BEFORE THE BOARD OF INQUIRY
FOR THE WATERVIEW CONNECTION PROPOSAL

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

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MEMORANDUM OF COUNSEL FOR AUCKLAND COUNCIL AND AUCKLAND TRANSPORT RESPONDING TO THE BOARD OF INQUIRY'S MINUTE OF 14 FEBRUARY 2011

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MAY IT PLEASE THE BOARD

1. These submissions are lodged in accordance with the Minute of the Board of Inquiry (**Board**) dated 14 February 2011.

2. In that Minute the Board called for submissions regarding the Board's ability to require or direct the NZTA to undertake mitigation beyond the outside boundary or footprint of the proposed designations. In particular, the Board has tentatively indicated that:

(a) the law relating to the scope to "modify" a notice of requirement under section 171 of the Resource Management Act 1991 (**RMA**) has changed little in recent years; and

(b) this Board's powers under section 149P of the RMA are the same as a territorial authority's under section 171.

3. In its Minute the Board has noted the Environment Court's decision in *Auckland Volcanic Cones Society Inc v Transit New Zealand Ltd* [2003] NZRMA 54. These submissions briefly discuss that case before responding to the two specific matters noted above.

Auckland Volcanic Cones Case

4. The Board's Minute refers specifically to paragraph 50 of the Court's decision, where the Court concluded as follows:

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

5. This statement was made in the context of various requests that an alternative motorway alignment be adopted by the Court in order to reduce the impacts on the Mt Roskill cone. In our view, it is settled law that there is no scope to decide that a "better" alternative be adopted.

6. Usefully, however, the Court went on in paragraph 51 to summarise the approach to assessing notices of requirement:

"Therefore, our task in this part of our decision in evaluating Part II matters against the NOR proposal is to identify matters which may be of importance in terms of Part II; identify what measures have been taken to avoid remedy or mitigate adverse effects of the proposal on the environment, with particular reference to environmental matters singled out in ss 6 and 7; and then to assess whether those measures are sufficient in view of the importance of the SH20 corridor or whether the damage inflicted by the works associated with that designation will have such an effect upon Part II matters that the work should not proceed."

7. Accordingly, in our submission, a key enquiry, when considering a notice of requirement, in terms of Part 2 of the RMA is whether the "measures" to avoid, remedy or mitigate adverse effects are "sufficient", in the circumstances of the case. In that regard, at paragraph 159, the Court said:

"However, s 171 is subject to Part II of the Act and if this Court felt that significant improvements 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".

8. In our submission, if the Board is not satisfied that the proposed measures to address the adverse effects of the Waterview Connection Proposal are sufficient, it has the power to impose conditions or "modify" the notices of requirement under section 149P(4) of the RMA.

9. The power to impose conditions is, in our submission, subject to the normal requirements of any 'resource management' condition including the need for certainty, reasonableness and serving a resource management purpose. Subject to these requirements, it is submitted that the Board has a wide discretion to impose conditions that may be necessary to avoid, remedy or mitigate adverse effects, including conditions that require additional mitigation or "offset" mitigation be provided. The "modification" issue is discussed in more detail below as this is a particular issue raised in the Board's minute.

Modifying a Notice of Requirement – the law

10. With regard to paragraph 2(a) above, the Board has expressed the tentative view that the law regarding the Board's ability to "modify a designation has changed little in the last seven years", despite alterations to the wording of the legislation. We agree with this view.

11. In our submission, the law relating to modifying notices of requirement can be briefly summarised as follows:

(a) Under section 171(2) of the RMA a territorial authority may recommend to the requiring authority that it "modify" a notice of requirement. Similarly, the Environment Court may decide to modify a notice of requirement under section 174(4)(c) of the RMA;

(b) A notice of requirement 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 issues it addresses cannot be altered or added to" (*Quay Property Management Limited v Transit New Zealand* W28/00, at page 26);

(c) The power to "modify" a notice of requirement however does not permit changes to the notice which "alter its essential nature or character" (*Quay Property Management Limited*, at pages 42-43: applied in *Norwest Community Action Group Incorporated v Transpower New Zealand Limited* A113/01 at para 39). Similarly, this power cannot "enlarge the scope of the use or uses specified in a requirement" (*Pukekohe Borough Council v Minister of Works and Development* (1980) 7 NZTPA 185 at 189);

(d) Ultimately, whether a modification alters the essential nature or character of a notice of requirement as notified will be a matter of judgement for the consent authority;

(e) When making that judgement, the key concern is whether people affected by the modification have been involved in the decision-

making process. In the *Norwest* decision, the Environment Court applied the test formulated in *Haslam v Selwyn District Council* (1993) 2 NZRMA 628 which dealt with the power of a District Council to amend a resource consent application following notification. In that case, the Court held that the test was "whether the amendments made after the period for lodging submissions had commenced [*were*] such that [*it was plausible that*] any person who did not lodge a submission would have done so if the application information available for examination had incorporated the amendment"; and

(f) The assessment as to whether any other person may be affected by a modification requires a careful consideration of whether a modification creates new or different adverse effects on the environment.[1] Generally, if any new effects are either no more than minor or positive the modification is likely to be within jurisdiction.

12. In our submission, the 2003 amendments to the RMA did not materially alter the scope of the matters that must be considered when assessing a notice of requirement other than to place an explicit emphasis on the need to consider the effects on the environment[2]. Therefore, the above case law regarding modification of notices of requirement still applies in our submission.

Extent of the Board's powers

13. In our submission the case law discussed above applies to the Board's powers under section 149P(4)(iii) of the RMA to "modify" the notices of requirement. This case law was decided under section 174 of the RMA.

14. We note that the Environment Court's powers on appeal include the power under section 174(4)(c) to "confirm a requirement, but modify it or impose conditions on it as the Court thinks fit". This decision is made after having regard to the matters in section 171(1). This is the equivalent wording to

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[1] A similar approach was taken by the Environment Court in *Frasers Papamoa Limited v Tauranga City Council* W90/07. At para 30 the Court adopted the following three tests from *Coull v Christchurch City Council* C77/06 as to whether a proposed change to a consent application was within jurisdiction:

> *"(1) Does it increase the scale or intensity of the activity?*
> *(2) 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?*
> *(3) Would parties who have not made submissions have done so if they were aware of the change?"*

section 149P(4)(iii). Accordingly, in our submission the case law applying to the Court's powers under section 174(4) of the RMA also applies to the Board's powers under section 149P(4) of the RMA.

DATED this 18th day of February 2011

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[2] Prior to the 2003 amendments there was no explicit reference in section 171(1) to require an assessment of effects on the environment of allowing the requirement.