

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

**MEMORANDUM OF COUNSEL FOR LIVING COMMUNITIES (AUCKLAND)
INCORPORATED & OTHERS PROVIDING COMMENT ON THE DRAFT REPORT
PURSUANT TO SECTION 149Q(4) OF THE RESOURCE MANAGEMENT ACT
1991**

May it please the Board:

1. This memorandum is filed on behalf of Living Communities (Auckland) Incorporated, North Western Community Association Incorporated, Sir Harold Marshall and the Mt Albert Residents Association ("the Submitters") pursuant to section 149Q(4) of the Resource Management Act 1991 ("RMA"). It sets out the Submitters' comments on minor or technical aspects of the Board of Inquiry's draft report ("the Draft Report").
2. The Submitters take this opportunity to thank the Board for the comprehensive way in which their submissions and evidence have been assessed and to express their support for the conclusions in the Draft Report.
3. Following the release of the Draft Report, the Submitters asked their consultants to review the conditions and to identify any matters that they considered were in error or that had been omitted. The technical witnesses (Melean Absolum, Bronwyn Rhynd and Shona Myers) forwarded their comments to Duncan McKenzie who then took part in meetings and communications with the planners for Council and NZTA (Tania Richmond and Amelia Linzey).
4. The planners reached an agreed position regarding almost all of the amendments sought by the various parties and the Submitters understand

that a schedule of the conditions showing the agreed changes has been filed with NZTA's memorandum. The Submitters have been provided with a number of iterations of that schedule including what they understand to be a near-final version dated 23 June 2011 ("the Amended Schedule"). They agree with the proposed changes to conditions set out in the Amended Schedule and ask that the Board implement them.

5. The following comments:
 - (a) Expand on the rationale for the most substantive change sought by the Submitters, which relates to the wording and effect of proposed Condition SO.14.
 - (b) Explain the rationale for some of minor wording changes made to the conditions that were sought by the Submitters.
 - (c) Make a suggestion regarding a procedural matter.
6. The Submitters have seen a draft of the supplementary memorandum from the Council and agree with and adopt the analysis, conclusions and relief sought therein. In the interests of efficiency this memorandum does not repeat the material addressed by the Council (although it does expand on the rationale regarding condition SO.14).

Condition SO.14 - Contribution to Pedestrian route, Cycleway and Bridges

7. Proposed condition SO.14 requires the NZTA to pay a financial contribution of \$8 million to the Council for the construction of a pedestrian and cycleway including two bridges in the vicinity of Soljak Place and Alford Street as a means of addressing certain specified adverse effects on the passive open spaces and reserves in sectors 5, 7 and 9.
8. The Submitters have been in consultation with other parties in this regard and support the revised wording of Condition SO.14 attached as **Annexure 1**. It is understood that NZTA does not agree with all aspects of that proposed wording. The attached wording is not found in the Amended Schedule
9. The revised version of Condition SO.14 (**Annexure 1**) provides:
 - (a) For NZTA to carry out the works;
 - (b) For each of the three components of the pedestrian and cycle network (ie: the Alford Bridge; the Soljak Bridge; and the pedestrian and cycle

route) to be constructed separately provided the relevant approvals are obtained for that element; and

- (c) For the Soljak Bridge to be built in certain circumstances even if Kiwi Rail does not grant permanent approval for it.

Payment of Contribution vs Provision of Works

10. The Submitters understand that NZTA will ask that the condition be amended to replace the obligation for it to fund works with an obligation for it to carry out those works provided the Council and Auckland Transport have complied with certain pre-requisites. The Submitters do not oppose a condition in those terms and the following comments assume that such a condition will be accepted by the Board.
11. In that regard:
 - (a) The Submitters understand that by offering such a form of condition NZTA is, to the extent necessary, agreeing to be bound by it (in terms of the *Augier* principle) and that any jurisdictional issues in that regard will be overcome.
 - (b) The Submitters appreciate that, given the extent of the designated works in the vicinity, it may prove economically efficient and more practical for the works to be carried out by NZTA contractors in conjunction with the construction of the motorway and tunnel.
 - (c) The Submitters accept that if that change to the condition means that it is accepted by NZTA then that is beneficial to the project and the public.
12. The Submitters consider that it is appropriate for the \$8 million maximum contribution in the condition to be adjusted for inflation, that being the one outstanding difference between NZTA and the Submitters in respect of this condition:
 - (a) The Submitters accept that the absence of CPI adjustment should incentivise the Council to proceed with obtaining the approvals as fast as possible. They consider, however, that from the community's perspective that would result in the benefit generated by the condition being reduced simply through the effect of inflation – being a purely economic phenomenon unrelated to the effects that the condition is intended to off-set.

- (b) The Submitters consider that in the absence of a CPUI adjustment any delay on the Council's part will have a compounding adverse effect on the public – they will both be deprived of the benefits of the network and face the possibility that the works, when they are finally carried out, will be of a reduced value.
- (c) The Submitters consider that the addition of a CPI adjustment would leave NZTA in the same position as it started and would not cause it any prejudice.

Separation of Elements of Works

- 13. Condition SO.14 as currently drafted creates an “*all or nothing*” position for the communities represented by the Submitters in the sense that, should Council and Auckland Transport fail to obtain any one of the necessary landowner or other consents on a permanent basis, then the NZTA obligation under the condition will not arise.
- 14. That wording implies that the condition will only produce a public benefit (and hence will only contribute to offsetting the particular adverse effects that it refers to) if the pedestrian and cycleway together with the two bridges are completed in full. The Submitters agree that a complete network is highly preferable. They consider, however, that each individual element will, even in the absence of the other elements, still be beneficial for the public and will still help to mitigate the relevant adverse effects.
- 15. The **attached** wording therefore proposes treating the three key components of the pedestrian and cycle network (ie: the Alford Bridge; the Soljak Bridge; and the pedestrian and cycle route) as individual works that should each be completed provided the relevant consents are granted for them, even if the other components are not built.
- 16. By way of explanation, the Submitters make the following observations with regard to the benefits that arise from each of the three components if constructed in isolation:
 - (a) The Alford Street Bridge will benefit residents in the vicinity of sectors 5 and 7 as it will provide safer and more convenient public pedestrian and cycle access between Waterview and the Unitec grounds. In isolation that bridge will enable members of the Waterview public:

- (i) To access Pt Chevalier without having to walk alongside the new motorway and Great North Road;
 - (ii) To access the open spaces and sports grounds at Phyllis Reserve and further south towards the Railway (in Harbutt Reserve);
 - (iii) To access the Unitec grounds and facilities and the activities along Carrington Road; and
 - (iv) To access Mt Albert shops and the railway station.
- (b) The improved pedestrian and cycleway will, even without the bridges, provide a safer and more convenient route between Pt Chevalier, Phyllis Reserve and the adjacent open space (Harbutt Reserve) and the residential areas towards Woodward Road. That will benefit residents who are affected by sectors 5 and 7, even if they still need to use the current tracks and bridge along and across the Oakley Creek. In the absence of the Soljak Bridge, residents affected by sector 9 will not be able to access these improved facilities without crossing the railway at Woodward Road or Blockhouse Bay Road.
- (c) The Soljak Bridge will in isolation provide improved accessibility for the Owairaka residents who are losing open space amenity to Phyllis Reserve, the sports facilities, the adjacent open space (Harbutt Reserve), the residential areas towards Woodward Road, the Unitec grounds, the tracks along the Oakley Creek and Pt Chevalier. The quality of that access would of course be enhanced if the pedestrian and cycleway is provided.
17. The Submitters consider that, while the three components will create a single connected route, there will only be a portion of users who will travel all the way along that route on any given occasion. They say that, while the cumulative benefit that arises from the full facility will be more than the sum of its parts, those parts will nevertheless each generate significant benefits that will offset (albeit to a limited extent) the adverse effects of the proposal and are worth retaining.
18. Implementation of individual components of the proposed pedestrian and cycle network will reduce the expenditure to Council of completing the route when and if the necessary consents are granted by landowners. Hence the implementation of the Alford Street Bridge and the pedestrian and cycleway

route in the absence of the Soljak Place Bridge could still benefit the Owairaka residents in the long term by bringing forward the date on which the Council completes their bridge and hence opens up their access to the rest of the network.

Requirement for Permanent Approvals

19. The requirement in the condition for landowner consents to be obtained on a permanent basis raises a particular concern with regard to the proposed Soljak Place Bridge.
20. That bridge is to cross the Kiwi Rail railway designation and hence will require Kiwi Rail approval as a designating authority and as occupier. Kiwi Rail has a designation along the alignment of NZTA's new motorway on which it intends to develop a rail connection between Onehunga and Mt Albert. The construction of that connection will require major rail works in the vicinity of Soljak Place. Given that, to the Submitters' knowledge, there is no certainty as to the form or timing of such works, there is a possibility that Kiwi Rail, even if it is prepared to consent to a bridge, will want to do so on a conditional basis.
21. Kiwi Rail might, for example, agree to construction of a bridge provided Council will remove it if required to do so by Kiwi Rail in the future in order to facilitate the construction of the rail connection. That may be many years in the future (if it occurs at all) but in the absence of permanent consent by Kiwi Rail, the obligation to make the payment under the condition would not come into force. Accordingly, the Submitters' draft condition contains a specific provision for Soljak Bridge that would enable the condition to be activated even if Kiwi Rail gives conditional consent.
22. As an aside, the Submitters consider that, should NZTA balk at construction of a pedestrian and cycle bridge at Soljak Place, a high quality at-grade crossing for pedestrians and cyclists (ie: with similar electronic protection mechanisms as are provided at the Avondale and Baldwin Avenue railway stations) would suffice. Given the wording of the condition, NZTA would not be responsible for providing that crossing which would need to be at Council's expense (subject to Kiwi Rail approval).

Summary

23. In the absence of the changes proposed by the Submitters, NZTA could be excused from making the payment required under the condition but the

adverse effects that the condition is explicitly intended to avoid would remain unmitigated. The Submitters ask the Board to amend the content of the condition to avoid that occurring.

Minor Wording Changes to Conditions

24. There are a large number of minor changes to the conditions that have been agreed between the planners and it is not proposed to address them here. The following paragraphs comment very briefly on matters of particular interest to the Submitters.
25. The advice note to Condition DC.6 has been amended at the Submitters' request for clarity.
26. Condition DC.8 addresses the outline plan of works for the Northern Ventilation Buildings and Stack:
 - (a) The Submitters understand from discussions with representatives of NZTA that they are concerned that for technical reasons some additional flexibility is needed regarding the relocation of the Northern Stack to the eastern side of Great North Road. For that reason NZTA has suggested a new condition DC.8(n) regarding works needed for land stability for the stack.
 - (b) The Submitters appreciate that tenderers for the project will want to maximise their ease of construction and that final design of works in the vicinity of the tunnel portal may raise additional issues. In a project of this scale construction works will have significant interim effects on the surrounding environment and in that context the Submitters are comfortable with the proposed new wording in condition DC.8.
 - (c) The Submitters consider it a critical part of the proposed wording that the works be integrated with the Oakley Creek Esplanade (Waterview Glades) Restoration Plan.
27. Condition DC.9 - The Submitters sought changes to the layout of condition DC.9 to clarify the various structures that require an outline plan of works. These changes have been incorporated into the Amended Schedule.
28. Condition LV.8 has been amended at the Submitters' request to reflect the outcome of caucusing.

29. Condition V.8 - The addition of the words in condition V.8 regarding ongoing obligations in terms of invasive plant pests had been agreed in caucusing but was omitted from previous versions of conditions. That has been rectified in the Amended Schedule.

Process Issue

30. Section 149Q(4) makes no provision for the staggered exchange of these comments or their service on other parties. Nor is there any formal provision made for parties to speak to their memoranda before the Board.
31. The issues before the Board are complex and the conditions are comprehensive and lengthy. The Board will not have the benefit of a range of views on matters before it.
32. The Submitters accept that it is both desirable and a requirement of the legislation that this litigation comes to an end shortly. They wonder, however, whether it would be advantageous for the Board to schedule a brief resumed hearing (perhaps an hour or two in length) to address any issues that arise through the parties' comments and that warrant a discussion between the Board and the parties or that invite questions of clarification from the Board. That approach would enable issues to be addressed quickly and may give rise in some cases to a consensus between the parties. The parties might also usefully comment orally (albeit very briefly) on any issues raised by others.
33. The Submitters would be prepared to attend such a hearing if it were considered desirable by the Board.

DATED this 23rd day of June 2011



**DA Allan – Counsel for the
Submitters**

Annexure 1

For the purpose of mitigating significant adverse effects on passive open space and reserves in Sectors 5, 7 and 9, both during the construction years and longer term, particularly in the Waterview, Owairaka and New Windsor communities (other mitigation having been held by the Board of Inquiry not to be adequate) the following applies:

- (a) The NZTA shall, subject to conditions (b), (c) and (d) below, construct the following:
 - (i) A pedestrian and cycleway to AUSTROADS standards between Waterview and Owairaka/New Windsor (as generally indicated on drawing labelled as "Indicative SH20 Cycleway Route" (refer to Schedule A, Row 40), subject to any modifications necessary to address design, property or engineering constraints.
 - (ii) The "Alford St Bridge".
 - (iii) The "Soljak PI Bridge".
- (b) The NZTA's obligations under condition (a)(i) arise when the NZTA receives certification from the Auckland Council and Auckland Transport that the Auckland Council and Auckland Transport have:
 - (i) acquired all necessary land, or obtained all necessary interests and/or landowner approvals on a permanent basis in respect of the facilities described in condition (a)(i); and
 - (ii) acquired sufficient land to form a cycle and pedestrian way to AUSTROADS standards between Alan Wood Reserve and Unitec; and
 - (iii) obtained all necessary resource consents required for construction and operation of the facilities.
- (c) The NZTA's obligations under condition (a)(ii) arise when the NZTA receives certification from the Auckland Council and Auckland Transport that the Auckland Council and Auckland Transport have:
 - (i) acquired all necessary land, or obtained all necessary interests and/or landowner approvals on a permanent basis for the Alford St Bridge; and
 - (ii) obtained all necessary resource consents required for construction and operation of the Alford St Bridge.
- (d) The NZTA's obligations under conditions (a)(iii) arise when the NZTA receives certification from the Auckland Council and Auckland Transport that the Auckland Council and Auckland Transport have:
 - (i) acquired all necessary land, or obtained all necessary interests and/or landowner approvals for the Soljak PI Bridge either on a permanent basis or on the basis that the Soljak PI Bridge may be constructed and operated unless and until its continued existence and / or operation conflicts with or compromises future works pursuant to the designation for rail purposes; and
 - (ii) obtained all necessary resource consents required for construction and operation of the Soljak PI Bridge.
- (e) The certification from Auckland Council required under conditions (b), (c) and (d) above must be received by the NZTA within 8 years of the designations for the Project being confirmed.

- (f) Each of the facilities for which certification has been given must be constructed within 1 year of the opening of the motorway, or two years from when certification is given for the relevant facility, whichever is the latest.
- (g) The value of the construction works to be undertaken by the NZTA pursuant to condition (a) to (d) above shall not exceed a sum equal to \$8 million in June 2011 New Zealand dollars as adjusted annually at a rate equal to the Consumer Price Index (all groups Consumer Price Index) calculated from the date of commencement of this consent to the date of completion of the construction works (with any construction costs above that figure being met by the Council.)
- (h) The pedestrian and cycleway facilities described in condition (a)(i) above are in addition to the cycling and pedestrian facilities required by the other conditions.

Advice notes:

The intention of this condition is to construct a continuous pedestrian and cycleway with bridges at Soljak PI and Alford St. To achieve this, the Council and Auckland Transport will use their best endeavours to obtain the necessary consents and landowner approvals, for all three components of the network.

The approvals required for the Soljak PI Bridge reflect the designation for rail purposes of land under the bridge and the possibility that any bridge structure will be approved for a limited length of time only.

In the event that, despite their best endeavours, the Council and Auckland Transport cannot obtain all of the necessary landowner approvals, the condition allows each part of the network to be constructed in isolation from the others. That will provide some mitigation of the significant adverse effects on passive open space and reserves in Sectors 5, 7 and 9 that the condition is intended to address. It will also enable the Council and Auckland Transport to complete the network in the future at their expense when and if they are able to obtain the outstanding approvals.

Subject to landowner approvals, the Council and/or Auckland Transport will be the owner of the pedestrian and cycleway and the bridges described in (a) above and shall have full responsibility for the operation and maintenance of those facilities once they have been constructed by NZTA. Accordingly, NZTA will be under no further obligation in respect of any of the facilities once they have been constructed and, in particular, will have no obligation in terms of the removal, alteration or replacement of the Soljak PI Bridge in the event that it conflicts with or compromises proposed works pursuant to the designation for rail purposes.