

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

**A N D**

**IN THE MATTER** of a Board of Inquiry  
appointed under section 149J  
of the Act to consider  
applications by New Zealand  
Transport Authority for  
resource consents and  
notices of requirement for the  
Waterview Connection  
proposal

**LEGAL SUBMISSIONS ON BEHALF OF LIVING COMMUNITIES (AUCKLAND)  
INCORPORATED & OTHERS**

**1. INTRODUCTION**

- 1.1 These legal submissions and the evidence to be presented are in support of submissions by Living Communities (Auckland) Incorporated, North Western Community Association Incorporated, Sir Harold Marshall and the Mt Albert Residents Association (“the Submitters”) regarding the NZTA Waterview Connection proposal (“the Proposal”).
- 1.2 The Submitters are concerned primarily by the effects of the Proposal in Sectors 5, 7, 8 and 9 (ie: along the SH20 route between its current termination at Maioro Street and the SH16 / 20 interchange). The evidence for the Submitters and the relief sought by them focuses solely on that part of the Proposal.
- 1.3 The Proposal is of such complexity that it has not been possible for the Submitters to address it comprehensively. They have endeavoured to identify the issues of greatest concern to them and to concentrate such resources as they have into those areas. They have had to leave subsidiary issues untouched.
- 1.4 The Submitters’ remaining issues fall into three categories:

- (a) *The treatment of the critical above-ground structures at the northern and southern portals of the tunnel.* These are the most important issues because mistakes at this stage cannot be rectified.
- (b) *The provision of appropriate improvements in connectivity and compensation for loss of open space.* These issues will impact on the quality of life of the residents of the areas that will be adversely affected by the Proposal.
- (c) *Matters of detail in respect of conditions.* The evidence touches upon these matters but the Submitters have to date focussed on the principal issues noted above. The Board will need to make findings on those matters if it is to uphold the Proposal and those determinations will have consequential effects on the conditions. The conditions are in any event developing iteratively with NZTA (appropriately) making ongoing refinements. The Submitters suggest that, if the Board decides to uphold the Proposal, it consider inviting further representations from parties on the detailed wording of the conditions.

1.5 At the commencement of the hearing, counsel advised that in response to the caucusing that had occurred and the additional information provided in the NZTA rebuttal evidence, the Submitters had been able to refine their position on the Proposal. In doing so, the Submitters accepted that some items of relief sought by them were impractical or were not going to be provided by NZTA through the proposal. In that regard:

- (a) Sir Harold Marshall and the Mt Albert Residents Association elected in light of the extensive additional information provided by NZTA not to pursue their proposal that additional ramps be provided to connect with SH20 at Pt Chevalier / Waterview. That relief was sought in response to an omission in the Proposal which compromised significantly its ability to benefit the residents of Waterview, Pt Chevalier and Mt Albert along with Unitec students and employees. It was recognised through caucusing that such ramps would be desirable and are feasible but NZTA's additional work indicated that their implementation would require moving the northern tunnel portal further south. That would increase adverse effects on the Waterview community, which the Submitters are not prepared to accept. While the relief is no longer sought, the absence of the ramps emphasises the disparity between regional benefits and local adverse effects. This

remains a significant flaw in the design of the interchange and the Proposal.

- (b) The Submitters had sought as mitigation for the effects of the Proposal implementation of a bridge across SH16 between Waterview and Eric Armishaw Park. They withdraw that relief.

The cross examination on behalf of the Submitters and the supplementary statements of evidence filed on 28 February 2011 have been consistent with those changes. The concession regarding SH20 ramps at Pt Chevalier means that the evidence in that regard is essentially redundant. With the Board's leave it is proposed that Sir Harold Marshall and John Parlane not now be called as witnesses. That will avoid the need for supplementary questioning of those witnesses.

1.6 Evidence by the following witnesses has been filed on behalf of the Submitters:

- (a) Phil Chase, an executive member of Living Communities (Auckland) Incorporated.
- (b) Bill McKay, chairperson of the North Western Community Association Incorporated.
- (c) Sir Harold Marshall (whose evidence is not now proposed to be called as it relates primarily to the issue of the SH20 ramps at Pt Chevalier).
- (d) Bronwyn Rhynd, consultant stormwater engineer.
- (e) Shona Myers, consultant ecologist.
- (f) Melean Absolum, consultant landscape architect.
- (g) Errol Haarhoff, consultant architect and urban designer.
- (h) John Parlane, consultant traffic engineer (whose evidence is not now proposed to be called as it relates solely to the issue of the SH20 ramps at Pt Chevalier).
- (i) Duncan McKenzie, consultant planner. Mr McKenzie is also a resident of Bollard Avenue and a submitter in his own right. He has addressed in his statement the basis upon which he has prepared and will give his evidence. Mr McKenzie's evidence has been carefully and

professionally prepared, benefits from his intimate knowledge of the affected areas and has appropriately acknowledged and responded to his status as a nearby resident.

## 2. **BACKGROUND**

### *The Submitters*

2.1 The Submitters are working as a coalition with a common interest in the amenity of the areas through which the Proposal passes but with different areas of particular concern:

(a) Living Communities (Auckland) Incorporated was formed in 2003 to act as an umbrella organisation working in the interests of the Owairaka, Mt Albert, Avondale and Waterview communities. It has an executive of 20 and a supporter mailing list of more than 250 individuals and households.

(b) North Western Community Association Incorporated was formed in 1999. Its focus is on protecting the environment and representing residents of the north western parts of the former Auckland City. The association has an executive of six and a total membership of 94.

(c) The Mt Albert Residents Association has been in existence for over seven years. Its focus is on protecting and promoting the amenity and interests of the wider Mt Albert community. The association has an executive of four officers plus seven committee members and a membership of approximately 250.

2.2 The Proposal affects different areas in different ways and in such circumstances there is an ability for relief favoured by one part of the community to cause concern to others. The Submitters have therefore endeavoured over the past 18 months to work together to identify areas of common concern and potential conflict. Where conflicts have arisen the members of the group have attempted to resolve those issues between themselves in a considered and balanced manner rather than leaving them to be addressed through the current process.

2.3 The Submitters have worked closely with other community groups who are separately represented in these proceedings in light of their particular

concerns, including Friends of Oakley Creek and Star Mills Preservation Group.

***Response to Proposal***

- 2.4 The Submitters' response to the Proposal can be summarised as follows.
- 2.5 The Submitters recognise that the decision as to whether a SH20 link should be promoted is a political one that has been taken by central government. They appreciate that this Board cannot revisit that decision although it could decline consent to the Proposal if it fails to mitigate the adverse effects adequately.
- 2.6 The Submitters accept that the tunnelling of much of the SH20 link enables the Proposal to be implemented with far less adverse impact overall than would arise from an at-grade motorway. They consider, however, that:
- (a) The undergrounding is an integral element of the Proposal that is before you and it is that Proposal that you are to consider not a hypothetical at-grade alternative.
  - (b) The undergrounding is fundamental to the acceptability of the Proposal. Were an at-grade option to be promoted it would have excited far greater opposition and in the Submitters' opinion would generate such significant adverse effects on residential amenity, connectivity, open space and the ecology of the Oakley Creek that consent should be declined.
  - (c) The tunnelling does, however, concentrate adverse effects around the portal areas because it requires provision of ventilation buildings, ventilation stacks and a control building.
- 2.7 The Proposal is being promoted in light of the regional benefits that it will generate. It is in the nature of the Proposal, however, that it will generate little in the way of local benefits for the communities through which it will pass (ie: Waterview; Mt Albert or Pt Chevalier). There will be a reduction in through traffic on routes such as Richardson Road, Woodward Road and Carrington Road but the residents within that immediate area are unlikely to change their travel patterns significantly. Nor will residents who currently travel along Great North Road between Pt Chevalier and New Lynn, Avondale, Kelston or Glen Eden change their travel patterns. [Parker; Transcript pages 92 and 93].

- 2.8 The regional benefits are generated at the cost of reduced amenity for the immediate communities. The tunnelling focuses that effect by reducing the effects on the tunnelled parts of route but intensifying effects at the tunnel portals by requiring the provision of extensive structures and stacks which generate significant adverse effects on the immediate environs.

***Relief Sought***

- 2.9 The Proposal in its current form generates excessive adverse effects at both the north and south portals. In that regard:
- (a) Those structures will be in place for the life of the Proposal and the significant adverse visual effects that they generate cannot be rectified subsequent to construction.
  - (b) Accordingly, unless those effects are mitigated appropriately the Submitters say that the Proposal should be declined.
  - (c) NZTA has developed alternative designs for the location of the stack at the northern portal and the structures at the southern portal that the Submitters consider adequately and appropriately address those adverse effects – being:
    - (i) A slight modification of Alternative 1 to come within the designation boundaries at the northern portal (given the legal issues posed by the preferred Alternative 2); and
    - (ii) Option 3 at the southern portal.
  - (d) The Submitters consider that those methods of mitigation are within the Board’s jurisdiction to impose by way of condition and ask that you do so.
- 2.10 With regard to connectivity and open space the Submitters seek:
- (a) Provision of an at-grade pedestrian and cycle bridge across Oakley Creek in the vicinity of Alford Street (“the Alford Bridge”).
  - (b) Provision of a pedestrian bridge across the Railway at Soljak Place (“the Soljak Bridge”).
  - (c) Provision of an at-grade pedestrian and cycle bridge across Oakley Creek in the vicinity of Phyllis Reserve (“the Phyllis Bridge”) (albeit

that this relief is of less importance than the Alford and Soljak Bridges).

- (d) The extension of the cycle way along the Oakley Creek and through Phyllis Reserve and Harbutt Reserve.

The adoption of Option 3 at the southern tunnel portal would address the issue raised by the Submitters (eg: paragraph 6.7.5 of Errol Haarhoff's evidence in chief) regarding the need for a bridge linkage across the motorway in the vicinity of Olympus Street. If Option 3 is not adopted the Submitters continue to seek that bridge.

- 2.11 With regard to open space the Submitters support the relief sought by the Auckland Council.
- 2.12 The Submitters consider that all of the items of relief sought have validity and warrant incorporation into the Proposal. That said, the items of relief are not of equal importance. Whilst the connectivity and open space issues ought to be resolved through this process, the Proposal will not preclude Council taking remedial action at a later stage should conditions not be imposed by the Board. In contrast, the construction of the structures at the tunnel portals is irreversible and must be resolved as part of this process. Those items of relief which must be implemented through this process are the most important to the Submitters.

### 3. **STATUTORY FRAMEWORK**

- 3.1 The Proposal includes both notices of requirement and resource consent applications. The issues of greatest concern to the Submitters are the subject of the notices of requirement for Sectors 5, 7, 8 and 9. These legal submissions will therefore concentrate on the legal framework regarding the assessment by the Board of those notices of requirement.

#### ***Sections 149P, 174(4) and 171(2) of RMA***

- 3.2 The Board's enquiry is governed by Part 6AA of the RMA. Section 149P concerns the basis for the Board's consideration of the Proposal.
- 3.3 Section 149P provides that a board of inquiry considering a notice of requirement must have regard to the matters in section 171(1) of RMA and may cancel the requirement; confirm the requirement; or confirm the requirement but modify it or impose conditions on it as the board thinks fit.

Section 174(4) bestows similar powers on the Environment Court when determining an appeal on a designation.

- 3.4 The wording of sections 149P(4) and 174(4) is of similar effect to section 171(2) of RMA. All three sections enable the adjudicator to modify a requirement although the extent to which that may occur is limited. That issue was addressed in counsel's Memorandum of 18 February 2011 and is also canvassed below as it is critical to the Board's ability to allow the relief sought by the Submitters.

**Section 171 of RMA**

- 3.5 By virtue of section 149P of RMA, section 171 is particularly germane to the Board's enquiry.
- 3.6 Section 171(1A) relates to trade competition issues and is not relevant to the Submitters. Section 171(2) is noted above. Section 171(3) requires that reasons be given for any decision under section 171(2).
- 3.7 Section 171(1) addresses the matters to be considered by a territorial authority and by the Board in this case. The opening words of the subsection state that, 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*" certain listed matters.

Comment: The wording of this section was last changed in 2003. Since then the primary focus of the enquiry under the section has been on the effects on the environment of allowing the requirement (being a matter that was not previously addressed explicitly in section 171). That wording elevates the importance of adverse effects and colours the Board's consideration of the matters listed in the balance of the section. It reinforces the obligation to consider the quality and adequacy of mitigation measures.

- 3.8 Section 171(1)(a) refers to the relevant statutory documents. These are addressed in the evidence.

Comment: A designation is an exception to the district plan and a failure to comply with objectives, policies or rules will not necessarily result in a notice of requirement being declined. The planning instruments give context to the enquiry under section 171(1) as to the effects on the environment of allowing



a requirement. Those provisions might assist the Board, for example, to reach a conclusion as to which parts of the route should be treated with particular care because of their recognised heritage values, ecological qualities or visual amenity.

- 3.9 Section 171(1)(b) refers to whether adequate consideration has been given to alternative sites, routes or methods if, inter alia, it is likely that the work will have a significant adverse effect on the environment (which NZTA's witnesses concede is the case).

Comment:

- (a) This section identifies one matter to which regard is to be had when undertaking the primary analysis under section 171(1) with respect to the effects of the requirement.
- (b) It has long been accepted that there is no obligation for a requiring authority to select the best alternative. The enquiry under this section simply identifies whether an adequate assessment of alternatives has been undertaken. [See, for example, paragraph [50] of *Auckland Volcanic Cones Society Inc v Transit NZ* [Decision A203/2002] (“the *Volcanic Cones Decision*”).]
- (c) The obligation to consider alternatives is an additional requirement on a requiring authority in comparison with an applicant for resource consent. It does not replace or render irrelevant the Court’s consideration of the adequacy of mitigation measures under section 5(2)(c) of RMA.
- (d) Thus the fact that a requiring authority has carried out an adequate assessment of alternatives does not mean that the adjudicator should disregard better methods of implementing the requirement if they will mitigate adverse effects. The Board may decide that only adoption of another (better) method will mitigate the adverse effects of the proposal to the extent that consent can be granted.
- 3.10 Section 171(1)(c) refers to whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought.

Comment: This provision effectively sets out a test that the notice of requirement should pass. Again, this is an additional test that is faced by a requiring authority but which is not faced by an applicant for resource consent. Consistency with the requiring authority's objectives does not replace or render irrelevant the Court's consideration of the adequacy of mitigation measures.

- 3.11 Subsection (1)(d) is "*any other matter the territorial authority considers reasonably necessary*".

Comment: Relevant additional matters might include alternative methods of mitigating adverse effects on the neighbouring properties.

### **Part 2 of RMA**

- 3.12 Section 171(1) provides that the Board's enquiry regarding effects of the requirement is to be "*subject to Part 2*". With respect to the matters of greatest importance to the Submitters, the key provisions of Part 2 are section 5; section 6 to the extent it applies to the tidal reaches, Oakley Creek and heritage resources (eg: Star Mills); and section 7(b), (c), (d) and (f).

- 3.13 Whilst the decision of the Environment Court in the *Volcanic Cones Decision* predates the current version of section 171 of RMA, it remains a useful summary of the relationship between the designation process and Part 2:

(a) In paragraph [51] of the *Volcanic Cones Decision* the Court recorded that its task, when evaluating Part 2 matters against a designation proposal, is to: identify matters that may be of importance in terms of Part 2; identify what measures have been taken to avoid, remedy or mitigate adverse effects of the proposal on the environment, with particular reference in that case to section 6 and 7 matters; and to then assess whether those measures are sufficient in the context of the case that the work should not proceed. The Submitters would add that an alternative response to declining consent is to implement mitigation measures, by condition if necessary, that address those effects to an adequate extent. That is the approach that they are requesting the Board to take here.

(b) In paragraph [159] of the *Volcanic Cones Decision* the Court addressed the relationship between section 171 and Part 2, stating:

*“We are at this stage of course discussing section 171(1)(b) as to whether adequate consideration has been given to alternative methods. We have no hesitation in holding that more than adequate consideration has been given to the question of the positioning of the interchanges and in doing so Transit has been aware of the importance of the volcanic cone. However, section 171 is subject to Part II of the Act and if this Court felt that significant improvement could be made to the visual aspects of Mt Roskill without harming the integrity of the motorway system, then the Court would tend to accept a lesser standard of motorway design (provided safety was not compromised) to achieve recognition of such a feature of national importance”.*

That is an example of where the Court considered imposing a condition instead of simply declining the designation. In the *Volcanic Cones Decision* it was section 6 and 7 matters relating to Mt Roskill that were of primary concern in terms of Part 2 of the RMA. In the current case, it is the amenity of the surrounding residential area that is of primary concern. That is also a matter that is relevant under Part 2 (eg: sections 5, 7(b), 7(c), 7(f)).

- 3.14 It is important to distinguish between the adequacy of the assessment of alternatives by the requiring authority under section 171(1)(b) of RMA and the consideration of adverse effects and their mitigation under section 171 generally and section 5(2)(c). The relocations of the northern stack and southern portal buildings are mitigation measures that the Submitters say are necessary in order for the Board to uphold the requirements. The Submitters are not alleging the NZTA has failed to carry out an adequate assessment of alternatives (particularly now that the options in Mr Walters' rebuttal evidence have been produced). Rather they say that the options selected by NZTA fail to address the adverse effects adequately and do not amount to sustainable management in terms of section 5.

#### 4. LEGAL ISSUES RE SCOPE OF MITIGATION CONDITIONS

4.1 The relief sought by the Submitters involves a number of changes to the Proposal including:

- (a) Moving the stack at the northern portal onto land that is subject to the designation but over which it is anticipated NZTA would remove the designation following completion of the construction process.
- (b) Changing the location of the southern portal and the location and form of the buildings in the vicinity of that portal.
- (c) Implementing additional pedestrian and cycle connections including connections over land that is not subject to the Proposal and that is not owned by NZTA.
- (d) Implementing the various open space works that have been detailed in Auckland Council's evidence.

4.2 When considering the Board's jurisdiction to require such changes it is important to distinguish between two quite different forms of mitigation, being:

- (a) *Improved treatment of essential elements of the Proposal* (eg: the stacks and the southern building). This category involves works that are the subject of the requirement. Those works can only be carried out to the extent that they are authorised by the requirement or a legitimate modification of it. Thus they are constrained by the bounds of the designation and the ability for it to be modified.
- (b) *Works that are not inherent to the Proposal but which mitigate adverse effects of the Proposal* (eg: improved connections to and through public spaces; the provision off the project site of new or improved public spaces). This category involves works that are not necessarily authorised by the requirement but which are required if the adverse effects generated by the designated works are to be mitigated appropriately. Those works may occur within the bounds of the designated area or offsite. They may require other consents.

4.3 The following sections consider the constraints governing the Board in terms of those two categories of mitigation.

***The Scope for Changing Essential Elements of a Designation***

- 4.4 The first category of mitigation requires consideration of the extent and scope of the requirement and the ability to modify it. That includes consideration of the ability to change the bounds of the designation and to change the location of physical works within the designated land.
- 4.5 As noted above, it is accepted that sections 149P, 174(4) and section 171(2) of RMA are of similar effect. None of the sections provide any detail as to the extent to which the Board may modify the designation, however.

*Caselaw*

- 4.6 The caselaw identifies that there is a power to modify a requirement but that it is constrained. The cases were reviewed in the various memoranda filed by the parties in response to the Board's minute of 154 February 2011. To recap, the principles can be summarised as follows:
- (a) A notice of requirement does not constrain a proposal to the extent that requires it to be undertaken strictly according to the notice provisions or in such a way that prevents issues being addressed by alterations (see *Quay Property Management Limited v Transit NZ* W28/00 at page 26).
  - (b) The power to modify a notice of requirement does not permit changes that would "*alter the essential nature or character*" of the proposed works (see *Quay Property Management Limited v Transit NZ* W28/00 at pages 42-43; *Norwest Community Action Group Incorporated v Transpower New Zealand Limited* A113/01)
  - (c) The power to modify cannot enlarge the scope of the use or uses specified in the requirement (see *Pukekohe Borough Council v Ministry of Works and Development* (1980) 7NZTPA 185).
- 4.7 The caselaw relating to amendments to resource consent applications is considered to be relevant to your consideration. The relevant considerations in that regard are settled. They were conveniently and recently recorded in *Frasers Papamoa Limited v Tauranga City Council* W90/07 where the Court reiterated the following three considerations regarding a proposal to amend a resource consent application after notification:
- (a) Does it increase the scale or intensity of the proposal?

- (b) Does it exacerbate or mitigate the impacts of the activity, both in terms of adverse effects and in terms of the Plan and other superior documents?
- (c) Would parties who have not made submissions have done so if they were aware of the change?

*Section 181 of RMA*

- 4.8 Section 181(3) of RMA addresses the alteration of designations without public notice. That section provides some additional but consistent context to the consideration of the scope of the Board's discretion.
- 4.9 Section 181(3)(a) enables the alteration of designations without a public notification process where:
  - (a) The alteration involves no more than a minor change to the effects on the environment; or
  - (b) The alteration involves only minor changes to the boundaries of the designation or notice of requirement.

It is submitted that these tests can give guidance to the Board when assessing any changes to the proposal. That is, if a designation can be changed without notice in these circumstances then the Board when assessing the notice of requirement should at least have the ability to impose similar changes without generating any injustice for neighbouring landowners or the public. In that regard:

- (c) The provisions make it clear that acceptable alterations may generate minor changes in effects (although the Board would want to be satisfied that on balance the proposal is beneficial) and that there can be minor changes in designation boundaries.
- (d) Notwithstanding the use of the word "or" in the section, it is submitted that, where a minor amendment is proposed to the extent of a designation, the change should also generate no more than a minor change in adverse effects.
- (e) Whether a particular change qualifies in terms of this section will be a matter for assessment on the facts and with regard to the context. A change in a designation boundary that may be acceptable in an

industrial area with large sites and robust neighbouring activities may be quite unacceptable in a sensitive residential area.

- 4.10 Section 181(3)(b) requires written notice of the proposed alteration to have been given to every owner or occupier of land directly affected and that those owners or occupiers agree with the alteration. It is submitted that the words "*directly affected*" in this provision mean that it is only the owners or occupiers of land that is to be included within the changed designation whose consent is required. The issue of adverse effects on adjacent or nearby landowners is addressed through the test in subsection 3(a)(i) discussed above.
- 4.11 Section 181(3)(c) requires both the territorial authority and the requiring authority to agree with the alteration. This element is not relevant to the Board's jurisdiction when assessing the appropriateness of proposed changes in terms of sections 149P and 171. Your consideration relates to conditions to mitigate effects that NZTA is not prepared to address adequately. NZTA has put evidence and submissions to you in support of its views but through this process conditions can be imposed against NZTA's will.

#### *Implications*

- 4.12 The Submitters consider that the Board has the ability to modify the physical extent of the designation but if it is to expand the designation into land outside that initially subject to the notice of requirement it ought to ensure that the owner or occupier of the additional land agrees with that change. That would apply, for example, if the Court adopted an alternative northern stack location that affected the BP land which is outside the notices of requirement (ie: Alternative Vent 2).
- 4.13 With regard to modifications within the designated area:
- (a) NZTA controls the land within that area but has chosen for convenience to divide the Proposal into a number of notices of requirement that abut each other.
  - (b) Those notices are interrelated and collectively define the Proposal. They could not be implemented individually and absent any one of them, the Proposal would become untenable. Changes to works in an area subject to one requirement may well generate a need to change works subject to a neighbouring requirement.

- (c) It is essential to assess the Proposal as a whole. NZTA cannot rely on the overall benefits it says will be generated by this integrated project but then argue that the effects and their mitigation need to be looked at in terms of artificial boundaries between the individual NZTA designations.
- (d) The Submitters say that a relocation of activities (eg: the shifting of the southern portal building) within the Proposal that necessitates a minor shift in the internal designation boundaries but does not extend the total project area would be within scope (subject to the Board being satisfied as to impacts on affected parties as discussed below).

4.14 Any change to the internal details of the requirement (eg; shifting or redesigning buildings) will require an assessment of the extent to which it generates a change in the adverse effects generated. It will not necessarily be fatal to such a proposal if there is an increase in a particular adverse effect or a change in the relative impact on neighbouring properties but an issue may arise if those changes are more than minor. In any event, it will be important for the Board to conclude that on balance the revised proposal is of benefit and better meets the purpose of the RMA.

4.15 In that regard it is accepted that consideration must be given to whether the changes are such that:

- (a) Any parties who had not been adversely affected by the original proposal become affected by the altered proposal; or
- (b) Any parties who were adversely affected become affected to a materially greater extent.

4.16 In this case the Submitters will say that:

- (a) No parties will be newly affected by the proposed changes;
- (b) No parties will be adversely affected to a greater extent;
- (c) Those parties who might potentially be at risk of being affected to a greater extent are understood to support the relief sought by the Submitters.



***The Ability to Impose Conditions requiring Off-site Mitigation***

- 4.17 The Proposal is of such a scale that it is inevitable that some of the mitigation for the effects generated by it will need to be carried out off-site. That has been recognised by NZTA through, for example, its proposed changes to public open space in Waterview (including the provision of non-designated land at Saxon Street for a park and at the end of Oakley Avenue).
- 4.18 The issue between the parties relates to whether or not the measures offered by NZTA are adequate. The relief sought by the Submitters in this regard (eg: the Alford and Soljak Bridges) will all necessitate cooperation from Council and in some cases other parties (eg: Unitec and Kiwi Rail) but are, it is submitted, capable of being addressed through conditions that:
- (a) Are themselves conditional on resource consent and landowner approval being forthcoming; or
  - (b) Require the provision of funds from NZTA to Auckland Council that would then be put towards the mitigation measures.
- 4.19 Such conditions would be analogous to off-site mitigation commonly required on resource consent applications. It is common in such circumstances for a council to require a consent holder to undertake physical works on remote council land (with council permission) or to make a payment to the council so that such works can be undertaken by council directly. That applies, for example to improvements to the roading network, the provision of additional carparking or improvements to public open space.
- 4.20 It may be argued by NZTA that there is no express provision in RMA for financial contributions in respect of designations, in contrast to the provisions in sections 108(9) and (10) regarding resource consents. In that regard the following is noted:
- (a) It is accepted that the form of section 171 of RMA regarding designations differs from that of sections 104 and 108 of RMA regarding resource consent applications.
  - (b) Section 104 requires the consent authority, when considering an application for resource consent, to have regard to a number of matters including any actual and potential effects on the environment of allowing the activity. Sections 108(9) and (10) enable the imposition

of financial contributions on resource consents in accordance with plan provisions that typically provide a formula for calculating the quantum.

(c) Section 171 in contrast places a primary obligation on the Board to consider the effects on the environment of allowing the requirement and contains no explicit reference to financial contributions. It is accepted that, as a result, it is inappropriate for the Board to impose on NZTA generic financial contributions of the type enabled under sections 108(9) and (10).

(d) While the Board's ability to impose conditions on the designation that flow from and address the effects of the requirement would not include the general forms of financial contribution enabled under section 108, they would enable a condition that obliged NZTA to fund off-site mitigation works needed to offset impacts on public amenity.

4.21 More fundamentally, if, in the absence of such conditions, the effects generated by the Proposal are not mitigated adequately, the Board could be left in the position where it has to decline the Proposal. That is a circumstance in which an applicant may be prepared to offer conditions that are beyond the consent authority's legal ability to impose on a reluctant applicant so as to ensure that the proposal can go ahead (ie: to take advantage of the *Augier* principle).

## 5. CONTEXT FOR ASSESSMENT OF MITIGATION

### *Nature of Mitigation*

5.1 Member Dormer posed to counsel during cross examination of Mr Foster a question regarding whether the tunnelling should be treated as mitigation in order to achieve NZTA's objectives or as an integral part of the proposal [Transcript pages 148 and 149].

5.2 Resolution of that issue is informed by the focus in section 171(1) on the "effects on the environment of allowing the requirement" (emphasis added). The tunnel is part of the requirement. It is therefore the effect of constructing the Proposal, including the tunnel, which is relevant to your assessment under section 171(1), not the effect of some other possible scheme for which consent has not been sought. In that regard, an at-grade proposal cannot be

treated as a permitted baseline and nor can any assumption be made that it would even receive consent.

- 5.3 NZTA's objectives are rendered relevant only by way of section 171(1)(c). As noted above, that section requires the Board to consider whether the work and designation are reasonably necessary to achieve the authority's objectives. While that matter must be addressed by NZTA, it does not change the essential nature of your enquiry regarding the effects of the requirement under section 171.
- 5.4 That approach is reinforced by the language of section 5(2)(c) of RMA which requires the Board to consider the extent to which any "*adverse effects of activities on the environment*" are avoided, remedied or mitigated. The "*activity*" that is relevant in this case is the Proposal, including the tunnel. The subsection does not require or enable consideration of NZTA's objectives.
- 5.5 To the extent that NZTA has treated the tunnelling as mitigation rather than as an inherent element of the proposal for which consent is sought, it has misunderstood the nature of the Board's enquiry and as a result has failed to address adequately the adverse effects generated by the large structures proposed at the tunnel portals.

***Relevance of Enquiry re Best Use of Funds***

- 5.6 On at least two occasions in the hearing it was suggested that, in assessing whether additional expenditure should be incurred on mitigation in respect of the stack at the northern tunnel portal and the southern portal buildings, the Board should have regard to whether that would be the best use of those funds. [See Foster, Transcript page 146 to 149; Linzey cross examination by Member Dormer, Transcript pages 703 to 704]
- 5.7 It is submitted that such an approach is flawed:
- (a) It is not the case that a requiring authority can identify a limited envelope of funds that it makes available for mitigation and which is then divided up on the basis of what mitigation gives the best return for the dollar. [Agreed by Foster, Transcript page 147]
  - (b) Rather, the Board is charged with assessing the Proposal in terms of sections 149P and 171 of the RMA. In doing so it should consider the effects of the Proposal along the route; identify whether those effects

have been adequately mitigated; and if that has not occurred, impose conditions that allow that to occur regardless of whether there would be a benefit in spending that money elsewhere. [Agreed Foster, Transcript page 148]

- (c) That approach is essential where, as in this case, different adverse effects of differing scales and intensity arise along a lengthy route. The Board cannot trade off mitigation between different parts of the route. The receiving communities along that route are many and varied. They face individual challenges and issues. Thus the adoption of Option 3 at the southern portal is largely irrelevant to the residents and community around the northern portal. Similarly, the relocation of the northern stack does not have any benefit for Owairaka residents whose access to open space has been compromised.
- (d) The Board will need to assess each impact in its context and impose conditions requiring appropriate mitigation. If mitigation is needed in a number of locations along the route then it needs to be implemented at each location regardless of the relative cost efficiency of further works at some other part of the route.
- (e) To take a concrete example, Ms Linzey was asked whether, if she had \$11 to \$21 million to spend on environmental enhancement while resolving and ameliorating environmental issues on the western half of the Auckland isthmus, moving the southern portal or the northern stack would feature on her list of 20 possible (and presumably preferred) projects. Her response was that they would not. The Submitters accept that there is a great deal of good that could be done for other areas and other communities with that amount of money but none of the additional work mentioned by Ms Linzey in her answer (eg: the cycleway; additional reserve areas; replacement and enhancement of elements within the reserve network) is being offered by NZTA as mitigation for this project and none of it would mitigate the adverse effects generated by the currently proposed southern portal structures (discussed below).

5.8 That brings us to a sensitive but important issue. It may be argued by NZTA that the Christchurch earthquakes render the mitigation sought by the Submitters an unaffordable luxury for the country. The Submitters acknowledge that the reconstruction in Christchurch may mean that the

funding of the Proposal is delayed. They do not accept that the events in Christchurch should result in a slackening of environmental expectations and standards through New Zealand, particularly in the case of this major piece of infrastructure that will involve large structures that will dominate the Waterview and Owairaka landscapes for decades. These are works that the Submitters say need to be got right – even if that involves some delay as a result of prioritising Christchurch recovery works.

- 5.9 In assessing this Proposal and the relief sought, the Submitters ask that you keep the costs in perspective. Even if the relief sought by them has a total cost in the order of \$40 million, that is only 2% of the project cost. Put another way, it is approximately the cost of the electricity required to run the tunnel fans for four years (see paragraph 24 of Gavin Fisher's supplementary evidence dated 17 February 2011).

## 6. RELIEF SOUGHT – NORTHERN PORTAL STACK

- 6.1 The Submitters seek conditions that require NZTA to shift the northern portal stack from the currently proposed location to the eastern side of Great North Road.
- 6.2 The Submitters' preferred location is Alternative 2 on Annexure E to Andre Walter's rebuttal evidence but they recognise that the placement of the stack on land outside the designation and owned and occupied by a third party (BP) raises practical difficulties. The Submitters therefore ask that the stack be located in the general vicinity of Alternative 1 on Mr Walter's plan but within the designated land rather than straddling the boundary.

### *Issues*

- 6.3 There is a difference of opinion as to the most appropriate way of addressing the northern stack:
- (a) NZTA's landscape and planning witnesses want to retain the stack on the western side of Great North Road. The Council's landscape architect, Dennis Scott, supports that approach.
  - (b) Unitec (Mr Condor) expressed concern about practical implications of Alternatives 1 and 2 along with some mild concerns about the likely visual effect of moving the stack to the eastern side of Great North Road.

- (c) The Submitters and their witnesses have a strong preference for Alternative 1 or 2.
- 6.4 There is a difference between the various NZTA witnesses as to the strength of their views on this issue. NZTA's urban designer, Lynne Hancock, concluded (Transcript page 584) that the movement of the stack would "*not be a deal breaker*" for her. NZTA's witness on open space, David Little, considered that Alternative 1 would have minor negative open space effects (Open Space Caucusing Statement; Transcript page 554 to 555). It was NZTA's landscape architect, Stephen Brown, who expressed opposition most strongly to the shift. For that reason the following passages concentrate on his reasoning.
- 6.5 There appears to be no issue as to the large scale of the stack in the context of the surrounding activities, its significant visibility or its ability to generate adverse visual effects. The key differences of opinion between the parties concern the following:
- (a) The extent to which shifting the stack from one side of the road to the other will benefit perceptions of Waterview.
  - (b) Whether the stack and the related ventilation buildings should be co-located so as to read as a functionally connected series of structures.
  - (c) The extent to which a sculptural treatment of the stack means that it would be better located at a point of maximum visibility.
  - (d) The extent to which retention of the integrity of the public open space should take precedence over the interests of the residents and school.
  - (e) In the case of Unitec, the potential for the location to compromise a possible access route for buses at Herdman Street.

***The Submitters' Concerns***

- 6.6 Before considering the issues in turn, it is appropriate to summarise the Submitters' concerns with the current location:
- (a) Waterview is a small residential enclave bounded on the east by Great North Road. It has no through roads and residents must in practice use Great North Road if they are to travel out of the area. Great North

Road forms a clear edge to the enclave at the northern end of the suburb.

- (b) The Proposal will result in extensive motorway structures at the northern end of Waterview. Those structures will exacerbate Waterview's isolation from Pt Chevalier and from Oakley Creek.
- (c) The motorway will enter the tunnel a short distance north of Herdman Street. South of that point, the new highly engineered environment will change to something similar to the current environment with a residential development to the west of Great North Road and the park to the east. Absent the stack, the above ground ventilation building structures (if treated appropriately in architectural terms) will be consistent with that residential scale and amenity. The Submitters consider that to be a positive outcome.
- (d) If the stack is retained in its currently proposed location, however, it will represent a very alien and unsympathetic building form within the Waterview residential enclave, the edge of which would otherwise be defined by Great North Road. That will, visually, bring the Proposal into the suburb. It will place the stack immediately adjacent to the school and will thus impose itself on the most significant piece of community infrastructure in Waterview.
- (e) The stack's proposed location at the termination of the view for vehicles travelling down Great North Road from the west will exacerbate its visibility and prominence within the suburb.
- (f) The Submitters are concerned that, as a result:
  - (i) The representative image of Waterview will become the stack;
  - (ii) The perception of residents and visitors will be of a residential area into which the motorway has imposed itself by exhausting the fumes generated in the tunnel;
  - (iii) Regardless of current scientific advice, parents who are concerned by the effects of pollutants and who can do so may shift their children to other schools;
  - (iv) The school's roll and hence its contribution to the community will reduce and the coherence and vitality of the community,

which will be compromised by the loss of approximately 8% of its housing stock as a result of the Proposal, will be reduced further.

***Issue 1 – Effect of Relocation on Perceptions of Waterview***

- 6.7 Stephen Brown (eg: Transcript page 465) questioned the extent to which shifting the stack from one side of Great North Road to the other will change people's perception of it being within Waterview.
- 6.8 As Dennis Scott acknowledged (Transcript pages 765 and 766), a landscape architect's visual assessment involves using an objective approach to identify the way in which viewers will respond subjectively to an element in a landscape. That involves endeavouring to understand how a member of the public who does not have the training and experience of a landscape architect will perceive the landscape.
- 6.9 In this case, there seems to be significant difference between the views of Messrs Brown and Scott on the one hand and those that have been expressed on behalf of the public generally:
- (a) The Submitters have a very strong view that a location on the eastern side of Great North Road would be preferable to the current location because that enables the residents of Waterview to treat the stack as something close to but not within their suburb.
  - (b) Even the evidence of Paul Condor for Unitec (Transcript page 899), whose organisation's buildings are some hundreds of metres away from the stack beyond the Oakley Creek, reinforced that perception. He had a concern that placing the stack on Unitec's side of the road might adversely affect the perception that Unitec visitors would have of Unitec.

That suggests that lay people with an interest in the area but who are not promoting the Proposal perceive Great North Road as an important line of delineation. To them the side of the road on which the stack is located is important.

- 6.10 In that context, while the Submitters accept that, as Mr Scott noted, there are a number of communities who will experience the stack, it is (as Mr Scott tentatively accepted) the resident and school community that must be given



priority in this case (see Transcript page 778). Those are the people who will experience the stack as a permanent presence in their lives, not something they observe as they drive past. They are also the people whose community the motorway has been driven through. The other audiences will, to varying degrees, be made up of the regional community that is to benefit from the motorway. They may have a more positive perspective on the Proposal as a whole which makes them more tolerant of the stack. They will likely be a less sensitive audience with less emotional investment in the issue.

***Issue 2 – Relevance of Function to Location***

- 6.11 The training and experience of landscape architects and architects may contribute to their view that a functional connection between ventilation building and the stack should be reflected by co-location of those elements.
- 6.12 The Submitters do not share that view in this case. They say that:
- (a) Given that the bulk of the ventilation infrastructure is to be located underground, there is no nexus between the scale of those elements and the above ground structures.
  - (b) The public will not necessarily have any idea about the purpose of the structures except in the case of the stack (which will be self explanatory).
  - (c) In the context of the scale of infrastructure proposed in this case, placing the stack on the other side of Great North Road will still constitute co-location. The stack and above ground ventilation buildings should not be looked at in isolation. They form part of a wider project along with the tunnel portal and motorway carriageway. The stack simply needs to be in the vicinity of the portal to honestly reflect its function.
  - (d) In any event, the Submitters are prepared to sacrifice a degree of functional legibility in return for a reduction in adverse visual impacts.
- 6.13 It is submitted that landscape architects objectively analyse landscapes to a greater extent than do the public generally. To Messrs Brown and Scott, it matters whether a series of structures functionally related to the ventilation system are physically proximate. To the public that may not even register whereas the visual impact of the structures will be quite apparent.

***Issue 3 – Merits and Implications of Sculptural Treatment***

- 6.14 Both Messrs Brown and Scott emphasised the positive attributes of treating the stack sculpturally. Mr Scott goes so far in his paragraph 5.50 to argue against Alternative 1 and 2 because they reduce the visibility of the stack and thus make it less obvious as a sculpture.
- 6.15 The Submitters consider that any opposition to shifting the stack based around the need for it to be a publicly visible sculpture is fundamentally flawed:
- (a) The stack cannot be a simple piece of art. It has a function and will exist solely because of that function. No party is otherwise proposing to construct a 15 or 25 meter tall sculpture on a constrained site in suburban Waterview.
  - (b) Perceptions of art are emotionally based. They are informed by contextual matters such as when the work was produced; by whom; for what reason; with what artistic language, images and cultural allusions; and the function, if any, that it serves.
  - (c) In this case, the sculpture is in fact a functioning exhaust stack for a motorway that is being put through a reluctant community. Its context is neutral at best for the general public but likely to be profoundly negative for many of the residents of the Waterview area.
- 6.16 There is nothing wrong with endeavouring to treat sculpturally a piece of infrastructure if that is the best form of mitigation. It is, however, misguided to then treat that infrastructure as a sculpture and endeavour to elevate its importance over the opposition of a reluctant receiving community. That results in the method (mitigation through sculptural treatment) subverting the objective (minimising effects on the community).

***Issue 4 - Public Open Space Integrity***

- 6.17 It was Stephen Brown and Dennis Scott who expressed the most concern about the loss of public open space to Alternative 1.
- 6.18 NZTA's witness on open space, David Little, is quoted in the Open Space Caucusing Statement as considering that Alternative 2 has no implications for open space other than visual while Alternative 1 has minor negative open space impacts because of the space taken. Mr Little confirmed that in cross

examination (Transcript page 554 to 555), noting that the affected area is in weedy vegetation and surrounded by steeply sloping sidewalls of the gully and that Alternative 1 involves a fairly small incursion in terms of its size.

6.19 The Submitters consider that Mr Little's analysis reflects the limited impact of the stack at Alternative 1 on the public open space and the amenity within it. They add the following observations:

- (a) The stack will be at the edge of the open space, adjacent to an arterial road, near to the BP petrol station, and well above and away from the focus of the reserve being the Oakley Creek.
- (b) The public's experience of the Oakley Creek and the walkway along it will not be impacted in any significant way by placing the stack at the western edge of the reserve.
- (c) The reserve is a lengthy and extensive area comprising a series of spaces with different shapes and qualities. Almost all of those areas will be unchanged as a result of the stack.
- (d) The one area which will experience a change in visual environment is the Waterview Glades. The stack will be noticeable there but its visual presence will not be vastly different from that which will occur if it is placed in the currently proposed location.

[See Scott, Transcript pages 773 to 776; and Brown, Transcript page 462 to 463 where questions were put on these points]

6.20 It is accepted that Mr Brown has found the treatment of the northern stack to be a challenging issue. He appeared to be strongly swayed in his assessment by his view that placing the stack in Alternative 1 would be "*saying that our reserves and open spaces can become dumping grounds for things that we don't like in our urban environment*" and that the stack is "*an intensely urban structure that should be in an urban location and not dumped on the edge of a reserve*" (Transcript page 463). Melean Absolum addresses this matter in her supplementary statement but the following additional observations are also made:

- (a) The outcome of adopting Mr Brown's view is that the stack is instead "*dumped*" on the edge of school and within a residential community. That implies that the integrity of open spaces in urban areas should

have priority over the amenity of the people those open spaces are meant to serve.

- (b) Mr Brown treats the reserve as separate from the urban area. Open space within urban areas are, however, essential pieces of the urban infrastructure – that is, they are themselves part of the city and integral to it. The Submitters say that, rather than treating the residential area and the stack as equally urban and the park as non-urban, the better approach would be to treat each of the residential area, the stack and the park as different types of urban elements.
- (c) In that context it is apparent that the stack is an equally alien form of urban development to introduce to both the residential area and the park. The question then is whether the impact on the critical affected community (the Waterview residents and school) is best addressed by a location next to the school or on the edge of the park adjacent to the arterial road.
- (d) The Submitters consider that there is no easy answer here. They agree with Mr Brown that the effects of the stack cannot be mitigated in either location (Transcript page 465 and 466). They say, however, that a balanced weighing up of the issues would give priority to the amenity of the people of Waterview and would result in the stack being placed on the eastern side of the road.

### ***Issue 5 – Unitec Access***

6.21 Paul Condor's supplementary statement for Unitec includes a plan which shows a potential bus route from Unitec across the Oakley Creek to Great North Road at the Herdman Street intersection. Mr Condor's evidence (eg: Transcript page 892) is that Unitec is concerned that:

- (a) Alternative 2 for the stack would compromise that access because it would be in its path; and
- (b) Alternative 1 for the stack raises a possible concern because it may compromise provision of a south bound merging land for buses from that connection.

6.22 The Submitters consider that those concerns are overstated and need not affect your decision:

- (a) The proposed Unitec access crosses reserve land and privately owned (BP) land. There is no tenure arrangement in place for the BP land (Transcript page 896) and no evidence that Unitec has even progressed discussions with that company.
- (b) The proposed route passes through the exit lane from the BP site. In practical terms its implementation would necessitate incorporating the traffic exiting the BP site into the Unitec access. There is no evidence that that is feasible or desirable to BP.
- (c) It would be logical to incorporate the traffic exiting the Unitec site into the traffic light phase at Herdman Street. Mr Condor's advice is that, based on discussions with Council officers, Unitec wants to give buses a free left turn and to that end would need to construct a merge lane to the south which might conflict with Alternative 1 (Transcript page 897):
  - (i) A complying version of Alternative 1 (ie: located fully on designated land) would be on the reserve land, not on the current road.
  - (ii) If there is to be a conflict between the merge lane and Alternative 1 that would arise as a result of the merge lane having to occupy reserve land (and given its nature, the lane would require far more reserve land than would the stack). Mr Condor was unable to advise the Board on that issue. [See Transcript page 897]
- (d) There can be no weight given to a proposal of such uncertainty and with such significant implications.

6.23 As an aside, Mr Condor's tentatively expressed concern regarding effects that might arise from the appearance of the stack at Alternative 1 (eg: Transcript page 897 line 31 he says there would "*probably be a negative effect*") should be given little if any weight. Unitec's premises are hundreds of metres to the west of the stack location and are shielded by planting. The impact on Waterview of the stack in any location will far outweigh any peripheral impact on Unitec.

***Jurisdiction to Adopt Alternative 1 or 2***

- 6.24 The Submitters submit that the Board has the ability to adopt Alternative 1 and could, with the agreement of BP, adopt Alternative 2. In the absence of any arrangement between NZTA and BP, it is accepted that Alternative 1 is the only practical option at this stage.
- 6.25 The relocation does not represent an increase in the scale or intensity of the Proposal.
- 6.26 The relocation would affect an area that is already subject to the notices of requirement. The Proposal anticipates that NZTA will reduce the area subject to its designation once the construction phase has finished. In this case it would simply retain its designation over the land to be occupied by the stack.
- 6.27 It is submitted that no parties will be newly or more adversely affected by the proposed changes:
- (a) The school is the closest and most affected site. It will benefit significantly from the stack being shifted a further 60 metres or so away from the school's boundary.
  - (b) The existing residential properties on Great North Road will be removed as a result of the project. No residential dwellings will be worse off as a result of the shift and those from which the stack can be seen (located for example on the western side of the school) will benefit from its movement.
  - (c) The BP service station is deliberately oriented to the north and will be unaffected by the shift.
  - (d) The stack will be less visible to the travelling public on Great North Road as it will no longer be on the outside of the corner.
  - (e) With regard to the reserve:
    - (i) The reserve is used by the general public but unlike the school and residential areas is not a locality where people regularly and consistently spend long expanses of time. It is also a large area from most of which the stack is not visible.

- (ii) While the stack will be visible from within the reserve, that is also largely true for the current location and there will be little difference for users of that area.
- (iii) In any event the Waterview Glades area is to be lost and then rebuilt during the course of the works. In that context the shift in the stack's location is of little moment.

6.28 NZTA has accepted that an outline plan of works should be tendered with respect to the buildings at the northern portal. That will allow the Council to seek refinements to the design that is eventually promoted. It is understood that the plans currently show an area subject to the outline plan process that excludes the eastern side of Great North Road. That would need to be amended as a consequence of the alteration to the stack's location.

6.29 It is essential to identify now appropriate design solutions for the structures at the northern portal. These buildings will be in place for many decades and they cannot retrospectively be relocated or reduced in scale.

## 7. RELIEF SOUGHT – SOUTHERN PORTAL

7.1 The Submitters seek conditions requiring NZTA to amend the location and form of the buildings in the vicinity of the southern portal to the tunnel so that they are consistent with Option 3 shown on Annexure J to Andre Walter's rebuttal evidence.

### ***Benefits of Option 3***

7.2 There is almost universal agreement that Option 3 is a significant improvement on the current proposal for the buildings. The position of NZTA's consultants is summarised in Annexures E and F to Amelia Linzey's first supplementary rebuttal statement. In response to questioning from the Board (Transcript page 471) Stephen Brown recorded his view that the improvement was fairly significant in terms of visual impact.

7.3 From the Submitters' perspective the adverse effects of the current proposal are significant and the benefits of Option 3 are striking and clear:

- (a) The current option:
  - (i) Includes a very tall, very lengthy building (crowned by a stack) which is to be located at the pinch point of the open space and

which will dominate direct views and wider oblique vistas from a large number of houses on Hendon Avenue and will sit above the Avondale campground.

- (ii) Occupies a significant extent of open space and will compromise connectivity and public safety along the open corridor.
  - (iii) Is quite out of scale and character with other structures in the area. The only building with a comparable scale is the Pak 'n Save supermarket a significant distance to the west on New North Road.
- (b) By contrast Option 3:
- (i) Comprises two much smaller above ground structures along with the stack and accordingly occupies a much smaller area of open space.
  - (ii) Has the advantage of shifting the tunnel portal some 70 to 80 metres to the east which frees up additional open space for public use.
  - (iii) Replaces the lengthy building with structures that are oriented north – south across the land and that therefore allow views through the site and vistas around the site for adjacent houses.
  - (iv) Moves away from the pinch point and thus allows better connectivity and reduces adverse effects on the campground.

#### ***Questioning of Amelia Linzey by the Board***

7.4 The Board through Member Dormer questioned Ms Linzey at some length on 28 February (Transcript pages 697 to 704) regarding matters concerning Option 3 that had in part also been canvassed in cross examination on 16 February (Transcript pages 377 to 387). The following observations are made with regard to the issues raised in those questions and Ms Linzey's answers.

7.5 With regard to the consideration of effects on individual houses (Transcript pages 697 to 701):

- (a) It is accepted that the Board needs to explore fully the extent to which any revised scheme will generate additional adverse effects on certain



parties. That is presumably one of the reasons why that issue was addressed in Ms Linzey's supplementary rebuttal statement. It is the key topic addressed by Duncan McKenzie in his first supplementary statement.

- (b) Any assessment of effects of a proposal under RMA involves weighing up a range of different types of effect (eg: traffic, noise, visual and access to open space) and the formation of an overall view. That is, for example, the essence of the enquiries by decision makers regarding notification, the substantive assessment of resource consent applications and in respect of designations.
- (c) The same assessment needs to be undertaken here. The fact that a property may experience an increase in one category of effect (eg: visual) does not necessarily mean that the proposal is beyond jurisdiction. The Board then needs to assess the scale of the increase in that effect and weigh it against any decreases in other effects before forming a view on whether the change would have elicited new submissions.

7.6 With regard to the costs estimates for the southern building options (Transcript page 701 to 702), neither the Board nor any other party has the resources and access to information required to test the NZTA estimates on that structure or other elements. The parties have to take those figures on trust and cannot determine how conservative or realistic the estimates are. Regardless of the exact cost, however, the issue for the Board is whether the mitigation of effects in a locality which is bearing the brunt of the impacts of this nationally significant infrastructure warrants the expenditure of something less than an additional 1% of the project cost. That issue is of sufficiently minor moment to NZTA to be within the delegated authority of Tommy Parker and his general manager (Transcript page 89).

7.7 With regard to the context for Ms Linzey's substantive conclusions (Transcript pages 702 to 704):

- (a) It is to be expected that NZTA's expert consultants on environmental effects would have formed a view on the relative benefits of the current option and Option 3 without reference to cost. That assessment is for NZTA initially and the Board at this stage to undertake.

- (b) Similarly it is not surprising that Ms Linzey, who was presumably able to support the notified proposal with its very extensive structures at both the northern and southern tunnel portals and then wrote evidence in chief in support of the Construct redesign of the buildings at both portals, remains of the view that additional mitigation is unnecessary. To say otherwise would be to depart from her earlier evidence. It is, of course, the Board's assessment as to the desirability for additional mitigation that is determinative.
- (c) In forming her overall view, Ms Linzey as a planner is able to take into account the cost implications. That said, it clearly remains Ms Linzey's view that Option 3 is the best environmental outcome from a social perspective and locally (see for example Transcript page 702, line 20 to page 703, line 5).

### ***Landowner responses to Option 3***

- 7.8 The Submitters' hope is that the Board's concerns regarding the jurisdictional implications of adopting Option 3 will have been addressed through:
- (a) Receipt of advice from Housing New Zealand Corporation, as the major affected landowner, as to its preference for Option 3.
  - (b) The letter from the owner of the other potentially affected house (85 Hendon Avenue) attached to the second supplementary statement of Duncan McKenzie in which Ms Salinger records her preference for Option 3.
- 7.9 In discussions with Ms Janissen (Transcript page 722) the Board canvassed the potential relevance of the *Augier* principle to the debate regarding Option 3. That principle concerns the ability of a decision maker to impose a condition offered by an applicant, even where the decision maker would not normally have the power to impose such a condition on an unwilling applicant. It is accepted that NZTA cannot waive a requirement to ensure that a condition does not create a jurisdictional issue in respect of additional impacts on a third party. The acceptance of Option 3 by the potentially affected owners of the Hendon Avenue properties suggests, however, that the Board can have confidence in the validity of modifications or conditions that require implementation of Option 3.

### ***Jurisdiction to Adopt Option 3***

- 7.10 The Submitters submit that the Board has the ability to adopt Option 3:
- (a) The changes do not increase the scale or intensity of the Proposal but instead serve to reduce the apparent scale of key visible elements of it.
  - (b) The changes will take place within the area that is already subject to the notices of requirement.
  - (c) The evidence is that no parties will be newly affected by the proposed changes.
  - (d) The planners (Amelia Linzey and Duncan McKenzie) appear to be of the view that, taking into account the visual impacts, impacts arising from reducing the extent of uncovered motorway (eg: noise) and benefits in terms of open space and connectivity, no parties will be adversely affected to a greater extent by the changes although some properties will experience changed effects.
  - (e) Those parties who might potentially be at risk of being affected to a greater extent are understood to support the relief sought by the Submitters.
- 7.11 As with the northern stack, it is essential to get right at this stage the design solutions for the structures at the southern portal of the tunnel. These buildings will be in place for many decades and they cannot retrospectively be relocated or reduced in scale.
- 7.12 NZTA has accepted that an outline plan of works should be tendered with respect to the buildings at the southern portal. That will allow the Council to seek refinements to the design that is eventually promoted. The relevant plans show an area subject to the outline plan process that reflects the current proposal but not Option 3. That would need to be amended as a consequence of adoption of Option 3.
8. **RELIEF SOUGHT – CONNECTIVITY AND OPEN SPACE**
- 8.1 The Submitters support the relief sought by Council with regard to public open space. While individual members of the group and witnesses have different preferences for open space development (some of which are expressed in

the evidence) the Submitters accept that it is Council's obligation to provide and maintain public open space for the community. Thus any compensatory works carried out in response to the Proposal need to be consistent with Council's open space strategy.

8.2 The Submitters have strong preferences regarding the provision of connections between those open spaces and through the community. The rationales for the connections sought differ with the circumstances.

8.3 The Alford Bridge would provide at-grade pedestrian and cycle connectivity across Oakley Creek in the vicinity of Alford Street. It is required both to offset reductions in pedestrian connectivity from Waterview to Pt Chevalier and to compensate for losses in open space amenity in Waterview:

(a) With regard to connectivity to Pt Chevalier:

(i) Waterview's physical isolation means that the pedestrian route to the nearest district centre (Pt Chevalier) involves a lengthy walk along Great North Road through the interchange. There is little amenity for pedestrians currently.

(ii) The Proposal will exacerbate that situation by removing the housing along Great North Road which provides some degree of safety for pedestrians and replacing it with a landscape consisting of motorway ramps and planting. That will extend the length and intensity of arterial road and motorway through which pedestrians must walk.

(iii) The Alford Bridge will open up an alternative route through Unitec but without the risks and challenges currently posed by the need to drop down into the vegetated valley in order to cross the Creek.

(b) With regard to long term public open space:

(i) The Proposal will severely affect Waterview Reserve. Like all reserves in the affected area it has been neglected for many years – a consequence of the uncertainty that has been caused by the debate about the motorway connection. NZTA's compensation proposal involves providing a similar area of reserve but the revised Waterview Reserve will be bordered to

both the north and east by a motorway interchange. The quality of the open space experience in Waterview will change.

- (ii) Part of the current availability of public open space in Waterview is the ability to access Oakley Creek by crossing Great North Road. The changes to that road discussed above in the context of access to Pt Chevalier will also affect accessibility of the northern reaches of Oakley Creek.
  - (iii) One way of addressing a reduction in open space amenity is to increase connectivity to other spaces. The Alford Bridge will do that in terms of the Unitec grounds. It will also enable access to the sports field that is to be relocated from Waterview to Phyllis Reserve.
- (c) Access to public space will be severely compromised for the Waterview community during the construction phase. Not only will the project directly affect existing open space but the temporary changes to Great North Road may cause traffic conditions that discourage travel by car beyond Waterview for recreation. In that context safe and convenient access to other open space is desirable and the Alford Bridge is the best way of providing that outcome provided suitable linkages can be put in place.

8.4 The Soljak Bridge would provide access across the Railway at Soljak Place to compensate for losses in open space quality and quantity in the vicinity of Alan Wood Park and reductions in connectivity elsewhere. It is needed to compensate for the reductions in open space amenity (including the *“unmitigated effects on passive open space function at Alan Wood Park”*; Little Transcript page 522 – 524). The Submitters accept that the need for this bridge arising from the Proposal (though not its overall desirability) would reduce if Option 3 is adopted for the southern portal buildings.

8.5 The Phyllis Bridge would provide at-grade pedestrian and cycle access across Oakley Creek in the vicinity of Phyllis Reserve. It is desirable but the Submitters consider that the community that would benefit from the Phyllis Bridge is far less affected by the Proposal than are those who would benefit from the Alford and Soljak Bridges. The Phyllis Bridge is not an effective alternative to either of those other bridges.

8.6 The extension of the cycle way along the Oakley Creek and through Phyllis Reserve and Harbutt Reserve would help to compensate for the losses in open space quality and quantity in Waterview and in the vicinity of Alan Wood Reserve and would also be consistent with NZTA's objectives.

## 9. CONCLUSION

9.1 The Submitters have endeavoured to present a case that is balanced and that seeks reasonable and justifiable relief. In doing so they have retained and accepted the recommendations of professional advisors and witnesses.

9.2 You have been asked by NZTA to approve the Proposal, notwithstanding the significant adverse effects that it will necessarily generate on the communities of Owairaka and Waterview, because of the extent of the regional and national benefit that it will generate. It is that benefit that warrants the expenditure of some \$2 billion on the project.

9.3 The relief sought by the Submitters may, on NZTA's figures, add something up to \$40 million to the project cost. That is but 2% of the project budget but it will dramatically reduce the adverse impact of the Proposal on the affected communities.

9.4 The bulk of that expenditure relates to the mitigation of extremely significant visual effects caused by the placement within residential environments (ie: within metres of a school at Waterview and houses in Owairaka) of very large structures of an industrial nature that will exhaust fumes into those communities for the life of the Proposal.

9.5 These are structures that in their currently proposed form will be landmarks in the region for decades at least. Future generations underwhelmed by NZTA's 2011 treatment of the buildings will not be able to rectify the problem. They will be left to work around unnecessarily large and dominant structures that:

- (a) In the case of southern portal buildings were clearly understood at the time to be comprehensively inferior to the Option 3 design; and
- (b) In the case of the northern stack was deliberately located where it would be most visible and in immediate proximity to the largest public facility in Waterview, the school.

9.6 The buildings at the northern and southern portal are the visible legacy that this project will leave to the communities that it will affect most severely. The

Submitters, as groups made up from those communities ask that the Board impose on NZTA conditions that will ensure that the structures that are built are as sensitive as possible to their domestic suburban context and reflect the Submitters' expressed preferences.

- 9.7 The Submitters say that the conditions they seek are reasonable, within the Board's jurisdiction and essential if the Proposal is to promote the sustainable management of resources and warrant the grant of consents. If the mitigation measures sought by the Submitters are not upheld then the Submitters ask that the Proposal as a whole be declined consent.

**DATED** this 7<sup>th</sup> day of March 2011



---

**DA Allan – Counsel for Living  
Communities (Auckland)  
Incorporated, Sir Harold Marshall  
and the Mt Albert Residents  
Association, and Northwestern  
Community Association  
Incorporated**

