BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No: [2018] NZEnvC 97

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under s174 of the Act
BETWEEN	D M HANDLEY
	(ENV-2017-WLG-96)
	Appellant
AND	SOUTH TARANAKI DISTRICT COUNCIL
	Respondent/Requiring Authority

Before:	Environment Judge J J M Hassan Environment Commissioner K A Edmonds
Held:	at Wanganui on Monday 25 June 2018
Appearances:	A Cameron for the appellant M Conway for the respondent/requiring authority S Ongley for the consent authorities
Date of Decision:	26 June 2018
Date of Issue:	26 June 2018

RECORD OF PRELIMINARY FINDINGS
ON MATTERS OF JURISDICTION

Introduction

[1] This is an appeal against a decision to confirm notices of requirement for a local roading project ('Project').

[2] The Project is to provide for an upgrade and realignment of Nukumaru Station Road, a secondary collector road that runs from State Highway 3 ('SH3') to Waiinu Beach Road near the township of Waitōtara. The present alignment veers sharp left and then sharp right through the middle of a certified organic farm owned by the appellant, Ms

Handley. The Project would see this section (referred to as the 'dog-leg') straightened such that the new alignment would run more or less adjacent to the eastern boundary of the farm to a new intersection with SH3 (although requiring some land of the appellant's to be taken along that boundary and in the vicinity of the new intersection). The new alignment would render the existing dog-leg redundant and South Taranaki District Council (as 'Requiring Authority') proposes that the dog-leg would be stopped through the relevant processes of the Local Government Act 1974 ('LGA74') or Public Works Act 1981 ('PWA') and divested under the PWA.

[3] Nukumaru Station Road traverses two districts – South Taranaki and Whanganui. An independent commissioner heard submissions on the Notice of Requirement ('NOR'/ 'Requirement') and her decision and recommendation modified the Requirement with the imposition of conditions. Due to the fact that South Taranaki District Council is the Requiring Authority, the commissioner made a decision on that part of the Project within South Taranaki District, under s168A of the Resource Management Act 1991 ('RMA'). For the remainder of the Project, within the Whanganui District, she made a recommendation under s171 RMA and that recommendation was then accepted by the Requiring Authority. The net result is that it is the Requirement, so modified by conditions, that is the subject of the appeal ('Decision Version').

[4] Each of the parties called planning evidence, as well as evidence on a range of other matters. The planning experts undertook facilitated expert witness conferencing and produced a Joint Statement of Planning Experts, dated 25 May 2018 ('JWS Planning'). This statement reveals a helpful narrowing of differences between those experts. It also identifies remaining significant differences on key questions as to appropriate mitigation particularly through designation conditions.

[5] An important element in the mix is that the planners have different understandings as to the jurisdictional limits for setting conditions. Specifically, the JWS Planning records that:

(a) the planners called by the Requiring Authority and Regulatory Authorities (Mr Wesney and Ms O'Shaugnessy) have the following relevant opinion:

> ... the effects on the use of the dog leg and changes to the farm to be minor or less than minor. The rehabilitation of the dog leg stretch of road is a matter beyond the application for designation.

(b) the planner called by the appellant (Mr Forrest) disagrees and has the following relevant opinions:[1]

> ... there are adverse effects on the organic farm related to the rehabilitation of the stopped road, and the matter of access for stock trucks, tankers and service vehicles, that are not addressed.
>
> ... the stopping of the road ... [is] mitigation related to the effects of the NoR. Therefore, there are a number of conditions ... necessary as a consequence of the stopping and rehabilitation of the north south section of the dog leg as listed in paragraph 5.4 of his evidence.
>
> [road stopping] is a matter that is reasonably necessary to be addressed to make the decision on the NoR.

[6] Mediation proved unsuccessful. However, in the week prior to the scheduled hearing, the appellant sought a judicial settlement conference ('JSC'). It sought that the first day of the scheduled hearing be used for a JSC with the hearing proceeding on the remaining scheduled days if required. The other parties supported this request. A judicial teleconference was arranged at short notice. For the reasons discussed during the teleconference, and recorded in the court's Record dated 19 June 2018, it was not practicable to make the necessary resourcing arrangements for a JSC on a basis that would have avoided vacating the scheduled hearing (the parties seeking that the hearing remain afoot). As an alternative, however, the parties expressed support for the court modifying its usual hearing procedures in certain respects so as to better facilitate opportunities for parties to continue to narrow differences (which we record to be consistent with the court's s269 RMA duties as to fairness and efficiency). An aspect of this agreed during the teleconference is for the court to make preliminary oral findings on key jurisdictional differences early in the hearing.

[7] Related directions were tested with the parties and were made in the Record dated 19 June and Minute dated 21 June 2018. Those included directions as to the prior filing of synopses of submissions on the jurisdictional issues.

[8] Against that background, I now address the respective parties' submissions on these matters and the court's preliminary findings on them.

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1 Partial quote with interpolations.

The appellant's submissions

[9] The appellant notes that the "primary outstanding issue" between the parties concerns the approach to be taken in conditions to the future of the dog-leg. She expresses an overall view that:[2]

> ... to address the adverse effects of the proposal, relevant conditions must provide for the stopping of the dog-leg (including the existing intersection with SH3), the vesting of the land into her ownership and other mitigation work to acceptably integrate the dog-leg into her overall farm environment (both as to functionality and amenity).

[10] The appellant's submissions assert that none of the mitigation relevant to the dog-leg can be undertaken prior to it being formally stopped and vested in her ownership. We observe that this assertion is somewhat dependent on the nature of the mitigation work required, a matter to which we will return shortly. The appellant further submits that, until such time as the mitigation is undertaken, she will face uncertainty regarding access and traffic disruption within her farm that is beyond her control.[3]

[11] The appellant further prefaces her submissions on jurisdiction by pointing out that the dog-leg is, on analysis of the Notice of Requirement and associated Assessment of Environmental Effects ('NOR', 'AEE'), properly to be treated as part of the Project. She refers to related and consistent observations made in evidence for the Requiring Authority to the Council commissioner's hearing. She summarises this as follows:[4]

> Therefore, in summary, the requiring authority's application states that the 'redundant section of local road (will be) abandoned and legally stopped'; the stopping of that road and also the unsafe intersection with state highway 3 and the vesting of that land in ... [her] was clearly relevant to the consideration of alternatives; the form of conditions (effectively now in issue) was the subject of discussions, proposal and evidence in a process which required certainty of outcome due to the nature of .. [her] farming operation but in circumstances where timely consultation did not occur.

[12] Lastly, in terms of context, the appellant notes as important Condition 16 of the Decision Version, which reads:

2 Appellant's synopsis of submissions dated 21 June 2018, at [1.8].
3 Appellant's synopsis of submissions dated 21 June 2018, at [1.10].
4 Partial quote with interpolations.

> The existing Nukumaru Station Road intersection shall be physically removed and the State Highway shoulders and road markings reconstructed. This shall be followed by the legal road stopping under the Local Government Act 2002 and the appropriate legalisation of the new alignment.

[13] At this point, I observe that there is some ambiguity in this aspect of the independent commissioner's recommendation and decision (which included Condition 16 in this form). The second sentence of the condition, on its face, would appear to *require* that legal road stopping *must* follow the physical works in the first sentence. The accompanying reasons, however, state:

> My view is that, unless there is agreement between the relevant adjoining owner and the road controlling authority about the ownership and management of closed road, it is not necessary or appropriate for these matters to be prescribed in conditions of a designation of a new road. There is no agreement in this case but there is a separate statutory process for resolving the outstanding matters. I would simply observe that, notwithstanding the potential organic certification implications, the redundant road would seem to have potential utility for the operation of Motorunga Farm and the requiring authority appeared at the hearing to be open to suggestions. A sanguine adjoining owner might take the opportunity to negotiate in those circumstances.

[14] In light of that reasoning, it would appear that the second sentence in Condition 16 of the Decision Version goes only so far as to require that *any* road stopping not precede the named physical work.

[15] Against that background, and with reference to various authorities, the appellant submits that the stopping and vesting of the dog-leg in her can be included as a condition of the designation provided that the condition "is worded as a pre-condition to 'stages' of the work being carried out".[5] In support of that submission, the appellant relies on the High Court decision in *Westfield*.[6] It is helpful to refer to the relevant passages from the judgment of Fisher J in full:

> [59] Of course it would be different if it could be postulated that consents could not be given to certain permitted activities without the imposition of invalid conditions. But I can see no reason for assuming that, faced with the need for changes to roads which lay beyond the immediate ownership and control of the appellants, it would be impossible for the Hamilton City Council to frame valid conditions in order to meet the need. In principle, for example, it would be possible to impose a condition similar to that imposed in *Grampian*, namely that

5 Appellant's synopsis of submissions dated 21 June 2018, at [3.3].
6 *Westfield (NZ) Limited v Hamilton City Council* [2004] NZRMA 556 (HC), at [59] and [60].

> until a nearby arterial route was increased in size from two lanes to four a proposed retail development could not proceed. Further, pursuant to rule 6.4.5 such condition precedent could be coupled with a levy requiring the appellants to contribute to the off-site roading development.
>
> [60] Technically, it has been held that there is a critical distinction between two ways in which a condition is framed. One requires an applicant to bring about a result which is not within the applicant's power, for example that the applicant construct a new roundabout on a nearby roadway when the roadway is controlled by Transit New Zealand. The other stipulates that a development should not proceed until an event has occurred, in this example that the roundabout has been constructed– see *Grampian* at p 636. While I have no respect for English formalism of this type, it seems clear that at least by wording the condition in appropriate terms the council will have the power to impose valid conditions of the kind in question in this case.

[16] The appellant goes on to submit:[7]

> It is accepted that any condition which otherwise purports to direct road stopping or vesting of land in another party would be invalid because it seeks to direct how an independent third party may determine those matters under different legislative requirements. However, provided that the condition is appropriately worded as a condition precedent, the difficulty identified in the *Westfield* decision can be readily overcome.
>
> It is generally submitted that the Court has the relevant jurisdiction in this case to direct that road stopping and the vesting of the dog-leg in Ms Handley as a pre-condition to the commencement of the work or on completion of stages of the work occur provided it is satisfied this is for a good planning purpose(s). The various 'timing' options are discussed in part 5 below.

[17] The appellant refers to a road stopping objection case in *Tasman District Council,*[8] where the Court accepted it had jurisdiction to set pre-conditions to road stopping. It reasons from there that "there is no reason as a matter of law why such a pre-condition cannot be extended to the vesting of redundant land where that is appropriate in all the circumstances."[9] The appellant goes on to state a preference for use of PWA processes over those of the LGA, for road stopping.

[18] The appellant then traverses broader matters concerning the court's jurisdiction in relation to the imposition of conditions on a designation. The appellant cites the

7 Appellant's synopsis of submissions dated 21 June 2018, at [3.4].
8 *Tasman District Council* EnvC C0065/07, at [85]-[87].
9 Appellant's synopsis of submissions dated 21 June 2018, at [3.6].

Supreme Court's decision in *Estate Homes*[10]. On that authority, she submits that a decision must be 'logically connected to' the work (as opposed to being for ulterior purposes), but that it need not be required for the purposes of the work. She submits that all the conditions she seeks satisfy the test in *Estate Homes.*

[19] The appellant then returns to her analysis of the background and, in particular, what the Requiring Authority treated as being within the scope of its Project in its NOR and AEE and consideration of alternatives. Those submissions refer to evidence from Mr Manning to the Council hearing that included the following statement:[11]

> In investigating the existing section of Nukumaru Station Road north of the Marton – New Plymouth rail line it was identified that safety improvements to ease the two 'dog-leg' bends for heavy traffic would be needed. An alternative option to realign the road to meet State Highway 3 at a new intersection approximately 200 metres west of the current Nukumaru Station Road intersection was proposed. This option has the added benefit of making a safer intersection with State Highway 3 and potentially removing the segregation of the Handley farm by offsetting the additional land required for the new alignment through offer back of the then redundant stretch of Nukumaru Station Road and closure of the unsafe intersection with State Highway 3. However, I acknowledge that at the recent meeting with Mrs Handley she did not support this offer.

[20] The appellant submits that the conditions she seeks are "contemplated by the form of the application" (which we take to mean the NOR) and "were relevant to the consideration of alternative route alignments". She argues that she is entitled to "rely on both of these fundamental aspects of the requiring authority's process". She goes further to argue that the Requiring Authority is "obliged to implement its proposal". She argues that "certainty" is fundamentally important here and "a failure to implement its proposal in the form notified would materially alter the effects of the proposed work on the appellant". She argues that those submissions are based on "well-known principles" relevant to 'scope', including in such cases as *Darroch.*[12]

[21] She submits that the "planning framework" as analysed in the evidence of Mr Forrest also supports the relief she pursues.[13] We make no findings on that as we are confined to addressing jurisdiction at this stage. However, we acknowledge (and address later) that matters of reasonableness inform the position of validity of conditions.

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10 *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149 (SC).
11 Appellant's synopsis of submissions dated 21 June 2018, at [2.3] and [4.4].
12 *Darroch v Whangarei District Council* EnvC A018/93.
13 Appellant's synopsis of submissions dated 21 June 2018, at [4.5].

[22] The appellant then addresses what she terms 'substantive fairness'. This submission relates back to her earlier submissions concerning both the substance of the NOR and the process by which it was prepared. The appellant cites the following passage from the decision of Whata J in *Queenstown Airport*[14] (a case concerning a designation):

> [106] As to whether RPL's claimed unfairness is prima facie relevant, the doctrine of legitimate expectation is also not new to resource management law. In *Aoraki Water Trust v Meridian Energy Ltd* the High Court recognised that the doctrine of legitimate expectation might be applied in the RMA context. The Court in that case was dealing with the expectation of water rights holders that the regional council would not derogate from their water rights grants unless specifically empowered to do so by the RMA. The application of the doctrine will however depend entirely on the facts of the particular case. But a key ingredient is whether there has been reliance on an assurance given by a public authority, made in the lawful exercise of the authority's powers. If so, the affected person may legitimately expect compliance with that assurance subject only to an express statutory duty or power to do otherwise. In the present case, that must mean satisfaction of the criteria expressed at s 171 and in particular at subs (1)(b) and (c), having regard to any relevant legitimate expectations, properly established. Fairness would then implore an outcome which is consistent with those expectations provided that the outcome met the statutory criteria and achieved the statutory purpose. Conversely, the Court, like QAC, cannot be bound to give effect to those expectations where to do so is inconsistent with the requirements of s 171. In short the Court's jurisdiction, though wide, is framed by the scheme and purpose of the RMA.

[23] The appellant's related submission on this is as follows:

> Without exhaustively examining the facts relevant to this issue in this case (which is beyond the purpose of this synopsis), it is generally submitted that questions of substantive fairness arise in the event the requiring authority continues to endeavour to depart from what it has proposed, the manner in which it has examined alternatives and the approach it has conveyed to the appellant it will take in relation to the issue of road stopping, vesting and general mitigation.

[24] An observation we make at this stage is that, just as the appellant is careful to qualify her submission by reference to facts that have yet to be tested in cross-examination, so should we on any submissions concerning legitimate expectation. Our findings on jurisdiction leave open capacity for further submissions, depending on what

14 *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZHC 2347, at [105].

arises from the testing of evidence, concerning any assurances to the appellant by or on behalf of the Requiring Authority.

[25] The appellant submits that the "mitigation" she seeks is not a form of "compensation". That is, it would not traverse what would apply to determining the compensation payable/price to pay in anticipated PWA processes for the acquisition and divestment of land for the project. She refers to *Green & McCahill Holdings Ltd*[15] in submitting that:

> As such the mitigation must be implemented (as a matter of planning law) and any valuation of the land must be undertaken or assessed, as though the mitigation requirements will be implemented.

[26] The appellant goes on to discuss her preferred approach, should the court accept that conditions as to the process for road stopping and vesting be accepted. She observes that conditions as to this could require stopping and vesting as a precondition to "other work" either:

(a) prior to the commencement of any work; or
(b) following the completion of 'Stage 1' i.e. the construction of the new section of Nukumaru Station Road through her land; or
(c) prior to the commissioning of the road (going on to state "given the requirements of condition 16, it is clearly an imperative that the road stopping process be formalised before the new road is completed" and submitting that there is no jurisdiction to extend the road stopping process beyond that point).

[27] The appellant states a preference for the approach in [26](b) (although, on a basis that invites consideration of the merits, which is not what is appropriate at this stage, in this preliminary oral decision).

[28] Counsel, Mr Cameron, in speaking to the appellant's submissions, noted that the existing environment should be treated as encompassing not only the dog-leg but that part of his client's organic farm pasture to be taken for the Project under the PWA. He noted the particular value of the organic farm, including in the fact that it is producing the

15 *Auckland Council v Green & McCahill Holdings Limited* [2015] NZCA 20, at [29].

highest butterfat outcome of any dairy farm in New Zealand. He submitted that 'rehabilitation', as this is used in the context of proposed conditions for the dog-leg, ought to be understood in this wider context that part of the organic farm would be removed from production by the Project. He explained that, in proportionate terms, the area represented by the dog-leg is not dissimilar to that land to be taken out of productive use by the Project.

[29] Mr Cameron also explained the appellant's case for seeking what he termed 'infrastructure' conditions (pertaining to moving the cow yard and calf shed). He submitted that these conditions were about things that were necessarily consequential on the Requiring Authority's intention that the dog-leg be stopped, abandoned and converted to pasture (as depicted in NOR plans).

Condition 3 no longer sought

[30] The appellant informs the court that "the relief regarding the farm gates and access to SH3 is not being pursued".[16]

[31] The court understands that to refer to Condition 3 as proposed by Mr David Forrest (planning witness for the appellant), which reads as follows:

> 3. When stopping the Nukumaru Station Road intersection with State Highway 3, STDC will maintain Motorunga's existing farm access to SH3 on either side of this existing intersection.

[32] The court treats the appeal as so modified.

Submissions for Requiring Authority and Regulatory Authorities

[33] The submissions of the Requiring Authority and Regulatory Authorities were materially similar and can be addressed together.

[34] Those parties submit that neither road stopping nor land acquisition are part of the Project or capable of being regulated under the RMA including by designation conditions. Both Mr Conway and Ms Ongley agreed that designations regulate land use and there was no RMA need for designation to encompass anything not restricted by s9,

16 Appellant's synopsis of submissions dated 21 June 2018, at [6.3].

RMA. As Mr Conway put it, land ownership is not a RMA effect and there are no identifiable effects that would make it necessary to regulate road stopping and/or land ownership transfer.

[35] In response to Mr Cameron's submission that rehabilitation of the dog-leg was in part a response to the loss of productive capacity of the appellant's land through land take, both Mr Conway and Ms Ongley submitted that the PWA fully accounts for that matter. Mr Conway acknowledged that, in some scenarios (such as the court's example of heritage value associated with land to be acquired), there could be relevant RMA matters that went beyond what the PWA addressed in terms of compensation. He also acknowledged that, in circumstances where the court is not able to definitively be satisfied that a matter would be fully encompassed by PWA compensation, the proper course could be to withhold from any jurisdictional determination until the evidence has been tested.

[36] Likewise, Ms Ongley submitted that the PWA fully accounted for any economic loss matters that the appellant would experience through loss of productive capacity and there was nothing left for RMA consideration. Like Mr Conway, however, she acknowledged that, insofar as the court could not make a definitive finding on matters on which evidence has yet to be tested, it may be appropriate for the court to withhold from making a preliminary jurisdictional ruling.

The statutory framework

[37] A matter not specifically traversed in the appellant's submissions is the statutory framework that is the source of the court's relevant jurisdiction in determining an appeal against a requirement decision. This is primarily specified in s174(4) RMA. In essence:[17]

(a) the court must have regard to the matters in s171(1), as if it were the territorial authority. In essence, that calls upon the court to, subject to pt 2 RMA, consider the effects on the environment of allowing the requirement, having particular regard to the matters in s171(1)(a)-(d);

(b) the court may:

  (i) cancel the requirement; or

  (ii) confirm the requirement; or

17 The requirement to comply with s171(1A) as to not having regard to trade competition and its effects does not arise.

(iii) confirm the requirement, but modify it or impose conditions on it as the court thinks fit.

[38] The court must have regard to the decision of the requiring authority the subject of appeal (s290A RMA). We read that to encompass the recommendation to which that decision pertains. We have the same power, duty and discretion in respect of the appealed decision as the Requiring Authority and the Regulatory Authorities had in making the appealed decision (s290 RMA). Subject to the above-noted powers and duties in s174 RMA, we may confirm, amend or cancel that decision (s290 RMA).

[39] At this stage, we apply this framework only insofar as it bears upon the narrow task of considering jurisdiction for the conditions in contention.

Legal principles

[40] Cancelling, confirming or modifying a requirement or imposing conditions on it involves the exercise of a statutory discretion. The exercise is governed by principles of administrative law. Those include what are termed the '*Newbury*[18] principles' concerning relevance and reasonableness. We bear in mind the clarification the Supreme Court provided in *Estate Homes Ltd* as to the application of those principles to RMA resource consent decisions.[19] We readily find that the *Newbury* principles as so clarified are also applicable to our discretion in the determination of this appeal.[20] Adapted to the discretion as expressed in s174 RMA, we find that we are to be satisfied that the modification to the requirement or condition:

(a) serves a resource management purpose, not an ulterior one;
(b) fairly and reasonably relates to the project or work that would be authorised by the designation (in the *Estate Homes* sense of logical connection);
(c) is not so unreasonable that no reasonable consent authority, duly appreciating its statutory duties, could have approved it.

18 As laid down in the English decision of *Newbury DC v Secretary of State for the Environment* [1981] AC 578, [1980] All ER 731.
19 *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149 (SC).
20 As the requirement pre-dates the most recent RMA reforms, the pre-reform regime applies.

[41] The 'resource management purpose' is to be considered in terms of the purpose that the designation would serve under the RMA. An aspect of the designation's purpose is to enable construction, operation, maintenance and protection of the relevant project or work (in this case the proposed Nukumaru Station Road Extension Project).[21] As the Requirement was notified under s168A, the project or work is a public work and is limited by the extent to which the Requiring Authority holds 'financial responsibility'. However, it is not a matter of dispute that the Project is something for which the Requiring Authority has 'financial responsibility'.

[42] A further aspect of the resource management purpose of a designation is the management and regulation of the Project and its effects on the environment. In this context, that includes any effects on the appellant and her farm (bearing in mind it is a certified organic farm). Conditions are particularly important to that purpose including in terms of monitoring and compliance and enforcement (ss 9, 314, 338(1)(a)).

Conditions precedent

[43] We have no difficulty in finding, on the basis of ample authority, that it is valid to have an appropriately worded condition precedent, such as a condition to require certain things to be done before work under a designation (even the entirety of physical work) is started. *Westfield* is authority for this, but many examples can be found of endorsement of such conditions. However, the rub is in the substance of such conditions. That is where we have reasonably significant difficulties in what the appellant is proposing in regard to the matters of road stopping and vesting and so-termed 'rehabilitation' of the dog-leg.

[44] Although we have read the evidence, it has not yet been tested. Hence, our observations at this point are preliminary. With that rider, we make the following observations on matters traversed in the planning evidence.

Scope of what is proposed in the NOR of limited relevance

[45] As noted, we leave aside at this stage, any issues as to legitimate expectation. It is well established that a resource consent application sets an outer envelope for what can be granted by the consent. The principle can be stated, in that context, as being that

21 EIC Manning Tab A.

an applicant cannot be granted more than she has applied for. However, that principle cannot be assumed to directly translate into the consideration and determination of an appeal against a requirement for a designation. That is because an important difference between such an appeal process and that for a resource consent application is that we have jurisdiction to modify the Requirement the subject of appeal. Clearly, there are due process limits that would apply in any circumstance where, on appeal, modification of a requirement was contemplated. In particular, the court would be constrained by principles of fairness, including in terms of what submitters and the parties were fairly informed could be the outcome of the process. In this case, another constraint is that any modification must remain within the Requiring Authority's financial responsibility.

[46] The appellants give a different emphasis to the question of scope, arguing that the Requiring Authority "is obliged to implement its proposal" (which we take to mean the Project but to include any associated arrangements concerning road stopping and vesting).

[47] Leaving aside any issues as to legitimate expectation, we do not accept as sound the proposition that whatever a requiring authority says to be its project or work, in its NOR and/or AEE and/or assessment of alternatives, is what it must then be required to do should it be conferred with a designation.

[48] A designation, in authorising a project or work for RMA purposes, does not operate to compel the requiring authority to undertake that work. Undertaking the work is a matter that, subject to adhering to any other statutory or other financial responsibilities, the designation enables the requiring authority to do (subject to its conditions). Further, nor is a requiring authority necessarily left unable to seek modifications to what it seeks in a notified requirement. As noted, modifying a requirement is an available discretion both at consent authority and appeal level, subject to questions of due process. Therefore, as a participant at both stages of the process, it is open to a requiring authority to seek a modification recommendation or decision.

[49] Insofar as the Requiring Authority made any statements in its NOR documentation and/or in direct discussions with the appellant concerning road stopping and/or land acquisition processes, that does not necessarily render those statements part of the project or work for RMA designation purposes. A project or work, for RMA purposes, is the thing for which designation is sought in order to comply with relevant RMA

requirements. Those key requirements pertain to the carrying out and protection of a use of land (being the project or work) and include the following:

(a) s166 which defines a designation to mean a provision in a district plan to give effect to a requirement;
(b) ss168 and 168A which authorise the giving of a notice of requirement for a designation:
    (i) for a public work, or project or work; and
    (ii) in respect of any land, water, subsoil, or airspace where a restriction is necessary for the safe and efficient functioning or operation of a public work or project or work;
(c) s176 RMA which both excludes the application of s9(3) to a project or work undertaken by a requiring authority under a designation and requires prior written consent from the requiring authority to do anything to land specified in s176(1)(b);
(d) s176A as to outline plan processes;
(e) s178 RMA which confers interim protection against things that could prevent or hinder a project or work pending determination of whether a requirement is confirmed as a designation;
(f) s9(4) RMA which prohibits a person from contravening ss176 and 178 without prior consent from a requiring authority; and
(g) s179 as to appeals against refusals of consent to do things on land the subject of a designation or requirement.

[50] We find that nothing in those provisions (or elsewhere in the RMA) compels or even enables us to treat road stopping and/or land acquisition as part of a project or work for RMA purposes.

Can conditions regulate road stopping or acquisition of land no longer required?

[51] The appellant rightly acknowledges that designation conditions cannot purport to direct road stopping or land vesting, as processes that are governed by other legislation and are the responsibility of other parties (or the Requiring Authority but in accordance with other legislation).

[52] Different road stopping procedures are provided for under s116 PWA and the LGA74. A prerequisite to s116 being used is that the appellant (and all other adjoining

landowners) consent or that adequate road access to adjoining land is left or provided (s116(2)). If the road stopping process of s342 and Sch 10 LGA74 is used, the procedures applicable include rights of objection which are to be referred to the Environment Court for determination unless they are allowed or withdrawn. The court's powers in determination of an objection include to confirm, modify or reverse the Council's road stopping decision. Whether the PWA or LGA74 procedures are used, the LGA74 also specifies requirements for dealing with stopped roads including disposal of land not required for road (s345 LGA74). If disposal is to be by way of sale to the adjoining owner, the value must be fixed by a valuer. Alternatively, disposal can be by way of lease.

[53] The appellant's acknowledgement that designation conditions cannot purport to direct road stopping or land vesting does not appear to be compatible with the substance of the relief she seeks in the notice of appeal on these matters nor with what the appellant's submission states namely that:

> ... relevant conditions must provide for the stopping of the dog-leg (including the existing intersection with SH3), the vesting of the land into her ownership ...

[54] We presume the word 'must' is offered there on an understanding that the evidence demonstrates a compelling case for such an outcome. However, more fundamentally, we find that it would be invalid, in terms of *Newbury* principles, to compel or direct anything as to either the process of road stopping and PWA land divestment or their outcomes. That would serve an ulterior purpose, namely to position the appellant to achieve what she seeks through those other legislative processes. It would not be a legitimate RMA purpose to position the appellant, in that way. In substance, the conditions sought on these matters would seek to influence both the process and outcome of road stopping and land acquisition under other legislative codes (and potentially in conflict with what those codes would require).

[55] Mr Cameron noted his client is willing to enter a Deed as to PWA processes and outcomes. One aspect was so as to give comfort that delays would not arise. However, those matters (like the proposed conditions) deal with PWA rather than RMA matters.

[56] Also, the appellant expresses a preference for the use of PWA processes for road stopping over those of the LGA (on the basis that the latter process is "cumbersome" and potentially "time consuming"). The court has no capacity to give any such direction in the

context of determining this appeal. This invitation to the court to do so further demonstrates that the conditions the appellant pursues are for an ulterior purpose, and hence offend *Newbury* principles, as espoused in *Estate Homes*.

[57] For the same reasons, we find the second sentence of Condition 16 of the Decision Version also offends *Newbury* principles. That is in the fact that it purports to direct that road stopping processes are to follow the stated works in the first sentence.

[58] We also see difficulty with the advisory note recommended by Mr Wesney and Ms O'Shaugnessy in the fact that it could be read to bind what the Requiring Authority does in its road stopping processes. We appreciate, however, that a possible point of difference is that it is volunteered by the Requiring Authority.

Can the requirement be modified and/or conditions imposed for the 'dog leg'?

[59] This issue between the parties and their planning witnesses is relatively easily addressed. We do not agree with the opinion expressed by Mr Wesney and Ms O'Shaugnessy in the Planning JWS that the dog-leg stretch of road is a matter beyond the requirement for the designation. The Project is termed the Nukumaru Station Road Extension. It is a project to upgrade and extend that road, and hence it is within the court's jurisdiction to consider the consequences of that upgrading and extending for the dog-leg section. That section presently functions as part of Nukumaru Station Road. Until road stopping processes are completed, it will remain as local road even despite the commission of the extension. The Requiring Authority remains the responsible road controlling authority for it. Until such time as the Requiring Authority divests itself of ownership of the dog-leg, it remains the responsible landowner for it. As road controlling authority and landowner, the Requiring Authority has attendant RMA responsibilities for it. Those include the following duty in s17 RMA:

> Every person has a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of the person, whether or not the activity is carried on in accordance with—
>
> (a) any of sections 10, 10A, 10B, and 20A; or
> (b) a national environmental standard, a rule, a resource consent, or a designation

[60] Part of what the court must have particular regard to is the ethic of stewardship (s7(aa) RMA). That informs our consideration of whether the designation should encompass the dog-leg and/or what conditions should require in regard to ongoing

stewardship of the dog-leg pending its ultimate divestment into private land ownership. Clearly, the *Newbury* principles pertain to our consideration of any modification and/or conditions pertaining to the dog-leg.

How far can a Requiring Authority be required to go to protect the appellant's organic farm?

[61] The evidence and submissions suggest that the most significant point of difference between the parties is as to how far the Requiring Authority should be obliged to go to protect the appellant's organic farm. Applying *Estate Homes*, a high bar must be crossed before a condition or modification to deal with environmental effects would be adjudged beyond jurisdiction. Usually, it would not be known whether that bar was crossed until the related evidence was tested. Therefore, the preliminary observations we now make are qualified. Specifically, the court reserves its determination of whether and in what respects the Requirement should be modified and what appropriate conditions should be imposed.

[62] Insofar as the Requiring Authority and Regulatory Authorities argued that the dog-leg and its treatment are beyond the scope of the Project, we disagree for the reasons we have given. We find we have jurisdiction to consider whether the designation footprint should encompass it and/or what conditions should be imposed in respect of it.

[63] An initial matter we consider appropriate to address concerns the choice of the words 'rehabilitation' and 'rehabilitated'. The word 'rehabilitation' first appears in the notice of appeal. For instance, that is in the relief it seeks that 'all practicable steps are taken to ensure that the existing 'dog-leg' of Nukumaru Station Road can be rehabilitated to the USDA NOP certifiable organic standard to the satisfaction of Asure Quality and/or otherwise be utilised by Ms Handley'. It is repeated extensively in the conditions recommended by the appellant's planning witness, Mr Forrest (in terms of what he calls a rehabilitation management plan for the dog-leg). On the other hand, the JWS Planning records the joint opinion of Mr Wesney and Ms O'Shaugnessy that "rehabilitation of the dog-leg stretch of road is a matter beyond the application for designation".

[64] The *New Zealand Oxford Dictionary* includes the following definition of 'rehabilitate' (and indicates a corresponding meaning for the noun rehabilitation):

> 2. restore to former privileges or reputation or a proper condition.

[65] From Mrs Handley's evidence, we understand that the farm has been supplying organic milk since around 2002 and gained certification subsequent to that date. The use of the present alignment of Nukumaru Station Road, including the dog-leg bisecting the appellant's land, commenced well prior to that. As such, it is proper to treat the present roading alignment as part of the existing environment in our consideration of what, if any, conditions should be imposed on its treatment with regard to the operation of the appellant's organic farm.

[66] Considered in that context, the conditions sought in the appeal and recommended by Mr Forrest for treatment of the dog-leg would appear to go well beyond what is ordinarily understood to be 'rehabilitation' of the dog-leg land. Rather, in substance, they seek to oblige the Requiring Authority to undertake physical works on the dog-leg that would significantly enhance its condition and render it capable of then being merged with the appellant's certified organic farm.

[67] We acknowledge that the existing environment also encompasses that part of the appellant's farm that the Project would remove from production. We find that the PWA compensation regime is a highly relevant part of the context for our consideration of whether what the appellant seeks for the dog-leg falls foul of the *Newbury* principles as applied by *Estate Homes.* That is in terms of both ulterior purpose and lack of logical connection to the project the subject of the requirement. Considering the loss of productive farm matter in isolation, we express a preliminary finding that this would not be sufficient of itself to justify imposition of a condition for remediation unless the evidence demonstrated economic wellbeing consequences beyond those for which the appellant would be compensated under the PWA. We are mindful that Mr Cameron emphasised, in his closing remarks, that the loss of productive capacity was only one factor in the mix to justify the conditions pursued for remediation. We have already explained why we do not find jurisdiction for a condition to regulate road stopping or land acquisition per se. However, we acknowledge the appellant may have in mind other matters in the mix on which the evidence should be tested.

[68] Therefore, we reserve our final determination on the extent of treatment of the dog-leg as may be within jurisdiction and appropriate until the evidence is tested.

Conclusion

[69] These preliminary findings ought to give all parties (and their planning witnesses) pause for thought as to the approach they have taken to date. As signalled in my Minute dated 22 June 2018, the court will now hear parties on whether they wish to proceed now with testing of evidence or seek a recess for the purposes of any further inter-party discussions in light of these preliminary jurisdictional findings.

For the court:

J J M Hassan
Environment Judge