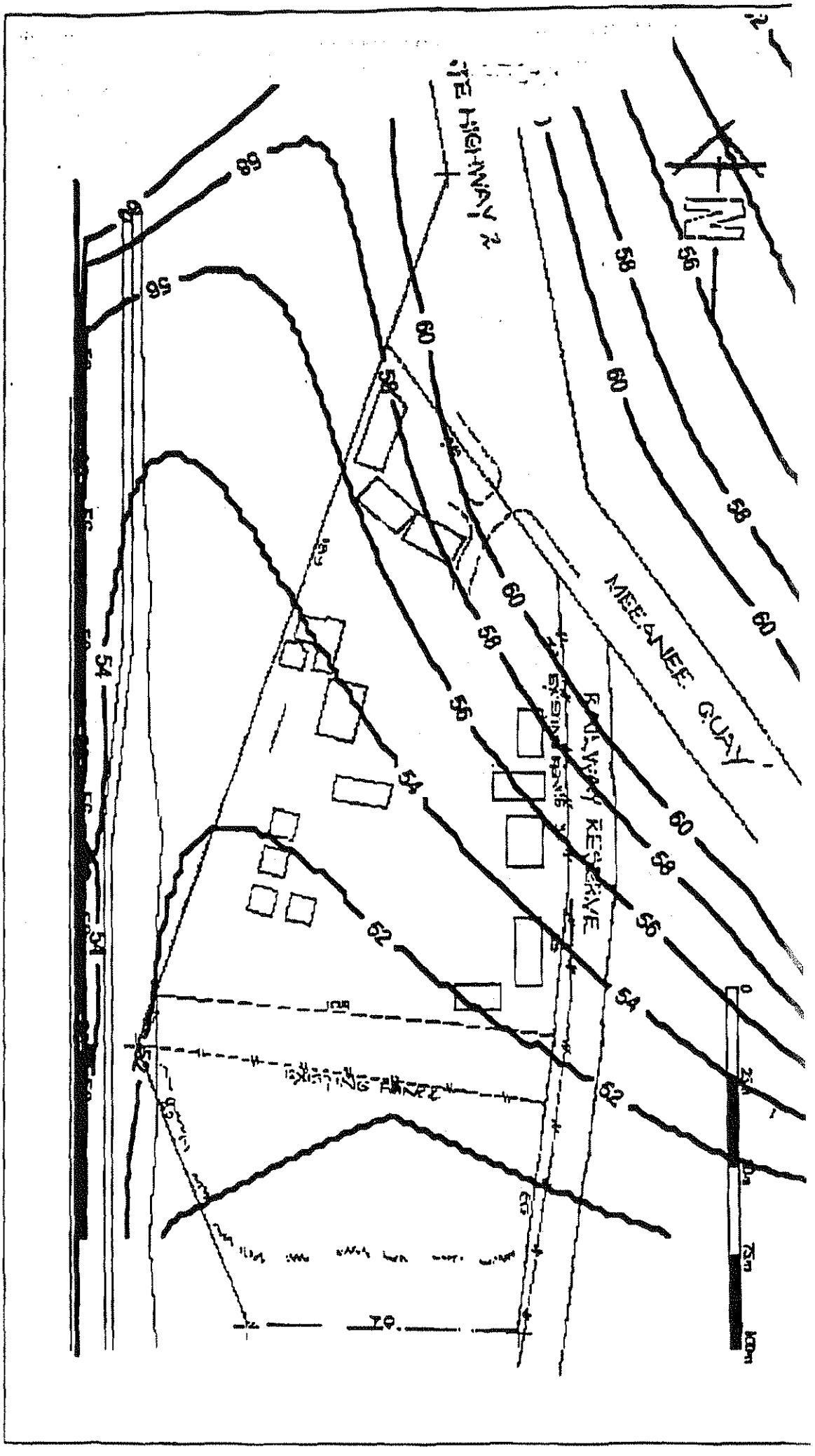

EXISTING CAMP
ENTRANCE TO
REMAIN OPEN
GISBORNE - NAPIER RAILWAY
WESTSHORE
MOTOR
APPENDIX 5
℄ MOTORWAY
PROPOSED ACCESS ROAD TO DOMAIN

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:

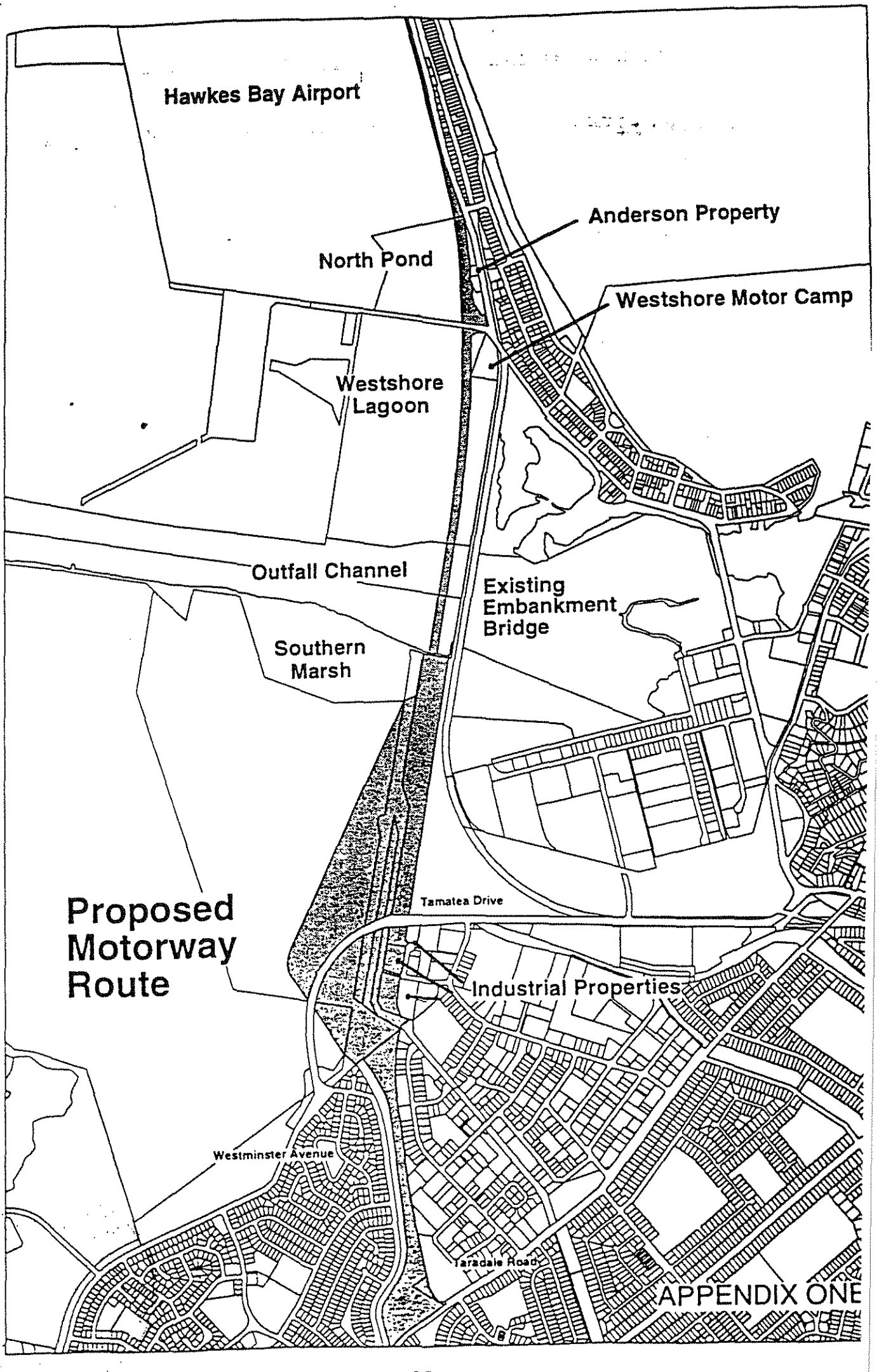
(aa) The period of construction, and
(bb) Either the maintenance period under the construction contracts or three years following completion of construction whichever is the longer;

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

Decision No C30/82

IN THE MATTER of the Town and Country Planning Act 1977

AND

IN THE MATTER of an appeal under s.118

BETWEEN WAIMAIRI DISTRICT COUNCIL
(Appeal No 38/82)

BOWER EGG FARM AND OTHERS
(Appeal No 67/82)

QUEENSPARK COMMUNITY ASSOCIATION AND OTHERS
(Appeal No 74?82)

B RYAN AND ANOTHER
(Appeal No 75/82)

R V ALLEN
(Appeal No 79/82)

SMITH DEVELOPMENTS LIMITED
(Appeal No 80/82)

J H LOCKYER
(Appeal No 127/82)

Appellants

AND CHRISTCHURCH CITY COUNCIL
PAPARUA COUNTY COUNCIL
HEATHCOTE COUNTY COUNCIL RICCARTON
BOROUGH COUNCIL KAIAPOI
BOROUGH COUNCIL

Respondent

HEARING BEFORE THE PLANNING TRIBUNAL (NUMBER THREE DIVISION)

His Honour Judge Skelton (Chairman)
Messrs R A McLennan (Members)
G W Ensor
R S Martin

HEARING at CHRISTCHURCH on the 10th to 14th and 17th to 21st days of May and the 3rd and 4th days of June 1982.

APPEARANCES: Mr DM Palmer for Waimairi County Council -(Appeal No 38/82)

Mr A Hearn QC for Bower Egg Farm Limited and four others - (Appeal No 67/82),
Queenspark Community Association Inc and 39 Others - (Appeal No 74/82),
R V Allen - Appeal No 79/82,
Smith Developments Limited - (Appeal No 80/82),

Mr B Ryan on his own behalf - (Appeal No 75/82)

Mrs J H Lockyer on her own behalf - (Appeal No 127/82)

Mr J Milligan and Mr E Ryan for the Respondents.

INTERIM DECISION

Preliminary

These seven appeals were commenced pursuant to s.118(7) of the Town and Country Planning Act. The status of some of the appellants, and objectors appearing pursuant to s.157, is challenged by the respondents on the ground that some of them did not have status to object, pursuant to s.2(3). However, it is common ground that a number of appellants do have status including the Waimairi District Council. Accordingly, we propose to deal with questions of status at the end of this decision for, notwithstanding our findings on such matters, we are required to determine some of these appeals on the merits.

We record also, at this point, that Mr Hearn, leading counsel for some of the appellants, raised a preliminary question as to whether or not the Tribunal's jurisdiction is affected by the fact that the respondent's appear to have

altered the terms of their requirements between the time when those requirements were dealt with by the Waimairi District Council and the time when the respondents notified that Council of their rejection of its recommendation. We did not understand Mr Hearn to require us to make a ruling on that matter at the time he raised it. Indeed, we would not have been able to do so without hearing from the other parties. We will deal with it later in this decision.

The hearing of these appeals occupied the time of the Tribunal for almost 12 days. During that time, with the concurrance of the parties, the Tribunal undertook an inspection of the western transfer station; the whole of the appeal site and its environs; and most of the land referred to throughout the hearing as the "Chaneys sites". Much evidence was heard and, notwithstanding our request at the beginning of the hearing, to limit repetitive evidence, much of what we heard was indeed repetitive. Later in this decision we shall review various parts of the evidence to the extent we think necessary. A number of witnesses called on behalf of various appellants had gone to a good deal of trouble to prepare what amounted to submissions rather than evidence. The Tribunal is becoming very concerned at the presentation of this type of "evidence". The Tribunal is becoming concerned also, at the repetition occurring in evidence given by expert witnesses and, in particular, planning witnesses. Many of them take several pages to say the same thing. It is apparent to us that little or no attempt is made by the parties, before a hearing, particularly a hearing which is likely to be as lengthy and complex as this one was, to establish what is common ground between them and thus define the issues. Then too, several witnesses delivered what can best be described as colourful orations. To a large extent this so-called "evidence" did not assist us in any way whatsoever to determine the issues raised by these appeals. Quotations from Sir Walter Scott (incorrectly cited as it turns out),

and highly emotive language are not persuasive, colourful as they might be.

If we appear to have been unduly critical of some people we stress that these examples are illustrative only of a trend which is of concern to this Tribunal. The Tribunal will not be used as a sounding board. Its function was succinctly stated in a report made under the National Development Act 1979 in respect of the Petralgas application - see Re An Application By Petralgas Chemicals NZ Ltd and Others under the National Development Act 1979, 8 NZTPA 106. It is worth repeating that statement and we hope that those reading thi decision will bear it in mind in the future:

> "This Tribunal is a judicial body which acts by weighing the evidence which it hears. It does not, indeed it cannot, 'plan'. The initial identification and evaluation required in the course of the planning process must be done by others. If after that step has been taken their opinions and conclusions differ, then it is the function of this Tribunal to test and weigh those opinions and conclusions, and to decide between them.

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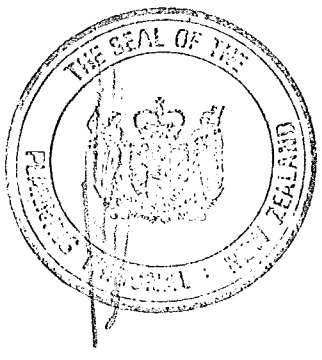
Background

On various dates in April 1980 each of the respondents issued a requirement, in the same terms, to the Waimairi District Council (hereinafter referred to in this decision as "the Council") pursuant to s.118(1). The relevant part of the requirement in each case reads as follows:

> HEREBY REQUIRES the Waimairi County Council to make provision in its District Scheme for the establishment of a Refuse Disposal Landfill Site, such provision to be made as a designation and by identifying the land referred to in the schedule hereto in the planning maps of the District Scheme and on that part of the maps so identified placing the words 'Proposed Refuse Disposal Landfill Site' ..."



In each case the respondents then set out the reasons for that requirement which again were the same in each case.

The land the subject of the requirement is described as containing an area of 96ha or thereabouts being Lots 1 to 65 (inclusive) on Deposited Plan 918, Lots 1 to 32 (inclusive) on Deposited Plan 810, Rural Sections 35471 to 35473 (inclusive), 35476, 35477 and 35491, and Reserves 2636 and part Reserve 2637. This land is hereinafter referred to as "the appeal site", but it is important to record, at this point, that the area of that site is to be reduced to 90ha. This was stated in the evidence of the respondents' planning consultant, Mr Douglass and confirmed by the respondents' counsel. The reason for that is that the 6ha balance comprises an area of approximately 400m in width which has been planted in pine trees and is intended to act as a permanent buffer between the appeal site and land to the south which is zoned for residential purposes. We shall be discussing the site in more detail later in this decision. But we record that the appeal site i.e. the site which is to be the subject of the respondents' requirements, has an area of 90ha.

The five respondents and the Council comprise the Christchurch Metropolitan Refuse Disposal Committee. This committee was established, by an agreement dated 11 October 1978, as a joint standing committee under the Local Government Act 1974. It's principle functions are to undertake the planning, design and administration of a comprehensive scheme for refuse disposal. Each of the territorial local authorities is a financial contributor to the committee's work and there is no doubt that the respondents and the Council have the financial responsibility for the public work which is the subject of the requirements. Because the Christchurch Metropolitan Refuse Disposal Committee (which is hereinafter referred to

as "the Refuse Committee") does not have the legal standing to make a requirement of its own motion, or at least there is doubt about that, each of the respondents made requirements accordingly. It is not necessary for us to consider each of the requirements separately for they are in common form and for the same purpose. As will be apparent already, they relate to the same land.

The Council publicly notified the requirements on 6 May 1980 in terms of s.118(3). The minimum period for the lodging of submissions and objections is 21 days. In this case the Council extended that period to 46 days because it was conscious of the public interest concerning the matter. It is said that some 1700 objections and submissions were received. That number may be in doubt having regard to questions of status, but there can be no doubt that a good deal of opposition was aroused, and has been sustained, in respect of this proposed public work. Initially, the Council intended to hear submissions and objections, pursuant to s.118(5), in November 1980 but the Queenspark Comunity Association and the Burwood Residents Association initiated proceedings in the High Court for certain declarations as to the notifying of the requirement, and the question as to whether or not provisions could be made for a designation over-riding an existing designation. Those proceedings were disposed of by Somers J in a judgment issued on 19 December 1980 - see Queens Park Community Association (Inc) and Others v Waimairi County Council and Christchurch City Council and Others 7 NZTPA 139. As a result of that judgment the Council was able to proceed with its hearing. The Council's hearings sub-committee conducted a hearing in late August and early September 1981. Following that hearing the Council produced a 36 page document said to be a recommendation. Pursuant to s.118(5) it recommended that the requirement be revoked. On or about 22nd and 23rd December 1981 the respondents notified the

Council that they wholly rejected the Council's recommendation. In making that notification, pursuant to s.118(6), the respondents set out what is described as a 'Statement of Reasons' for rejecting the recommendation. In that 'Statement of Reasons' the respondents state that the word "proposed" in the requirement is to be replaced by the word "interim". In the next paragraph the respondents state:

> "Because the Waimairi County Council has not proposed any modifications to the requirement as originaly made this Council (reference to each of the respondents) has no option but to confirm that requirement unchanged.
>
> However, this Council assures the Waimairi County Council but not as a formal part of the designation that in operating the landfill the Metropolitan Refuse Disposal Committee will do so in conformity with the definitions and specification now set out."

There then follows a definition section and specifications for management lettered (a) to (v). It is this aspect of the matter which is the subject of Mr Hearn's preliminary submission.

The Council notified the objectors of the respondents' decision, as it is required to do pursuant to Regulation 40(6) of the Town and Country Planning Regulations 1978.

These appeals have followed.

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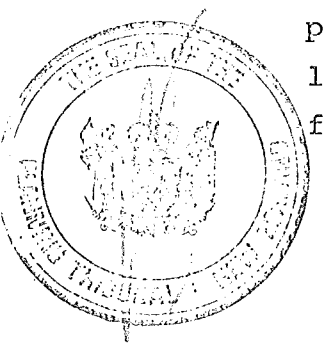
The Proposed Public Work

The metropolitan area of Christchurch covered by the Refuse Committee's proposal generates approximately 140,000 tonnes of refuse each year. That is approximately 1.3kg per head of population per day. The loose volume of refuse that must

be carted and disposed of in each year is approximately 500,000m^3. At the present time that quantity of refuse material is being disposed of in various local authority tips. Those tips are coming to the end of their useful lives. Already, some have closed. The Refuse Committee's proposal for the disposal of the metropolitan refuse includes establishing three principal refuse transfer stations of which, the western transfer station, which is now operating, is the first. It is intended that there should be a northern transfer station and a southern transfer station. It is also intended that there should be a small transfer station at Kaiapoi. To these transfer stations members of the public generally and the territorial local authorities carrying out their refuse collection duties will bring all refuse. Re-cycling is to be encouraged at these transfer stations and it is hoped that a small percentage of the total refuse will be re-cycled. Something like 2% this coming year and it could reach between 5% and 10%. 50% of the final volume of refuse is inert material which is ideal for landfill and has little alternative value. A further 40% is irreversibly mixed with the refuse content and it is impractical to separate it for recycling purposes. Mr Douglass said that 90% of the refuse is suitable for landfill disposal. It is proposed to use the appeal site for that purpose. The principle difference between the use to be made of the appeal site and existing refuse disposal tips, such as at Bexley and Sawyers Arms Road is that the disposal of refuse at the appeal site will not be open to the public generally. The refuse will be transported to the appeal site in specially designed vehicles, known as metropolitan refuse vehicles, which are fully enclosed. These multi axle articulated vehicles have an all up weight of approximately 37 tonnes. They will transport compressed refuse from the transfer stations to the appeal site. In addition, demolition materials will be transported to the appeal site by private contractors and,

again in addition, a certain amount of cover material will have to be transported to the appeal site also. It is anticipated that, as a peak, there will be some 90 return heavy vehicle trips to the appeal site in any one day. The landfill operation at the appeal site will be carried out seven days a week during normal working hours. A detailed description of the appeal site follows shortly. It is sufficient to record here that the proposal is to excavate, where necessary, to within 1m of the existing water table and to deposit the refuse in layers to a maximum height, in places, of 25m above the existing ground levels. Mounds will be formed. Eventually the lower slopes of those mounds will be planted with trees and the tops will be grassed. It is the expectation of the Refuse Committee that the whole of the appeal site will become a passive recreation area. The landfill operation is expected to last for between 15 and 20 years. It is planned that, at any one time, the area of the working spaces on the appeal site will occupy approximately 2ha with preparation and stripping ahead of a similar area. Mr Vogan, the Project Engineer employed by the Refuse Committee was at some pains to stress that the proposed public work is a controlled landfill and not a tip. A narrow face will be operated and by receiving only precompressed loads generally in the range of 8 tonnes to 18 tonnes continuous compaction and cover of refuse can be ensured.The total area occupied by the proposed work at any one time should not exceed 5ha. Once the landfill operations are completed the area so worked will be covered, soiled and planted to the ultimate plan. Each "cell" of approximately 5ha is expected to have a landfill life of between one and three years. Much more detail was given in evidence about the proposed management and control of the proposed work. We shall have more to say about this matter later. What we have recorded here includes the main features of the proposed work.



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The Appeal Site

Much evidence of a descriptive nature was tendered in respect of the appeal site. For obvious reasons it is not possible for us to record all that evidence in detail. We have recorded already, a legal description of the site and the fact that it occupies an area of 90ha.

A convenient means of identifying the location of the appeal site is to be found in Figs 1 and 2 attached to the evidence of the respondents' planning consultant, Mr Batty. Copies of those figures are annexed to and form part of this decision. Because the figures are not clear we record that the road forming the northern boundary of the site is known as Range Road and is unformed. The road along the western boundary of the site is Bower Ave and it too is unformed along this length. The road which crosses Bower Avenue south of the appeal site is Rothesay Road and it too is unformed. The southern boundary of the site is discernable on a site inspection, at least in part, by rows of newly planted pine trees which are to form the 400m barrier between Rothesay Road and the site. The eastern boundary of the site is not so readily discernable but it is on the landward side of a further unformed road shown on Fig 2 attached to Mr Batty's evidence, as Esplanade Reserve. It is a minimum of 140m from the seaward toe of the foredunes. In other words, the beach itself and the foredunes are not part of the appeal site. Immediately to the south of the unformed Rothesay Road and immediately to the east of Bower Avenue is the Waimairi Beach Golf Course which runs in a southerly direction towards Beach Road. The most northern, presently developed and occupied residential property on the eastern side of Bower Avenue, is owned and occupied by one of the appellants, Mr De La Mare. Just to the north of his property, the presently formed part of Bower Avenue

terminates. On the opposite side of Bower Avenue from Mr De La Mare's residential property is the land owned and occupied by Bower Egg Farm Limited. It is on the western side of Bower Avenue. To the north of this property the land is zoned for residential purposes in the Council's operative district scheme and we heard evidence from a substantial landowner in that area - Smith Developments Limited - about proposals for residential development. There is no suggestion that this land will be used for any other purpose. Residential development could occur to the southern side of Rothesay Road. To the north of Rothesay Road and west of Bower Avenue is the Christchurch City Council's Plantation Reserve, otherwise known as the Bottle Lake Forest Plantation. The head forrester, Mr Johns, described this plantation and detailed the layout of tracks and pony trek routes through the plantation. None of these tracks or pony trek routes goes through the appeal site. They are in use on a daily basis, seven days per week. Members of the public gain access from Burwood Avenue through the forest park headquarters.

Mr Miskell, a landscape architect called by the respondents divided the appeal site into three distinct landscape identity "zones". First, a foredune system partially vegetated and inherently unstable, secondly, a sand plain complex, semi stable with a cover of marram grass and lupin and an increasing colonisation by self seeded pinus radiata, and thirdly, the remnants of a section of exotic conifer plantation. Mr Miskell said that the appeal site is not visible from the beach and that the second "zone" has a moderate sense of place. The natural pattern of landforms is well modified and no longer intact. It has some unity but is generally low in interest. It has no structure. The third of his "zones" is an area of wind blown forest between Bower Avenue and the main fire break. The main visual value of this "zone" is its temporary open, expansive, nature

contrasting with the enclosed character of the production forest to the west. Mr Barthelmeh, a landscape architect employed by the Council, did not, as we understood him, disagree with Mr Miskell's division of the appeal site. His principal area of disagreement with Mr Miskell relates to the effect which the construction of mounds up to 25m high, will have on the site's natural character.

The other matter of significance, at this point, about the evidence of these two witnesses is that Mr Miskell agrees that part of the appeal site is within the coastal environment while Mr Barthelmeh asserts that the whole of it is within the coastal environment. We shall be discussing the concept of the coastal environment in more detail later in this decision.

The known history of the appeal site was given to us by Mr Batty. From 1853 to 1912 it was used for the grazing of sheep. Thereafter it has been used for afforestation purposes and between 1939 and 1946 it was used as a defence manouevre area. After World War II it continued to be used for afforestation purposes until a major storm in 1975, which brought about a significant loss in afforestation. The bulk of the appeal site now contains only remnant and self sown pine trees together with extensive areas of marra grass and lupin cover. The soil type is Kairaki sand and in the National Water and Soil Conservation Organisation's classification it is classed VIIe15. It is not land having any high actual or potential value for the production of food. Forestry would be a suitable use as would passive recreation provided, (and this was stressed by a number ofwitnesses called in support of and in opposition to the proposed public work) that the foredune area is protected. At the present time there is no vehicular access to the appeal site except by four-wheel drive vehicles such as

landrovers. The respondents' proposal is to complete the formation of Bower Avenue, at least as far as the south-western corner of the appeal site, in order to gain access.

In the Council's operative scheme, the appeal site is designated "Recreation (General) Proposed" (Rec (Gen) Prop), with an underlying zoning of Rural. In proposed Change No 27 which, for the purpose of these appeals cannot be altered by objection or appeal procedures, the existing designation, i.e. the designation contained in the operative district scheme, remains, but the underlying zoning is changed to Rural P. The appeal site is shown on the planning map attached to Change No 27 at page 99A, as being part of a larger site "being investigated by the Christchurch Metropolitan Refuse Committee for the disposal of refuse by landfill".

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The Evidence and Submissions

On reviewing all the evidence and submissions made, certain important issues have emerged. In summary those issues are as follows:

1. The practicalities of carrying out the proposed public work on the appeal site including, in particular, the practicalities of restoring the re-contoured land formation.

2. The protection of the coastline and the foredune area generally.

3. Problems associated with drainage and the possible formation of leachate from the landfill operation.

4. The effects of the proposed work in the coastal environment.

5. The likelihood of adverse effects from noise, smell, dust and vermin arising from the proposed work on the appeal site.

6. Difficulties with regard to access to the appeal site.

7. The effects of the proposed work upon district and regional planning objectives for the general area and in respect of the appeal site in particular.

8. The matters set out in s.118(8).

9. The means by which provision should be made for the requirement in the Council's district scheme .

We heard detailed evidence and submissions on all these matters. We had evidence from engineers associated with the proposed public work, scientists commissioned to evaluate and give opinions on matters relating to leachate, land restoration and protection of the coastline, landscape architects in relation to environmental aspects, and planning consultants. In addition we had evidence from one engineer, Mr Hollands, whose general opinion was that the appeal site should not be used for a variety of reasons, from planners on behalf of various appellants and from a number of objector/appellants . On traffic matters we had evidence from traffic engineers who held opposing views as to the suitability of Bower Avenue in particular.

Later in this decision we will set out our conclusions in respect of these various issues. We record, at this point, that, in large measure, a number of the issues relating to the use of this appeal site are coloured by the fact that matters relating to drainage, leachate, restoration and the protection of the coastline will be affected by the nature and quality of the management of the proposed work. It is of concern to us that those opposed to the proposed work are reluctant to accept that the Refuse Committee is either willing to, or capable of, exercising a high degree of mangement and control. Many of the fears expressed by a number of witnesses and, in particular, the residential witnesses are founded on their experiences or observations of past performances relating to landfill oprations. Reference was made to the Bexley tip and the Heathcote County Council tip. The latter was the subject of proceedings before the Number Two Town and Country Planning Appeal Board which imposed a series of stringent conditions some of which, it appears have not been adhered to. Notwithstanding Mr Vogan's genuine endeavours to make it clear that what is proposed here is a controlled landfill operation different in nature from the ones just referred to, we can readily understand and appreciate the concerns of those who have expressed their fears before us. Mr Vogan recognised that management of the appeal site is not going to be easy. However, it is of some comfort to us, and we hope it will be of some comfort to others, to record that our inspection of the western transfer station coupled with the evidence we heard about the operations of that station satisfies us that the Refuse Committee's management record, at least so far, is impressive.

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Statutory and Other Legal Considerations

Under this heading we put to one side the locus standi issues referred to earlier in this decision.

We begin by dealing with Mr Hearn's preliminary submission concerning the Tribunal's jurisdiction. The question is whether that jurisdiction is affected by the fact that the respondents appear to have altered the terms of their requirements, between the time those requirements were dealt with by the Council and the time when the respondents notified the Council of their rejection of it recommendation. We record that this submission was made on behalf of those appellants, and other bodies or persons, pursuant to s.157, represented by Mr Hearn. No such submission was advanced by the Council.

The relevant part of the requirement made by each of the respondents is set out near the beginning of this decision. It requires the Council to make provision in its district scheme for the establishment of a refuse disposal landfill site by way of a designation, by identifying the land referred to in the planning maps of the district scheme, and on those maps placing the words "Proposed Refuse Disposa Landfill Site". That is the requirement which was the subject of the procedures embarked upon by the Council pursuant to s.118(3) and which was the subject of objections and submissions pursuant to s.118(4). That is the requirement also, which was the subject of the Council's consideration and recommendation pursuant to s.118(5).

For the reasons set out by the Council it concluded that the designation, which was the subject of the respondents' requirements should not proceed. Accordingly, it recommended that the requirement be revoked.

Pursuant to s.118(6) the respondents are empowered, after considering the Council's recommendation, to advise the Council of their decision as to whether that recommendation is accepted or rejected either wholly or in part. In this case each of the respondents notified the Council, relevantly, in the following terms:

> "THIS COUNCIL having considered that recommendation and the reasons given for it now rejects that recommendation and CONFIRMS the designation such land being described in the Schedule hereto but with the word 'proposed' deleted and replaced by the word 'interim'. This Council also resolves to adopt as its statement of reasons for this decision, as required by Regulation 40 of the Town and Country Planning Regulations, the reasons set out in the attachment annexed hereto."

Each Council then adopted a statement of reasons for rejecting the Council's recommendation and in the course of doing so said, inter alia:

> "The word 'proposed' is to be replaced by the word 'interim'.
>
> Because the Waimairi County Council has not proposed any modifications to the requirement as originally made this Council has no option but to confirm that requirement unchanged.
>
> However this Council assures the Waimairi County Council but not as a formal part of the designation that in operating the landfill the Metropolitan Refuse Disposal Committee will do so in conformity with the definitions and specifications now set out."

There then follows a series of definitions and a specification for management.

Put shortly, it is Mr Hearn's submission that the respondents are not empowered to "confirm the designation such land being described in the schedule hereto but with the word 'proposed' deleted and replaced by the word

'interim'". Accordingly, he submits that the decisions of the respondents are ultra vires and, as a consequence, no rights of appeal have arisen pursuant to s.118(7). Therefore the Tribunal is without jurisdiction.

As part of his answer to this submission, Mr Milligan submitted that the Council's recommendation includes its extensive reasons therefor. Accordingly that part of the decisions complained of by Mr Hearn is nothing more than an indication of the respondents' rejection, in part, of the Council's recommendation. Put another way, by making the amendment referred to in their decisions the respondents are confirming part of the Council's recommendation relating to the difficulty about the word "proposed" as opposed to the word "interim". In addition, Mr Milligan pointed out that, in the reasons given by the respondents for their decisions it is clear, from the passage cited above, that the respondents accept that the requirement must remain unchanged.

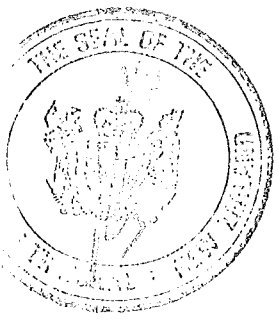
We do not accept the first part of Mr Milligan's submission, but we think there is some significance in the second part. In our judgment the Council's recommendation was that the requirement be revoked. The Council has the power to recommend that the requirement be confirmed, modified or revoked or made subject to conditions restrictions or prohibitions - see s.118(5). It is to be noticed that this is a power of recommendation only. A council does not have the power itself to do any of those things. In this case the Council made no recommendations other than that the requirement be revoked. Pursuant to s.118(6) the requiring authorities, in this case the respondents, have the power to accept or reject that recommendation either wholly or in part. In this case the recommendation is not capable of being accepted in part.

Accordingly, it is our judgment, that in purporting to 'confirm the designation such land being described in the schedule hereto but with the word 'proposed' deleted and replaced by the word 'interim'", the respondents acted without lawful authority. We pause to comment that we are not quite sure what those words mean. But we take them to mean that the respondents intend that the requirement to make provision by way of designation is to be modified by deleting the word "proposed" and substituting the word "interim". The respondents did not have the power to do that. There are good reasons for this. By the time the procedures reach the stage contemplated by s.118(6), the requirement has been the subject of public scrutiny and recommendations by the territorial local authority in whose district scheme provision is to be made. In the absence of any recommendations by that territorial local authority it would be quite wrong if a requiring authority were then permitted to make its own modifications. Its decision under s.118(6) is the decision which gives rise to the rights of appeal provided for by s.118(7). Then too, it is important to notice that, on appeal, this Tribunal is empowered to confirm, modify or revoke the requirement and impose such conditions or restrictions as it thinks fit. Therefore, if any error has occurred earlier, or circumstances have arisen which make it desirable to modify the requirement, the situation is not without remedy. Then too, s.118(9) requires the Council, without formality, to include the requirement in its district scheme as issued or as modified. If there are no appeals pursuant to s.118(7), the Council is empowered only to make provision in its district scheme for the requirement as issued, or modified as a result of its own recommendations to the requiring authority.

For these reasons we have concluded that there is force in Mr Hearn's submission that the respondents' decisions are

invalid, at least in part. But the question remains as to whether that invalidity is such as to deprive this Tribunal of its jurisdiction on appeal. There is authority, binding upon this Tribunal, for the proposition that where a decision of a council is given without reasons, thus rendering that decision invalid for failure to comply with s.67(2), no right of appeal arises - see Duncan v Thames Coromandel District Council 7 NZTPA 65. But there is also authority for the proposition that this is not an absolute rule - see Calvin v Carr [1980] AC 574, Ireland v Auckland City Council 7 NZTPA 97 and King v Waimea County Council A27/80. Then too, there is the doctrine of severance which was discussed at the hearing. That doctrine was referred to by the Court of Appeal in Turner v Allison [1971] NZLR 833; 4 NZTPA 104. In that case severance was applied with regard to a certain condition imposed by the Town and Country Planning Appeal Board in respect of a land use planning consent. It was applied in order to sever a condition which was seen to be ultra vires the Board, leaving the balance of the Board's decision, including other conditions, a valid decision at law.

Having regard to this doctrine, the judgments just cited and the matters set out earlier in this part of this decision, it is our judgment that this is a case where we should treat the respondents' decisions as being valid by severing the words complained of. Those words are not vital to the respondents' decisions and, once severed, the decisions themselves remain sensible and valid decisions in accordance with the Act. We record, that having accepted jurisdiction for these reasons, we have had the advantage of a lengthy and detailed examination of the merits of the respondents' proposal as embodied in the original requirements. We apprehend that our ruling is in accord with the spirit of s.166 of the Town and Country Planning Act 1977.



If the respondents had failed to resolve to reject the Council's recommendation we think our decision might well have been different.

We turn now to consider the more substantial legal issues. Lenthy submissions were made to us on the meaning and effect to be given to s.118(8) as amended by the Public Works Act 1981. Then too we heard lengthy submissions on the meaning and effect to be given to s.3(1)(c) which provides that, as a matter of national importance, the preservation of the natural character of the coastal environment and its protection from unnecessary development should be recognised and provided for. Although the Canterbury United Council was not a party to these appeals, reference was made to that Council's operative regional scheme and its proposed review of that scheme. Reference was made also, to the provisions of the Council's operative district scheme and proposed Change No 27, and to the Christchurch City Council's operative scheme and proposed review.

It was common ground that the respondents' proposed work is an "essential work' as defined in the Public Works Act 1981. By virtue of s.244(7) of that Act, s.118(8) of the Town and Country Planning Act 1977 was amended by adding a new sub-paragraph (d). The result is that s.118(8) now provides inter alia as follows:

> "In determining any such appeal the Tribunal shall have regard to
>
> (a) Whether the proposed work is reasonably necessary for achieving the objective of the Minister or local authority;
> (b) Whether the site is suitable for the proposed work; and
> (c) The economic, social and environmental effects of the proposal; and
> (d) The extent to which adequate consideration has been given to alternative sites, routes, or methods of achieving the objectives of the Minister or local authority - ..."

Mr Palmer, for the Council, submitted that s.118(8) provides a complete code although he qualified that by saying, except for s.3. Other counsel and Mr Milligan in particular, made detailed submissions referring to previous decisions of Town and Country Planning Appeal Boards and this Tribunal concerning public works and sought to establish a developing pattern concerning the way in which the Boards and the Tribunal have dealt with these matters in the past, as an aid to understanding the provisions of s.118(8). That is an interesting academic exercise, but in our judgment it is not necessary to do any more than refer to it. The wording of s.118(8) is clear. The provisions of that sub-section are not criteria, such as, for example, the provisions of s.74(2)(a) with regard to specified departures. They are Parliament's expression, in legislative form, of the matters which the Tribunal is required to have regard to in determining appeals under this section. It follows that if, with respect to any particular matter specified in that sub-section, a positive answer in favour of the proposal cannot be stated, nevertheless it will be within the jurisdiction of the Tribunal to confirm a requirement or modify it and/or impose conditions or restrictions. In the end, it is a matter for the Tribunal's overall judgment, provided, all those matters are given consideration. But the Tribunal is not confined to a consideration of those matters alone, although it should be noticed that, with regard to public works, Parliament has devoted a separate part of the Town and Country Planning Act 1977 to that subject. However, a public authority having financial responsibility for a public work, is not bound to follow the procedures provided for in Part VI - see Pukekohe Borough Council v Minister of Works and Development 7 NZTPA 184. Then too, it should be remembered that in the preparation of a district scheme or the review of a scheme, procedures are provided, pursuant to s.43 and s.60 of the Act, for

provision to be made for public works. It is only where Part VI is invoked that the provisions of s.118(8) are applicable. But it was not suggested that we should not have regard, for example, to the relevant provisions of s.3, the relevant provisions of s.4, or the appropriate regional and district planning schemes.

We think all these matters are relevant, but we do not accept Mr Hearn's submission that the relevant provisions of s.3(1) must prevail if conflict is established. Part VI of the Act is not made subject to s.3. Other provisions of the Act are expressly made subject to s.3, such as s.36, s.72 and s.74. We think, with respect, that the provisions of s.3 as they relate to public works were put into proper perspective by Speight J in Environmental Defence Society v Mongonui County Council M101/81 when, after referring to the provisions of s.3(1)(c), His Honour said at page 10 of his unreported judgment:

> "In so far as the Act does not prohibit works which in any way alter natural structures but merely calls for recognition and provision, the favourable assessment of the Tribunal on this question appears to me to be quite in keeping with its obligation."

That is not to say that the provisions of s.3 should not be given considerable weight in the context of an appeal pursuant to s.118. However, we reject any suggestion that they are over-riding in their effect. If Parliament had so intended it would have been a simple matter for it to have said that.

Accordingly, for the purpose of determining these appeals we shall have regard to the operative district schemes of the Waimairi District Council and the Christchurch City Council;

the proposed review of the Christchurch City Council's scheme; proposed Change 27 to the Waimairi District Council scheme; the operative regional scheme; the relevant provisions of s.3 and, in particular, s.3(1)(c); the provisions of s.4; and the matters set out in s.118(8). We will not give much weight to the provisions of the proposed review of the regional scheme because its provisions were not espoused before us by the Canterbury United Council and its formulation is at an early stage.

Finally, under this head, we wish to say something more about the provisions of s.118(8). In some respects they are overlapping. For example, economic social and environmental effects of a proposal may be considered along with site suitability. Alternative sites, routes and methods may be considered along with site suitability, and the economic, social and environmental effects. We think it is wrong to be too rigid in examining the matters set out in this sub-section. What is important is that each of them is given consideration. 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 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.

In saying all this, we again state our view that there is no onus of proof placed on any party with regard to any of these matters. To the extent that the judgment of Speight J in Environmental Defence Society v Mongonui County Council (supra) might be read, at page 6, as indicating a contrary view, we record a submission made to us that His Honour's statement appears to be contrary to the judgment in Wellington Club Incorporated v Carson and Wellington City Council [1972] NZLR 698; 4 NZTPA 309 This Tribunal's opinion on the question of onus of proof in planning appeals was restated recently in West Coast Regional Abattoir Company Limited and Others v Westland County Council DNo C64/81. We adhere to the view there expressed. In our judgment the Tribunal's function is to receive all relevant evidence both for and against a proposal; to make its findings of fact and to adjudicate upon the matters in issue in the light of those findings having regard to the matters which Parliament has laid down in the Act. From there its function is to make a determination in accordance wth the jurisdiction given to it under the relevant section or sections of that Act, in this case, s.118. Inevitably the Tribunal has to weigh the evidence. It is the substance of

that evidence that is important, not its volume. There may well be an evidential burden which will shift from party to party making various assertions and depending on the issues. For example, with regard to s.118(8)(d) we think there is an evidential burden upon a requiring authority, in the first instance, but that does not amount to an onus of proof. That evidential burden may shift if the requiring authority tenders evidence which, by itself, would satisfy the Tribunal that adequate consideration has been given. In this case evidence has been tendered, on both sides, with regard to this issue. But neither side is under any onus of proof.

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Our Conclusions

We return now to give more detailed consideration to the issues referred to earlier in this decision under the heading "The Evidence and Submissions". In respect of each of those issues we will now record our conclusions thereon and in the course of doing so we will give our reasons in each case.

The Practicalities of Carrying out the Proposed Public Work on the Appeal Site.

Several witnesses expressed reservations about the use of the appeal site for the proposed public work, none more strongly, than Mr Hollands. Mr Vogan conceded that management of the site is not going to be easy. Some of the

witnesses doubted the practicality of restoration in the way envisaged by the respondents. It was suggested that there would be difficulties with regard to stabilisation of the refuse mounds and the establishment of planting on those mounds. It was suggested also, that despite the best of intentions, because the proposed landfill site is in an area where ground water is at present found at shallow depths, and surface ponding of ground water and rainwater have been known to occur, it will be impracticable to ensure that the refuse always remains above the groundwater level.

Having considered all these matters we have concluded, on balance, that the proposed work including the restoration work is practicable on this site. In particular we were impressed by the evidence of Mr Keating who has had practical experience with restoration work in an exposed part of the New Zealand coastline north-west of Wanganui in relation to the Wapipi Iron Sands project and who has seen, first hand, restoration work carried out in Australia and England. Mr Vogan is confident that the work can be carried out on this site and he accepts that drainage works will probably be necessary. We think that many of the concerns expressed by Mr Hollands can be overcome and should be overcome by the employment of appropriate management techniques and we will have something more to say about that aspect of the matter later in this decision.

The Protection of the Coastline and the Foredune Area Generally

In this regard the evidence of Dr Kirk a geographer and a specialist in coastal geomorphology and the dynamics of beach systems is of particular importance. It is Dr Kirk's

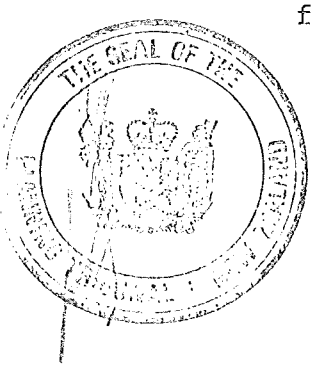
opinion, which we accept, that it would be unwise to develop the landward face of the foredune area within a distance of 120m from mean high water mark. Dr Kirk states further, that a wider buffer zone of 250m is not necessary to provide for either the buffer function itself or dune conservation since this particular piece of coastline has a long term stable position. Again, we accept that opinion. We recognise and record that Dr Kirk's opinion is based upon the premise that the landfill operations will not significantly raise and maintain an elevated water table through the foredune area. If that were to occur, it is Dr Kirk's opinion that there is a possibility that saturatio(of the beach sand might occur and the capacity of the sand system to resist erosion could be greatly reduced. Dr Kirk mentioned also, the possibility of cementation of the beach sands due to the infiltration of leachate. We shall be discussing these matters in more detail under another sub-heading. But, given that premise, we accept that the proposed public work will not jeopardise the protection of the coastline and the foredune area. For reasons which we shall state later, the proposed public work, although not being necessary for this purpose, may well enhance that objective.

Problems Associated with Drainage and the Possible Formation of Leachate from the Landfill Operation.

We have mentioned already problems associated with drainage. We have recorded our conclusion, that drainage works will, in all probability, be necessary. We think largely this is a management matter but it should be provided for accordingly. Under this heading, it is appropriate to deal with matters relating to the possible pollution of groundwater and the likelihood of the formation of leachate. Detailed evidence was given on this topic by Mr Wilson a hydrologist, Dr Noonan a microbiologist, Mr Bowden the regional water engineer with the North Canterbury Catchment Board and Mr Hollands.

Our conclusion from a consideration of all the relevant evidence on this topic is that the possibility that leachate will be formed as a result of this proposed public work cannot be excluded. Indeed, it cannot be excluded irrespective of where the proposed public work is carried out. We further conclude, and we understood Mr Hollands to agree with this, that it is an important matter, in the public interest, to ensure as far as possible, that the Christchurch Metropolitan area's underground water supplies are not adversely affected by such influences as the infiltration of leachate from landfill operations. There is some force in Dr Noonan's observation that if the leachate is not toxic there is no problem. It cannot be said, with certainty, that toxic material will not find its way into the landfill operation and cause the production of toxic leachate. We accept that it is important that the landfill operation be kept above groundwater. We have made reference to this already. We accept also that it is important that continuous monitoring of the landfill site be maintained. However, we think it is important also, to record, that the results of such monitoring as has been done to date show that the maximum pore velocity towards the beach from the appeal site is estimated to be 6.71m per month. That was the figure given by Mr Bowden. Dr Noonan's experiments show that artificial leachate has a slow seaward movement at the rate of approximately 1m per month. Three small pits monitored for 500 days showed little evidence of migration of chloride ions. Dr Noonan suggested also that to lengthen the time of leaching, the mounds should be covered with material which will hold winter rain and that transpo-evaporation will be an important factor in minimising problems which might occur as a result of leachate being produced.

We accept the evidence of the expert witnesses called on behalf of the respondents, that if there is to be any escape of leachate from the landfill operation, then a site close to the coast is desirable. As several witnesses stressed, no potable water supplies are likely to be affected if such a site is used. In saying that we do not overlook the importance of avoiding rises in the water table level or leachate inflitrating the sand dunes and beach area. We think, from an engineering point of view, it is possible to avoid those consequences. While on this topic, we wish to make reference to that part of Mr Hollands evidence where he drew attention, in a graphic way, to the existing situation at the site of the Heathcote County Council's refuse disposal tip on the banks of the Heathcote River. It is of concern to us that this evidence could be adduced. That particular proposal was the subject of extensive consideration by the Number Two Town and Country Planning Appeal Board and its final decision is reported as Lyttelton Borough Council and Others v Heathcote County Council 6 NZTPA 33. It is not for us to determine, but it does appear from Mr Holland's uncontested evidence that some of the conditions imposed by the Board in that case are being given scant attention. Our concern is that one of the respondents in these appeals is the Heathcote County Council. When evidence of this kind can be adduced before us it is little wonder that members of the public are sceptical of statements made that possible problems associated with matters such as leachate can be controlled. We stress again that it is of the utmost importance that the public has confidence in the controlling authorities' willingness and ability to exercise proper management and control over these public works and Mr Hollands's evidence shows how easy it is for that public confidence to be shaken.



The Visual Effects of the Proposed Public Work

Earlier in this decision we set out, in some detail, a description of the proposed work. With the buffer planting proposed the visual effects will be restricted but not entirely hidden from view. Nevertheless unless members of the public are actually within the confines of the site or are standing on the foredunes overlooking the site, they are unlikely to have a view of the proposed work, except from the air and such a view would be so transitory as to be insignificant. The end result of the proposed work, i.e. the re-contouring of the land and its restoration as already described will not be unpleasant, and in our view, will not be entirely out of character with its surroundings. To the west is a substantial commercial exotic forest. To the south of the site there is more exotic planting beyond which is the golf course to the south-east and, in due time, residential development to the south-west. Immediately to the east is the foredune and beach area which will remain undisturbed and immediately to the north is further substantial exotic forest planting. The landform will be higher, in places, than it is now. But it is important to record that, although that height will, in places, reach 25m the scale is such that the increases in height will appear reasonably gradual. It is wrong to give the impression that this proposed work will create the visual effect of a series of high mounds indiscriminately located in an otherwise flat landscape. One of the witnesses who was called on behalf of the appellants, Mr Cathcart, the resource management manager for the planning division of the North Canterbury Catchment Board and a soil conservator, told us that the matters of concern to him in the landfill proposal as presented in 1981 have been adequately dealt with in the 1982 proposal by which he was referring to the evidence given before this Tribunal. He said that changes in the height of the dunes

further away from the coastline itself have affected his view of the matter. He recognised that there is room for a difference of opinion with regard to visual effects as shown by the evidence of the two landscape architects. But we think Mr Barthelmeh's approach is too rigid. He places far too much emphasis on the alleged incongruity of the mound formations.

It is at this point that we must consider one of the major arguments put forward by the appellants. The appellants assert that to confirm this requirement would be to fail to recognise and provide for the matters of national importance set out in s.3(1)(c) of the Town and Country Planning Act 1977. We have expressed our view on the place which that sub-section should occupy in our consideration of this matter. We confess immediately that we have not found this particular aspect of the case an easy one to resolve. On one view of the matter, taken literaly, it can be said that this proposed work will change the appeal site in such a way that its preservation becomes impossible. In the end, this is really what those opposed to the proposal assert. However, what appears to have been given insufficient weight by those opposed to this proposal is the fact that the proposed public work includes a detailed programme of restoration designed to leave the appeal site in a state fit for passive recreation. That state will not be the same as presently exists. But, in our judgment, its character will be natural. In this regard we rely, in particular, on the evidence of Mr Miskell and to a lesser extent, the evidence of Mr Keating. The appeal site will possess a character where the forces of nature predominate over the hand of man. To the extent that the wording of the proposed designation, as set out in the requirement, does not state this objective, it may have to be modified and we shall have something more to say about that later in this decision. In

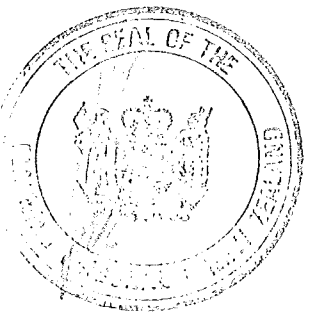
the light of the foregoing findings, we see it as our function to determine whether confirmation of the proposed public work on this site will amount to a failure to recognise and provide for the matters set out in s.3(1)(c). If Parliament had intended that what is to be preserved and protected is the present natural physical state of the land then we think the answer to the question just posed must be "yes". We record that we are satisfied that the appeal site is part of the coastal environment; it is subject, in a direct way, to the coastal influences and in our view it would be artificial, as some witnesses tried to do, to divide the site for the purpose of determining whether part of it is, and part of it is not within the coastal environment. We think the site has a natural character. But, as we say, if Parliament did intend the preservation and protection of the existing physical state then it must follow as Speight J said in Environmental Defence Society v Mongonui County Council (supra):

> "...that not a shingle be moved, not a shell fish disturbed."

His Honour was not prepared to hold that this was what Parliament intended and with respect, nor are we.

We think Mr Milligan is right when he submitted that "character" must be construed as a quality rather than merely a physical state of affairs. Such a submission is in accord with s.2(2) of the Act. We must evaluate the effects upon the natural character of this part of the coastal environment by reference to amenities. We must consider in what way the proposed work will affect the quality of those amenities, or put another way, we must ask ourselves the question "Will the proposed work adversely affect those natural qualities and conditions in the area which contribute to the pleasantness, harmony and coherence of

this environment and its better enjoyment for any permitted use?" If this public work were one which involved the construction of permanent non natural features, such as a sewage treatment station or an oxidation pond, then we think it would be very difficult indeed to justify it on this appeal site. But the proposed work is not a work of that kind. From time to time, during the life of the proposed work, certain aspects of it will interfere, in an interim way, with the preservation and protection provided for by s.3(1)(c). But these effects will be transitory and will be limited to relatively small specified areas of the site. The progressive result of the proposed work will be the restoration of the site to a state where its character will contribute to the pleasantness, harmony and coherence of this environment and its better enjoyment for any permitted use which, in this case, as the Council's district scheme and Change No 27 contemplate, is passive public recreation. If there is any conflict with s.3(1)(c), it is slight and transitory. On the other hand, if the appeal site is seen to be part of New Zealand's resources, and we think it should be, then this proposed public work is a wise use and management of it in in terms of s.3(1)(b). We say that because, although it is not necessary for the preservation of the coastline and the sand dune area that this proposed work be carried out, it will create a passive recreation area, providing for the type of activities about which we heard a good deal of evidence from various objector witnesses during the hearing, and take the pressure off the more fragile sand dune area itself. We do not accept the proposition put to us by some witnesses for the respondents, that the use of the refuse itself is a wise use and management of one of New Zealand's resources, but for the reasons just set out, we think the use of the appeal site can be seen to be so.



It is of passing interest only, but we think worth, recording that neither the existing designation of Recreation (General) Proposed, the provisions nor of Change No 27 limit the use of this site to uses which could be seen necessarily, to be protecting and preserving the natural character of this coastal environment. There is nothing in either of those two documents which limits the kind of recreation reserve which may be created. There are statements in Change No 27 which indicate that it is the Council's intention that such recreation should be passive and unstructured. But the uses permitted in the Rural P zone do not have that limitation. We find it a little difficult therefore, to understand why the Council is so strongly opposed to the use of this site on this ground.

So far as the question of "unnecessary development" is concerned, we say immediately that this proposed work is a "development". While it may not be necessary, it is certainly not in the luxury class and is therefore not unnecessary. To the extent that it will enhance the amenities of the area, it can be seen, in planning terms, as being necessary. It is not an unwarranted development in land use planning terms.

<u>The Likelihood of Adverse Effects of Noise, Smell Dust and Vermin Arising from the Proposed Work on the Appeal site</u>

Many emotive statements were made to us by various witnesses about this aspect of the proposed work. Yet the nearest existing residence is 1000m away. It is correct that residential development is planned to come within 600m of the site at the nearest point, but we are entirely satisfied by Mr Vogan's evidence that all the fears expressed about these alleged adverse aspects of the proposed work are quite

unfounded. In saying that we do not say that some of these results will not occur from time to time. Mr Vogan recognise that and again management techniques can be employed to avoid any adverse results.

Difficulties with Regard to Access to the Appeal Site

Of all the matters put in issue by these appeals, this is the one which we think the respondents have failed to answer adequately. The evidence is that the appeal site has no existing formed access. It is proposed to form the legal extension of Bower Avenue and use that street as the only direct access to the appeal site. Notwithstanding the detailed evidence given by Mr Smith, the traffic engineer called by the respondent and the concession made by Mr McCombs the traffic engineer called on behalf of some of the appellants, to the effect that certain upgrading work, especially to the surface of Bower Avenue would result in some amelioration of noise and vibration effects, we have reached the clear and firm view that the use of Bower Avenue as the direct access to this appeal site must not be permitted. North of Beach Road, all the traffic to and from the appeal site will use Bower Avenue. On an average that is likely to involve at least 75 heavy vehicle movements during a working day for 7 days per week. Apart from the Golf Course on the eastern side the rest of Bower Avenue from New Brighton Road through to Rothesay Road is zoned and to a large extent established for residential purposes. We recognise that some other residential streets in the Christchurch Metropolitan area may be used for transportation from the various refuse transfer stations. But the important point about the use of Bower Avenue and, in particular, that stretch of Bower Avenue north of Beach Road is that there the whole of the traffic to and from the appeal site will be concentrated. Given the provisions of the two relevant district schemes and the expectations of

the residents, based on those schemes and based also on what is physically present, we think it is quite unreasonable, in the public interest, to allow Bower Avenue south of Rothesay Road to be used for this purpose. This street has never been intended to carry a procession of heavy motor vehicles such as is proposed to be travelling to and from this site. Such a use of the street will be quite out of character with the existing and foreseeable amenities of this area. We think the residents are entitled to be protected against that eventuality. We shall refer to this matter again when we come to consider our determinations.

The Effects of the Proposed Work upon District and Regional Planning Objectives for the General Area and the Appeal site in Particular

We have referred already to the provisions of the Council's operative district scheme and Change No 27. During his submissions Mr Hearn endeavoured to persuade us that the requirement should not be confirmed because the Council itself would not have jurisdiction, under s. 36 of the Act, to make provision for refuse disposal in respect of a district other than its own. He drew attention to the fact that the second schedule to the 1977 Act makes no specific reference to refuse disposal whereas the comparable provision in the 1953 Act did. We think the answer to that submission was given by Mr Milligan when he said that if Mr Hearn's argument were accepted, then it would be improper for a district scheme to make provision, for example, for defence works. We do not accept Mr Hearn's submission. In any event, whether or not the Council has the jurisdiction to designate for this purpose, of its own motion, is not in issue. That is not to say that the provisions of the district scheme should not be considered. We have already said that they should and we have so considered them.

So far as regional planning is concerned we have said already that the proposed regional scheme is at a stage

where we should place little reliance on it and, in any event, if anything it is less rigid than the operative scheme. In the operative scheme the appropriate notation in terms of the Code of Ordinances is "the Special Rural Area". For the purpose of this decision we take the matter of regional significance relating to this notation to be that part of the scheme statement referred to it which reads as follows:

> "Land where the amenity and recreational value both existing and potential of such physical features as the Port Hills, the coastline (our emphasis) and the river banks are of major importance and the environmental contrast which such features afford to any population are considered essential to the community from a health and convenience point of view."

It is common ground that it is in matters of regional significance that district planning is required to recognise regional planning under the 1953 Act - see Hutt County Council v Wellington Regional Planning Authority [1972] NZLR 916; Pikarere Farms Limited v Porirua City Council 6 NZTPA 545; and Russell v Paparua County Council DNo C26/80. The question then is whether confirmation of this requirement will lead to a failure to recognise the relevant matters of regional significance. If the requirement were not to lead to the results which we have already discussed under the heading relating to the environmental effects, it may well be that it would. However, for the reasons set out under that heading we are satisfied that confirmation of this requirement will not result in the existing designation being excluded as discussed by Somers J in Queenspark Community Association Inc v Waimairi County Council (supra). We think we are entitled to assume that the existing designation is in harmony with the matter of regional significance provided for by the operative scheme; at least there was no evidence or submission to the contrary. We add that when we refer to confirmation of the requirement we do not overlook what we have said already about the requirement having to be modified.

The Matters set out in Section 118(8)

We have said earlier in this decision that we think it is wrong to endeavour to separate these matters too rigidly. Consideration of some aspects of one can be involved with a consideration of others. So, for example, with regard to the question of access it is our judgment, for the reasons set out already, that if direct access is to be via Bower Avenue this site is unsuitable. It may be that questions of access can also be seen to be relevant under that part of subs.(8) relating to the extent to which adequate consideration has been given to alternative routes. Again, it may be seen to be related to that part of subs(8) concerning the social and environmental aspects of the proposal. Similarly, whether or not the proposed work is reasonably necessary for achieving the respondents' objective, should not be seen in total isolation from the other matters set out in the sub-section. In this case there was some evidence that composting might be a suitable alternative method. But the advocate of that method conceded that, even if it were adopted, substantial land filling operations would still be required. Composting and other methods of disposal of waste have been considered by the respondents for many years and the Council's engineer, Mr Lamb gave a detailed history of those considerations. The objective of the respondents is clear. Put quite shortly it is to dispose of approximately 140,000 tonnes annually, of refuse created by the Christchurch Meropolitan area. We are satisfied that the proposed work is reasonably necessary for achieving that objective. We are satisfied also, that the respondents have given considerable consideration to alternative methods of achieving that objective and adequate consideration to alternative sites. In the end there was only one group of sites, which came to be known during the hearing, as the Chaneys sites, which were pressed by the appellants. But the evidence

establishes that in the early 1970s, other sites were considered. The Chaneys sites have been discounted by the respondents primarily on the grounds that transportation costs to and from those sites are higher than with the chosen site and also because of a greater risk with regard to acquifer pollution. There is another reason, which has not escaped our notice, and that is that for the most part, the land involved is owned by the Christchurch City Council which wishes to continue using it for afforestation purposes. If that were the only reason for rejecting the Chaneys sites, then we would have our suspicion about whether adequate consideration has been given. We think it is unfortunate that a good deal of the investigation of alternative sites has occurred since the chosen site was selected in early 1975, when the Refuse Committee decided to begin land acquisition in respect of the appeal site. We say it is unfortunate because it has enabled Mr Palmer, for the Council, to make the submission supported by evidence from Mr Hollands, that the justification for rejecting supposedly alternative sites proceeded on the basis of ex post facto reasoning. Given the history of this matter as deposed to by Mr Lamb, Mr Forbes and Mr Douglass, we think Mr Palmer's submission has some foundation. So far as Mr Holland's evidence on this aspect of the matter is concerned we think its force was diminished considerably when, in answer to Mr Milligan,, he agreed that if the appeal site were 600m further to the north and 360m further west then except for the question of access, it would meet his selection criteria. This is so because those movements to the north and to the west were based on Mr Holland's own view that by so moving it greater protection would be afforded to the coast and the residents to the south. We have dealt with those questions already and we have found against Mr Hollands's assertions. We find that the respondent has given adequate consideration to alternative sites. In doing so we stress that it is not for us to say

that the chosen site is the only suitable site or the most suitable site. As we said earlier, we apprehend that the purpose of this part of the sub-section is to ensure that, on appeal, this Tribunal is satisfied that the respondents have not acted arbitrarily nor given only cursory consideration to alternatives. In respect of sites and methods we are satisfied that the respondents' consideration has been neither arbitrary nor cursory.

If the selection of Bower Avenue is a matter of consideration of routes, then we think the respondents have failed to give adequate consideration. In saying that we recognise that the respondents have given some consideration to alternative routes and detailed evidence about those matters was given by Mr Smith and Mr McCombs. But we do not overlook also the evidence of Mr Forbes, the Christchurch City Council engineeer, who made it clear that at the time when the appeal site was selected it was anticipated that one of the alternative routes, namely the Bexley Expressway along the edge of the Travis Swamp, was expected to be developed earlier than has occurred. It remains designated in the appropriate district schemes. It is Mr Forbes opinion that whilst Bower Avenue would be adequate in the interim the long term preferred alternative route is along the designated route. The stumbling block is the cost of developing that route. Witnesses were at variance on this issue of cost and we recognise the limitations they were under. But it is certainly the most expensive, its cost lying between $1M and $2M, and probably nearer the latter figure. However, we prefer to found our conclusion on the question of Bower Avenue on the basis that its use as the direct access to the site makes the site unsuitable and it will also have undesirable social and environmental effects.

As to the economic effects of the proposal, for the most part, these must be beneficial in that it will provide along with the transfer stations system, a desirable and much needed system of disposing of the refuse generated by Metropolitan Christchurch, at a cost to the community which, leaving aside the question of access, no witness was prepared to say would be unreasonable. The appellant Smith Developments Limited is concerned, on economic grounds, about its prospects of developing the residentially zoned land on the western side of Bower Avenue and we have taken that into account in concluding that Bower Avenue should not be used.

The Means by which provision should be made for the Requirement in the District Scheme

Having regard to the interim determination which we intend making it is not necessary for us to dwell on this matter at any length at this stage. Much argument was addressed to us on the topic of the perceived inadequacies of the designation procedures from the point of view of enforcement. Suggestions were made that the most appropriate way to make provision for this requirement is by way of zoning. Elsewhere in this decision we have made reference to the fact that the requirement needs to be modified.

We content ourselves by saying, at this stage, that we were disappointed that no reference was made, by any of the parties, to one particular previous decision of the Town and Country Planning Appeal Boards namely Whitford Residents and Ratepayers Association Inc v Manukau City Council 6 NZTPA 294. Many of the matters canvassed at the hearing were the subject of the Board's decision in that case. It was a case involving a designation for a rubbish tip. The Board had no

difficulty in resolving questions relating to conditions and restrictions. The decision has stood the test of time and the Town and Country Planning Act 1977 does not alter the law with regard to the way in which the Board set about making provision for that public work. It held that provision should be made, in the relevant district scheme, by way of a designation and an addition to the ordinances. The details are set out in the decision and we commend it to the parties for study.

In this case we think the same procedure should be adopted. This is not a case where the land should be zoned as was suggested in Pikarere Farms Ltd v Porirua City Council (supra). Principally there are two reasons for that. First, this is not a case where land in private ownership is involved and where, as in that case, once the construction of the proposed public work has been completed it is intended that the part of the land, to be used for the construction of the public work, is to be returned to the owner for normal farming purposes. Secondly, we think there are technical problems involved in zoning this land for this proposed public work given the existing designation. On the other hand, for the reasons aleady set out, we think the existing designation and the proposed public work are not incomptatible.

Accordingly it is our view that provision should be made for this public work by way of a designation. Such designation will have to be modified to make it clear that it is not only for refuse disposal purposes by landfill but also for restoration purposes. The designation should be coupled with a provision in the ordinances to include the management control matters, referred to by Mr Douglass in his evidence and discussed in earlier parts of this decision.

In due course, whether or not those provisions are adequate will depend on the willingness of the Council to enforce them. It is the Council's responsibility to do that. We see no force in the proposition put to us, that s.123 of the Act is an inhibiting factor because it enables a designation or other provision in a district scheme for a public work to be altered. That can be done only by the Council. We think it would be a brave council indeed which would contemplate altering the provisions of its district scheme here contemplated, in terms of s.123, in a way which would lessen the responsibility of the respondents. The Council itself will be one of the territorial local authorities responsible for the management and control of this proposed work. Then too, the Council has its powers under s.125. If it is not satisfied with any management plan put forward, it can have that matter brought before this Tribunal. In his submissions Mr Palmer urged us to ensure that provision was made in the scheme in such a way that its terms were enforceable at the suit of either the Council or the objectors. There are difficulties about doing that in any direct way, but we can ensure that provision is made in such a way that enforceability is available at the suit of the Council. It is the Council which has been vested with that responsibility by Parliament and we need hardly remind it of its responsibilities to the inhabitants of its district.

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Status

Near the beginning of this decision we said that we would deal with questions of status at the end. In his submissions Mr Milligan said that the status of the following representative appellants is challenged:

North New Brighton Residents Association (Appeal 74/82)
R W Bell (Appeal 74/82)
Queenspark Community Association (Appeal 74/82)
Burwood Residents Association (Appeal 74/82)
Waimairi Coastal Protection Committee (Appeal 74/82)

It is Mr Milligan's submission that each of the above appellants, which seeks status as an objector and therefore as an appellant pursuant to s.2(3)(d) of the Town and Country Planning Act 1977 lacks status pursuant to that sub-section. This was Mr Milligan's initial submission in respect of these appellants. Later, Mr Milligan modified that submission by saying that in respect of the North New Brighton Residents Association and Mr Bell, status is no longer challenged. But in each case, evidence given by these parties went beyond what they were entitled to put before the Tribunal in terms of their status pursuant to s.2(3)(d). For clarification we record here that Mr Bell is the Principal of Parkview Primary School which is located in Chadbury Street, some 660m from the buffer planting area on the southern side of the appeal site.

Then Mr Milligan challenged the status of the following individual appellants or persons seeking to appear pursuant to s.157 on the grounds that they were parties to the proceedings by reason of having been objectors initially or were persons having an interest in the proceedings greater than the public generally:

W E Foote: Formally of Lake Terrace Road but more recently of 193 Queenspark Drive - (Section 157)

A R Birbeck: 452 Burwood Road - (Appeal 74/82)

R V Allen: 104A Roydvale Avenue, Burnside - (Appeal 79/82)

R J Watson: 10 Arosa Place - (Appeal 74/82)

R A Garbutt: 6 Parish Street, Christchurch - (Appeal 74/82)

P O Brown: 462 Halswell Road, Christchurch - (Appeal 74/82)

Mr and Mrs Schneider: 133 Queenspark Drive - (Appeal 74/82)

Mrs J H Lockyer: 31 Greenhaven Drive, Burwood - (Appeal 27/82)

Mr B Ryan: 119 Bassett Street, Christchurch - (Appeal 75/82)

As the submissions under this general heading of Status developed it became clear to us that Mr Milligan was developing two separate propositions. One, directly related to the question of locus standi and the other related more to questions of admissibility and relevance of evidence. We shall deal with the second matter first.

We have recorded that Mr Milligan accepts that the North New Brighton Residents Association and Mr Bell have status pursuant to s.2(3)(d) in that each of those objectors is representing a relevant aspect of the public interest. But Mr Milligan went on to submit that in each case those objectors should be restricted to calling evidence and/or making submissions only about the relevant aspect of the public interest which they are representing. He pointed out that s.2(3)(d) had no equivalent in the Town and Country Planning Act 1953. That is correct as this Tribunal has said before - see Remarkables Protection Committee v Lake County Council (1979) DC16/79. However, if Mr Milligan is right, then the Judgment of Cooke J in Blencraft Manufacturing Company v Fletcher Development Company [1974] 1 NZLR 295; 5 NZTPA 33 must be seen as being no longer binding for the proposition there expressed, that if there is a valid appeal before the Tribunal all matters relevant to the particular proceedings before the Tribunal arise for consideration however limited the interests of the appellant. Mr Milligan accepts that this is the consequence of his submission and he asked us to rule accordingly. We

are not prepared to do that. We think there is an important distinction to be made between locus standi and the relevance of evidence and submissions. Section 2(3) is the primary provision in the Town and Country Planning Act 1977 defining rights of objection and, by reason of various later sections in the Act, rights of appeal. In the absence of any clear expression by Parliament to the contrary we think it would be wrong to limit an objector with status, in the way sought by Mr Milligan. The Tribunal is empowered, generally, to conduct a wide ranging inquiry and, pursuant to s.149,:

> "To receive as evidence any statement, document, information, or matter which in its opinion may assist it to deal effectually with the proceeding before it, whether the same would be legally admissable evidence or not."

Of course, in any individual case it is open to the Tribunal to rule that what an objector is putting before it is not relevant. But that has nothing to do with that objector's locus standi unless that is the issue calling for determination. Accordingly we rule against this part of Mr Milligan's submission.

However, it is convenient at this point to say something about a submission made by Mr Hearn with regard to the locus standi of objectors pursuant to s.2(3)(d). Mr Hearn submitted that the Tribunal's final decision in Remarkables Protection Committee v Lake County Council 7 NZTPA 273 is wrong because it is too narrow an interpretation of the term "representing some relevant aspect of the public interest". However, Parliament has sought to express some limitation on the right of a body or person to object and consequently to appeal. As we understood him, Mr Hearn submitted, in effect, that any body or person wishing to make representations about some relevant aspect of the public

interest connected with the subject matter of the proceedings has status pursuant to that sub-section. We reject that submission and adhere to the view expressed in Remarkables Protection Committee v Lake County Council (supra). That view has been followed, at last in part, by the Number Two Division of this Tribunal in Butcher v Masterton Borough Council DNo W85/80 where it is said:

> "In the present case the appellant cannot claim to be anything but a concerned private individual. We accordingly rule that he did not have status to object and therefore cannot appeal."

This brings us to another matter raised by Mr Hearn in answer to Mr Milligan's submissions. Mr Hearn submitted that s.2(3)(c) enables any body or person in any way affected, or claiming to be affected to object and consequently to appeal. Thus, for example, he submitted that Mr R V Allen (Appeal 79/82), who resides at 14A Roydvale Avenue, Burnside has locus standi because, as Mr Allen told us in evidence, he is a regular visitor to the area and uses the area adjacent to the appeal site for recreation purposes. Mr R J Watson who lives at 10 Arosa Place is in the same category. When the extensive list of objectors put before us by Mr Hearn is examined, and it runs into 19 closely typed double columned pages, there are other names and addresses appearing on that list which could be said to be in the same category. There is a person whose address is given as 69 Lincoln Road - many kilometres across Christchurch City to the west. There is another person whose address is given as 111 Mount Pleasant Road - again many kilometres to the south across the other side of the Estuary from the appeal site. These are but two examples taken at random. In the unreported part of the Tribunal's decision in Remarkables Protection Society v Lake County Council (supra) reference was made to the word "affected".

In this regard, we held that the law as it stood prior to the passing of the 1977 Act remains the same. Again, we refer to the judgment of Cooke J in Blencraft Manufacturing Company v Fletcher Development Company (supra) where this particular matter is considered extensively. Recognising that in that case Cooke J was being asked to consider the term "affected" as it related to economic consequences, it is important to record that at page 52 of the NZTPA report, His Honour said this:

> "I think that an objector whose status is challenged must be able to show that he has reasonable ground for contending that he is appreciably affected by the use, in the sense that there is or is likely to be an effect on him significantly greater than or different from the effect on the general public." (the emphasis is ours).

With respect, it is our judgment that this is still the law so far as s.2(3)(c) is concerned.

Having made these observations we turn to consider the locus standi of the bodies and persons specifically challenged by Mr Milligan. With regard to all those bodies and persons whose status is challenged and who are parties to appeal 74/82, it is not necessary for us to make a ruling because, even if all of them are found not to have status there are parties to that appeal whose status remains unchallenged. Accordingly, that appeal cannot be disallowed on that ground.This observation relates to:

Queenspark Community Association Incorporated
Burwood Residents Association Incorporated
Waimairi Coastal Protection Committee
Mr and Mrs Schneider
Mr R J Watson
Mr A R Birbeck
Mr P A Brown, and
Mr R A Garbutt

We record that to the extent that evidence was adduced by or on behalf of those bodies or persons, none of that evidence

has weighed with us at all in the conclusions we have reached on the merits of the respondents' proposal.

Evidence was given by Mr G R Stevenson, president o the Queenspark Community Association Inc. He told us that this Association was set up six years ago to promote community activities and facilities, and care for the local environment. The Association has a committee consisting of 12 residents. At the date of the hearing of these appeals the Associations's sphere of influence covered the area west of Inwoods Road and north of Beach Road. Mr Stevenson accepted that the members of the Association within this area will not be affected by traffic matters but he asserte that some could be affected by noise from the site itself. Mr Stevenson told us that the Waimairi Coastal Protection Committee is a sub-committee of this association. We think Mr Stevenson's assertion about noise effects is doubtful. We think the status of the Association is questionable. But since it is not necessary for us to make a ruling we decline to do so.

We have no evidence upon which we can rule in respect of the status of the Waimairi Coastal Protection Committee and again, for the reasons just set out, we decline to make any ruling as to its status.

Evidence was given by a committee member of the Burwood Residents Association, Mr Garbutt, whose own status is also challenged. Mr Garbutt told us that this Association does not have a subscribing membership. Any resident in the Burwood area is entitled to be a member of the Association. The Association asserts that traffic will adversely affect the residents in its community. He referred to routes affecting major shopping centres such as Shirley, the primary school at Burwood, the kindergarten at Bassett

Street, and the picnic and recreation area on the northern end of Horseshoe Lake. The Association's area is considered to be from the Burwood Hospital north west of the site to Marshlands Road and thence to Dallington. Mr Garbutt said that he uses the area where the appeal site is located for walking with his family. He gains access through Spencer Park. Again, we entertain considerable doubt as to the status of this Association. We are still not sure what relevant aspect of the public interest the Association purports to represent. But again, for the reasons already set out we do not intend to rule on its status.

So far as the individual objectors set out above are concerned, none of them can be held to be representing a relevant aspect of the public interest. As persons affected, Mr R J Watson and Mr P O Brown, on their own evidence, are not affected to any greater extent than the public generally. This area is open to the public generally for recreation purposes. Both Mr Watson and Mr Johns, confirmed that this is so. Whether or not Mr and Mrs Schneider, Mr Birbeck and Mr Garbutt are affected to an extent greater than the public generally is doubtful but again, for the reasons set out earlier, we do not find it necessary to make a ruling.

If we were required to rule we would find that neither Mr Watson nor Mr Brown has status. Mr Brown's interest was in the field of the composting of refuse.

As to the three separate appellants, Mr R V Allen, is in the same category as Mr Watson and for the reasons already set out, we rule that Mr Allen does not have status. Mrs Lockyer lives at 31 Greenhaven Drive, Burwood. She keeps horses on properties in Mairehau Road and Prestons Road, some distance from the appeal site. She uses the area

adjacent to the appeal site to exercise her horses. We can find nothing in her evidence which satisfies us that she is likely to be affected by this proposed work in any way greater than the public generally. Accordingly, we rule that Mrs Lockyer does not have status.

Mr Ryan, who appeared on behalf of himself and his wife, lives at 119 Bassett Street. That is some distance from the appeal site and so far as he is concerned with regard to his ownership of that property we are satisfied that he has no greater interest than the public generally. But, in the course of giving evidence, he did say that he had an interest in land adjacent to the appeal site. He said this in answer to a question from Mr Milligan, in cross-examination, and the matter was not pursued any further. Accepting that as being the case, it could be that Mr Ryan is a person affected. Accordingly, we are not prepared to rule that he lacks status.

Finally, we are left to consider the locus standi of Mr W E Foote. At the time he lodged his objection Mr Foote was a resident of Lake Terrace Drive. By the time he gave evidence before us, he had moved closer to the appeal site and now lives at 193 Queenspark Drive. He claims to appear before us pursuant to s.157. It is strange indeed that Mr Foote chose to move closer to the appeal site at a time when he knew that this proposed public work was in contemplation. We think that the extent to which he is likely to be affected by the proposed work is very limited but like many other residents in this particular locality, he could be affected to an extent greater than the public generally. Accordingly, we are not prepared to rule that he lacks the necessary standing to be heard at the hearing of these appeals.

We think that we have now covered all the matters of status and relevance of evidence raised by Mr Milligan and referred to by Mr Hearn. We wish to say that we have found this particular part of our decision a somewhat tedious and unrewarding exercise especially when, as we said at the beginning of this decision, there can be no doubt that a number of appellants and objectors before us have the necessary status. We do not know why so many bodies and persons appear on the list, previously referred to, and tendered to us by Mr Hearn. We have said already, that a number of them appear to us to be lacking status of any kind. We have said in other cases and we repeat it here that land use planning decisions do not fall to be determined by considering the volume of objections. We repeat what the Chairman said, at the beginning of the hearing of these appeals:

> "It will be helpful, however, if all parties bear in mind that the Tribunal is concerned principally to weigh the substance of the various cases presented to it rather than the numerical force of those cases."

At the end of his submissions Mr Palmer drew our attention to the costs to which the Council has been put in complyingwith the various procedural steps relating to its appeal. We did not understand him to be asking for an order for costs against any other party and we do not intend to make any orders for costs in respect of these proceedings. However, he drew our attention, to the fact that the cost of notifying objectors of the respondents' decision, pursuant to Regulation 40(3), came to $400; the cost of printing the appeal papers for this one appeal came to $1100 and the cost of posting the Notices of Appeal to those required to be served pursuant to the regulations, came to $456. We think that Mr Palmer would accept that this was an exceptional case. But we have recorded these facts because we think it

is important to draw to the public's attention the consequences that can arise when multiple, repetitive, and sometimes status lacking objections are made. In the end of course, it is the rate payers who have to foot the bill. In this case it will be the ratepayers of the Waimairi District Council.

When issues of considerable public importance like this arise we express the view, for what it is worth, that because the Town and Country Planning Act 1977 has given a wide right of objection and appeal in terms of s.2(3)(d), local communities should take advantage of that and concentrate their individual objections, many of which may well be justified and valid in terms of s.2(3)(c), into a single community effort. From the point of view of substance such an objection will be equally as valid and important. We see no reason for example, why all the residents of Bower Avenue should not have come together and presented one objection on behalf of all of them. That objection would carry equal weight with objections lodged by the residents individually. But procedurally, matters would be much more manageable and, in the end, less costly to all concerned.

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Determinations

For all the foregoing reasons the Tribunal now makes the following determinations in respect of these appeals:

1. Appeal No 79/82 - R V Allen and Appeal No 127/82 - Mrs J H Lockyer are disallowed for lack of status.

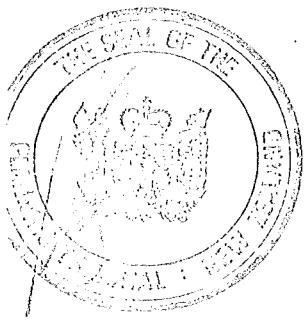
2. By way of an interim decision the Tribunal determines;

That the appeal site is unsuitable for the proposed public work if the direct access to it is to be Bower Avenue south of Rothesay Road. The Tribunal further determines that the appeal site remains unsuitable for the proposed work if any other direct access will involve the use of residential streets like Bower Avenue.

The matter of direct access is of vital importance in this case. The respondents may wish to reconsider their requirements in the light of this interim determination.

If the respondents wish to have their requirements relating to the appeal site confirmed, it will be necessary for them to put before the Tribunal a proposal for gaining access to that site which is acceptable to the Tribunal having regard to what we have said on this issue. If the respondents are unable or unwilling to do that, then it is the Tribunal's intention to allow all the valid appeals and revoke the requirements.

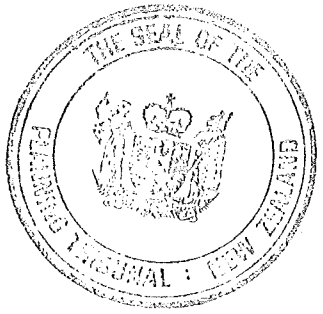
If the requirements are to be confirmed then the necessary amendments and provisions to be made in the district scheme in accordance with the Tribunal's earlier ruling at pages 42 and 43 will have to be provided for. We emphasize that in formulating the necessary management controls particular attention will have to be given to methods of ensuring that fill is kept above the ground water level.



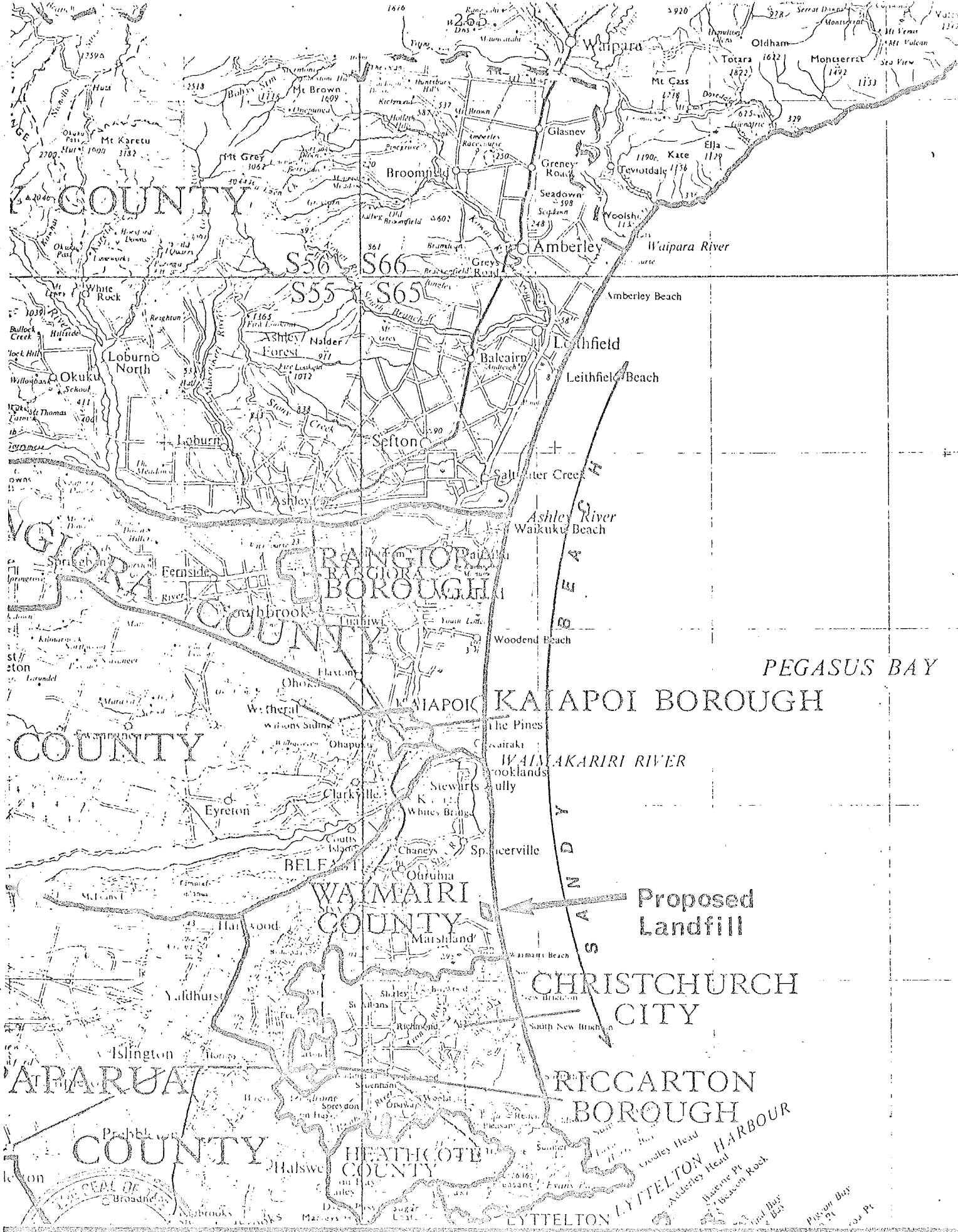
Appeal 38/82 - Waimairi District Council, Appeal 67/82 - Bower Egg Farm Limited and Four Others, Appeal 74/82 - Queenspark Community Association Incorporated and 39 others, Appeal 75/82 - B Ryan and Appeal 80/82 - Smith Developments Limited will stand adjourned sine die.

Leave is reserved to any of the parties to have these appeals brought on for hearing on 21 days notice.

DATED at CHRISTCHURCH on the 13th day of July 1982.



District Court Judge Skelton
Chairman
Number Three Division
Planning Tribunal



CHRISTCHURCH METROPOLITAN REFUSE DISPOSAL COMMITTEE

PEGASUS BAY and the PROPOSED LANDFILL LOCATION

Fig 1

CHRISTCHURCH METROPOLITAN REFUSE DISPOSAL COMMITTEE

LOCATION FOR PROPOSED DESIGNATION FOR REFUSE & DISTRICT SCHEME ZONING PROVISION

FIG 2

IN THE MATTER of the Town and Country Planning Act 1977

AND

IN THE MATTER of an appeal under s.118

BETWEEN WAIMAIRI DISTRICT COUNCIL
(Appeal No 38/82)

BOWER EGG FARM AND OTHERS
(Appeal No 67/82)

QUEENSPARK COMMUNITY ASSOCIATION AND OTHERS
(Appeal No 74?82)

B RYAN AND ANOTHER
(Appeal No 75/82)

R V ALLEN
(Appeal No 79/82)

SMITH DEVELOPMENTS LIMITED
(Appeal No 80/82)

J H LOCKYER
(Appeal No 127/82)

Appellants

AND CHRISTCHURCH CITY COUNCIL
PAPARUA COUNTY COUNCIL
HEATHCOTE COUNTY COUNCIL RICCARTON
BOROUGH COUNCIL KAIAPOI BOROUGH COUNCIL

Respondent

INTERIM DECISION

ORIGINAL

Decision No. A 054/2003

IN THE MATTER of the Resource Management Act 1991, and its amendments and regulations

AND

IN THE MATTER of an appeal pursuant to section 174 of the Act

BETWEEN **LLOYD MURRAY WATKINS and MARGARET ANNE WATKINS**

(RMA I. 111/00)

Appellants

AND **TRANSIT NEW ZEALAND**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge R G Whiting (presiding)
Environment Commissioner A H Hackett
Environment Commissioner H A McConachy

HEARING at Taupo on 20, 21, 22 and 23 January 2003

APPEARANCES

Mr A Cameron and Ms E Lamont-Messer for Transit New Zealand
Mr C D Arcus and Ms J Cowles for Mr and Mrs Watkins
Ms B A Parham for the South Waikato District Council

DECISION

Introduction

[1] The appellants, Mr Lloyd Watkins and Mrs Margaret Watkins, own an attractive property known as Roxborough Farm on state highway 1, approximately 23km south of Cambridge. In 2000, Transit New Zealand gave notice to the South Waikato District Council of its requirement to alter a designation to re-align state highway 1 from a point 23 kilometres south of Cambridge, to a point 4 kilometres

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

further south. Part of that realignment would encroach some 53 metres into the Watkins' property.

[2] The Watkins, as an affected landowner, filed a submission in opposition to Transit's notice. The South Waikato District Council conducted a hearing relating to the notice, following which the Council made a recommendation to Transit that the notice of requirement be confirmed subject to four conditions. Transit accepted the Council recommendation in part and modified two of the recommended conditions.

[3] The Watkins appealed. The relief sought *was that the alteration to the existing designation be disallowed insofar as it impacts upon the appellants' property*. In the interim the issues have been substantially narrowed.

[4] The Watkins now propose a modification to Transit's requirement, proposed by their consultant engineer Mr Burnett. According to the Watkins, although the proposed modification may not satisfy Transit New Zealand's desirable minimum geometric standards, it will nonetheless, result in both a safe standard of geometrics and an acceptable degree of encroachment. The Burnett proposal will intrude at worst only some 28 metres into their property in comparison to 53 metres with the Transit option.

[5] Accordingly, the relief now sought is a modification of the requirement and/or the imposition of conditions to ensure that the designation is limited to the Burnett proposal;

Transit's proposal

[6] It is accepted, that in the interests of safety, the existing road is in need of re-alignment. Mr D G Heine, principal transportation engineer with Opus International Consultants Limited, gave evidence on behalf of Transit. He told us that the geometry of the existing alignment is substandard in terms of accepted design practice. Currently the road consists of a series of tight horizontal curves, which are out of context with the speed environment' for the area immediately to the north and south. This creates an anomaly in driving conditions. As a result, the subject area has a higher than normal accident rate.

[1] A term used to describe a characteristic of a section of road. It is regarded as being uniform over a section of road that is reasonably consistent both in terrain and general geometric standard, p 4, Rural Road Design, Austroads.

[7] The work proposed by Transit covers some 4km and will affect 10 properties. The works are generally restricted to land immediately adjacent to the existing alignment. There are however two significant departures. One of those departures occurs on the Watkins' property. Here the proposed alignment swings east of the existing route.

[8] The alignment proposed by Transit is shown on a photo plan labelled as *option* 3 *modified* and appended as Attachment 1 to this decision'. The centre line of the highway would move 53 metres closer to the Watkins' house in the vicinity of their entranceway. At its closest approach the proposed highway boundary will be 125 metres from the house instead of the existing separation distance of 160 metres – resulting in a reduction of 35 metres or 22%.

[9] The alignment proposed by Transit, provides for a minimum curve radii of 600 metres, a maximum superelevation rate[3] of 7.2%, and a design speed of 110 km/h. A broken back curve[4] arrangement with a'45 metres straight is included. However the radius of the southern curve of this pair of curves is relatively large, at 3200m, and according to Mr Heine's evidence will be driven by most drivers as if it were straight, so it will not require the application of superelevation.

The Burnett proposal

[10] The Watkins propose an alternative alignment as shown on a photo plan labelled as *option* 4 *modified* and appended as Attachment 2 to this decision'. This option involves shifting the highway approximately 28 metres closer to the house at the entranceway, in contrast to the Transit option, which, as we have said, would result in the highway being 24 metres closer. At its closest approach, the existing highway is 160 metres from the Watkin's house. The Burnett proposal would result in the highway being 145 metres from the Watkin's house, compared with a 125-metre distance with the Transit option.

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[2] Heine, EIC, Attachment 4.

[3] Banking of the road to help counter the sideways centrifugal force which tends to throw a vehicle negotiating a curve to the outside of the curve.

[4] Broken-back curves are a pair of adjacent curves turning in the same direction and connected by a short straight. They are generally avoided because drivers do not expect to find successive curves turning in the same direction and because they do not have a pleasing (free-flowing) appearance. See Mr Heine, EIC, paragraph 5.19.

[5] Mr Heine, EIC, Attachment 3.

[11] This alternative alignment includes a 450 metre radius curve with a superelevation rate of 8% and a design speed of 103 km/h. It also includes a broken back curve arrangement, The length of the connecting straight between the two curves would be 119 metres.

[12] Transit opposes the Burnett proposal. Transit's advisors maintain that the Burnett proposal fails to meet Transit's guidelines and fails to provide an acceptable standard of safety. On the other hand, Mr Burnett maintains that his proposal will not compromise the safe operation of the highway and that the alternative can provide a consistent and appropriate driving environment. It is this difference of expert opinion that dominated the hearing and is the main issue.

The site and landscape

[13] The site is part of the south Waikato area, more particularly between Tirau in the south and Cambridge in the north. The wider landscape comprises what Ms de Lambert, a landscape architect called by the Watkins, described as "archetypal Waikato rural landscape with high rural amenity values and a pleasant rural aesthetic".

[14] The locality is dominated by pastoral farming. The landscape reflects long-term farming practices with shelter belts, fence lines and groups of specimen trees with a scattering of farm houses and outbuildings.

[15] The land subject to the appeal comprises that part of the Watkins' property that adjoins State Highway 1. In total Roxborough farm comprises some 213 hectares. The area affected by the proposed designation in dispute comprises 3 paddocks in front of the house, totalling an area of some 1.529 hectares.

[16] The existing alignment of State Highway 1 parallels the meandering course of the Piarere Stream within a shallow valley formed between rolling hills. The hills constrain expansive views and create a small scale and intimate landscape. The valley floor is deceptively undulating, a legacy of hill slope erosion and alluvial deposition process that formed it. The homestead, nestled in the middle ground, is set back from the road by a flat to rolling pasture. The tree-lined driveway draws the connection between the homestead and the roadway. The experts agreed that the view of Roxborough farm from the State Highway was of a rural homestead

landscape with particularly high aesthetic qualities, We agree with Ms de Lambert when she says:

> . ..Roxborough farm as it adjoins State Highway 1 is in my opinion a significant visual amenity landscape, comprising both picturesque composition that elevates the view of the property from the road above those of its neighbours and experiential qualities of arrival and landscape perception that create a distinctive high quality rural homestead entry of significant amenity.

[17] The critical difference between the two proposed alignments, from a landscape and visual effects perspective is, that the Watkins' alternative extends a lesser distance into the Watkins' property. This would result in a:

(i) reduced intrusion into the foreground distance between the State Highway viewpoint and the middle ground homestead and rock outcrop locations;

(ii) reduced number of driveway avenue trees resulting from the intrusion of the State Highway, and

(iii) reduced impact on the varied curvature of the Watkins' driveway and the perceptual experience of the landscape revealed.[6]

[18] Transit does not really take issue with the landscape benefits that would accrue from the Burnett proposal. Transit's argument is, that the Burnett proposal sacrifices too many safety factors. On balance, the increase in accident risk that would result from the Burnett proposal far outweigh any amenity benefit that would accrue. Conversely, it is the Watkins' position, that their proposed alternative does not have significant alignment deficiencies which would result in increased accident risk. It is this issue of safety that is the only real issue in these proceedings. We now deal with this issue.

Safety issue

Transit's guidelines

[19] On the issue of safety, we heard from three witnesses: Mr G Taylor, the Highway Strategy and Standard's Manager for Transit; Mr D G Heine and Mr R A Burnett.

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[6] See Ms de Lambert's EiC, paragraph 5.5.

[20] Mr Taylor introduced us to the Transit guidelines, namely the State Highway Geometric Design Manual, which has been developed using a blend of the Australian and American guidelines.

[21] The Transit guidelines are used both by Transit project staff and its consultants, to provide the geometric standards underlying the design of Transit's highways. All of the experts accepted that it was appropriate to apply the Transit guidelines. However, Mr Burnett emphasised that, in his experience, something less than the recommended standards may be employed when confronted with topographical or other constraints of significance, provided the lesser standards are considered safe in the circumstances'.

Actual constraints

[22] It was accepted by all parties, that there were a number of natural topographical features, which constitute significant constraints on the alignment options. While Transit looked at several alignment options, it is agreed, that for practical reasons, the only practical options are the two that we have identified in this decision namely, the Transit proposal and the Burnett proposal.

Speed environment and design speed

[23] All of the experts agreed that the key parameters that must be considered in determining the horizontal alignment standards are: (i) the speed environment applying to the highway area of the, project; and (ii) the design speed used to compute the geometry of individual curves[8].

[24] Mr Heine assessed the speed environment for this area of highway as 115-120 km/h based on:

(i) the surrounding terrain;

(ii) its location in relation to larger centres of population:

(iii) the strategic importance of this highway;

(iv) observed travel speed on a nearby, relatively unconstrained section of the highway:

[8] Burnett, EiC, paragraph 28.
[9] Heine, EiC, paragraph 5.2.

(v) the traffic volumes of this section of highway.'

[25] With regard to the surrounding terrain, Mr Heine assessed it as being flat to gently rolling. This, he said, together with the facts: that this section of highway is relatively remote from a large population centre; the strategic importance of the highway as a main route; and the relatively low traffic volumes; all indicate a speed environment of 115-120 km/h[10].

[26] Mr Heine also referred to a speed survey about 3.5 km south carried out in 1999 which indicated an average north-bound speed of 110 km/h and the 85th percentile speed was 123 km/h*'.

[27] Mr Burnett took issue with Mr Heine's assessment of the speed environment. His assessment was, that a reasonable estimate of the speed environment of this site for north-bound drivers would be 100 km/h. This assessment was based on:

(i) the surrounding terrain;

(ii) observed travel speeds.

[28] Mr Burnett assessed the terrain as undulating to rolling. He also had regard to the topographical features such as gully heads, hills and bluffs. The nature of the landscape is such, he said, that a driver would expect the road geometry to be constrained".

[29] Mr Burnett was also concerned that the speed survey carried out in 1999 did not appear to match his observations. He therefore commissioned a further survey which was carried out in November 2002. The speed distribution from that survey had a mean of 98 km/h and the 85" percentile speed was 106 km/h.

[30] The 1999 survey appears to support the assessment of speed based on terrain and other factors used by Mr Heine. The 2002 survey appears to support the assessment of Mr Burnett based on the terrain and other topographical features. Neither expert could give a reason for the differences between the two surveys, other than Mr Heine's suggestion, that provided there was no malfunction with equipment,

[9] Heine, EiC, paragraph 4.3.
[10] Heine EiC, paragraph 5.5.
[11] Heine, EiC, paragraph 5.6.
Burtnett, EiC, paragraph 46.

then the only explanation is that the weather conditions or concentrated enforcement activities might be the answer.

[31] We have no reason to doubt the accuracy of the equipment used for each of the surveys. We were also informed that the weather during the 2002 survey had been tine, and no specific enforcement activities were noted. Whatever the reason, there was a reduction in speed between 1999 and 2002. Taking the cautious approach to safety issues we consider it prudent to adopt the more conservative survey taken in 1999. There is no reason, on the evidence, why speeds could not rise again in the future to the 1999 levels. Also, the wide range of factors considered by Mr Heine, although to some extent subjective, gives us greater confidence in his assessment.

Design speed

[32] Mr Heine told us that the term "design speed" is used to describe the safe operating speed of individual geometric elements of a road alignment[13]. He told us that in high speed environments (where the 85th percentile speeds are greater than 100 km/h) drivers tend to maintain uniform travel speeds. Design speeds should ideally be equal to the environmental speed or even exceed it. Thus, based on the assessed speed environment for the sector of highway, Mr Heine considered the design speed should ideally be 120 km/h, but should not in any case be less than 110 km/h[14].

Superelevation rates

[33] Superelevation is the elevation across the centre width of the road and recorded as a percentage. It is applied to the road to help counter the sideways centrifugal force and to reduce the dependence on road/tyre friction. Superelevation rates on highways typically vary between 0% and 10%.[15]

[34] For two lane state highways, the Transit guidelines recommend a maximum superelevation rate of 10% although on flat terrain the preferred maximum is 6 or 7%.

[13] Heine, EiC, paragraph 5.11.
[14] Heine, EiC, paragraph 5.2.
[15] Heine, EiC, paragraph 5.17.

Broken-back curves

[35] Both Transit's proposal and the Burnett proposal require broken-back curves because of the alignment constraints. Broken-back curves are a pair of adjacent curves turning in the same direction and connected by a short straight. They are generally avoided because they are unexpected and lead to erratic driving. The length of straight between the two curves should either be short enough that the two curves flow together, or long enough so that the two curves are distinctly separate elements in the road alignment. According to the Transit guidelines, for a design speed of 110 km/h the length of straight between two broken-back curves should either be less than 66 metres or greater than 330 metres.[16]

Proposed alignment standards

[36] According to Mr Heine, having regard to the above factors the desirable and accepted alignment standards are as follows:

	Desirable Standard	**Acceptable Standard**
Speed Environment	120km/h	115 km/h
Design Speed	120 km/h	110 km/h
Maximum Superelevation Rate	7%	8%
Broken-back Curves	None	Straight less than 66m, Or greater than 330m

For curves to meet the "desirable" criteria, Mr Heine said, they would need to have minimum radii of 771m and maximum superelevation rates of 7%. Curves meeting the "acceptable" criteria would need to have minimum radii of 541 metres and maximum superelevation rates of 8%.

As we understand it, Mr Burnett does not take issue with the fact that this reflects the Transit guidelines.

The alternative options

[37] At this point, for clarity, we restate the relevant factors of the two options:

[16] Heine, EiC, paragraphs 5.19 – 5.22.

(i) The Transit proposal provides for minimum curve radii of 600 metres, a maximum superelevation rate of 7.2%, and a design speed of 110 km/h; and

(ii) The Burnett proposal provides for a minimum curve radii of 450 metres with a superelevation rate of 8% and a design speed of 103 km/h.

[38] Mr Burnett told us that his proposal satisfies the Australian guidelines[17] and with a little tweaking, it would satisfy the Transit guidelines. He said:

> Inconsideration of the terrain type at the site, the proposed 110 km/h design speed of 600 metre radius and 450 metre radius curves meets the SHGDM (Transit guidelines) design criteria, provided the associated geometric elements such as superelevation, friction demand, shoulder width and so on are adequate."

And:

> Increasing the superelevation on the 450 metre radius curve to 10%, increasing the superelevation on the 600 metre radius curve, and/or adopting a more conservative rate of superelevation application means that the option for modified alignment [the Burnett proposal] can satisfy the draft SHGDM (Transit guidelines) criteria.

[39] Mr Heine was critical of Mr Burnett's suggested adjustments. He said:

> A superelevation rate of 9.5 or 10% is at the very high end of the guideline rates and represents a significant compromise in alignment standards. Drivers tend to read the speed of curves primarily based on the perceived radius or tightness of the curve without factoring in the superelevation rate. The 450 metres curve would therefore be seen as out of context even though the theoretical design speed was satisfactory."

and:

> I also believe that it would be undesirable to artificially lengthen the spiral lengths of this curve because it could interfere with a driver's ability to read the tightness of the curve.[20]

And further:

> An additional consequence of increasing the spiral length is that Mr Burnett's alignment will be moved closer to the Piarere Stream inbend by about 500mm. His original alignment was about 1.5 metres from the top of the bank at the inbend, compared with 3.5 metres for the Transit proposal.

[17] Burnett, EiC, paragraph 63.
[18] Burnett, EiC, paragraph 69.
[19] Heine's rebuttal evidence, paragraphs 4.4 and 4.5.
Heirs's rebuttal evidence, paragraph 5.2.

> The increase in superelevation rate from 8% to 9.6% would shift the alignment about 500mm closer...The net result is that the alignment would be about 500mm only from the top of the bank at the stream inbend. At this point the stream is about 17 metres below the road.[21]

He pointed out that there were already grave safety constraints posed by the Piarere Stream and the adjacent bluffs. This further reduction would allow virtually no room for drivers to regain control of an errant vehicle on this already tight curve.

Determination on safety issue

[40] We are confronted with deciding between the two proposals. We are satisfied that the Transit proposal is the safer of the two. However, we are also conscious of Mr Burnett's experience and his opinion that his proposal is consistent with the inherent flexibility in Transit's standards to recognise local factors.[22] He said:

> It does not compromise the safe operation of the highway, and can provide a consistent and appropriate driving environment.[23]

[41] We ask the question: how safe is safe? We are of the view that the safest option should be preferred unless there are resource management factors that warrant protection, to the extent that they outweigh the difference in safety between the two options. We now address the relevant resource management issues in the context of the Act.

The legislation

[42] The requirement for alteration of the designation was made under section 181 of the Resource Management Act. Pursuant to section 18 l(2) of the Act, sections 168 to 179 of the Act apply to a requirement to alter the designation as if it were a requirement for a new designation.

[43] Section 171 of the Act sets out the matters which territorial authorities, and this Court on appeal, shall have regard to when considering the requirement. For this case, we are required to assess the two alignment options:

[21] Heine, rebuttal, para 5.2(c).
[22] Burnett, EiC, paragraph 77.
[23] Burnett, EiC, paragraph 78.

(i) subject to Part II-section 171(1);

(ii) having regard to the matters set out in the notice - section 171(l);

(iii) having particular regard to:

(a) which option is reasonably necessary for achieving the objectives of the public work - section 171(l)(a);

(b) whether adequate consideration has been given to the alternative route-section 171(l)(b);

(c) whether the nature of the public work means it would be unreasonable to expect the requiring authority to use the alternative route -section 171(l)(c); and

(d) all relevant provisions of the relevant statutory instruments - section 171(d).

We now deal with each of these in turn.

Part II matters

[44] Section 171(1) of the Act is expressed to be *subject to Part II*. This phrase has been the subject of judicial consideration in a number of cases. It has been held to mean, that the general direction to have regard to the matters listed in section 171(1) does not apply to any one or more of those matters, where to do so would conflict with something in Part II[24]. For present purposes Part II is relevant to the extent that we must be satisfied that one or other of the proposals meets the requirements of Part II. The particular sections of Part II which we consider relevant are:

(i) Section 5

The design of roads must provide for the nation's social, economic and cultural wellbeing and for its health and safety, while meeting the requirements of sections 5(2)(a), (b) and (c) of the Act. In this regard the question of safety, which we have already considered as a factual issue, is important. There needs to be a balance between the

[24] *See* for example *Application by Canterbury Regional Council* [1995] NZRMA 110.

sustainable management of the physical resource, whieh is the state highway system, and the sustainable management of a natural and physical resource which is the farm property of the Watkins. This farm property is considered attractive, not only by Mr and Mrs Watkins. We heard evidence from a number of witnesses, many of them hitherto unknown to Mr and Mrs Watkins, who value the property for its landscape and amenity appearance. The evidence showed that, as a matter of fact, there was a much broader community of interest with respect to the property. This interest includes: embassies, artists, photographers, local and overseas tourists, all of whom have a view about this property and its aesthetic value.

(ii) ***Section 7(aa) - the ethic of stewardship***

The evidence of Mr and Mrs Watkins established that they observe a very strong ethic of stewardship. The property has been in the Watkins' family for 91 years. Mr Watkins gave evidence to the effect that he has spent a lifetime on the property, has a very strong affinity for and stewardship for the land, which he believed to be much stronger than mere ownership. Clearly this is a matter for which we must have regard.

(iii,, ***Section 7(b) - the efficient use and development of natural and physical resources***

The Watkins' property is currently a well-managed and high performing farm, It is a hill country property with a limited amount of flat land and within the flat land there is a limited amount of free draining land. Mr Watkins' evidence addressed the consequences of Transit's proposal to take a portion of that free draining land. He considered it to be of some significance to the farming operation, particularly with regard to the movement of stock.

Balanced against this, we accept that the provisions of section 7(b) of the Act are of relevance to Transit's case. A safe and efficient designation corridor is in the interests of the overall community.

(iv) ***Section 7(c) -the maintenance and enhancement of amenity values***

We have already addressed the landscape issues. We find that whilst not "an outstanding natural landscape" in terms of section 6 of the

Act, Roxborough farm as it adjoins State Highway 1 is a significant visual amenity landscape. The farm property has high appeal in terms of rural aesthetics and amenity.

(v) ***Section 7(e) – recognition and protection of the heritage*** values of ***sites, buildings, places or areas***

We note that recognition is to be accorded to heritage value rather than to a heritage site. There is no named historic building on this site nor are there Maori cultural issues involved. However, Mr Arcus submitted that heritage values of New Zealand also include: farming; rural landscapes; and open low housing density countryside. He submitted that part of the New Zealand heritage is an identity with those elements.

When considering the effects on the environment, we have to consider not only the natural and physical resources but also the people and communities. Environment, as defined in the Act, includes people and the social, economic, aesthetic and cultural conditions that affect people. Heritage values are clearly part of that environment.

The heritage value of the Watkins' property is that of the historic and present-day farming culture and identity of New Zealand. The evidence established that it has been photographed and painted, held out as a spectacle in some of our embassies and consulates, recommended and admired by many. The heritage value of the Watkins' property lies in its visual location and is an aesthetic portrayal of a high quality New Zealand sheep and cattle farm.

(vi) ***Section 7(f) – maintenance and enhancement of the quality of the environment.***

This again relates to landscapes issues which we have already discussed. We reiterate what we said in (iv) above.

(vii) Section 7(g) – jinite characteristics of natural and physical resources

While the Transit option may reduce the amount of flat arable land on this hill country property, a designation corridor is itself a finite resource and part of the statutory hierarchy to which particular regard must be had.

The matters set out in the notice – section 171(1)

[45] The reasons for the proposed alteration of the designation are set out in paragraph l(a) of the requirement namely; the easing of curves and improvements to the horizontal alignment to overcome an existing traffic accident problem. The information provided in support of the requirement, referred to,27 recorded accidents on the 4km stretch of road during the period 1994-1998, with the majority of accidents (23) resulting from loss of control on comers; Additionally, there were a farther 28 recorded accidents on this stretch of road in the preceding 5 years.

[46] As the notice of requirement records at paragraph 4(1), the principal objective of Transit, pursuant to section 5 of the Transit New Zealand Act 1989, is *"to operate a safe and efficient state highway system".*

Section 171(a) – reasonably necessary

[47] An important issue in this case is whether or not the extent of the designation is reasonably necessary for achieving the objectives of the work pursuant to section 171(l)(a) of the Act. The meaning of *the* words *whether the designation is reasonably* necessary was extensively considered in the case of ***Bungalo Holdings Limited v North Shore City Council".*** In that case the Environment Court determined, that the question to be considered concerns the particular designation proposed rather than designation *as* a generic class of planning technique. The Court then went on to analyse the meaning of the words *reasonably necessary* and was assisted by the approach of Justice McGechan in the case of ***Fugle v Kowie***[26]. At paragraph [94] the Court held as follows:

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25 D. No. A052/01.
[1997] NZRMA 395.

> In short "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.

[48] So far as the Watkins' property is concerned, we have regard to the attractiveness and aesthetic qualities of Roxborough farm. We also have regard to the need for Transit's safety and efficiency objectives on its highways.

Alternative route-section 171(l)(b)

[49] The question of a possible alternative route is particularly relevant to the present appeal. Consideration of this matter involves an evaluation of the traffic engineering and the landscape and aesthetic issues.

Nature of the public work to be considered-section 171(l)(c)

[50] The nature of the work in this case is the realignment of a small part of the State Highway. This is a public work, which, in this case involves safety issues, which need to be considered against the background of our findings on the landscape issues.

Relevant provisions of statutory instruments – section 171(l)(d)

[51] We heard evidence from Mr R J Fisher, the Director of Environmental Development for the Council. He referred us to the relevant provisions of the Waikato Regional Policy Statement; the Regional Land Transport Strategy; the Proposed Waikato Regional Plan; and the South Waikato District Plan. He also referred us to proposed Plan Change 13 notified on 1 August 2001 which is to amend the heritage and ecological inventory to the South Waikato Operative District Plan 1998.

[52] We do not propose to set out in this decision the various provisions referred to by Mr Fisher. Suffice it to say there are safety and efficiency objectives, policies and rules in both the regional policy statement and the district plan. However, there are also landscapes and visual objectives. These were addressed by the landscape architects who gave evidence for the respective parties.

Determination

[53] In our view the need for safety is the dominant consideration in this case. As was noted in ***Te Runanga 0 Ati Awa Ki Whakarongotai Inc & Others v Kapiti District Council***[27] a designation corridor is a finite resource and part of a statutory hierarchy to which particular regard must be had. Further, when determining the efficient use and development of natural and physical resources a long-term view should be maintained.'* We accept that Roxborough farm has significant aesthetic appeal. However, when all of the relevant matters are weighed, the safety imperatives predominate against any perceived concerns regarding the amenity values in issue. We consider the Transit designation is necessary in the interests of safety.

[54] Accordingly, the Transit designation is confirmed and the appeal is dismissed.

DATED at **AUCKLAND** this 16th day of April 2003

For the Court:

R Gordon Whiting
Environment Judge

[27] W32/02.
[28] *See Robson v Ashburton District Council,* W92/94