IN THE MATTER of the Resource Management Act 1991

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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

MEMORANDUM ON BEHALF OF LIVING COMMUNITIES (AUCKLAND) INCORPORATED & OTHERS CONCERNING PRELIMINARY ISSUE

May it please the Board:

1. The Board of Inquiry's Minute of 14 February 2011 ("the Minute") invited submissions from parties on the extent to which the Board may direct NZTA to undertake works or mitigation outside the boundary or footprint of the proposed designations.

2. Living Communities (Auckland) Incorporated, Northwestern Community Association Incorporated, Sir Harold Marshall and Mt Albert Residents Association ("the Submitters") reserve the right to expand on these matters in their legal submissions.

3. The Minute directs parties to the decision of the Environment Court in *Auckland Volcanic Cones Society Inc v Transit NZ* [Decision A203/2002] ("the *Volcanic Cones* Decision"). This memorandum will consider the implications of the *Volcanic Cones* Decision and will then summarise the Submitters' view as to the bounds of the Board's jurisdiction.

The Volcanic Cones Decision

4. The Minute identifies paragraphs [50], [51] and [126] of the *Volcanic Cones* Decision as being particularly relevant to the issue. Paragraphs [125], [126], [159], [165] and [166] are also of assistance.

5. It is submitted that the most instructive aspects of the *Volcanic Cones* Decision are the following:

(a) The observation in paragraph [50] that, pursuant to the wording of the version of section 171 of the Resource Management Act ("RMA") that then applied, the Court had "*no power or authority to decide on an alternative*", its powers "*being merely to ascertain whether adequate consideration has been given to such alternatives*".

Comment: It is accepted that the Court's consideration of alternatives was limited in terms of section 171. However, that is not the end of the assessment. An adjudicator is also required to assess a proposal and its effects and could impose conditions to mitigate the effects of the chosen method.

(b) The observation in paragraph [51] that the Court's task when evaluating Part 2 matters 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.

Comment: This is one of the elements of the adjudicator's assessment that involves consideration of adverse effects. The Court notes that if those effects are not mitigated adequately then the proposal may be declined consent. The Submitters say that a practical and lawful alternative to declining consent is to implement mitigation measures through conditions that address those effects to an adequate extent.

(c) The Court's consideration of the test in section 171(1)(b) of RMA as to whether adequate consideration has been given to alternative sites, routes and methods of achieving the work. In this case the Court focussed in detail on the method of achieving the work (see paragraphs [121] to [166]). In that regard:

(i) The Court undertook a detailed analysis of the options put to it and found on the facts that "*the benefits which would be gained [from the submitter's proposal] are not such as to warrant a major reconstruction of motorway interchanges because those major reconstructions*" would have certain cumulative effects (see paragraph [165]).

(ii) The Court concluded that in relation to section 171(b) adequate consideration had been given to alternatives and "*it is our view that the benefits to be gained by the [submitter] proposal are not sufficiently superior to the Transit proposal (taking into account mitigation measures) to warrant this Court requiring the interchange to be shifted*" (see paragraph [166]).

Comment: The Submitters are asking the Board to undertake in this case a similar enquiry with particular regard to the shifting of the northern portal stack and the shifting and redesign of the southern portal buildings and stack. Their case is that, in this case, their preferred options do have benefits that outweigh potential adverse effects.

(iii) Those findings were put in a legal framework in paragraph [159] which stated:

> "*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*".

Comment: 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 nearby residential areas that is of primary concern. That matter is also relevant under Part 2 (eg: sections 5, 7(b), 7(c), 7(f)).

(iv) In paragraph [125] the Court notes that "*it is not our function to force on a requiring authority a design which it does not want therefore should the Court come to the view that the May Road interchange is desirable in the context of the visual protection of the Mt Roskill cone then Transit would need to be given time to consider if and how that interchange could be incorporated within the NoR*".

Comment: That statement reflected the fact that Transit did not consider that the proposed alternative was a desirable means of addressing traffic and had not prepared a workable design. NZTA has responded in an analogous way in this case to the request by Sir Harold Marshall that it install SH20 on and off ramps at Pt Chevalier. In both cases, the proposals go to the core of the roading authority's role being the provision of roads. By contrast, NZTA has identified workable options for the relocation and redesign of the northern stack and the southern portal building and those mitigation measures could be implemented now by way of conditions.

(v) In paragraph [126] the Court noted that "*the May Road intersection could well require the acquisition of further land and, if so, it is not an available method within the meaning of the RMA. In fairness to all parties we nevertheless consider we should pay some attention to the ... alternative*".

Comment: This issue arose in terms of the request made by Sir Harold Marshall for additional ramps, but does not arise in the case of Option 3 for the southern portal buildings or alternative vent stack 1 (provided it is moved a short distance to the south).

Section 149P and the Extent of Board's Power to Modify a Requirement

6. Section 149P(4) of RMA provides that a board of inquiry considering a notice of requirement must have regard to the matters in section 171(1) 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.

7. The wording of section 149P(4) is of similar effect to section 171(2). Both sections enable the adjudicator to modify a requirement but the extent to which that may occur clearly should be limited.

8. The power to modify a requirement clearly envisages changes to the terms of a designation but is constrained, as has been noted in the caselaw (see *Quay Property Management Limited v Transit NZ* W28/00; *Norwest Community Action Group Incorporated v Transpower New Zealand Limited* A113/01; *Pukekohe Borough Council v Ministry of Works and Development* (1980) 7NZTPA 185). That flexibility is necessary to enable both the requiring authority and the adjudicator to respond to changed circumstances or information that becomes apparent regarding adverse effects generated by the proposal. The submissions on behalf of the Auckland Council in this regard are adopted.

9. In addition, section 181(3) of RMA, which addresses the alteration of designations without public notice, is of some assistance. That section enables the alteration of designations without a public notification process where:

    (a) In terms of subsection (3)(a), either:

        (i) The alteration involves no more than a minor change to the effects on the environment; or

        (ii) The alteration involves only minor changes to the boundaries of the designation or notice of requirement.

        Comment: It is submitted that these tests can give guidance to the Board when assessing any changes to the proposal. That is, given that a designation can be changed without notice in such circumstances, the Board when assessing the requirements should have the ability to impose similar changes. 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. Notwithstanding the use of the word "or" in the section, where a minor amendment is proposed to the extent of a designation it would be appropriate to ensure that the change also generated no more than minor effects.

(b) In terms of subsection 3(b), written notice of the proposed alteration has been given to every owner or occupier of land directly affected and those owners or occupiers agree with the alteration.

Comment: 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.

(c) Both the territorial authority and the requiring authority agree with the alteration.

Comment: This element is not relevant to the Board's jurisdiction when assessing the appropriateness of proposed changes in terms of sections 149P and 171.

Statutory Changes to Section 171 of RMA

10. The version of section 171 that was addressed in the Volcanic Cones Decision is different from the current legislation. For completeness the following observations are made with regard to the current (2003) version of section 171:

(a) Section 171(1) provides 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: Both forms of section 171 are subject to Part 2 so the observations of the Court in the *Volcanic Cones* Decision in that regard remain relevant. The current version of the section differs significantly from the older version, however, in that the primary focus of the section is now on the effects on the environment of allowing the requirement, being a matter that was not previously explicitly addressed in the text of section 171 (although it did arise indirectly through the reference to Part 2). That change 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.

(b) Subsection (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: Whilst the comments in the *Volcanic Cones* Decision remain relevant, this enquiry is just one matter to which regard is had when undertaking the primary analysis with respect to the effects of the proposal. There is no obligation for a requiring authority to select the best alternative but 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 those adverse effects. Put another way, 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.

(c) Subsection (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 is also an additional requirement on a requiring authority in comparison with an applicant for resource consent but does not does not replace or render irrelevant the Court's consideration of the adequacy of mitigation measures.

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

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

Conclusions

11. The Submitters' view regarding the Board's obligations and powers with respect to modifications to the proposal and mitigation measures is summarised below:

(a) The Board has a limited power to modify the physical extent of the project area subject to the notices of requirement. If the Board is to expand the designated activities onto land outside that initially subject to the requirements then:

(i) The owner or occupier of the additional land must agree with that change; and

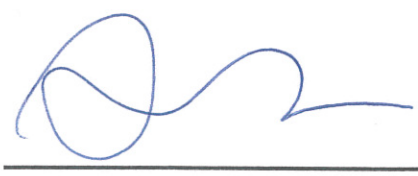
(ii) The change in effects must be no more than minor.

That would apply, for example, if the Board in this case adopted an alternative northern stack location that affected BP land outside the notices of requirement.

(b) Within the project area defined by the suite of requirements sought, the Board has a greater degree of flexibility. NZTA controls the land within that area and if a relocation of designated activities (eg: the shifting of the southern portal building) necessitates a minor shift in the internal designation boundaries but does not extend the total project area then that would be within scope. Any such change will require an assessment of any change in adverse effects generated (ie: with respect to whether any new parties are affected or any existing affected parties are affected to a greater extent).

(c) Conditions may be imposed with regard to the carrying out off site of mitigation measures that are not inherent to the designated activities (eg: improved connections to and through public spaces). If need be such conditions can be conditional on landowner consent and/or the obtaining of necessary statutory consents. Alternatively they could require the payment of funds to the Council so that it may undertake the work.

DATED this 18th day of February 2011



DA Allan – Counsel for the Submitters