Before the Board of Inquiry
Waterview Connection Project

*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 NZ Transport Agency for the Waterview Connection Project

# Memorandum of counsel on behalf of the **NZ Transport Agency** on a preliminary legal issue (modifications to the designation)

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## MEMORANDUM OF COUNSEL ON BEHALF OF THE NZ TRANSPORT AGENCY ON A PRELIMINARY LEGAL ISSUE

### Introduction

1 On 14 February 2011, the Board of Inquiry (*Board*) issued a Minute to the parties concerning a preliminary legal issue about the extent to which a consent authority may modify a requirement. As part of this issue, the Board also referred to the extent to which alternatives have been considered.[1]

2 The Board described this preliminary legal issue as having arisen due to submissions seeking "decisions from the Board that either require directions to NZTA to undertake mitigation beyond the outside boundary or footprint of the proposed designations, or require directions to NZTA to undertake mitigation beyond that footprint".[2]

3 The Board referred the parties to the Environment Court's decision in *Auckland Volcanic Cones Society Inc v Transit NZ Ltd.*[3] In addition, the Board compared the power to modify contained in section 149P(4)(b)(iii) of the Resource Management Act 1991 (*the RMA*) with section 172(2).

4 The purpose of this memorandum is to set out the NZTA's position on this preliminary legal issue.

### Legal position in *Volcanic Cones*

5 Counsel for the NZTA concurs with the Board's Minute that the law in this area has changed little in the last seven years – i.e. since the *Volcanic Cones decision*.

6 In that case the Environment Court rejected an appellant's argument that (then) Transit New Zealand should shift the proposed west facing ramps on SH20 at Dominion Road to another location so as to avoid impacts on Mt Roskill. The alternative location sought by the appellant (at May Road) was not within Transit's proposed designation – indeed, it fell within another requiring authority's designation (NZ Railways Corporation).[4]

7 The Court rejected the alternative on a number of grounds, including:

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[1] Minute at para 8.

[2] Minute at para 3.

[3] *Auckland Volcanic Cones Society Inc v Transit New Zealand Ltd* [2003] NZRMA 54. The High Court dismissed an appeal from the Environment Court's decision in *Auckland Volcanic Cones Society Inc v Transit New Zealand Ltd* [2003] NZRMA 316.

[4] *Auckland Volcanic Cones Society Inc v Transit New Zealand Ltd* [2003] NZRMA 54 at [35].

7.1 The fact that a shift of the SH20 corridor "to positions beyond the present NOR proposal" could have "horrendous consequences" on businesses, industries, schools and residents who had been going about their affairs relying upon the designation as shown in the District Plan. (para 50)

7.2 (As noted in the Board's Minute), the Court noted that it had "no power or authority to decide upon an alternative, our powers being merely to ascertain whether adequate consideration has been given to such alternatives". (para 50)

7.3 Its finding that "it is not our function to force upon a requiring authority a design [for an on-ramp and off-ramp] which it does not want..." (para 125)

7.4 Its finding that the alternative "could well require the acquisition of further land and, if that is so, it is not an available method within the meaning of the RMA". (para 126)

7.5 Its finding that the alternative would have cumulative adverse effects. (para 165)

7.6 The alternative could not be implemented without NZ Rail's consent in any event, which consent was not forthcoming. (para 36)

7.7 Its finding, based on the evidence, that "we have no hesitation that more than adequate consideration has been given to the question of the positioning of interchanges". (paras 159 and 166)

8 The Court in *Volcanic Cones* also noted – in response to claims that the SH20 Roskill extension was premature until the ultimate link to SH16 (now the Waterview Connection) was sought – that "a requiring authority is entitled to have its requirement dealt with in terms of the RMA. It is under no obligation to extend the ambit of the requirement at the behest of submitters". (para 11)

**Effect of changes to section 171 RMA**

9 Counsel concurs with the Board's Minute that the amendments to section 171 of the RMA in 2003 do not change the legal position, as set out in the *Volcanic Cones* decision. For ease of reference the amendments are shown below.

10 Prior to 2003, section 171(b) read:

> (b) whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work or project or work...

11 Section 171(b) currently reads:

> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if –
>
> > (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
> >
> > (ii) it is likely that the work will have significant adverse effect on the environment...

12 Prior to 2003, section 171(2) of the RMA read:

> (2) After considering a requirement made under section 168, the territorial authority shall recommend to the requiring authority either –
>
> (a) Confirm that their requirement and any conditions as to duration, with or without modification and subject to such conditions as the territorial authority considers appropriate; or
>
> (b) Withdraw the requirement.

13 Section 171(2) currently reads:

> (2) The territorial authority may recommend to the requiring authority that it –
>
> (a) confirm the requirement:
>
> (b) modify the requirement:
>
> (c) impose conditions:
>
> (d) withdraw the requirement.

**Modifications and alternatives under the RMA**

14 A modification is "an act of making changes to something without altering its essential nature or character".[5]

15 In *Quay Property Management*, an entirely new road alignment, which would pass straight through a motorcamp and pass closer to a substantial number of residents, was not a "modification" of a requirement that the Court could make under section 174(4).[6] However, the Court acknowledged that a proposal may change, as

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[5] *Quay Property Management Ltd v Transit New Zealand* (W28/2000, 16 July 2001) at [167]. The Environment Court referred with approval to this definition of "modification" in *Alan Hope T/A Victoria Lodge v Rotorua District Council* [2010] NZEnvC 7 at [40].

[6] *Quay Property Management Ltd v Transit New Zealand* (W28/2000, 16 July 2001) at [167].

recognised by the consideration given to submissions under section 171:[7]

> Section 171 anticipates further modification to the proposal from submissions by including these as matters to have regard to before a final decision is made. From this process we conclude that the notice of requirement per se does not "ring fence" the proposal in a way which requires it to be undertaken according to the notice provisions from the outset – or which sets it in stone in a way that the issues it addresses cannot be altered or added to.

16 In *Norwest Community Action Group Inc v Transpower New Zealand Ltd*, the Environment Court considered the issue of whether Transpower's modification of its requirement breached section 172(2).[8] The Court reached the following conclusion:[9]

> On the findings on factual aspects that we later reach, we conclude that the modification to the building height associated with the additional footprint area embraced in the decision under appeal was not such as to alter the substance of the requirement. Transpower sought to modify the proposal to assist in reducing the visual impact. In responding as it did to submitters' concerns over the height aspect, the modification included in its decision did not change the material nature of the proposal.

17 A claim that the Court could cancel a significant piece of a requirement for a link road on the Kapiti Coast is an example which went "well beyond modifying a proposal".[10] While the Court may confirm or modify a requirement under section 174(4), the part cancellation was considered not "simply a modification of the overall scheme", and the Court's section 174(4) power to cancel a requirement was not found to extend to cancelling part of a requirement.[11]

18 The interim decision in *van Camp v Auckland City Council* provides an example of a requirement that was modified.[12] The requirement to enable renovation of the Auckland City Art Gallery was to be confirmed, "subject to the modification to the design of the roof structure and day lit gallery above the Grainger & D'Ebro building".[13]

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7 *Quay Property Management Ltd v Transit New Zealand* (W28/2000, 16 July 2001) at [101]. This passage was quoted with approval in *Malvern Hills Protection Society Incorporated v Selwyn District Council* (C105/2007, 9 August 2007) at [20].

8 *Norwest Community Action Group Incorporated v Transpower New Zealand Ltd* (A113/01, 29 October 2001) at [36].

9 Ibid at [47].

10 *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 at [37].

11 Ibid.

12 *van Camp v Auckland City Council* (A073/2007, 31 August 2007).

13 Ibid at [223].

A final decision was made on the designation, following two further interim decisions.[14]

19 In *Malvern Hills Protection Society Incorporated v Selwyn District Council*, the Environment Court acknowledged "that the public participatory process of the NOR provides for and anticipates changes to a proposal, as it is considered".[15] In that decision, the Court declined to make declarations that the notices of requirement were constrained by the original application for requiring status to the Minister.[16]

20 In a procedural decision, the Court recently made the following obiter comments on its modification powers. The Court may have the power to modify a requirement if "the changes are minor, there is a lessening of environmental impact, and that affected landowners remain unchanged".[17] However, where new parties are involved, "the power to modify could not encompass such substantive change".[18]

21 Counsel concurs with those comments.

22 Likewise, the law on the consideration of alternatives has undergone little change since the decision in *Volcanic Cones.*

23 Section 171(1)(b) "is not a duty to decide the preferable site, route or method".[19] Instead, the section 171(1)(b) duty "is limited to having particular regard to whether adequate consideration has been given to alternatives".[20]

24 The Environment Court in *Beda Family Trust v Transit New Zealand* stated that "a requiring authority does not have to demonstrate that it has selected the best of all available alternatives".[21] The Court went on to state that "[w]hat is required is a careful assessment of the relevant proposal in and of itself to determine whether it achieves the Act's purpose".[22]

25 In *Villages of NZ (Mt Wellington) Ltd v Auckland City Council*, the Environment Court adopted the findings from three earlier decisions

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[14] *van Camp v Auckland City Council* (A063/09, 29 July 2009) at [2], [5] and [18].

[15] *Malvern Hills Protection Society Incorporated v Selwyn District Council* (C105/2007, 9 August 2007) at [21].

[16] Ibid at [14] and [39].

[17] *Alan Hope T/A Victoria Lodge v Rotorua District Council* [2010] NZEnvC 7 at [41].

[18] Ibid at [40].

[19] *Omokoroa Ratepayers Association Inc v Western Bay of Plenty District Council* (A102/2004, 5 August 2004) at [51].

[20] Ibid.

[21] *Beda Family Trust v Transit New Zealand* (A139/2004, 10 November 2004) at [57].

[22] Ibid at [58].

on what constitutes adequate consideration of alternatives.[23] These three decisions referred to the (then) Planning Tribunal not being required to be satisfied that the best alternative has been chosen; proponents not acting arbitrarily or giving only cursory consideration to alternatives; and not requiring a council to go to unreasonable lengths to support a chosen route or site.[24]

**Board's power to modify requirements**

26 In its 14 February Minute, the Board found no substantive difference between the Board's power to modify under section 149P(4)(b)(iii), and the power to modify under section 172(2). The Board's tentative view was that "the Board is in the same position as the territorial authority in s172 concerning the extent of any modification".[25]

27 Section 149P(4)(b) provides that the Board:

> (b) may–
>
> (i) cancel the requirement;
>
> (ii) confirm the requirement; or
>
> (iii) confirm the requirement, but modify it or impose conditions on it as the Board thinks fit...

28 Section 149P(4)(a) provides that the Board must "have regard to the matters set out in s171(1) ... as if it were a territorial authority".

29 To that extent, s149P provides that the Board is essentially in the same position as the territorial authority in section 171(2)[26] – rather than under section 172 which refers to the "requiring authority's" decision once it has received a recommendation from the territorial authority.

30 It is noted that the wording of section 149P(4)(a) and (b) is very similar to the Environment Court's power to make a decision on a requirement under section 174(4). Section 149P was inserted into the RMA by the Resource Management (Simplifying and Streamlining) Amendment Act 2009. The select committee report on the preceding bill compared the decision making powers of

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[23] *Villages of NZ (Mt Wellington) Ltd v Auckland City Council* (A023/2009, 20 March 2009) at [44].

[24] The decisions were: *Stop Action Group v Auckland Regional Authority* (Chilwell J, M514/85, 28 July 1987 at page 80); *Bungalo Holdings Ltd v North Shore City Council* (A52/01 at paragraph 111); and *Takamore Trustees v Kapiti District Council* (W23/02 at paragraph 111). The Court in *Villages of NZ (Mt Wellington) Ltd v Auckland City Council* (A023/2009, 20 March 2009) at [61] found the council's approach in considering alternatives was adequate in this case.

[25] Minute at para 9.

[26] Counsel anticipates that section 171(2) RMA is the section the Board intended to refer to in its Minute.

boards under section 149P to the Environment Court's jurisdiction in respect of appeals on notices of requirement.[27]

31 Finally, it is noted that a requirement may only be modified "as the Court thinks fit" or "as the board thinks fit".[28] While the Environment Court has stated (as obiter) that its power to modify a requirement does "not have any particular explicit limitations",[29] the Court went on to state that "where new parties are involved then the power to modify could not encompass such substantive change".[30]

**Application in this case**

32 In this proceeding, it is submitted that the Board has before it clear instances where practical modifications to the Project's requirements can - and cannot - be made. Two examples are given.

33 It is submitted that the 'rotation' of Construction Yard 1 (the construction yard which sits within the area of Harbourview-Orangihina Park leased by the Te Atatu Pony Club) is an example of a modification that is within the Board's jurisdiction.

34 In response to submissions and evidence from both Auckland Council (Mr Beer) and Te Atatu Pony Club (Mrs McBride), the NZTA has already lodged a resource consent application for a construction yard which, if granted, would have the effect of rotating the yard within the Park and mitigating the impacts of the Project on the Pony Club. Auckland Council has indicated that this application can be processed on a non-notified basis as no parties are adversely affected. The purpose of the 'rotation' is to reduce adverse effects on the Pony Club. It is also noted that the properties across the road at the end of Titoki Street will be removed for the Project, meaning that the 'rotation' of the yard will not affect those residents.

35 In that context, the Board can have some considerable confidence that there are no parties adversely affected by such a modification. Moreover, the activity is consistent with that originally proposed. In those circumstances, it is submitted that a modification to 'rotate' the yard would be within this Board's jurisdiction, notwithstanding that it alters the Project footprint.

36 By contrast, it is submitted that Auckland Council's suggestion of altering the layout of the proposed Valonia Street Reserve to accommodate side-by-side sportsfields (as set out in the evidence of Mr Gallagher and supported by Mr Beer), is outside the Board's

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[27] Resource Management (Simplifying and Streamlining) Amendment Bill 2009 (18-2), select committee report, at 16.

[28] RMA, s 174(4)(c) and s 149P(4)(b)(iii).

[29] *Alan Hope T/A Victoria Lodge v Rotorua District Council* [2010] NZEnvC 7 at [40].

[30] *Alan Hope T/A Victoria Lodge v Rotorua District Council* [2010] NZEnvC 7 at [40].

jurisdiction. The Council's revised layout (while potentially producing improved sporting facilities) would require the acquisition and removal of 8 additional properties, all outside of the NZTA's proposed designations. It is quite possible that at least some of the residents or owners of those properties do not wish to have their properties acquired and/or may have submitted on the Project had such a proposal formed part of the Project as lodged and notified.

37 Further, the removal of the 8 houses could expose the properties and houses across the street to different effects from the sportsfields and possibly the motorway. The views of these residents to such a change are not known to the Board, nor have they had the opportunity to submit on such a proposal.

38 It is noted also that the layout at Valonia Street Reserve proposed by NZTA mitigates the Project's effects on active recreation facilities by replacing the current sporting facilities (albeit with grounds with improved drainage). The Council's suggested designation and acquisition of 8 additional properties simply to provide side-by-side sportsfields (rather than to mitigate effects or as a by-product of the construction process) would in our submission be outside the NZTA's area of financial responsibility and therefore outside its ability to designate and acquire the land in any event. It is submitted that the Board cannot modify a requirement so as to require a requiring authority to designate land that it is not legally entitled to designate.

39 As foreshadowed in the Board's Minute, the NZTA considers that there are various other examples of modifications to the designations sought in submissions which go beyond the modification powers of the Board.

Dated: 18 February 2011

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