Before the Independent Hearing Commissioner
In Wellington

Under	the Resource Management Act 1991 (the Act)
In the matter of	A Notice of Requirement by Wellington City Council to alter Designation 58 (Moa Point Drainage and Sewage Treatment) to provide for the construction, operation and maintenance of the proposed Sludge Minimisation Facility at Moa Point, Wellington

Bundle of Authorities

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Queenstown Lakes District Council v Hawthorn Estate Ltd

Court of Appeal CA 45/05
14 March; 12 June 2006
William Young P, Robertson and Cooper JJ

Resource consent — Non-complying activity — Appeal on a question of law — Further appeal to Court of Appeal — Land use activity consent — Subdivision consent — Permitted baseline — Assessment of effects of proposed activity on the environment — Relevance of future environment on determination of resource consent application — Resource Management Act 1991, ss 2, 5, 6, 7, 8, 30(1), 31, 45, 56, 61, 66, 94, 104, 105, 123(b), 125, 271A, 308.

Hawthorne Estate Ltd applied to the Queenstown Lakes District Council for both subdivision and land use activity consent to subdivide and develop 33.9 ha of land in the Wakatipu Basin, near Queenstown. The council declined to grant resource consent for the non-complying activity. A key question which arose in relation to the assessment of the effects of the proposed activity on the environment was whether a consent authority should take account of the environment as it might be in the future, assuming that unimplemented resource consents would be given effect to in the future. The council argued that the assessment of effects should be limited to the environment as it existed at the time when the application was considered. On appeal the Environment Court set aside the council's decision and granted consent for the proposed activity. The decision of the Environment Court was upheld on further appeal to the High Court on a question of law. The council then obtained leave to pursue a further appeal to the Court of Appeal.

Held (dismissing the appeal)

1 The "permitted baseline" analysis was designed to isolate activities permitted by a district plan or activities which had been approved by the grant of resource consent, with the result that the effects of such activities should not be taken into account when assessing the effects of a proposed activity on the environment. The "permitted baseline" analysis was conceptually different from the question of whether the future environment should be considered when carrying out the assessment of effects on determination of a resource consent application (see paras [65], [66]).

2 There was no justification for borrowing the term "fanciful" from the "permitted baseline" cases to determine whether the future environment was relevant to determination of the resource consent application. That question could be determined in a practical way by receiving evidence about any resource consents granted by the consent authority in the past in relation to the surrounding area, and whether those consents were likely to be implemented. The possibility of "environmental creep", where successive consents were obtained in respect of the same site, did not result in such consents being disregarded from any assessment of the future environment notwithstanding the fact that later consents may have replaced earlier consents (see paras [74], [75], [77], [79]).

3 Having regard to consented activities as part of the future environment did not create a precedent for the approval of other activities, and cumulative effects arose in the context of a proposed activity not from other activities which might take place in the vicinity (see paras [80], [81], [82], [83], [84]).

Cases mentioned in judgment

Aley v North Shore City Council [1998] NZRMA 361.

Arrigato Investments Ltd v Auckland Regional Council [2001] NZRMA 481; [2002] 1 NZLR 323 (CA).

Bayley v Manukau City Council [1999] NZLR 568 (CA).

Dye v Auckland Regional Council [2001] NZRMA 513; [2002] 1 NZLR 337 (CA).

Fleetwing Farms Ltd v Marlborough District Council [1997] 3 NZLR 257.

Geotherm Group Ltd v Waikato Regional Council [2004] NZRMA 1.

O'Connell Construction Ltd v Christchurch City Council [2003] NZRMA 216.

Rodney District Council v Gould [2006] NZRMA 217.

Smith Chilcott Ltd v Auckland City Council [2001] NZRMA 503; [2001] 3 NZLR 473 (CA).

Wilson v Selwyn District Council [2005] NZRMA 76.

Appeal

This was an appeal by the Queenstown Lakes District Council from the judgment of the Environment Court setting aside a decision of the council declining a resource consent application made by Hawthorn Estate Ltd, the first respondent. The Court of Appeal gave leave to appeal on a question of law.

E D Wylie QC and *N S Marquet* for Queenstown Lakes District Council.

N H Soper and *J R Castiglione* for Hawthorn Estate Ltd.

The judgment of the Court was delivered by

COOPER J. [1] This is an appeal from a judgment of Fogarty J pursuant to leave granted by this Court under s 308 of the Resource Management Act 1991 (the Act).

[2] Fogarty J had dismissed an appeal by the Queenstown Lakes District Council and the second respondents against a decision of the Environment Court. The Environment Court had set aside a decision of the council declining a resource consent application made by the first respondent (Hawthorn).

[3] As a result of the Environment Court decision, Hawthorn was authorised to proceed to subdivide and carry out subdivision works on a property near Queenstown. Some 32 residential lots were proposed to be created.

[4] This Court gave leave for the following questions to be pursued on appeal:

1. Whether His Honour Justice Fogarty erred in law when he determined (either expressly or by implication):
   (a) that the receiving environment should be understood as including not only the environment as it exists but also the reasonably foreseeable environment;
   (b) that it was not speculation for the Environment Court to take into account approved building platforms in the triangle and on the outside of the roads that formed it;
   (c) that the Environment Court had given adequate and appropriate consideration to the application of the permitted baseline.
2. Whether His Honour Justice Fogarty erred in law when he determined that the Environment Court had not erred in law in concluding that the landscape category it was required to consider was an "Other Rural Landscape".
3. Whether His Honour Justice Fogarty erred in law when he held that the Environment Court had not erred in law when it considered the minimum subdivision standards in the Rural Residential zone in addressing the first respondent's proposal which is in a Rural General zone.

[5] As was observed by the Court in granting leave, the questions are interrelated, and the answers to the second and third questions are in large part dependent on the answer to the constituent parts of the first. The main issue that underlies the appeal is whether a consent authority considering whether or not to grant a resource consent under the Act must restrict its consideration of effects to effects on the environment as it exists at the time of the decision, or whether it is legitimate to consider the future state of the environment.

[6] It was common ground that the three questions fall to be considered under the Act in the form in which it stood prior to the coming into force of the Resource Management Amendment Act 2003.

Background

[7] Hawthorn applied to the council for both subdivision and land use activity consent in respect of land in the Wakatipu Basin. The land comprises 33.9 ha, and is situated near the junction of Lower Shotover and Domain Roads, with frontage to both of those roads. It is part of a triangle of land bounded by them and Speargrass Flat Road, known locally as "the triangle".

[8] Hawthorn's development would subdivide the land into 32 separate lots, containing between 0.63 and 1.30 ha, together with access

lots, and a central communal lot containing 12.36 ha. The application also sought consent to the erection of a residential unit on each of the 32 residential sites, within nominated building platforms that were shown on plans submitted with the application. The proposal required consent as a non-complying activity under the operative district plan, and as a discretionary activity under the proposed district plan.

[9] There was an existing resource consent which allowed subdivision of the land into eight blocks of approximately 4 ha in each case. Those approved allotments contained identified building platforms.

[10] The Environment Court recorded that the whole of the land proposed to be subdivided is flat, apart from a small rocky outcrop. The Court observed that the triangle had been the subject of considerable development pressure over the past decade, and that within the 166 ha area so described, 24 houses had been erected, with a further 28 consented to, but not yet built. Outside of the roads that physically form the triangle were a further 35 approved building platforms. It is unclear from the Environment Court's decision whether any of those had been built on.

[11] In assessing the effects of the proposal on the environment for the purposes of s 104(1)(a) of the Act, a key question that arose was whether the consent authority ought to take into account the receiving environment as it might be in the future and, in particular, if existing resource consents that had been granted but not yet implemented, were implemented in the future. The council had declined consent to the application and on the appeal by Hawthorn to the Environment Court argued that that Court's consideration should be limited to the environment as it existed at the time that the appeal was considered. That proposition was rejected by the Environment Court, and also by Fogarty J.

[12] Before we confront the questions that have been asked directly, we briefly summarise the reasoning in the decisions respectively of the Environment Court and the High Court.

The Environment Court decision

[13] The Environment Court held that the dwellings, and the approved building platforms yet to be developed by the erection of buildings, both within and outside the triangle, were part of the receiving environment. As to the undeveloped sites, that conclusion was founded on evidence that the Court accepted that it was "practically certain that approved building sites in the Wakatipu Basin will be built on". That conclusion, not able to be challenged on appeal, is critical to the arguments advanced in the High Court and in this Court.

[14] The Environment Court held that the eight dwellings for which resource consent had already been granted on the subject site were appropriately considered as part of the "permitted baseline", a concept explained in the decisions of this Court in *Bayley v Manukau City Council* [1999] NZLR 568, *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473 and *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323. However, it rejected an argument by Hawthorn that landowners in the area could have a reasonable expectation that the council would grant consent to subdivisions that matched the intensity of

three other subdivisions in the triangle, for which the council had recently granted consent. Those subdivisions had an average area of 2 ha per allotment. Hawthorn had argued that the present development should be considered in the light of a future environment in which subdivision of that intensity would occur throughout the triangle.

[15] The Court rejected that proposition as being too speculative. Noting that all subdivision in the zone required discretionary activity consent, the Court observed that:

> [25] We have no way of knowing whether existing or future allotment holders will apply for consent to subdivide to the extent of two hectare allotments, nor whether they can replicate the conditions which led the Council to grant consent in the cases referred to by Mr Brown, nor at what point the consent authority will consider that policies requiring avoidance of over-domestication of the landscape have been breached. In general terms we do not consider that reasonable expectations of landowners can go beyond what is permitted by the relevant planning documents or existing consents.

[16] At the time that the appeal was heard before the Environment Court, there was both an operative and a proposed district plan. The Court's focus was properly on the proposed district plan, however, because the relevant provisions in it had passed the stage where they might be further modified by the submission and reference process under the Act. Under the proposed district plan (which we will call simply "the district plan", or "the plan" from this point), it was necessary for the Court to classify the landscape setting of the proposed development. The Court found that the appropriate landscape category was "other rural landscape". In doing so the Court rejected the arguments that had been put to it by the council and by parties appearing under s 271A of the Act that the proper classification was "visual amenity landscape". Both are terms used and described in the district plan.

[17] Once again, the Court's reasoning was based on what it thought would happen in the future. It held that the "central question in landscape classification" was whether the landscape "when developed to the extent permitted by existing consents" would retain the essential qualities of a visual amenity landscape. That would not be the case here, because of the extent of existing and likely future development of "lifestyle" or "estate" lots both in the triangle and outside it.

[18] The Environment Court then discussed the effects of the development on the environment. It found that the subdivision works would introduce an unnatural element to the landforms in the triangle, but that they would be largely imperceptible, and the landform was not one of the best examples of its type. In terms of visual effects, the Court concluded that, although the development could be seen from positions beyond the site, it would not intrude into significant views, nor dominate natural elements in the landscape. As to the effects on "rural amenity" the Court held that the position was "finely balanced", but after it identified and considered relevant district plan objectives and policies dealing with rural amenity, concluded that the development was marginally compatible with them.

[19] The Court also considered the proposal against relevant assessment criteria in the district plan. It found that the proposal would satisfy most of them. This part of the Court's decision required it to revisit under s 104(1)(d) of the Act matters already dealt with in the inquiry into effects on the environment under s 104(1)(a).

[20] One of the assessment criteria raised as an issue whether the proposed development would be complementary or sympathetic to the character of adjoining or surrounding visual amenity landscape. Another required consideration of whether the proposal would adversely affect the naturalness and rural quality of the landscape through inappropriate landscaping. The Court was able to repeat here conclusions that it had already arrived at earlier in its decision. In particular, it said that although the effects of the proposal on the retention of the rural qualities of the landscape were "on the cusp":

> . . . in the context of consented development on this and other sites in the vicinity the proposal is just compatible with the level of rural development likely to arise in the area.

[21] Having considered the objectives and policies of the district plan as a whole, the Court concluded that while the proposal was marginal in respect of some significant policies, it was supported by others. Consequently, it was "not contrary to the policies and objectives taken as a whole".

[22] In the balance of its decision the Court rejected an argument of the council that the decision would create an undesirable precedent. It considered the proposal against the higher-level considerations flowing from Part II of the Act, expressed a conclusion that the effects on the environment of allowing the activity would be minor, provided that there was a condition proscribing any further subdivision of the land, and then moved to the exercise of its discretion to grant consent under s 105(1)(c) of the Act. For present purposes it should be noted that the Court's conclusion that there would not be an undesirable precedent set by the grant of consent was expressly justified on the basis that the proposal had been comprehensively designed, and would provide facilities for the public that would link to other facilities in the triangle. The Court considered that it was difficult to imagine that another such comprehensive proposal could be designed for another location, given the "level of subdivision and building that has already occurred within the triangle". Further, the Court's conclusion that adverse effects on the environment would be minor was reached:

> [h]aving considered carefully the changes that will occur on the surrounding environment as a result of consents already granted and the "baseline" set by existing resource consents on the land . . . .

[23] So it can be seen that, in respect of the main issues that the Court had to decide, its reasoning in each case was predicated on the ability to assess the development against the future conditions likely to be present in the area.

The High Court decision

[24] The questions earlier set out particularise the challenged conclusions of Fogarty J. On the first issue, as to whether the receiving

environment should be understood as including not only the environment as it exists, but also the reasonably foreseeable environment, Fogarty J essentially adhered to his own reasoning in *Wilson v Selwyn District Council* [2005] NZRMA 76. He held in that case that "environment" in s 104 includes potential use and development in the receiving environment.

[25] Accordingly, the Environment Court had not erred when it took into account the approved building platforms both within and outside of the triangle. In para [74] of the judgment Fogarty J said:

> In my view the reason why the baseline analysis is abrupt is that the Court had no doubt at all that advantage would be taken of approved building platforms in this very valuable location. Mr Goldsmith's view was not challenged in cross-examination. Ms Kidson, the landscape witness for the Council, took into account that more houses would be built as a result of a number of consents.

[26] Fogarty J went on to observe that the Environment Court's approach did not involve speculation, and that the Court had rejected an argument that it should take into account the possibility of further subdivision as a result of possible future applications for discretionary activity consent. He observed that in that respect, the approach of the Environment Court was more cautious than that which he himself had taken in *Wilson v Selwyn District Council.*

[27] One of the questions that has been raised on the appeal concerns the adequacy of the Environment Court's consideration of the application of what has come to be known as the "permitted baseline". Although that expression was used by Fogarty J in para [74], we doubt that he was using the term in the sense that it is normally used, that is with reference to developments that might lawfully occur on the site subject to the resource consent application itself. Rather, Fogarty J appears to have used the expression to refer to the likely developments that would take place beyond the boundary of the subject site, utilising existing resource consents. Nothing turns on the label that the Judge used to refer to lawfully authorised environmental change beyond the subject site. However, it would be prudent to avoid the confusion that might result from using the term other than in its normal sense, addressed in *Bayley v Manukau City Council*, *Smith Chilcott Ltd v Auckland City Council* and *Arrigato Investments Ltd v Auckland Regional Council.* As we will emphasise later in this judgment the "permitted baseline" is simply an analytical tool that excludes from consideration certain effects of developments on the site that is subject to a resource consent application. It is not to be applied for the purpose of ascertaining the future state of the environment beyond the site.

[28] The second and third questions raised on the appeal have their genesis in particular provisions in the council's proposed district plan. Under the landscape classification employed by that plan, the Environment Court held that the receiving environment of the subject application should be regarded as an "other rural landscape". In a passage which again uses the expression "baseline" in an unusual context, Fogarty J said at para [76]:

> Mr Wylie argued that, although there was evidence before the Court on which it could conclude the landscape was Other Rural Landscape that it reached that decision after taking into account, irrelevantly, that the landscape would be developed to the extent permitted by existing consents. So he was arguing that the much earlier finding of Other Rural Landscape was affected by this same area of baseline analysis. As I do not think that there is any error of baseline analysis, this point cannot be sustained. It is, however, appropriate to comment on one detail in Mr Wylie's argument in case it be thought I have overlooked it.

[29] The Judge accepted Mr Wylie QC's argument that the Environment Court had considered their judgment regarding the effect of the proposal on rural amenity as finely balanced. Having observed that the Environment Court was an expert Court, was thoroughly familiar with the Queenstown area and skilled in the assessment of landscape values, Fogarty J said at para [79]:

> In my view Mr Wylie's argument has to depend on the point he has reserved, namely that a consent authority applying s 104 in these circumstances must consider the receiving environment *as it exists*, and ignore any potential development: whether it be imminent pursuant to existing building consents; or allowed as permitted uses; or potentially allowable as discretionary activity, controlled activity, or non-complying activity. If that is the law, then the judgment by the Environment Court on other rural landscape may be infected with an error of law, in a material way.

[30] The Judge had already decided that there was no such error of law, because it was proper for the Environment Court to consider the future state of the environment.

[31] Fogarty J also held that the Environment Court had not erred in assessing the proposed development by reference to the lot sizes permitted in the Rural Residential zone. Essentially, he held that this was a legitimate course to follow, because the site was located in an other rural landscape, which is the least sensitive of the landscape categories provided for in the district plan. Using terms that appear in the district plan itself, Fogarty J said at para [87]:

> Obviously different levels of protection of landscape value will depend on whether the proposed developments impact on romantic landscape, Arcadian landscape or other landscape. Reading the [plan] as a whole one would expect quite significant protection of romantic and Arcadian landscape. The degree of protection of other landscape, including Other Rural Landscape from any further development is less certain.

[32] He noted there were no minimum subdivisional allotment sizes for the Rural General zone. It was a zone that contemplated consents being granted for a wide range of activities provided they did not compromise the landscape and other rural amenities. The proposal had been designed to have a park-like appearance and would incorporate planting that would to some extent screen the development from neighbouring land use. He concluded at para [90]:

> Had the Court been proceeding on the basis of a classification of the landscape as Arcadian, considering Rural Residential Standards could well

> have been taking into account an irrelevant consideration. But where the Court considers that the Arcadian character of the landscape has gone and is dealing with a rural landscape already showing some kind of residential character, I do not think it can be said that an expert Court has fallen into error of law by looking at the standards in the rural living area zones, when exercising a judgment as to how to address a proposal which is a discretionary activity in the rural general zone of the [plan].

[33] Mr Wylie contends that in respect of all these determinations Fogarty J's decision was incorrect in law. We discuss the reasons that he advanced for that contention in the context of the questions that we have to answer.

Question 1(a) – the environment

[34] Mr Wylie's principal submission was that Fogarty J erred in holding that the word "environment" includes not only the environment as it exists, but also the reasonably foreseeable environment after allowing for potential use and development. The council contended that such an approach is not required by the definition of the word "environment" in s 2 of the Act, and that to read the word in that way would be inconsistent with Part II of the Act, in particular with s 7(f).

[35] Mr Wylie further submitted that a purposive approach to the relevant statutory provision would lead to a conclusion that the "environment" must be confined to the environment as it exists. He submitted that the reference to "Maintenance and enhancement of the quality of the environment" in s 7(f) of the Act was strongly suggestive that it is the environment as it exists at the date of the exercise of the relevant function or power under the Act which must be relevant. He contended that it would be difficult, perhaps impossible, to have particular regard to the maintenance and enhancement of the quality of a speculative future environment.

[36] Further, referring to the importance of district plans made under the Act and the process of submission in which members of the public may formally participate in the plan preparation process, Mr Wylie argued that when a plan becomes operative, it represents a community consensus as to how development should proceed in the council's district. Such plans, he submitted, focus on existing environments and put in place a framework for future development. But they do not, as he put it, "assume future putative environments degraded by potential use or development".

[37] In addition, Mr Wylie pointed to practical difficulties that he said would make the approach that found favour with the Environment Court and Fogarty J unworkable. There was, in addition, the potential for "environmental creep" if applicants having secured one resource consent were then able to treat the effects of implementing that consent as something which would alter the future state of the environment whilst returning to the council on successive occasions to seek further consents "starting with the most benign, but heading towards the most damaging".

[38] Mr Wylie also argued that to uphold Fogarty J's view on the meaning of the word "environment" would be to run counter to authorities which have established rules for priority between applicants, authorities

dealing with issues of precedent and cumulative effect as well as the authorities already mentioned on the "permitted baseline".

[39] Both parties have argued the matter as if the word "environment" in s 2 of the Act ought to be seen as neutral on the issue of whether it requires the future, and future conditions to be taken into account. We think that that is true only in the superficial sense that none of the words used specifically refers to the future.

[40] The definition reads as follows:

> "Environment" includes —
>
> (a) Ecosystems and their constituent parts, including people and communities; and
> (b) All natural and physical resources; and
> (c) Amenity values; and
> (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

[41] This provision must be construed on the basis prescribed by s 5(1) of the Interpretation Act 1999; the meaning of the provision is to be ascertained from its text and in the light of its purpose.

[42] Although there is no express reference in the definition to the future, in a sense that is not surprising. Most of the words used would, in their ordinary usage, connote the future. It would be strange, for example, to construe "ecosystems" in a way which focused on the state of an ecosystem at any one point in time. Apart from any other consideration, it would be difficult to attempt such a definition. In the natural course of events ecosystems and their constituent parts are in a constant state of change. Equally, it is unlikely that the legislature intended that the inquiry should be limited to a fixed point in time when considering the economic conditions which affect people and communities, a matter referred to in para (d) of the definition. The nature of the concepts involved would make that approach artificial.

[43] These views are reinforced by consideration of the various provisions in the Act in which the word "environment" is used, or in which there is reference to the elements that are set out in the four paragraphs of its definition. The starting point should be s 5, which states and explains the fundamental purpose of the Act in the following terms:

> **5. Purpose** — (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety while —
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[44] "Natural and physical resources" are, of course, part of the environment as defined in s 2. The purpose of the Act is to promote their sustainable management. The idea of management plainly connotes action that is ongoing, and will continue into the future. Further, such management is to be sustainable, that is to say, natural and physical resources are to be managed in the way explained in s 5(2). Again, it seems plain that provision by communities for their social, economic and cultural well-being, and for their health and safety, is an idea that embraces an ongoing state of affairs.

[45] Section 5(2)(a) then makes an express reference to the "reasonably foreseeable needs of future generations". What to this point has been implicit, becomes explicit in the use of this language. There is a plain direction to consider the needs of future generations. Paragraph (b)'s reference to safeguarding the life-supporting capacity of air, water, soil, and ecosystems also points not only to the present, but also the future. The idea of safeguarding capacity necessarily involves consideration of what might happen at a later time.

[46] The same approach is requisite under para (c). "Avoiding" naturally connotes an ongoing process, as do "remedying" and "mitigating". The latter two words, in addition, imply alteration to an existing state of affairs, something that can only occur in the future.

[47] Each of the components of s 5(2) is, therefore, directed both to the present and the future state of affairs. An analysis of the concepts contained in ss 6 and 7 leads inevitably to the same conclusion. That is partly because the particular directions in each section are all said to exist for the purpose of achieving the purpose of the Act. But in part also, the future is embraced by the words "protection", "maintenance" and "enhancement" that appear frequently in each section. We do not agree with Mr Wylie's argument based on s 7(f). "Maintenance" and "enhancement" are words that inevitably extend beyond the date upon which a particular application for resource consent is being considered.

[48] The requirements of ss 5, 6 and 7 must be complied with by all who exercise functions and powers under the Act. Regional authorities must do so, when carrying out their functions in relation to regional policy statements (s 61) and the purpose of the preparation, implementation and administration of regional plans is to assist regional councils to carry out their functions "in order to achieve the purpose of this Act". Further, the functions of regional councils are all conferred for the purpose of giving effect to the Act (s 30(1)). Consistently with this, s 66 obliges regional councils to prepare and change regional plans in accordance with Part II.

[49] The same obligations must be met by territorial authorities, in relation to district plans. The purpose of the preparation, implementation and administration of district plans is, again, to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. Similarly, the functions of territorial authorities are conferred only for the purpose of giving effect to the Act (s 31) and district plans are to be prepared and changed in accordance with the provisions of Part II. There is then a direct linkage of the powers and duties of regional and territorial authorities to the provisions of Part II with the necessary consequence that

those bodies are in fact planning for the future. The same forward-looking stance is required of central government and its delegates when exercising powers in relation to national policy statements (s 45) and New Zealand coastal policy statements (s 56). The drafting shows a consistent pattern.

[50] In the case of an application for resource consent, Part II of the Act is, again, central to the process. This follows directly from the statement of purpose in s 5 and the way in which the drafting of each of ss 6 to 8 requires their observance by all functionaries in the exercise of powers under the Act. Self-evidently, that includes the power to decide an application for resource consent under s 105 of the Act. Moreover, s 104 which sets out the matters to be considered in the case of resource consent applications, began, at the time relevant to this appeal:

> **104. Matters to be considerd** — (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to . . .

[51] The pervasiveness of part II is once again apparent. In the case of resource consent applications, reference must also be made to the list of relevant considerations spelled out in paras (a) to (i) of s 104(1). These include: "Any actual and potential effects on the environment of allowing the activity" (para (a)); the objectives, policies, rules and other provisions of the various planning instruments made under the Act (para (c) to (f)) and "Any other matters the consent authority considers relevant and reasonably necessary to determine the application" (para (i)).

[52] Each of these provisions is likely to require a consent authority, in appropriate cases, to have regard to the future environment. In so far as ss 104(1)(c) to (f) is concerned, that will be necessary where the instruments considered require that approach. If the precedent effects of granting an application are to be considered as envisaged by *Dye v Auckland Regional Council* [2002] 1 NZLR 337 then the future will need to be considered, whether under s 104(1)(d) or s 104(1)(i). As to s 104(1)(a), its reference to potential effects is sufficiently broad to include effects that may or may not occur depending on the occurrence of some future event. It must certainly embrace future events.

[53] Future potential effects cannot be considered unless there is a genuine attempt, at the same time, to envisage the environment in which such future effects, or effects arising over time, will be operating. The environment inevitably changes, and in many cases future effects will not be effects on the environment as it exists on the day that the council or the Environment Court on appeal makes its decision on the resource consent application.

[54] That must be the case when district plans permit activities to establish without resource consents, where resource consents are granted and put into effect and where existing uses continue as authorised by the Act. It is not just the erection of buildings that alters the environment: other activities by human beings, the effects of agriculture and pastoral land uses, and natural forces all have roles as agents of environmental change. It would be surprising if the Act, and in particular s 104(1)(a), were to be construed as requiring such ongoing change to be left out of

account. Indeed, we think such an approach would militate against achievement of the Act's purpose.

[55] A further consideration based in particular on the provisions concerning applications leads to the same conclusion. When an application for resource consent is granted, the Act envisages that a period of time may elapse within which the resource consent may be implemented. At the time relevant to this appeal, the statutory period was two years or such shorter or longer period as might be provided for in the resource consent (s 125). Consequently, the effects of a resource consent might not be operative for an appreciable period after the consent had been granted. Mr Wylie's argument would prevent the consent authority considering the environment in which those effects would be felt for the first time. Rather, the consent authority would have to consider the effects on an environment which, at the time the effects are actually occurring, may well be different to the environment at the time that the application for consent was considered. That would not be sensible.

[56] Similarly, it is relevant that many resource consents are granted for an unlimited time. That is certainly the case for most land use and subdivision consents (see s 123(b)). Yet it could not be assumed that the effects of implementing the consent would be the same one year after it had been granted, as they would be in 20 years' time.

[57] In summary, all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

[58] We have not been persuaded to a different view by any of Mr Wylie's arguments based on practical considerations and conflict with other lines of authority. It was his submission that the practical difficulties arising from Fogarty J's judgment would be significant. He contended that to require those administering district plans, and applicants for resource consents, to take account of the potential or notional future environment would be unduly burdensome, and would require them to speculate about what might or might not occur in any particular receiving environment, about what future economic conditions might be, and possibly about how such future economic conditions might affect future people and communities. He submitted that this would require a degree of prescience on the part of consent authorities that was inappropriate.

[59] In support of those propositions he referred to *O'Connell Construction Ltd v Christchurch City Council* [2003] NZRMA 216, and in particular to what was said by Panckhurst J at para [73]:

> I also agree with the submission of Mr Chapman for AMI/AMP that an extension of the rule to include potential activities on sites other than the application site would place an intolerable burden on the consent authority when assessing resource consent applications.

[60] The concerns expressed by Mr Wylie about practical difficulties were overstated. It will not be every case where it is necessary to consider the future environment, or where doing so will be at all

complicated. Suppose, for example, an application for resource consent to establish a new activity in a built up area of a city. There will be rules which provide for permitted activities and in the vast majority of cases it would be likely that the foreseeable future development of surrounding sites would be similar to that which existed at the time the application was being considered. In such a case, it might be a safe assumption that the environment would, in its principal attributes, be very much like it presently is, but perhaps more intensively developed if there are district plan objectives and policies designed to secure that end. At the other end of the spectrum, if one supposed an application to carry out some new activity involving development in an area which was rural in nature and which was intended to remain so in accordance with the policy framework established by the district plan, then once again it ought not be difficult to postulate the future state of that environment.

[61] Difficulties might be encountered in areas that were undergoing significant change, or where such change was planned to occur. However, even those areas would have an applicable policy framework in the district plan that, together with the rules, would give considerable guidance as to the nature and intensity of future activities likely to be established on surrounding land. In cases such as the present, where there are a significant number of outstanding resource consents yet to be implemented, and uncontested evidence of pressure for development, the task of predicting the likely future state of the environment is not difficult.

[62] The observations made by Panckhurst J in *O'Connell v Christchurch City Council* must be read in context. He was dealing with an appeal from an Environment Court decision overturning a decision by the City Council to grant consent to establish a tyre retail outlet. AMI and AMP occupied multi-storey office premises adjoining the subject site and had appealed to the Environment Court against the council's decision. When the Environment Court set aside the council's decision, the applicant for resource consent appealed to the High Court. One of the issues raised on the appeal was a contention that the Environment Court had misapplied the "permitted baseline test" in as much as it had considered the effects of permitted activities on only the subject site and had not considered the effects of permitted activities on adjacent sites as well. At [70] Panckhurst J said:

> [70] I accept that the Court did apply the baseline test with reference only to the subject site. That is it compared the proposed activity against other hypothetical activities that could be established on this site as of right in terms of the transitional and proposed plans. Regard was not had to the impact of the establishment of hypothetical activities on a closely adjacent site. Was such an approach in error?
>
> [71] I am not persuaded that it was. This conclusion I think follows from a reading of various decisions where the permitted baseline assessment has been considered in a number of contexts . . .

[63] The Judge referred to *Bayley v Manukau City Council*, *Smith Chilcott Ltd v Auckland City Council* and *Arrigato Investments Ltd v Auckland Regional Council*, and concluded that the required comparison for purposes of "permitted baseline" analysis is one that is restricted to the

site in question. There was nothing in those cases which was consistent with the extension of the test for which the appellant had contended. We have earlier expressed our view that the "permitted baseline" has in the previous decisions of this Court been limited to a comparison of the effects of the activity which is the subject of the application for resource consent with the effects of other activities that might be permitted on the subject land, whether by way of right as a permitted activity under the district plan, or whether pursuant to the grant of a resource consent. In the latter case, it is only the effects of activities which have been the subject of resource consents already granted that may be considered, and the consent authority must decide whether or not to do so: *Arrigato Investments Ltd v Auckland Regional Council* at paras [30] and [34] - [35].

[64] We agree with Panckhurst J's observations about the limits of the "permitted baseline" concept, and we also agree with him that the decisions of this Court have not suggested that it can be applied other than in relation to the site that is the subject of the resource consent application. However, it is a far step from there to contend that *Bayley v Manukau City Council* and the decisions that followed it, dictate the answer on the principal issues to be determined in this appeal. The question whether the "environment" could embrace the future state of the environment was not directly addressed in those cases, nor was an argument in those terms apparently put to Panckhurst J.

[65] It is as well to remember what the "permitted baseline" concept is designed to achieve. In essence, its purpose is to isolate, and make irrelevant, effects of activities on the environment that are permitted by a district plan, or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application. As Tipping J said in *Arrigato* at para [29]:

> Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[66] Where it applies, therefore, the "permitted baseline" analysis removes certain effects from consideration under s 104(1)(a) of the Act. That idea is very different, conceptually, from the issue of whether the receiving environment (beyond the subject site) to be considered under s 104(1)(a), can include the future environment. The previous decisions of this Court do not decide or even comment on that issue.

[67] We do not overlook what was said in *Bayley v Manukau City Council* at p 577, where the Court referred to what Salmon J had said in *Aley v North Shore City Council* [1998] NZRMA 361 at p 377:

> On this basis a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists.

The Court said that it would add to that sentence the words:

> . . . or as it would exist if the land were used in a manner permitted as of right by the plan.

[68] However, it must be remembered first, that *Bayley* was the case in which the "permitted baseline" concept was formally recognised, and as we have explained did not deal with the issue which has to be decided in this case. Secondly, it was a case about notification of resource consent applications. The issue that arose concerned the proper application of s 94 of the Act, and the provisions it contained allowing non-notification in cases where the adverse effect on the environment of the activity for which consent was sought would be minor. In that context there could be no need to consider the future environment, because if the effects on the existing environment were not able to be described as minor, there would be no need to look any further.

[69] Mr Wylie referred to other practical difficulties which he illustrated by reference to Fogarty J's decision in *Wilson v Selwyn District Council*. In that case, as in this, Fogarty J held that the term "environment" could include the future environment where the word is used in s 104(1)(a) of the Act. He held further that, to ascertain the future state of the environment it was appropriate to ask, amongst other things, whether it was "not fanciful" that surrounding land should be developed, and to have regard in that connection to what was permitted in a proposed district plan. Because the district plan contemplated the subdivision of neighbouring land as a controlled activity, His Honour held that it was plain that the district council did not regard it as fanciful that the land in the locality might be subdivided down into smaller sites with increased dwellings. Mr Wylie pointed out that although subdivision was a controlled activity under the proposed plan relevant in that case, and there were no submissions challenging that, there were, however, submissions challenging the right to erect dwellings, as Fogarty J himself had recorded in para [38] of the judgment. Mr Wylie criticised the decision on the basis that it had effectively "pre-empted" the submission process in relation to the district plan. It would also, in his submission, lead to considerable uncertainty.

[70] Mr Wylie further argued that in the present case, some of the remarks made by Fogarty J suggested that the possibility of development pursuant to resource consents for discretionary or even non-complying activities should be taken into account to ascertain the future state of the environment, in advance of such consents being granted.

[71] That is an inference which can arise from what the Judge said at para [79]:

> In my view Mr Wylie's argument has to depend on the point he has reserved, namely that a consent authority applying s 104 in these circumstances must consider the receiving environment *as it exists*, and ignore any potential development: whether it be imminent pursuant to existing building consents; or allowed as permitted uses; or potentially allowable as discretionary activity, controlled activity, or non-complying activity. If that is the law, then the judgment by the Environment Court on Other Rural Landscape may be infected with an error of law, in a material way.

[72] Fogarty J noted that the decision of the Environment Court in the present case had rejected an argument that it should take into account the likelihood of future successful applications for discretionary activity consent. At para [74] he said:

> As noted, the Court did go on to reject taking into account the further subdivision and thus even more houses resulting from successful applications for discretionary activities. It may be noted that that is a more cautious approach than I took in *Wilson and Rickerby*, see [62] and [81].

[73] The reference here to *Wilson and Rickerby* was a reference to the case now reported as *Wilson v Selwyn District Council*.

[74] These observations by the Judge express too broadly the ambit of a consent authority's ability to consider future events. There is no justification for borrowing the "fanciful" criterion from the "permitted baseline" cases and applying it in this different context. The word "fanciful" first appeared in *Smith Chilcott Ltd v Auckland City Council* at para [26], where it was used to rule out of consideration, for the purposes of the "permitted baseline" test, activities that the plan would permit on a subject site because although permitted it would be "fanciful" to suppose that they might in fact take place. In that context, when the "fanciful" criterion is applied, it will be in the setting of known or ascertainable information about the development site (its area, topography, orientation and so on). Such an approach would be a much less certain guide when consideration is being given to whether or not future resource consent applications might be made, and if so granted, in a particular area. It would be too speculative to consider whether or not such consents might be granted and to then proceed to make decisions about the future environment as if those resource consents had already been implemented.

[75] It was not necessary to cast the net so widely in the present case. The Environment Court took into account the fact that there were numerous resource consents that had been granted in and near the triangle. It accepted Mr Goldsmith's evidence that those consents were likely to be implemented. There was ample justification for the Court to conclude that the future environment would be altered by the implementation of those consents and the erection of dwellings in the surrounding area.

[76] Limited in this way, the approach taken to ascertain the future state of the environment is not so uncertain as to be unworkable or unduly speculative, as Mr Wylie contended.

[77] Another concern that was raised by Mr Wylie was the possibility of "environmental creep". This is the possibility that someone who has obtained one resource consent might seek a further resource consent in respect of the same site, but for a more intensive activity. It would be argued that the deemed adverse effects of the first application should be discounted from those of the second when the latter was considered under s 104(1)(a). Mr Wylie submitted that if s 104(1)(a) requires that consideration be given to potential use and development, there would be nothing to stop developers from making a number of applications for resource consent, starting with the most benign, and heading towards the most damaging. On each successive application, they would be able to argue that the receiving environment had already been

notionally degraded by its potential development under the unimplemented consents.

[78] This fear can be given the same answer as was given in *Arrigato* where the Court had to determine whether unimplemented resource consents should be included within the "permitted baseline". At para [35] the Court said:

> [35] Resource consents are capable of being granted on a non-notified as well as a notified basis. Furthermore, they relate to activities of differing kinds. There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baseline, but equally there may be circumstances in which it would not be appropriate to do so. For example, implementation of an earlier resource consent may on the one hand be an inevitable or necessary precursor of the activity envisaged by the new proposal. On the other hand the unimplemented consent may be inconsistent with the new proposal and thus be superseded by it. We do not think it would be in accordance with the policy and purposes of the Act for this topic to be the subject of a prescriptive rule one way or the other. Flexibility should be preserved so as to allow the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the question of the effects of the instant proposal on the environment.

[79] The Environment Court dealt with the implications of the existing resource consents in the present case in a manner that was consistent with that approach. It will always be a question of fact as to whether or not an existing resource consent is going to be implemented. If it appeared that a developer was simply seeking successively more intensive resource consents for the same site there would inevitably come a point when a particular proposal was properly to be viewed as replacing previous proposals. That would have the consequence that all of the adverse effects of the later proposal should be taken into account, with no "discount" given for consents previously granted. We are not persuaded that the prospect of "creep" should lead to the conclusion that the consequences of the subsequent implementation of existing resource consents cannot be considered as part of the future environment.

[80] Three other issues, raised by Mr Wylie in support of his argument that "environment" should be confined to what exists at the time the resource consent application is considered by the consent authority, can be briefly mentioned. First, he suggested that the contrary approach would have the effect of negating the result of cases that have decided that priority as between applicants should be established in accordance with the time when applications are made to a consent authority (*Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 and *Geotherm Group Ltd v Waikato Regional Council* [2004] NZRMA 1). That argument would only be legitimate if we were to endorse Fogarty J's decision that resource consent applications not yet made but which conceivably might be made, could be taken into account. That is not our view.

[81] Secondly, Mr Wylie contended that to hold that the word "environment" included potential use or development would undermine the decision of this Court in *Dye v Auckland Regional Council* where it

had been decided that the grant of a resource consent had no precedent effect in the "strict sense". It is apparent from para [32] of that decision, that what was meant by use of the expression "the strict sense" was that one consent authority is not bound by its own decisions or those of any other consent authority. We do not agree that a decision that the "environment" can include the future state of the environment has any implications for what was decided in *Dye*.

[82] Finally, Mr Wylie contended that if unimplemented resource consents are taken into account, then consent applications will fall to be decided on the basis of the environment as potentially affected by other consents. He submitted that this was to all intents and purposes "precedent by another route". We do not agree. To grant consent to an application for the reason that some other application has been granted consent is one thing. To decide to grant a resource consent application on the basis that resource consents already granted will alter the existing environment when implemented, and that those consents are likely to be implemented is quite a different matter.

[83] There is nothing in the High Court's decision in *Rodney District Council v Gould* [2006] NZRMA 217 on the question of cumulative effects which has any implications for the current issue. That decision simply explained what was already apparent from what this Court had decided in relation to cumulative effects in *Dye v Auckland Regional Council* — that is, that the cumulative effects of a particular application are effects which arise from that application, and not from others.

[84] In summary, we have not found, in any of the difficulties Mr Wylie has referred to, any reason to depart from the conclusion which we have reached by considering the meaning of the words used in s 104(1)(a) in their context. In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed. In short, we endorse the Environment Court's approach. Subject to that reservation, we would answer question 1(a) in the negative.

Question 1(b) – speculation

[85] The foregoing discussion means this and the subsequent questions can be answered more briefly. The issue raised by this question is whether taking into account the approved building platforms in and near the triangle, was speculative. The process adopted by the Environment Court cannot properly be characterised as having involved speculation. The Court accepted Mr Goldsmith's evidence that it was "practically certain" that the approved building sites in and near the triangle would be

built on. Mr Wylie confirmed that there was no issue with the Environment Court's finding of fact on the likelihood of future houses being erected.

[86] However, Mr Wylie argued that the environment against which the application fell to be assessed comprised only the existing environment. If that assertion were correct, he submitted that it followed that the potential effects of unimplemented resource consents were irrelevant.

[87] We have already rejected his contention that the relevant environment was confined to the existing environment. It follows that there is no basis upon which we could find error of law in relation to question 1(b).

Question 1(c) – consideration of the permitted baseline

[88] The issue raised by this question is whether the Environment Court had given adequate and appropriate consideration to the application of the permitted baseline. Mr Wylie's argument on this issue proceeded as if the Environment Court had been making a decision about the permitted baseline when it allowed itself to be influenced by its conclusion that the building sites in and around the triangle would be developed. For reasons that we have already given, we do not consider that the receiving environment was properly to be approached on the basis of a "permitted baseline" analysis, as that term has normally been used.

[89] Whatever label is put upon the exercise, Mr Wylie's main contention in this part of his argument was that there was nothing in the Environment Court's decision to show that it had a discretion of the kind that had been explained by this Court in the decision in *Arrigato Investments Ltd v Auckland Regional Council*, in particular the passage at para [35] that we have earlier set out. Mr Wylie submitted that, properly understood, the decision in *Arrigato* meant that there was a discretion when it came to the consideration of unimplemented resource consents. Mr Wylie also contended that it was not obvious from the Environment Court's judgment that it was aware that it had that discretion, let alone that it had exercised it.

[90] We do not consider that it is appropriate to describe what is simply an evaluative factual assessment as the exercise of a discretion. Further, we agree with Mr Castiglione that the council's argument wrongly conflates the "permitted baseline" and the essentially factual exercise of ascertaining the likely state of the future environment. We have previously stated our reasons for limiting the permitted baseline to the effects of developments on the site that is the subject of a resource consent application. On the relevant issue of fact, the Environment Court relied on the evidence of Mr Goldsmith about the virtual certainty of development occurring on the approved building platforms in and around the triangle. There was no error in that approach.

[91] In reality the present question simply raises, in a different guise, the central complaint that the council makes about the acceptance by both the Environment Court and the High Court that the receiving environment can include the future environment. That issue is not to be approached by invoking the permitted baseline, so the question posed does not strictly

arise. We simply answer the question by saying that the issues raised by the council in this part of the appeal do not establish any error of law by the Environment Court, nor by Fogarty J.

Question 2 – landscape category

[92] The council argued that the Environment Court had wrongly concluded that the landscape category it was required to consider was an "other rural landscape" under the district plan. It was contended that Fogarty J had erred by approving the Environment Court's approach.

[93] The district plan defines and classifies landscapes into three broad categories, "outstanding natural landscapes and features", "visual amenity landscapes" and "other rural". The classification of a particular landscape can be important to the consideration of resource consent applications, because different policies, objectives and assessment criteria apply to land within the different categories.

[94] Landscapes in the "outstanding" category are described in the district plan as "romantic landscapes — the mountains and the lakes — landscapes to which s 6 of the Act applies". The important resource management issues are identified as being the protection of these landscapes from inappropriate subdivision, use and development, particularly where activity might threaten the openness and naturalness of the landscape. With respect to "visual amenity landscapes", the district plan describes them in the following way:

> They are landscapes which wear a cloak of human activity much more obviously – pastoral (in the poetic and picturesque sense rather than the functional sense) or Arcadian landscapes with more houses and trees, greener (introduced) grasses and tend to be on the district's downlands, flats and terraces.

The district plan seeks to enhance their natural character and enable alternative forms of development where there are direct environmental benefits of doing so. This leaves a residual category of "other rural landscapes", to which the district plan assigns "lesser landscape values (but not necessarily insignificant ones).

[95] There was a contest in the Environment Court as to whether the landscape to be considered in the present case was properly categorised as "visual amenity" or "other rural". In making its assessment as to which classification should apply, the Environment Court plainly had regard to what the landscape would be like when resource consents already granted were utilised. At para [32], it said:

> We consider that the landscape architects called by the Council and the section 271A parties have been too concerned with the Court's discussion of the scale of landscapes and have not sufficiently addressed the central question in landscape classification, namely whether the landscape, when developed to the extent permitted by existing consents, will retain the essential qualities of a VAL, which are pastoral or Arcadian characteristics. We noted (in paragraph 3) that development of "lifestyle" or "estate" lots for rural-residential living is not confined to the triangle itself.

[96] It then made reference to existing developments in the area finding some to be highly visible and detracting significantly from any

"Arcadian" qualities of the wider setting. It concluded that the landscape category was other rural.

[97] We accept, as Mr Wylie submitted, that in large part that conclusion of the Environment Court was apparently based on the view that it had formed about what the landscape would be like when modified by the implementation of as yet unimplemented resource consents.

[98] In the High Court, Fogarty J recorded the submission that had been made to him by Mr Wylie that, although there was evidence before that Court on which it could have concluded that the landscape was "other rural", nevertheless it had reached that conclusion after taking into account, irrelevantly, that the landscape would be developed to the extent permitted by existing consents. Fogarty J held first that this was in effect a repetition of the arguments previously made about faulty baseline analysis. As he did not consider that the Environment Court had made any error in that respect, Mr Wylie's argument could not be sustained. A little later in the judgment, Fogarty J confirmed his view that a landscape categorisation decision could only be criticised if the Court was obliged to ignore future potential developments in the area (para [79] of his decision, set out in para [29] above).

[99] Mr Wylie repeated in this context his argument that the Court had been obliged to consider the environment as it existed at the time that it made its decision. That argument must fail for the reasons that we have already given. However, in this Court Mr Wylie developed another argument based not on the relevant statutory provisions, but on provisions of the district plan itself. Mr Wylie's argument was based on rule 5.4.2.1 of the district plan.

[100] Rule 5.4.2 contains "assessment matters" which are to be considered when the council decides whether or not to grant consent to, or impose conditions on, resource consent applications made in respect of land in the rural zones. As we have previously noted those assessment criteria vary according to the categorisation of the landscape. Before the actual assessment matters are stated, however, rule 5.4.2.1 sets out a three-step process to be followed in applying the assessment criteria. It provides as follows:

> 5.4.2.1 **Landscape Assessment Criteria – Process**
>
> **There are three steps in applying these assessment criteria.** First, the analysis of the site and surrounding landscape; secondly determination of the appropriate landscape category; thirdly the application of the assessment matters. For the purpose of these assessment criteria, the term "proposed development" includes any subdivision, identification of building platforms, any building and associated activities such as roading, earthworks, landscaping, planting and boundaries.
>
> **Step 1 – Analysis of the Site and Surrounding Landscape**
>
> An analysis of the site and surrounding landscape is necessary for two reasons. Firstly it will provide the necessary information for determining a sites ability to absorb development including the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape. Secondly it is an important step in the determination

of a landscape category – ie whether the proposed site falls within an outstanding natural, visual amenity or other rural landscape.
An analysis of the site must include a description of those existing qualities and characteristics (both negative and positive), such as vegetation, topography, aspect, visibility, natural features, relevant ecological systems and land use.
An analysis of the surrounding landscape must include natural science factors (the geological, topographical, ecological and dynamic components in [sic] of the landscape), aesthetic values (including memorability and naturalness), expressiveness and legibility (how obviously the landscape demonstrates the formative processes leading to it), transient values (such as the occasional presence of wildlife; or its values at certain times of the day or of the year), value of the landscape to Tangata Whenua and its historical associations.
Step 2 – Determination of Landscape Category
This step is important as it determines which district wide objectives, policies, definitions and assessment matters are given weight in making a decision on a resource consent application.
The Council shall consider the matters referred to in Step 1 above, and any other relevant matter, in the context of the broad description of the three landscape categories in part 4.2.4. of this Plan, and shall determine what category of landscape applies to the site subject to the application.
In making this determination the Council, shall consider:

(a) to the extent appropriate under the circumstances, both the land subject to the consent application and the wider landscape within which that land is situated; and
(b) the landscape maps in Appendix 8.

Step 3 – Application of the Assessment Matters
Once the Council has determined which landscape category the proposed development falls within, each resource consent application will then be considered:
First, with respect to the prescribed assessment criteria set out in r 5.4.2.2 of this section;
Secondly, recognising and providing for the reasons for making the activity discretionary (see para 1.5.3(iii) of the plan [p 1/3]) and a general assessment of the frequency with which appropriate sites for development will be found in the locality.

[101] Mr Wylie argued, that even if his argument confining "environment" to the current environment failed, nevertheless in accordance with these district plan provisions it could not be relevant to consider the future environment other than at step 3. He submitted that for the purposes of step 1 and step 2, attention should be focused solely on the current state of the environment.

[102] Mr Castiglione argued to the contrary, suggesting that the words used in step 1, ". . . the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape", were apt to refer to proposed development generally within the landscape. We reject that submission. In context, the reference to "the proposed development" must be the development which is the subject of a particular application for resource consent.

[103] But the wording of steps 1 and 2 does not exclude a consideration of the environment as it would be after the implementation

of existing resource consents. Although the second paragraph in step 1 refers to "existing qualities and characteristics", the words used are inclusive, and there is nothing to suggest that they are exhaustive. The same applies in respect to the last paragraph in step 1. We do not read the words in either paragraph as ruling out consideration of the future environment. Even if that conclusion were wrong it would be legitimate for the council to consider the future environment as part of "any other relevant matter", the words used in the second paragraph within step 2. Further, the second part of step 2 authorises a broadly based inquiry when it requires the council to "consider . . . the wider landscape" within which a development site is situated. There is no reason to read into these words, or any of the other language in step 2, a limitation of the consideration to the present state of the landscape.

[104] It follows that the future state of the environment can properly be considered at steps 1 and 2, before the landscape classification decision is made. Neither the Environment Court nor Fogarty J erred and question 2 should be answered No.

Question 3 – reliance on minimum subdivision standards in the Rural Residential zone

[105] In the High Court, the council had argued that the Environment Court had misconstrued the relevant district plan provisions, and taken into account an irrelevant consideration by referring to the subdivision standards contained in the district plan for the Rural Residential zone. The subject site is zoned Rural General.

[106] Mr Wylie pointed to three separate paragraphs in the Environment Court's decision where there had been references to the Rural Residential provisions of the plan. In para [74] of its decision the Environment Court had discussed evidence that had been given about the desire of the developer to create a "park-like" environment. A landscape architect whose evidence had been called by the council expressed the opinion that although the proposal would not introduce urban densities, it was not rural in nature. The Court referred to the fact that in the rural-residential zone a minimum lot size of 4000 m^2 and an associated building platform was permitted. It will be remembered that the subject development would comprise allotments varying in size between 0.6 and 1.3 ha. No doubt with that comparison in mind, the Environment Court expressed the view that the development would provide more than the level of "ruralness" of Rural Residential amenity.

[107] The next reference to the Rural Residential rules was in para [78]. The Environment Court was there dealing with the issue of whether the development would result in the "over-domestication" of the landscape. The Court expressed its view that the proposal could coexist with policies seeking to retain rural amenity and that while it would add to the level of domestication of the environment, the result would not reach the point of overdomestication. That was so, because the site was in an "other rural landscape", and the district plan considered that Rural Residential allotments down to 4000 m^2 retained an appropriate amenity for rural living.

[108] Finally, Mr Wylie referred to the fact that at para [92], where the Environment Court was dealing with a proposition that the proposal would be contrary to the district plan's overall settlement strategy, the Court made a reference to the reluctance that it had expressed in a previous decision to set minimum allotment sizes in the rural-residential zone. Mr Castiglione suggested that the Environment Court had made a mistake, and that it had meant to refer to the rural general zone in that paragraph, not the Rural Residential zone. We do not need to decide whether or not that was the case.

[109] Having reviewed the various references to the Rural Residential zone in context, Fogarty J held that the Environment Court had not considered an irrelevant matter or committed any error of law in its references to the Rural Residential zone. We cannot see any basis to disturb that conclusion. In this Court Mr Wylie contended that Fogarty J's reasoning had been based on the fact that the Environment Court had considered that any "Arcadian" character of the landscape had gone. He then repeated the point that that conclusion had turned on the fact that the Court had considered the likely future environment as opposed to confining its consideration to the existing environment. He submitted that the decision was wrong for that reason. We have already rejected that argument.

[110] We do not consider that there was any error of law in the approach of either the Environment Court or the High Court on this issue. Question 3 should also be answered No.

Result

[111] For the reasons that we have given, each of the questions raised on the appeal is answered in the negative. That answer in respect of question 1(c) must be read in the context that the Environment Court's analysis of the relevant environment was not a "permitted baseline" analysis.

[112] The respondent is entitled to costs in this Court of $6000 plus disbursements, including the reasonable travel and accommodation expenses of both counsel to be fixed, if necessary, by the Registrar.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-000724
[2013] NZHC 2104

BETWEEN	SAVE KAPITI INCORPORATED Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent
	THE BOARD OF INQUIRY INTO THE MACKAYS TO PEKA PEKA EXPRESSWAY PROPOSAL Decision-maker

CIV-2013-485-000744

BETWEEN	ALLIANCE FOR A SUSTAINABLE KAPITI INCORPORATED Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent

Hearing: 10 July 2013

Appearances: RJB Fowler QC for Appellant Save Kapiti Incorporated
Dr M O'Sullivan for Appellant Alliance for a Sustainable Kapiti Incorporated
J Hassan and K Viskovic for Respondent
H C Andrews and J Duffin for Board of Inquiry into the Mackays to Peka Peka Expressway Proposal
D Gilbert for Board of Inquiry into the Peka Peka to North Otaki Expressway Proposal

Judgment: 19 August 2013

JUDGMENT OF D GENDALL J

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Introduction

[1] In April 2012, the New Zealand Transport Authority (NZTA) applied to the Environmental Protection Authority (EPA) for 29 resource consents and a notice of requirement to build north of Wellington the Mackays to Peka Peka Expressway project (the Expressway), a state highway. A Board of Inquiry (the Board) was appointed by the Minister for the Environment under s 149J of the Resource Management Act 1991 (the Act) and a hearing was held between November 2012 and January 2013. The Board issued their final report and decision on 12 April 2013, which confirmed the notice of requirement and granted the resource consents,

subject to certain conditions. Save Kapiti Incorporated (Save Kapiti) and Alliance for a Sustainable Kapiti Incorporated (Alliance) appeal against this decision.

[2] Section 149V of the Act provides that an appeal from the Board of Inquiry's decision may only be on a question of law.

Narrative

[3] The Kapiti Coast District Council (KCDC) had been developing plans for another road in this general area prior to this decision – the Western Link Road (WLR). In 1997 the KCDC issued a notice of requirement for a designation for the WLR along the "sandhills" route in the same area as the Expressway. This notice of requirement for a designation was for a four lane road, with two lanes in some parts. The notice of requirement was confirmed in 1998 by an independent hearing commission. Final confirmation of the designation didn't occur until July 2006 because of appeals. There were to be three stages of construction and seven sections. A number of regional consents were obtained for the construction of stage one. In 2008 the KCDC decided the WLR would be reduced in scope to just two lanes.

[4] In parallel with this development, the NZTA developed plans for the Expressway – a four lane road, passing through the middle of medium and high density housing and wetland areas, with a total of 1360 dwellings within 200 metres of the proposed route. The Expressway would pass through much of the same area as the WLR.

Procedural History

[5] The Resource Management Act sets out the procedure for applications of this kind.

[6] A requiring authority can give notice to a territorial authority of its requirement for a designation for a project or work.[1] A designation is a provision made in a district plan to give effect to a requirement made by a requiring authority.[2]

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1 Section 168(2) of the Act.
2 Section 166.

[7] As a requiring authority,[3] NZTA can give notice that it requires a designation – a provision in the district plan needed for a project. If a designation is included in a district plan, s 9(3) of the Act (which allows land to be used for a non-complying use if it is otherwise expressly allowed by a resource consent or under existing use rights) does not apply to a public work or project undertaken by a requiring authority under the designation.[4] No person can without the consent of the requiring authority, do anything in relation to the land subject to the designation that would prevent or hinder a public work, project or work to which the designation relates.[5] The provisions of a district plan shall apply in relation to any land that is subject to a designation only to the extent that the land is used for a purpose other than the designated purpose.[6] A designation can be removed on notice by a requiring authority if it is no longer required.[7] Designations lapse five years after the date they are included in a district plan unless they have already been given effect to or a territorial authority determines on application that substantial progress to give effect to them has been, and continues to be, made and fixes a longer period for their expiry.[8]

[8] As I have noted above, NZTA lodged their present application for one notice of requirement and 29 resource consents with the Environmental Protection Authority (EPA).[9] The EPA recommended to the Minister that a Board of Inquiry consider the matter.[10] The Minister made a direction to that effect because he thought the matter was of national significance.[11] The Minister, as required, gave detailed reasons for this direction:[12]

[9] Thus the matter was referred to the Board. It is necessary to set out what a Board must consider on such an application. Generally the Board must have regard

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3 NZTA is a requiring authority under the Act, approved as such under s 167(3) in 1994.
4 Section 176(1)(a).
5 Section 176(1)(b).
6 Section 176(2).
7 Section 182.
8 Sections 184 and 184A of the Act.
9 Section 145.
10 Section 146.
11 Sections 147, 142(3).
12 Section 147(5).

to the Minister's reasons for making a direction in relation to the matter; and consider any information provided to it by the EPA under s 149G of the Act.[13]

[10] If the application is for a resource consent, then s 149P provides that the Board must apply ss 104 – 112 of the Act as if it were a consent authority. Relevantly here, s 104 provides in part:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.
>
> (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.
>
> ...

[11] The Board, therefore, must consider the actual and potential effects on the environment, but may disregard the adverse effects of the activity on the environment if the plan permits an activity with that effect (known as the permitted baseline test). It also must consider the relevant provisions of a plan or proposed plan.

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[13] Section 149P(1).

[12] If the application is for a notice of requirement for a designation, then s 149P provides that s 171 applies. The relevant provisions provide:

> **171 Recommendation by territorial authority**
>
> (1A) When considering a requirement and any submissions received, a territorial authority must not have regard to trade competition or the effects of trade competition.
>
> (1) 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—
>
> (a) any relevant provisions of—
>
> (i) a national policy statement:
>
> (ii) a New Zealand coastal policy statement:
>
> (iii) a regional policy statement or proposed regional policy statement:
>
> (iv) a plan or proposed plan; and
>
> (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 a significant adverse effect on the environment; and
>
> (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and
>
> (d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

[13] Thus the Board must consider the effects of allowing the requirement on the environment, particularly considering provisions of a plan, and must also consider whether adequate consideration has been given to alternative methods if the requirements of s 171(1)(b) of the Act are met.

Decision of the Board of Inquiry

[14] The Board here issued an extensive report granting the resource consents and confirming the notice requirement.

[15] The Board began by outlining the proposal and the application before them. They outlined a brief history of the roading issues in the area, and the history of this particular project. They referred specifically to the reasons the Minister directed the application to the Board, and said that they have considered these reasons throughout the report.[14]

[16] They then dealt with a number of preliminary legal issues that arose during the hearing. The Board considered both whether the WLR should form part of the "environment" under ss 104 and 171 of the Act, and whether they should use their discretion to allow it to be part of the permitted baseline analysis (under s 104, and perhaps also s 171).

[17] The Board considered the environment first. They referred to the decision of the Court of Appeal in *Queenstown Lakes District Council v Hawthorn Estate Limited* (*Hawthorn*).[15] The Court of Appeal considered there that the "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out a permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears that those resource consents will be implemented. It found that the environment does not include the effects of resource consents that might be made in the future.

[18] The Board accepted that the WLR could form part of the existing environment as being a provision in the district plan for a permitted activity. However, they found the WLR was not a viable alternative to the expressway – there had been no request for funding, and it did not have all the regional consents

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14 At [50]

15 *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299; [2006] NZRMA 424 (CA).

required. Furthermore, there was no prospect of the WLR proceeding if the present application was to succeed. It would not be credible to conclude that the future environment might be modified by utilisation of the WLR designation, if the expressway proceeded. Thus the Board held that they could not consider the WLR to form part of the environment.

[19] The Board also pointed out that, although a designation is included in a district plan as if it were a rule, that does not mean a designation is a rule and so it could be argued that the WLR does not amount to a permitted activity. Thus it would need to be considered as an unimplemented resource consent under *Hawthorn*. The test would be whether the WLR designation and remaining resource consents would be likely to be implemented if the Expressway project proceeds. For the reason that the Board considered the WLR was not viable, they considered it would not meet the test. They said this decision was consistent with the decision of the Environment Court in *Villages of NZ (Mt Wellington) Ltd v Auckland CC.*[16] There, the appellant challenging a notice of requirement already had a resource consent for a development on land required by the local authority for public playing fields. The Court accepted that the *Hawthorn* principle applied, that is, that the effects of the Council's proposal were to be measured against the "future environment". However, under *Hawthorn* it was necessary to consider whether the consented development was likely to proceed. The consented development would and could not proceed if the designation was implemented. Therefore the Court could not measure the effects of the Council's proposal against the "future environment".

[20] The Board then considered whether the WLR should form part of a permitted baseline test. They pointed out that such a test would not be helpful as the WLR and the expressway overlap. Furthermore, the law was unclear whether the permitted baseline test could be extended to apply to designations or requirements for regional resource consents under s 171 when the permitted baseline is not expressly included in that section, unlike s 104. They accepted that, as no submissions had been received on the issue, they should assume it could.

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16 *Villages of NZ (Mt Wellington) Ltd v Auckland CC* EnvC A023/09.

[21] The Board then said it could be argued that the WLR designation provides a permitted baseline on the basis that it enables construction of a highway on the designated route as a permitted activity under the plan. However, while a realistic and reasonable development of itself, the WLR was too fanciful because it could not co-exist with the Expressway. Alternatively, they could consider it as an activity authorised by an unimplemented resource consent, but again ruled that option out because there was no prospect of it being implemented if the current application succeeded. The Expressway, if granted, would supersede the WLR. They then considered that even if the WLR could form part of the permitted baseline, they would use their discretion to exclude it, for the reasons noted above.

[22] However, in saying that, the Board did make reference to the WLR throughout the report. They accepted the NZTA's position that the WLR designation to an extent was relevant because:

(a) It showed a four line highway had previous been found acceptable;

(b) It has influenced land use since 1956 and residents had developed their expectations to accommodate it and its likely effects;

(c) Residents considered the WLR designation as the first step in a development; and

(d) The WLR designation had acted as a barrier, creating a degree of severance along the line.

[23] The Board then said overall, however, that the particular fact of the WLR designation was of no great weight in their considerations.

[24] They then addressed whether the NZTA had considered alternatives, in accordance with s 171. On this aspect, the Board examined the consultation process the NZTA underwent in deciding on the Expressway. They found the NZTA considered a number of options, including the WLR. The Board concluded that the

consideration of alternatives had been sufficiently broad and varied to meet the test for adequate consideration.

[25] The Board then considered the effects of the expressway project, including the effect on public health, noise, culture and heritage and air quality (to name a few). In assessing the effect on noise levels, the Board referred to the evidence of Ms Wilkening, who completed a study and concluded that the effect on noise of the Expressway was no worse than that of the WLR. They also compared the proposed Waikanae bridge in the Expressway with the Waikanae bridge in the WLR, but explicitly said this was for context only, in considering the effect on hydrology and storm water. In considering the effect on culture and heritage, the Board summarised evidence that the Expressway was preferred for the purposes of wahi tapu than the WLR. However, the Board did not consider this expressly in their conclusion on this effect. Likewise, they referred to evidence of Professor Manning who considered the WLR would have been worse for climate change than the Expressway.

[26] However, at other points in the report the Board was at pains to say the WLR was not part of the permitted base line.

[27] Ultimately, the Board granted the application. They concluded the decision of which alternative to choose was NZTA's not the Board's, who had no jurisdiction to say which alternative was correct. They just needed to be satisfied that there had been adequate consideration of alternatives. The Board noted they were required to apply ss 104 and 171 of the Act, but both sections were subject to Part 2, and in the event of conflict, they were overridden by Part 2. And on this, the Board found the application met the requirements of Part 2.

Submissions

Submissions for Alliance for a Sustainable Kapiti Incorporated

[28] In this appeal the Alliance for a Sustainable Kapiti Incorporated (the Alliance) submits the Board made two errors of law – the decision not to include the WLR as part of the baseline, and the failure to consider the Minister's reasons for directing the matter to the Board.

[29] It is suggested here that the reasons for saying the WLR was not part of the "baseline" were wrong. The Board declined to consider the WLR as part of the permitted baseline as it said it was not a viable alternative. However, the Alliance contends this is a misinterpretation of *Hawthorn* which merely allows a permitted baseline analysis which removes certain effects from consideration. This is not the same as providing an alternative.

[30] The Alliance argues that there are inconsistencies in the Board's reasoning here. When considering whether the WLR designation formed part of the environment, the Board said the WLR could only become relevant if analogous to an existing but unimplemented resource consent. However, when considering whether the WLR formed part of the permitted baseline test, they preferred to consider it as a hypothetical activity rather than an unimplemented resource consent. The Alliance contends that the WLR should have been considered analogous to an unimplemented resource consent.

[31] The Alliance also submits that the Board misapplied *Beadle v Minister of Corrections*[17] as the question is whether the hypothetical activity was realistic in and of itself, not whether it was fanciful in relation to any other project. Furthermore, the Alliance says the WLR was not fanciful – resource consents had been granted and the release of funds was approved.

[32] Next, the Alliance contends the Board was wrong to consider that the WLR was not a viable alternative. It was not dependent on the Expressway – it had already been approved and was a permitted activity. They argue that actually the WLR supersedes the Expressway project as it had already been approved. And the Board, it says, was wrong as to funding – funding, it is claimed, had been released. Furthermore, this was an irrelevant consideration, and does not in any event discount the WLR as a baseline. The defining criteria for an activity to be part of the permitted baseline is that the project had received a resource consent, because the purpose of the test is to remove from consideration effects that have already been consented to. The WLR did have resource consents.

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17 *Beadle v Minister of Corrections* EnvC A74/2002, 8 April 2002.

[33] The Alliance also argues that the Board's use of the WLR above was inconsistent with not using the WLR as a baseline. Furthermore, the WLR it used was the wrong one – a four lane road was not acceptable to the community. The resource consent for this would have lapsed after five years, so in 1961, and thereafter NZTA twice revisited the four lane WLR and rejected it because the community severance was seen as being too severe. Furthermore, the Alliance suggested the WLR has never been regarded as a barrier as the Board contended.

[34] The Board, according to the Alliance, also did not acknowledge the WLR as part of the existing environment, but incorporated other plan changes into the existing environment that only resulted from the WLR designation.

[35] Furthermore, the Board, it is said, then inconsistently used the WLR as a baseline later in their report. The Alliance accepts that the Board did not explicitly accept Ms Wilkening's evidence but they did draw heavily on it. They also used the WLR as a permitted baseline when considering specific sections of the Expressway and the Waikanae bridge.

[36] The Alliance argues this inconsistency must be resolved – the Board cannot refuse to use the WLR in the permitted baseline but then use it to discount serious adverse effects.

[37] Secondly, the Alliance submits the Board was required by the Act to have regard to the Minister's reasons for directing the matter to the Board, but they did not. They did not consider that the Expressway would represent a significant change in the use of land from its current state, a state that supports a number of different activities and land uses. The Expressway project, it is said, affects housing, food production, and equestrian activities. There will be a huge loss of amenity values, which, it is said, was only addressed by the Board in very broad terms.

[38] The Alliance asks that the decision be overturned and a new Board be appointed to reconsider the application.

Submissions for Save Kapiti Incorporated

[39] Save Kapiti submits the Board's decision placed pivotal emphasis and reliance on significant positive effects of the Expressway to the environment. However, it says the Board was wrong in its decision in excluding the WLR from the "environment". Including it as part of the environment would neutralise the positive effects of the Expressway.

[40] It argues the WLR is part of the "environment" in two ways:

(a) Because it is included in a district plan, it is a permitted activity. It does not need to be credible or viable, but it is anyway; or

(b) Designation is equivalent to a granted but unimplemented resource consent. So according to *Hawthorn*, likelihood of implementation is relevant. The WLR here was likely to be implemented.

[41] Section 175(1)(d) of the Act (which is now s 175(2)(a)) includes a designation as if it were a rule in a district plan. It is submitted the Board was wrong to draw a distinction between a deemed rule and an actual rule. A designation actually can proceed as of right without a resource consent under s 176, and is given exclusive priority and protection over other rules in a plan. Thus a designation can be considered as a permitted activity under *Hawthorn*. Furthermore, whether or not an activity is fanciful is not even a criterion. That aspect of whether an activity for which there is a designation is fanciful had already been considered when the designation was incorporated into the district plan.

[42] Even if it was, the WLR designation was not fanciful because of its exclusive priority and protection. The question of funding is irrelevant as the designation should be taken at face value as if it were a rule. The fact there were no regional consents was also irrelevant, as there was a finding by the Board that these would not be obtained, as the designation was only in stage one. The fact that the WLR could not co-exist with the Expressway is not the test. The Board relied on *Villages* (above) which is distinguishable as it concerned a resource consent, not a designation which is in a very different position. Furthermore, that case was wrong

because in *Hawthorn* the previous on-site unimplemented consent was incompatible with the application under consideration, but was taken into account. There is no principled reason why an inability to co-exist creates a lack of credibility, it just means that the WLR designation remains as a legitimate back up option. Section 177 of the Act expressly provides for overlapping designations. If the WLR designation was no longer credible, it could have been removed under s 182 of the Act.

[43] Even if designation was not equivalent to a permitted activity, it could be considered as an unimplemented resource consent. Save Kapiti submits the designation was likely to be implemented. It also highlights the same inconsistency the Alliance did of the use by the Board of unimplemented private plan changes around the WLR designation as part of the environment.

Submissions for NZTA

Environment

[44] The NZTA argue that the Board was correct to exclude the WLR from the "environment". In *Queenstown Central Limited v Queenstown Lakes District Council*[18] the High Court said a "real world" approach was required, without artificial assumptions, creating an artificial future environment. The appellant's submission that the Board was wrong in this "real world" assessment, excluding the WLR as non credible, is a matter of fact, not of law.

[45] The argument that the Board was required to discount the positive effects of the expressway project on the environment is contrary to what the RMA directs. Section 171 of the Act does allow for the consideration of alternatives, but it is said the WLR was not an alternative given the Project objectives. If the WLR designation were included, the true benefits to people would be artificially under-weighted simply because the designation remained in the district plan.

[46] Save Kapiti's submission that the Board gave undue weight to the Expressway's positive effects is a matter of fact and not of law. In any event NZTA

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[18] *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 1324.

maintains the Board did consider all the positive and negative effects of the Expressway.

[47] Furthermore, any alleged error was immaterial because the Board was more than satisfied that the requirements in Part 2 were met, and s 171 is subject to Part 2.

Permitted Baseline

[48] NZTA argues that s 171 does require the Board to have particular regard to provisions in a plan, which includes the designation pursuant to s 166. The Alliance does not take issue with this, but instead focuses on the permitted baseline test. NZTA submit that the Board did consider this anyway by holding that the WLR designation would no longer be required with the Expressway designation in place.

[49] There was no error of law in finding that the WLR was not part of the baseline. Under s 104(2), this is a matter of discretion for the decision maker. While there is no equivalent provision in s 171, NZTA accepts that a similar rationale applies. NZTA suggests the Board was entitled not to treat the WLR designation as part of the baseline as part of their discretion. This is not an error of law.

[50] In any event, according to NZTA, a finding the WLR was part of the baseline would have made no difference – the effect of the permitted baseline comparison is only to diminish the *adverse* effects of the project, not the positive effects. The Board did not do this exercise, and still approved the project.

Minister's reasons

[51] Finally, the Board is not directed to consider the Minister's reasons – they are to have regard to them. NZTA submitted the Board did consider the Minister's reasons, and they expressly said so. The Board found the project was essential to achieving the project's objectives of management of land use. The Board also considered amenity values generally, and specifically matters of noise, air quality, construction impacts, public health, water quality and social effects. They were not required to expressly record a disagreement with the Alliance's position.

[52] Furthermore, it is said this argument is about findings on the evidence, which again is outside the scope of the appeal.

[53] Finally, any error would be immaterial because the substantive content of the Minister's reasons were central to what the Board considered. The Board did consider the amenity values.

Submissions for the Board of Inquiry

[54] The Board submits generally that findings as to the relevance of the WLR were factual, based on the evidence before them, that the two roads could never co-exist. The WLR is only a backup-up option. And, finally, the Board noted that, like resource consents, designations are permissive, not mandatory, thus the existence of a designation does not mean that it will necessarily be pursued.

Analysis

[55] To begin it must be remembered that an appeal like the one before me can only be on a question of law.[19]

[56] The High Court in *Countdown Properties (Northlands) Limited v Dunedin City Council*[20] set out that an error of law will only arise if the lower court/tribunal:

(a) Applied a wrong legal test; or

(b) Came to a conclusion without evidence or one to which on evidence, it could not reasonably have come; or

(c) Took into account matters which it should not have taken into account; or

(d) Failed to take into account matters which it should have taken into account.

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19 Section 149V.

20 *Countdown Properties (Northlands) Limited v Dunedin City Council* (1994) 1B ELRNZ 150; [1994] NZRMA 145

[57] The principles to be applied are well known and dealt with by the Supreme Court in *Bryson v Three Foot Six Limited.*[21]

> An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly unsupportable.
>
> An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14 at 36 a state of affairs 'in which there is no evidence to support the determination' or 'one in which the evidence is inconsistent with and contradictory of the determination' or 'one in which the true and only reasonable conclusion contradicts the determination'. Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test...

[58] Any error of law must be material before an appellate court will grant relief.[22]

[59] In my view, it is important to note at the outset that any arguments on whether the WLR designation was credible and non-fanciful are questions of fact, not law.

[60] This appeal turns principally on three questions:

(a) Should the WLR designation have been considered as part of the "environment";

(b) Should the WLR designation have been included as part of the "permitted baseline";

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21 *Bryson v Three Foot Six Limited* [2005] NZSC 34, [2005] 3 NZLR 721 at [25] – [26].

22 *RFBPS v With A Habgood Ltd* (1987) 12 NZTPA 76 (HC); *Falkner v Gibson DC* [1995] 3 NZLR 622; [1995] NZRMA 462 (HC); *Countdown Properties (Northlands) Ltd v Dunedin CC* [1994] NZRMA 145, partially reported at (1996) 1B ELRNZ 150 (HC); *BP Oil NZ Ltd v Whitaker CC* [1996] NZRMA 67 (HC); *Urawa Land Ltd v Auckland Council* (2011) 16 ELRNZ 417 (HC).

(c) Did the Board fail to consider the Minister's reason of considering this a proposal of national significance of a change in land use resulting from the expressway?

Should the WLR designation have been considered as part of the "environment"?

[61] As noted above, s 104 requires the Board to consider any actual and potential effects on the environment of allowing the activity, and s 171 requires the Board to consider the effects on the environment of allowing the requirement, having particular regard to any relevant provisions of a plan.[23]

[62] Environment is defined as including:[24]

(a) ecosystems and their constituent parts, including people and communities; and

(b) all natural and physical resources; and

(c) amenity values; and

(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

[63] As stated above, the Court of Appeal decision in *Hawthorn* is the leading authority here. That case at [84] in defining the word "environment" seems to set up two limbs of the future state of the environment:

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23 As to the different analysis required, see Broker's Resource Management at [A171.02] which says: The obligation to assess effects in the consideration of designation requirements is subtly different from the obligation applying to resource consent applications (under s 104). Firstly, under s 171(1), what is required is consideration of the effects on the environment having particular regard to the matters in paragraphs (a)-(d) (whereas s 104 requires regard to actual and potential effects of allowing the activity alongside regard to the other matters in s 104(1)(a)-(c)). Secondly, under s 171(1), the obligation is to consider the effects on the environment "of allowing the requirement" whereas s 104(1)(a) refers to "allowing the activity". However, unlike a resource consent, a designation itself has a restrictive effect on land use and subdivision as well as authorising the work.

24 Section 2.

(a) as it might be modified by the utilisation of rights to carry out permitted activity under a district plan; and

(b) as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.

[64] In the present case the question arises as to what limb a pre-existing designation falls under. As noted above, Save Kapiti argues a designation falls under the first limb, as it is a superior right under a district plan. A permitted activity is one authorised by the district plan, that does not require a resource consent.[25] A designation is a special provision in a district plan to enable certain work or a particular activity to be undertaken on certain land, regardless of what the rules in the plan might otherwise say may be done on that land. A designation has the effect of not allowing anyone to undertake any activity that would prevent or hinder the designated work, without the prior written consent of the "requiring authority" which holds the designation. It is to be included in a district plan as if it were a rule.[26]

[65] If a designation is considered to be equivalent to a permitted activity, then the test is whether the environment "might be" modified by its use. In *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council*[27] Fogarty J said this notion of "might" applies only to permitted uses and has nothing to do with "likelihood". Likelihood only applies to whether existing resource consents, which are for activities not permitted, will be implemented.[28] Later the Judge said it should be understood that [84] of the *Hawthorn* decision leaves intact the qualification on taking into account permitted uses where the activity is only a very remote possibility, so long as it is not fanciful.[29]

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25 Section 87A(1).
26 Section 175.
27 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1324.
28 At [19].
29 At [56].

[66] If, however, however a designation is considered as an unimplemented resource consent, then the rationale in *Villages* referred to a [19] above could apply and an activity that could not co-exist with the activity under consideration would not form part of the future environment.

[67] However, recent case law has emphasised that [84] of *Hawthorn* is not to be read as a code.[30] In *Royal Forest and Bird Protection Society of New Zealand Inc v Buller*, Justice Fogarty highlighted the problem that the Courts are increasingly finding themselves asked to analogise a resource management problem to fit into the text of [84].[31] In *Queenstown Central Ltd* Justice Fogarty said in reference to *Hawthorn*.[32]

> That decision recognised the importance of context...[84] was a summary only, and itself should not be read out of context.
>
> Section 104D, and indeed the RMA as a whole, calls for a "real world" approach to analysis, without artificial assumptions, creating an artificial future environment...

[68] Those two cases involved an objective in the operative plan (which was considered part of the future environment) and a coal mining licence (which was not).

[69] Based on this "real world" approach, the question becomes why the Court of Appeal in *Hawthorn* said a permitted activity could be part of the future environment, but an unimplemented resource consent could not unless it was likely to be implemented. It depends on whether the distinction the Court of Appeal sought to draw was between activities that were likely to happen and those that were not, or whether it was between activities the effects of which had already been consented to and those that had not.

[70] I think logically it must be the former. As was said in *Queenstown Central Ltd*, it is not appropriate to consider a future environment that is artificial.

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30 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815; [2013] NZRMA 239 (HC); *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1324.

31 At [24].

32 *Queenstown Central Limited* at [84].

Incorporating a designation into the future environment, when it cannot co-exist with the Expressway, I am satisfied would be artificial. The Board was entitled to find the WLR was unlikely to be put into effect, so was entitled to exclude it from its environment.

[71] It is also important to remember that the Board is required to consider whether the requiring authority had given adequate consideration to the alternatives. The enquiry is not into whether the best alternative has been chosen.[33] I am satisfied here that the Board did make this enquiry, and that it has not been challenged in any real way on appeal.

Should the WLR designation have been included as part of the permitted baseline?

[72] When forming an opinion for the purposes of s 104(1)(a) of the Act a consent authority such as the Board here under s 104(2) may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

[73] As noted above, this is often referred to as the "permitted baseline" assessment. Its original is in a decision of the Court of Appeal which stated the appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right by the plan.[34]

[74] The test set out in *Bayley* was further explained by the Court of Appeal in *Smith Chilcott Ltd v Auckland City Council*[35] In particular, the Court explained the approach which should be taken to determining what could be done "as of right" (to use the words of *Bayley*) on a particular site. The Court of Appeal in *Smith Chilcott* said:[36]

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33 *Waimairi DC v Christchurch CC C030/82 (PT),* (under the similar s 118(1)(d) TCPA) applied in *Estate of P A Moran v Transit NZ EnvC* W055/99; *Quay Property Management Ltd v Transit NZ EnvC* W028/00.

34 *Bayley v Manukau City Council* [1999] 1 NZLR 568; [1998] NZRMA 513.

35 *Smith Chilcott Ltd v Auckland City Council* [2001] NZLR 473 (CA).

36 At [26].

> We begin with what is allowed under the relevant plan. In accordance with the purpose of the legislation anything that is permitted but fanciful does not provide a realistic indication of what is permitted and a proper point of comparison. There must be a practical fact specific assessment. The test is perhaps best captured in a single expression as the discussion at the hearing indicated. Of the various phrases used in *Barrett* and elsewhere, "not fanciful" appears to us to set the standard appropriately. It follows that any permissible use qualifies under the permitted baseline test unless in all the circumstances it is a fanciful use.

[75] The components of the permitted baseline test as set out in *Bayley* and *Smith Chilcott* were drawn together by the Court of Appeal in *Arrigato Investments Ltd v Auckland Regional Council*[37] as follows:

> Thus the permitted baseline in terms of Bayley, as supplemented by Smith Chilcott Ltd, is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[76] In that case the Court considered whether to include unimplemented resource consent activities in the permitted baseline comparison. On this, the Court went on to say:[38]

> ...Mr Brabant argued that following the granting of a resource consent, the holder has an equal right to do what is allowed as would have been the case had the plan allowed it. That is so but, as Mr Burns and Mr Loutit submitted, there is a material difference between what is allowed under a plan and what is allowed under a resource consent. The plan represents a consensus, usually after very extensive community and regional involvement, as to what activities should be permitted as of right in the particular location. There is therefore good reason for concluding, as was done in *Bayley*, that any such permitted activities should be treated as part of the fabric of the particular environment.
>
> Resource consents are capable of being granted on a non-notified as well as a notified basis. Furthermore, they relate to activities of differing kinds. There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baseline, but equally there may be circumstances in which it would not be appropriate to do so. For example, implementation of an earlier resource consent may on the one hand be an inevitable or necessary precursor of the activity envisaged by the new proposal. On the other hand

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37 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323.

38 At [34] and [35].

> the unimplemented consent may be inconsistent with the new proposal and thus be superseded by it. We do not think it would be in accordance with the policy and purposes of the Act for this topic to be the subject of a prescriptive rule one way or the other. Flexibility should be preserved so as to allow the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the question of the effects of the instant proposal on the environment.

[77] If the WLR designation in the present case was considered as an unimplemented resource consent, the rationale in *Arrigato* applies. The Board found the WLR designation would be superseded by the Expressway designation, and so to discount the adverse effects of the Expressway would be incorrect.

[78] If the WLR designation was considered a permitted activity under the district plan, then to be included in the permitted activity it must be non fanciful. Addressing this aspect, in my judgment, the Board was entitled to make the factual finding that the WLR designation was fanciful.

[79] However, even if the WLR designation could have been included as part of the permitted baseline, then there would still be no error of law. The Board said they would exercise their discretion not to consider the WLR designation because of the above reasons, and I am satisfied here they were entitled to do this.

[80] Furthermore, I agree with the submission advanced by NZTA that it would have not made the difference the appellant contends. Positive effects of allowing the activity are not relevant to the assessment of the permitted baseline.[39]

[81] The Board was at pains to point out that the WLR designation was not part of the baseline throughout their report. Although they referred to evidence that used the WLR as a baseline, they came to no conclusion on that aspect, and it can only be assumed that in light of such comments, the Board did not in fact use the WLR as a baseline.

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[39] *Kalkman v Thames-Coromandel DC* EnvC A152/02, applied in *Rodney DC v Eyras Eco-Park Ltd* [2007] NZRMA 1 (HC). This is reinforced by s 104(2) which provides that a consent authority "may disregard an adverse effect on the environment if the plan permits an activity with that effect". (Emphasis added)

Did the Board fail to consider the Minister's reason of considering this a proposal of national significance of a change in land use resulting from the expressway?

[82] I am satisfied that this ground of appeal has no merit. Paragraphs [47] to [50] of the Board's decision set out the Ministers reasons for making the direction here in terms of s 139P(1) of the Act. And in paragraph [50], the Board records that in:

> The various sections of this report (the Board has) considered the Minister's reasons for directing this matter to us.

[83] I am satisfied here that the Board did turn their mind to the Minister's reasons – it is clear from the report. Their assessment of those reasons is not a matter for an appeal on a question of law.

Conclusion

[84] For the reasons I have outlined above, the appeal is dismissed on all grounds.

Costs

[85] No submissions were made to me at the hearing of this matter on the issue of costs. Costs therefore are reserved.

[86] If costs are in issue here and counsel are unable to agree between themselves on costs, they may file memoranda on costs (sequentially) and, in the absence of any party indicating they wish to be heard on the issue, I will decide the question of costs based on all the material before the Court and the memoranda filed.

.....
D Gendall J

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IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV 2012-425-000576
CIV 2012-425-000566
CIV 2013-425-000242
[2013] NZHC 2347

BETWEEN	QUEENSTOWN AIRPORT CORPORATION LIMITED Appellant (in respect of CIV 2012-425-000566)
	REMARKABLES PARK LIMITED Appellant (in respect of CIV 2012-425-000566 and CIV 2013-425-000242)
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent
	AIR NEW ZEALAND LIMITED Interested Party

Hearing:	19-22 August 2013 (At Queenstown)
Counsel:	R J Somerville QC and R A Davidson for Remarkables Park D A Kirkpatrick and R M Wolt for Queenstown Airport Corporation JDK Gardner-Hopkins and E L Matheson for Air New Zealand Limited
Judgment:	12 September 2103

JUDGMENT OF WHATA J

INDEX

Introduction

[1] Queenstown Airport Corporation ("QAC") wants to:

> ... provide for the expansion of Queenstown airport to meet projected growth while achieving the maximum operational efficiency as far as possible.

[2] It has issued a notice of requirement ("NOR") seeking in effect an additional 19 or so hectares of land in order to achieve this objective. Remarkables Park Limited (RPL) owns property that is subject to the NOR. With this land QAC could enable, among other works, a precision instrument approach runway and a parallel taxiway. It also would be able to provide additional space for other aviation activity, including for relocation of smaller and private aviation operations and helicopters.

[3] The NOR was considered by the Environment Court.[1] The Court rejected that part of the NOR seeking to provide for a precision instrument approach runway and a parallel taxiway. As a result, the area of land subject to the NOR was reduced to 8.07 ha.

[4] Both QAC and RPL contend that the Environment Court got it wrong. QAC identifies five errors of law while RPL identifies 12 errors of law. RPL is supported in large part by Air New Zealand Limited ("ANZL").

[5] QAC says, in short, that the Environment Court exceeded its jurisdiction by revisiting the scope of the existing designation and erred in law also by imposing a limitation on the NOR based on an interpretation of civil aviation standards that might prove to be erroneous.

[6] The RPL appeal raises the following key issues:[2]

(a) Whether the Environment Court was empowered to cancel part only of the NOR;

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1 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206.

2 There are other discrete issues dealing with s 16, cost benefit analysis, QAC's inconsistent approach and a substation.

(b) Whether the Environment Court erred by not adopting a threshold test of "essential" for the proposed works and designation;

(c) Whether the Environment Court wrongly failed to consider the unfairness of the NOR to RPL; and

(d) Whether the Environment Court wrongly treated an alternative site for the works located on existing QAC land as suppositious.

Structure of the decision

[7] I propose to address the appeal in four parts, namely:

(a) Part A – The background, jurisdictional, and statutory frame;

(b) Part B – The appeal by QAC;

(c) Part C – The appeal by RPL;

(d) Part D – Outcome.

Part A

Background

[8] The background to these proceedings is usefully summarised by the Environment Court which I largely adopt.

The parties

[9] QAC manages one of the busiest airports in New Zealand. There are on average 40,000 aircraft movements and over one million scheduled and non-scheduled passenger movements through the airport every year. The airport is owned by Queenstown Lakes District Council and managed by QAC. ANZL is a major user of the airport and is the largest scheduled service provider to and from the airport. RPL owns all of the undeveloped land within an area subject to the

Remarkables Park zone. A significant parcel of RPL land is affected by the NOR issued by QAC and then confirmed by the Environment Court.

The airport and existing designations

[10] The airport, the area subject to existing designations and the proposed designation, together with the surrounding land uses is helpfully depicted on a plan produced by RPL (by consent) and attached to this judgment as Annexure A.

Proposed designation

[11] The NOR was applied for on 21 December 2010 with the objective:

> To provide for the expansion of Queenstown Airport to meet projected growth while achieving the maximum operational efficiency as far as possible.

[12] Its key elements are:

- a helicopter facility;
- a general aviation (fixed wing) facility for up to Code B aircraft;
- a private and corporate jet facility for up to Code C aircraft;
- a fixed based operator (to service jets and possibly general aviation);
- a Code D parallel taxiway adjacent to main runway;
- a Code B parallel taxiway adjacent to cross-wind runway;
- a precision approach runway with a 300 metre width runway strip;
- ancillary activities, including landscaping, car parking, and an internal road network which includes two access roads to connect with Hawthorne Drive at the western end of the designation area and the Eastern Access road (EAR) at the eastern end.

[13] Significantly, for the purpose of these proceedings, the area included in the requirement for the designation includes Part Lot 6 DP 304345 and a portion of an unformed road adjacent to the south western corner of Lot 6 DP 304345, being land owned by RPL. The airport's southern boundary and the extent of the existing aerodrome designation adjacent to Lot 6 is located 201 metres south of the main runway centre line. The requirement is for a strip of Lot 6 approximately 160 metres

in depth, lying parallel to the entire one kilometre length of the common boundary of the QAC and RPL land.[3]

The interim decision

[14] Relevant to this proceeding the Environment Court made the following key orders in its interim decision:

> A That part of the NOR required for instrument precision approach runway and Code D parallel taxiway is cancelled. The court reserves its decision on the balance of the NOR.
>
> B By 5 October 2012 QAC is to file and serve:
>
> (1) an amended Figure 1 to the NOR reducing the extent of the requirement to exclude provision for a (sic) instrument precision runway and Code D parallel taxiway and any land no longer required for carparking, circulation and landscaping.
>
> ...

[15] The judgment is then framed by reference to key legal and evaluative issues. I detail here the findings that are relevant to this appeal. I note for completeness that the final decision is not subject to appeal and it is not necessary for me to address it here.

"Requirement"

[16] The Environment Court rejected RPL's submission that the term "requirement" in s 168 Resource Management Act 1991 should be construed in light of s 40 of the Public Works Act 1981. The Court found that the matter and subject of these provisions are not, as submitted, *in pari materia*. The Court observed:

> [46] ... In this case neither the relevant term nor subject matter addressed in section 168 RMA and section 40 PWA are the same and we do not accept RPL's submission that "a requirement" has the same meaning as "required" for the reasons we gave in [45] above.

[17] At [45] the Environment Court observed that the term "requirement" is a noun that is a term given to a proposal for a designation.

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[3] *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [37].

Scope of evaluation under s 171(1)(b)

[18] The Court observed that the central issue under s 171(1)(b), dealing with the assessment of alternatives, is whether QAC gave adequate consideration to alternative sites, routes or methods. The Court then adopted the principles stated in the final report and decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project as follows:[4]

> a) the focus is on the process, not the outcome: whether the requiring authority has made sufficient investigations of alternatives to satisfy itself of the alternative proposed, rather than acting arbitrarily, or giving only cursory consideration to alternatives. Adequate consideration does not mean exhaustive or meticulous consideration.
>
> b) the question is not whether the best route, site or method has been chosen, nor whether there are more appropriate routes, sites or methods.
>
> c) that there may be routes, sites or methods which may be considered by some (including submitters) to be more suitable is irrelevant.
>
> d) the Act does not entrust to the decision-maker the policy function of deciding the most suitable site; the executive responsibility for selecting the site remains with the requiring authority.
>
> e) the Act does not require every alternative, however speculative, to have been fully considered; the requiring authority is not required to eliminate speculative alternatives or suppositious options.

Scope of evaluation under s 171(1)(c)

[19] The Court also adopted the summary provided by the Board of Inquiry dealing with the Upper North Island Grid Upgrade Project for the purposes of its assessment under s 171(1)(c) dealing with whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority. Of particular relevance to this appeal, the Court adopted the following passage:[5]

> In paragraph (c), the meaning of the word necessary falls between expedient or desirable on the one hand, and essential on the other, and the epithet reasonably qualifies it to allow some tolerance.

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4 *Final Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project* Ministry for the Environment, Board of Inquiry, 4 September 2009 at [117] and [186].

5 At [51].

[20] The Court added that it may consider the extent to which the work is reasonably necessary for achieving the requiring authority's objectives and may limit the extent of the designation accordingly.[6]

Section 171(1)(d) and the Public Works Act

[21] The Court agreed with submissions by QAC and QLDC that the compulsory acquisition process not having commenced s 24 PWA is not directly relevant to its determination. The Court noted:

> In particular, the three overlapping criteria in section 24(7) of fairness, soundness and the [reasonable] necessity for achieving the objective of the local authority (here QAC) are not matters we need to decide.

[22] The Court then goes on to observe:

> Even if we are wrong, and the issue of fairness (in particular) is relevant under section 171(1)(d), there is no evidence upon which we could find that QAC agreed, as submitted by RPL counsel, not to designate the land. Apart from the fact that QAC and RPL entered into contractual arrangements we have no evidence from RPL as to its reliance on the contracts or any representation made by QAC when subsequently planning to develop its land or that it held a legitimate expectation its "buffer" ie Activity Area 8, would not be reduced. (The contracts were handed up to the court as a bundle attached to counsel for RPL's opening submissions, which we were told "not to read".)

Best practicable option – s 16 of the Resource Management Act

[23] The Court held that s 16 is not to be applied as if it were an additional criterion to subs (1)(a)-(d) of s 171. The Court said in some cases adopting the best practicable option may be a useful check for the decision maker, particularly when assessing the adequacy of the alternatives under consideration, but not in every case.

Statutory plans

[24] The Court then reviewed the various statutory planning documents applicable to the region, including the Regional Policy Statement (RPS) and the Queenstown Lakes District Plan, including the structure plan dealing with Activity Area 8, where RPL's land (Lot 6) is located. Reference is made to the fact that this activity area is a

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6 Citing *Bungalo Holdings Limited v North Shore City Council* EnvC Auckland AO52/01, 7 June 2001.

"buffer" area and the Court observes that while "buffer" is not explained in the District Plan, there was general agreement that these policies mutually benefited the RPL and QAC.

Section 171 evaluation

[25] The Court observes that QAC has commissioned no less than eight reports since 2003 dealing with its existing land and site facilities at the airport. It observes:

> [76] The reports produced in 2005, 2006, 2007 and 2008 consider sites for a new general aviation/helicopter precinct located within the existing aerodrome designation north of the main runway. In four of the eight reports produced, consideration was given to relocating the general aviation/helicopter precinct south of the main runway. However, in each case the site of the proposed southern precinct is different from that supported by QAC in its NOR, albeit part of Lot 6 is included.

[26] The Court then deals with various master planning documents between 2005 and 2010. It notes that the 2005 Master Plan considered alternative locations within Lot 6 but they were dismissed because:[7]

> (a) these options required protracted negotiations and change of designations without guarantee of outcome;
>
> (b) there were no significant operational benefits; and finally
>
> (c) the options were highly distracting to QAC management.

[27] The Court then refers to an April 2007 South East Zone Planning Report observing that it is the only report to consider possible use of the designated land south of the main runway. The assumed planning parameters the Court said include a Code C aircraft design and a non-precision approach to the main runway. The Court observes that the report concluded:

> the northern side was a better location for future helicopter facilities

And the report also recommended:

> ... that general aviation flightseeing operations be grouped north of the main runway.

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7 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [79].

[28] The Court then refers to the 2010 Master Plan which listed five developments that it said has a significant bearing on the NOR provision for a general or aviation/helicopter precinct on part of Lot 6. The Court noted that these are:[8]

(a) the protection of airfield runway/taxiway/object separation distances for a precision approach runway;

(b) planning for a parallel taxiway;

(c) consideration of protection for aircraft with wider wingspans;

(d) accelerated traffic growth; and

(e) the decision to consider Lot 6 as an option for the general aviation/helicopter precinct.

[29] The Court considered that (a) through (c) above were critical in determining the spatial requirements of the designation. The Court observes that the 2010 Master Report evaluated two alternative locations for a general aviation/helicopter precinct:

(a) To the north east comprising 22 ha of land owned by QAC; and

(b) 19.1 ha to the south east located on part of Lot 6. The Master Plan concluded that the north east precinct is distinctly inferior.

Adequate consideration of alternative sites?

[30] The Court describes the five alternative sites as follows:[9]

(a) locating the general aviation/helicopter precinct on land north of the main runway including on undesignated land owned by QAC and/or QLDC;

(b) locating the general aviation/helicopter precinct on land north of the main runway within the aerodrome designation;

(c) whether RPL land should have a building restriction strip placed on it for a distance of 15.5m from the common boundary to satisfy taxiway separation distance requirements for a new southern taxiway or whether CAA dispensation could be obtained for this;

(d) the relocation of some or all of the general aviation and helicopter facilities off the Airport;

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8 At [82].
9 At [87].

(e) consideration of individual components of the work being accommodated within the existing aerodrome designation.

[31] The Court then found:

> We consider (a), (c) and (e) to be entirely suppositious for reasons that we set out next. However this is not true for (b) and (d) which we consider in more detail.

[32] Most relevant to this appeal, the Court treated option (a) as suppositious for the following reasons:

> [89] The Conceptual plans prepared by RPL for a general aviation/helicopter precinct north of the main runway included undesignated land owned by QAC within the area of PC19. Under these plans a general aviation/helicopter precinct would displace up to 4.52 hectares of industrial land within PC19. In proposing this option, RPL witnesses did not address the scarcity of industrial land within Queenstown (an important issue that PC19 *inter alia* seeks to address). There was some suggestion by the RPL planner, Mr M Foster, that aerodrome activities are industrial activities for the relevant activity areas within PC19.
>
> [90] We doubt Mr Foster's interpretation is correct and in the absence of any evidence in this proceeding or PC19 addressing the applications of an aviation precinct within PC19, particularly in relation to the urban form and function, we do not consider that PC19 land should be available as part of an alternative location. Activities relating to an aviation precinct appear to be outside those contemplated by the District Council when promulgating PC19.

[33] Before addressing the other mooted alternatives the Court makes the following initial findings of fact:

(a) there is insufficient land within the aerodrome designation to develop an instrument precision approach runway and southern parallel taxiway for Code D aircraft and to develop a general aviation/helicopter precinct; and

(b) QAC has no firm development plans for designated land north of the main runway.

[34] Dealing then relevantly with the alternative precinct on land north of the main runway within the area of the aerodrome designation the Court observed:[10]

> ... Several issues present themselves against a northern precinct, including the transportation of dust into helicopter hangars carried by the prevailing westerly winds and the stronger lower frequency southern winds, increased

[10] At [103].

> exposure to the winds from the south and west during helicopter take off and landings, increased runway occupancy by helicopters to minimise or reduce exposure to prevailing winds; the geographical constraints north of the cross wind runway and the desirability for flight paths over TALOs to be unobstructed by stacked (parked) helicopters. All these are important factors which lead to the adoption by QAC of a southern precinct.

[35] After considering the remaining alternatives, the Court then makes an overall conclusion, stating a summary of reasons as to why it considered that other alternatives had been given adequate consideration. The Court observed:

> [112] We conclude that there is an array of factors, including safety, which militate against a northern location for a helicopter facility. Of these cost (to the helicopter operator and other users of the Airport) is an important consideration, but it is not determinative. Section 171(1)(b) is satisfied as we find that adequate consideration was given to alternative location of the helicopter facility.
>
> [113] Likewise we are also satisfied that adequate consideration was given by QAC to alternative locations for corporate jets and that it is operationally efficient to locate these adjacent to the proposed Code C taxiway south of the main runway.
>
> [114] Apart from the April 2007 study, none of the studies looked at the option of splitting the various aeronautical businesses north or south of the main runway within the existing aerodrome designation. But in the absence of any contrary evidence we conclude, like corporate jets, it is operationally efficient to locate fixed wing operators adjacent to a proposed Code C taxiway.
>
> [115] We are also satisfied that under section 171(1)(c) that a general aviation/helicopter precinct south of the main runway is reasonably necessary for achieving the NOR's objective.

"Reasonably necessary"?

[36] The Court identified two key decisions made by QAC in terms of the area plan required for the designation, namely:

(a) The type of runway (whether an instrument non-precision or instrument precision runway); and

(b) The aircraft design parameters (whether a Code D aircraft would operate at the Airport).

[37] As to the first issue, the Court accepted Mr Morgan's evidence that:

> ... because of the terrain constraints inhibiting ILS approaches the final stage of an approach needs to be conducted by assuming a visual approach at 400 ft above ground level, which also means no more than a 150m runway strip width is needed.

[38] The Court also appeared to accept the evidence of ANZL and RPL and that there is no suggestion of Code C aircraft being phased out and indeed the converse appears to be the case.

[39] The Court then observed whether the works or designation, like these findings, is reasonably necessary for achieving the objective of QAC. The Court observed:

> [139] On the issue of whether the works or designation is reasonably necessary for achieving the objective of QAC the evidence is clear: within the planning horizon under negotiation there is no nexus between the NOR objective and enablement of Code D aircraft operating at Queenstown Airport. The predicted growth is able to be achieved using Code C aircraft.
>
> [140] For the same reason we find that there is no nexus between the NOR's objective and the provisioning for an instrument precision approach runway.

[40] Significantly, for the purposes of identifying the scope of the designation the Court observes:

> The consequences of the findings are this: the provision of an instrument non-precision approach runway and Code C parallel taxiway would reduce the lateral extent of the land required by 97.5m along the approximately 1,000m length of the common boundary with RPZ, being a total land area of about 9.75 hectares. Put another way, the land required for the designation would be reduced from around 160m into the RPZ to around 60m. We are not, however, required to approve the Code C parallel taxiway. Land within the existing designation is available for this purpose and it is a matter for QAC to decide whether to construct the same.

[41] And further:

> [142] Subject to what we say at [164] in all other respects we conclude that the work and designation is reasonably necessary for achieving QAC's objective. We prefer Mr Munro's assessment of the comparison of area requirements for the northern and southern precincts as it comprehensively addresses the proposed building and infrastructure. We found limited assistance in the area requirements produced by RPL's witnesses as these do not include all components of the aviation precinct or use different measurements to assess the components. ...

Effects on the environment

[42] The Court identified three categories of effects, namely noise, landscape and amenity, and traffic and transportation.

[43] As to noise, the Court was satisfied that with the resolution of PC35, the extension of the airport will not preclude opportunities for future development within the Remarkables Park Zone. The Court therefore concluded that this aspect of the NOR to locate the helicopter precinct on the southern side of the airport was not in tension with the planning instruments.[11]

[44] Other issues were said to be manageable by reference to operational plans or via an outline plan of works.

[45] Traffic management and access are not a feature of this appeal and I do not address them further. Nor do I address the Court's summaries in relation to landscape effects as they are not a matter subject to appeal.

Minister's reasons for direct referral

[46] The Court agreed with the Minister's statement that:

> Queenstown is a world renowned tourist destination and expansion of the Airport is likely to affect Queenstown, which is considered to be a place or area of national significance.

[47] The Court also observes that the NOR should be considered in the wider context of other far reaching proceedings before the Environment Court, including QAC's privately initiated PC35 and a second NOR also to amend Designation 2 and PC19.[12]

Part 2 of the Act

[48] The Court's decision focused on s 7(b), (c) and (f).

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11 Refer to [157].
12 Refer [207].

[49] Dealing first with s 7(b) (efficient use of resources), the Court observed that in this case the economists agreed that it was not possible to monetarise all the benefits or costs associated with the NOR. The Court observed that decisions on costs and economic viability or profitability of a project are not matters for the Court.[13] The Court then observed that a cost benefit analysis may be relevant and informative of matters in s 171(b) and s 7(b) but that does not elevate that matter to a criterion to be fulfilled. The Court then assesses the evidence produced by other parties, including that of Dr T Hazeldine, Professor of Economics at the University of Auckland, Mr Ballingall, an economist employed by the New Zealand Institute of Economic Research, and Mr Copeland.

[50] The Court observed that Professor Hazeldine's evidence was focused on whether the designation was reasonably necessary to achieve its objective, and having taken a different view found his concluding remarks of limited assistance.

[51] It then observes that the key difference between Mr Ballingall and Mr Copeland lies in the relevance of a cost benefit analysis for options which have been considered and discounted by requiring authorities. It says that Mr Copeland's approach is like an economic assessment considering the use of the aerodrome with or without Lot 6.

[52] The Court agrees with Mr Copeland that QAC is not subject to any requirement of NZ Treasury or any other government agency when presenting its NOR. It observes that a cost benefit analysis of the alternatives may be relevant and informative of the matters in s 171(1)(b), and in particular whether adequate consideration was given to alternatives in circumstances where a requiring authority either does not have an interest in the land or the work will have a significant adverse effect on the environment.[14]

[53] But as the Court did not have any cost benefit analysis the Court reached various conclusions qualitatively on operational efficiency and externality costs. The relevant conclusions were as follows:

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13 Citing *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC).

14 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [220].

Operational efficiency

(a) an instrument precision runway and a Code D taxiway is an *inefficient* use of part of the Lot 6 land when it is unlikely these uses will establish;

(b) a general aviation/helicopter precinct including air and landside buildings, infrastructure and landscaping is an *efficient* use of part of the Lot 6 land;

(c) it would be an *efficient* use of land to co-locate the Code C corporate jets south of the main runway in proximity to the Code C taxiway on the basis that QAC elect to build a Code C taxiway in this location;

(d) a hybrid alternative would be *inefficient* in that it would compromise the benefits which would accrue from the collocation of all operations on one site, including for example, shared support services, shared parking, shared accessways within the precinct, proximity for day to day interactions among operators and for customers, many of whom will be unfamiliar with the Airport, knowing that all flightseeing and helicopter operations are located in one precinct.

[54] As to externalities, the view is expressed that the western access imposes an unacceptably high cost on the public. It also said that:

> ... inadequate level of landscape mitigation proposed by QAC would create externality costs to the public using the airport facility and RPL in the development of its land.

[55] It concluded however that the effects are able to be adequately mitigated.

[56] As to s 7(c) and (f), the Court observed that even with conditions, the amenity values and quality of the environment within RPZ will not be fully maintained and that is an outcome to be taken into consideration when making an ultimate determination.

[57] The Court then turned to s 5, "the purpose of sustainable management" and adopted the longstanding approach recommended by the Court in *North Shore City Council v Auckland Regional Council (Okura)*,[15] namely that it is necessary to compare the conflicting considerations, their scale and degree and relative significance or proportion in arriving at the final outcome.

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[15] *North Shore City Council v Auckland Regional Council (Okura)* (1996) 2 ELRNZ 305, [1997] NZRMA 59 (EnvC).

[58] The key conclusion is then drawn:

> [231] For the reasons we have given, an insufficient nexus has been established between fulfilling the QAC's objective and making provision for an instrument precision approach runway and Code D parallel taxiway to support the use of RPL's land for these purposes. The balance of the work will be achieved at the cost to RPL of not being able to use the affected resources it owns for purposes authorized by the district plan. This is recognized and if required there is legislation to deal with any related considerations which may arise (such as compensation).

[59] The Court then concludes:

> [236] ... Overall we find the significant benefits to QAC and the wider community of developing and using the affected resources in the manner proposed, subject to the modifications and the conditions we have identified to avoid, remedy or mitigate adverse effects on the environment, to be consistent with the sustainable management purpose of the Act.

Jurisdiction on appeal

[60] Section 299 of the RMA confers a right of appeal on questions of law only. As stated in *Countdown Properties (Northland) v Dunedin City Council*:[16]

> ...this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:
>
> - applied a wrong legal test; or
> - came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
> - took into account matters which it should not have taken into account; or
> - failed to take into account matters which it should have taken into account.
>
> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349, 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82.

[61] Plainly also, I am not concerned with substantive merits of any conclusion. Rather, I must be satisfied that the conclusion has been arrived at by rational process.[17]

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16 *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

Statutory frame

[62] In order to properly frame the appeals, it is necessary to explain the legislative scheme as it relates to NORs.

[63] This proceeding came before the Environment Court by virtue of the exercise of powers by the Minister under s 147 of the Resource Management Act, after receiving a recommendation from the Environmental Protection Authority (EPA). In reaching a decision to refer, the Minister is required to apply s 142(3) dealing with whether the matter is, or is part of a proposal of national significance. This provides a cue to the importance of the underlying proposal.

[64] Section 149U sets out the relevant gateway tests for approval or otherwise of a notice of requirement. It states:

> **149U Consideration of matter by Environment Court**
>
> (1) The Environment Court, when considering a matter referred to it under section 149T, must-
>
> (a) have regard to the Minister's reasons for making a direction in relation to the matter; and
>
> (b) consider any information provided to it by the EPA under section 149G; and
>
> (c) act in accordance with subsection (2), (3), (4), (5), (6), or (7), as the case may be.
>
> ...
>
> (4) If considering a matter that is a notice of requirement for a designation or to alter a designation, the Court—
>
> (a) must have regard to the matters set out in section 171(1) and comply with section 171(1A) as if it were a territorial authority; and
>
> (b) may-
>
> (i) cancel the requirement; or
>
> (ii) confirm the requirement; or
>
> (iii) confirm the requirement, but modify it or impose conditions on it as the Court thinks fit; and

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[17] Refer also *Stark v Auckland Regional Council* [1994] NZRMA 337 (HC) at 340.

(c) may waive the requirement for an outline plan to be submitted under section 176A.

...

[65] The reference at subs (4) to s 171(1) incorporates the criteria ordinarily applicable to designation processes.

[66] The key criteria in s 171 are as follows:

> **171 Recommendation by territorial authority**
>
> (1A) When considering a requirement and any submissions received, a territorial authority must not have regard to trade competition or the effects of trade competition.
>
> (1) 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-
>
> (a) any relevant provisions of-
>
> (i) a national policy statement:
>
> (ii) a New Zealand coastal policy statement:
>
> (iii) a regional policy statement or proposed regional policy statement:
>
> (iv) a plan or proposed plan; and
>
> (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 a significant adverse effect on the environment; and
>
> (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and
>
> (d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

...

[67] The power to cancel, confirm, or confirm but modify under s 149U(4)(b) mirrors the equivalent power enjoyed by the Environment Court under s 174(4) in respect of appeals from decisions of requiring authorities.

[68] It will be seen that the focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. The import of this is that the purpose, policies and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement.[18] Indeed, in the event of conflict with the directions in s 171, Part 2 matters override them.[19] Paramount in this regard is s 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.

[69] Part 2 also requires that in achieving the sustainable management purpose, all persons exercising functions shall recognise and provide for identified matters of national importance;[20] shall have regard to other matters specified at s 7 and shall take into account the principles of the Treaty of Waitangi.[21]

[70] The reference at s 171(1)(d) to "any other matter" is qualified by the words "reasonably necessary". Given the Act's overarching purpose, however, the scope of the matters that may legitimately be considered as part of the effects assessment must be broad and consistent with securing the attainment of that purpose.

Part B

[71] QAC raises five separate questions of law, namely:

1. Did the Court wrongly interpret cl 3.9.9 and Table 3/1 of Civil Aviation Authority Advisory Circular AC139-6?

2. Is the minimum separation distance between a runway and a parallel

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18 See Briar Gordon and Arnold Turner (eds) Brookers Resource Management (looseleaf ed, Brookers) at 1-1470 and *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC).

19 *McGuire* at 594.

20 Section 6.

21 Section 8.

taxiway for Code C aircraft (in the absence of an aeronautical study indicating that a lower separation distance would be acceptable) 93 metres or 168 metres on the true construction of AC139-6?

3. Did the Court err in failing to have regard to whether its conclusion that a parallel taxiway for Code C aircraft should be 93 metres from the runway would not be able to be implemented unless the Director of Civil Aviation found it to be acceptable after considering an aeronautical study?

4. Did the Court err in directing QAC as to the purpose for which land within the existing aerodrome designation can be used?

5. Did the Court err in holding that there needed to be a nexus between QAC's NOR objective and the provision for an instrument precision approach runway at Queenstown Airport?

The CAA standards

[72] The underlying and critical issue in relation to the first three questions is whether the Environment Court could impose conditions based on an interpretation of Civil Aviation Authority (CAA) standards for separation distances that ultimately might prove to be erroneous and thereby disenable the efficient operation of the designation. The significance of this and the separation distances is shown by an illustration produced by Mr Gardner-Hopkins. I attach this to the judgment as Annexure B.[22] It will be seen that the overall space requirement increases from 119m to 194m, depending which separation distance for Code C aircraft is adopted. If the latter separation distance applies, then a considerably larger encroachment into RPL's land might be needed. I propose to resolve this issue first.

[73] Mr Gardner-Hopkins submits that the Environment Court had no option but to assess the effect of the standards because they drove the land requirements of the

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[22] Mr Kirkpatrick disputed the subtitle references to "Non Precision" and "Precision", but otherwise consented to the production of Annexure B.

airport. Significantly QAC's counsel, having taken expert advice accepted in the Environment Court that 93m was a sufficient separation distance between the main runway and the parallel taxiway under the standards for Code C aircraft. There was therefore no other basis upon which the Environment Court could resolve the factual evaluation of QAC's land requirements. It was an evaluation of agreed fact and one that is not amenable to challenge in this Court.

[74] Mr Kirkpatrick immediately accepts that he must resile from the position he adopted in the Environment Court. He accepted the evidence of Mr Morgan that the appropriate separation distance for Code 4/C aircraft is 93m and that the Environment Court relied on that evidence (being the only evidence available to it). However he submits that immediately after the interim decision was released he advised the Court of the potential difficulties with Mr Morgan's and the Court's assessment, namely that the CAA might insist on a greater separation distance with the result that a key component of designation would be disenabled, as QAC would not have sufficient land to make a parallel taxiway. He says that the requisite separation distance could be as much as 168m. He contends that there is no bar to counsel seeking to resile from a concession where it is in the interests of justice to do so.

[75] Mr Kirkpatrick also submits that the interpretation of the standards is an assessment of law, not fact. In short, he says that the Court is engaged in an assessment of the separation distance required by law, but that the jurisdiction to make that assessment is reposed with the Director of CAA.[23]

Assessment

[76] I agree with Mr Kirkpatrick that the efficacy of the separation distance of 93m is dependent on the approval of the Director of Civil Aviation. If s/he does not approve the 93m separation distance and requires a greater separation distance, a key component of the designation works cannot then be enabled. A condition with that disenabling effect cannot be lawful unless it is the product of a thorough evaluation

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[23] Civil Aviation Rule 139.51(c).

in terms of s 171, because it is, in substance, a condition derogating from the grant.[24] Regrettably, the Environment Court did not appear to turn its mind to the potentially disenabling consequences of a 93m limitation prior to the interim decision. Accordingly, the Environment Court did not discharge its duty to consider the effects of the designation in terms of s 171.

[77] In saying this there can be no criticism of the Environment Court. It logically assumed that the proper separation distance was 93m given the agreement of all parties. Ordinarily I would refuse to grant relief in circumstances where the Environment Court has proceeded to a decision on an agreed factual basis. But here the impugned spatial limitation might preclude a significant component of the designation activity and therefore render nugatory a key enabling justification for it. In the absence of the assessment of the effects of this potentially significant outcome, the decision is flawed.

[78] It is also reasonably apparent that Mr Kirkpatrick was agreeing to the evidence about separation while focused on Code D rather than Code C aircraft. Further, he sought to have the matter addressed by the Environment Court prior to the final decision, but the Court ruled that it had already decided the evidential issue. But with respect to the Court's reasoning on this, the Court had not, on the face of the decisions, assessed the significance of the disenabling effect of a negative decision from the Director of Civil Aviation. Whatever the Court's finding of fact or law about the standards, that evaluation needed to be made. Against a backdrop where we are dealing with a project of national significance, this 'error' is significant.

[79] Given the foregoing it is not necessary for me to address the interpretation of the standards and I refuse to do so. In short, there are major problems with this Court, on an appeal under the RMA, purporting to inquire into the interpretation of the standards that must still ultimately be applied by the Director of Civil Aviation. It quickly became abundantly apparent to me that the interpretation of the standards would need to be premised on a sufficient understanding of their practical effect, in

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[24] As to the principle of non derogation refer *Tram Lease Ltd v Croad* [2003] 2 NZLR 461 (CA) at [24].

context, and the interrelationship of the various standards. It appears from submission from the Bar that they are disputable matters and that the Court would be assisted by expert evidence on them. Normally on an appeal like this I would have the benefit of a detailed discussion about the key issues in the decision of the Environment Court, or in terms of my supervisory jurisdiction, an assessment from the Director. I have neither. Furthermore, whatever I say here could not bind the Director, or if it could, runs the risk of usurping the statutory function reposed in the Director and then without the benefit of the Director's assessment of those standards in context.

Existing rights

[80] Questions 4 and 5 relate to the effect of the modified designation on existing rights. Mr Kirkpatrick initially claimed that the Court incorrectly altered the scope of the existing designation by purporting to exclude the potential for instrument precision approaches. He says that the present NOR did not seek to revisit any existing grant. Therefore while the Court could refuse to enlarge the designation to enable an instrument precision approach, it could not thereby extinguish an existing right to pursue that course if QAC deems it feasible to do so in the ordinary operation of its business. He says that the Court was also wrong to resolve there was no nexus between the instrument approach and the objective of the NOR to the extent that this might preclude such an approach in the future.

[81] On closer examination Mr Kirkpatrick accepted that observations made by the Court about nexus and necessity did not translate into conditions or limitations on the internal operations of the Airport.

Assessment

[82] The decision is not purporting to limit the internal operations of the Airport in any material way beyond the existing limits of the current designation and the extent of the designation area. I was not taken to any changes to the designation that had this effect. I do not think therefore that there is anything against which to attach the points of law raised for the purpose of relief. In short, the points of law do not call for a remedy so I see no need to address them.

Part C

[83] RPL claims that the Environment Court acted outside its jurisdiction by purporting to cancel part only of the NOR. It also raises the following questions of law:

1. Should the term 'requirement' in s 168(2) of the Act be defined as meaning 'essential'?

2. Should the term 'requirement' in s 168(2) of the Act be construed in light of s 40 of the PWA?

3. Is the principle of fairness and equitable issues (estoppel) relevant under s 171(1)(d)?

4. Should the duty under s 16 of the Act have formed part of the Court's assessment of alternative locations for FATOs (Final Approach and Take Off)?

5. Did the Court fail to consider relevant alternatives under section 171(1)(b) of the Act?

6. Should the Court have given weight to the absence of any assessment by the QAC of alternatives raised by RPL and Air New Zealand Limited (ANZL) under section 171(1)(b) of the Act?

7. Would a strict application of the "reasonably necessary" test necessitate a determination of the best site for the works?

8/9. Having found that it should reject land required for works associated with a Code D taxiway and a precision approach runway, did the Court subsequently err in:[25]

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[25] Items 10.8 and 10.9 of the appeal were consolidated and recast as above.

(i) Finding that the QAC had given adequate consideration to alternatives (section 171(1)(b))?; and

(ii) Finding that the remainder of the works were reasonably necessary (section 171(1)(b))?

10. Did the Court err in determining that the NOR was efficient in the absence of any cost benefit analysis?

11. Does the inconsistency between the QAC's position at the hearing that it could undertake the work and meet the NOR's objective on 8.07 ha of land and the content of its High Court appeal and Public Works Act Notice render the NOR hearing process unfair?

12. Did the Court err by including an existing substation within the land to be designated for airport purposes?

Jurisdiction and procedural fairness

[84] On the question of jurisdiction under s 149U(4) Mr Somerville QC submits:

(a) The Court decided to cancel part and to confirm part of the NOR (refer interim decision cited at [15] above);

(b) Referring to *Takamore Trustees v Kapiti Coast District Council*[26] s 149(U)(4)(b) empowered the Court to cancel or confirm or confirm with modification but it does not expressly empower the Court to mix and match these alternatives;

(c) The scale of the cancellation (a 50% reduction) logically precludes confirmation of the balance – the NOR has been altered so fundamentally that even QAC says that the balance will not achieve the stated objective of the NOR;

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[26] *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 (HC) at [37]-[38].

(d) The Court erroneously relied on *Bungalo Holdings Limited v North Shore City Council*[27] to the effect that the Court had jurisdiction to reduce the scale of the proposed designation when that decision concerned the scope of the discretionary assessment under s 171, not the power to grant relief under s 174;

(e) Part cancellation carries the risk of procedural unfairness in that affected persons may have challenged the altered NOR and did not do so;

(f) There being no power to confirm part only of the NOR, that part of the decision may be set aside without the need to refer the decision back to the Environment Court.

Assessment

[85] I do not accept that the interim decision to cancel part only of the NOR was flawed for want of jurisdiction for the following reasons.

[86] First, the meaning of s 149U(4)(b) from its text and in light of its purpose is reasonably clear.[28] The power to "modify it or impose conditions on it as the Court thinks fit" literally and logically includes the power to modify the scale of the NOR as occurred here; and there is no obvious reason to read down those words to preclude a reduction in scale.[29] This interpretation better serves the overt scheme of the requiring provisions to enable necessary works with appropriate effects, having regard to the criteria expressed at s 171. Further, a flexible power to modify will, in my view, better enable decision makers to carry out their functions in a manner that is consistent with the broad purpose of sustainable management. Conversely, a narrow interpretation of the power may unduly inhibit the capacity of functionaries to achieve that purpose.

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27 *Bungalo Holdings Limited v North Shore City Council* EnvC Auckland A052/01, 7 June 2001.

28 Interpretation Act 1999, s 5(1).

29 Cf by analogy see *West Coast Regional Council v Royal Forest & Bird Protection Society of New Zealand* (2006) 12 ELRNZ 269, [2007] NZRMA 32 (HC) (cited by Mr Gardner-Hopkins). See also *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) – the Privy Council said in the designation context that "a full right of appeal on the merits is contemplated" and the Environment Court had "wide powers of decision" at 595.

[87] Second, no legitimate question of procedural unfairness arises in this case – the scope of works and envelope of effects is substantially reduced as a consequence of the modification. The prospect of affected parties not having submitted because a much larger proposal was notified is, in my view, highly unlikely.

[88] Third, the reliance placed on *Takamore Trustees v Kapiti Coast District Council* by RPL is misplaced. The Court in that case was confronted with a submission that part of a road route could be cancelled and redirected with the result that an altogether different proposal from that notified would have been enabled. The observation of the Court therefore that "cancellation of a significant piece of the NOR is well beyond modifying a proposal" is understandable, but altogether removed from the present facts. Unlike *Takamore*, the revised designation falls entirely within the envelope of the notified proposal.

[89] Finally, to the extent that the Court decided that the NOR was part cancelled, rather than modified, the error was not sufficiently material to warrant referral back. The difference in this context is semantic.

[90] Accordingly this ground of appeal is dismissed.

Essentiality, PWA, Best Option

[91] Questions 1, 2, 7, 8 and 9 concern the meaning of the terms "requirement" and "reasonably necessary". I deal with them together.

[92] Mr Somerville submitted:

(a) The Environment Court erred when it held that "requirement" under s 168 and the phrase "reasonably necessary" under s 171 meant something less than essential (refer [94]).

(b) Given that the NOR was a precursor to compulsory acquisition of private land, the Court should have instead adopted a narrow meaning of requirement or reasonably necessary, namely essential as this would accord with the common law approach to interpretation where

property rights might be subject to the coercive powers of the State.[30]

(c) The Environment Court further erred by refusing to interpret the meaning of "requirement" in the same way as the term require or required has been interpreted under s 40 of the PWA.[31]

(d) The requiring provisions of the RMA and the acquisition powers under the PWA touch and concern the same underlying subject matter and should be applied consistently. And, as the Court of Appeal said in *Seaton* (not overruled on this point), s 24(7) of the PWA provides an appropriate guide to the legislative policy in terms of decision making involving derogation from and the taking of property for public purposes.

(e) Furthermore, with the rejection of the requirement for a precision runway and Code D aircraft taxiway, the taking of private land is not reasonably necessary in the sense of essential.

Assessment

[93] The language of "requirement" and "reasonably necessary" in ss 168(2) and 171(1)(c) (and in s 24(7) of the PWA) are standards used in everyday language. They should require no undue elaboration. But in the present context, involving the coercive powers of public authorities for public purposes, the words "requirement" and "reasonably necessary" are statutory indicia that any proposed works must be clearly justified by reference to the objective of the NOR. This aligns with the threshold identified by the Court of Appeal in *Seaton* when dealing with the concept of "required" and given the prospect of compulsory acquisition.[32] Whether the scope of the NOR is clearly justified, in context, is of course a question for the Environment Court.

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30 Referring to *Edmonds v Attorney-General* HC Wellington CIV 2000-485-695, 3 May 2005; *Deane v Attorney-General* [1997] 2 NZLR 180 (HC).

31 Referring to *Minister for Land Information v Seaton* [2012] 2 NZLR 636 (CA).

32 *Minister for Land Information v Seaton* [2012] 2 NZLR 636 (CA) at [31]. Note the substantive decision of the Court was overturned by the Supreme Court, but these observations were not tested or criticised. See *Seaton v Minister for Land Information* [2013] NZSC 42.

[94] The Environment Court adopted what might be called the orthodox threshold test of reasonably necessary namely:[33]

> In paragraph (c), the meaning of the word necessary falls between expedient or desirable on the one hand, and essential on the other, and the epithet reasonably qualifies it to allow some tolerance.

[95] The inbuilt flexibility of this definition enables the Environment Court to apply a threshold assessment that is proportionate to the circumstances of the particular case. This is mandated by the broad thrust of the RMA to achieve sustainable management and the inherently polycentric nature of the assessments undertaken by the Environment Court. Provided therefore that the Environment Court was satisfied that the works were clearly justified, there was no error of law in applying this orthodoxy.

[96] I acknowledge that in *Seaton* the Court of Appeal used the concepts reasonably necessary and essential interchangeably.[34] I also accept that a NOR that will derogate from private property rights calls for closer scrutiny.[35] Further, I think that the Environment Court was mistaken when distancing the PWA from the designation powers under the RMA. Both statutes deal with the coercive powers of public authorities to derogate from private property rights. They should be interpreted in a consistent way. This suggests that the Environment Court erred by adopting a threshold test of falling between essential and desirable. But the Environment Court's rejection of RPL's submission that "requirement" and "reasonably necessary" mean "essential" must be understood in the sense that the Court was using that word. As Mr Kirkpatrick highlighted, the Court equated "essential" with the proposition that the "best" site must be selected.[36] And I agree with him that this would set the test beyond the required threshold of "reasonably" necessary. Indeed to elevate the threshold test to "best" site would depart from the everyday usage of the phrase "reasonably necessary" and significantly limit the capacity of requiring authorities to achieve the sustainable management purpose. If

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33 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [51].

34 *Minister for Land Information v* Seaton [2012] 2 NZLR 636 (CA) at 644-645.

35 *Deane v Attorney-General* [1997] 2 NZLR 180 (HC); and is to be distinguished from planning regulation simpliciter: *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC); *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112.

36 *Re Queenstown Airport Corporation Limited* [2012] EnvC 206 at [94].

that was the intention of Parliament then I would have expected express language to that effect (as it has done in relation to s 16 and the duty to use the "best" practicable option for noise mitigation).[37] I therefore discern no error in the Court's adoption of a threshold test that falls below this benchmark.

[97] If I then turn to the substance of the Court's assessment, it is evident that the Court carefully evaluated whether the works were clearly justified. In this regard, the Court was aware that NORs that affect private property must be afforded "less tolerance".[38] I also agree with Mr Kirkpatrick that the various passages of the judgment illustrate that the Court sought clear justification for the scope of the NOR.[39] And it is important to view the judgment as a whole. When this is done, very careful consideration was plainly given to whether the works were justified.

[98] Accordingly, I see no definitional flaw of substance. This ground also fails.

Fairness and substantive legitimate expectation

[99] Question 3 concerns the relevance of fairness in designation proceedings. Mr Somerville contends:

(a) The Environment Court erroneously did not consider the unfairness to RPL resulting from a NOR, deeming it to be irrelevant as a matter of law and factually (refer [54]-[55]).

(b) Fairness is a mandatory relevant consideration as a matter of common law principle, and at the very least is a relevant consideration under s 171(1)(d).

(c) The previous dealings between RPL and QAC involved land transfer and other agreements concerning the use of the land now subject to the NOR, including the following clauses:[40]

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37 Refer also to discussion in *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC) at [118]-[120].

38 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [94].

39 For example at [112]-[115], [139]-[142], [226], [236].

40 Deed Settling Resource Management Issues Between Queenstown Airport Corporation Limited

3.3 The land transferred to RPH pursuant to clauses 3.1 and 3.2 and other RPG holdings shown on Figure 6-1R and Figure 6-3R referred to below, shall not thereafter be the subject of any claim or requirement by QAC other than Air Noise Boundary and Airport Approach and Land Use Controls and aerodrome purposes designations/requirements QAC needs to maintain for the continuing operation of Queenstown Airport in accordance with agreed present and future layout.

...

6.3 RPG shall after the land exchange, utilise the buffer land only for rural and/or recreational uses and infrastructural utilities not of a noise sensitive nature in terms of NZS6805. ... This limitation shall be the subject of a registrable restrictive covenant in favour of QAC which shall enure during the life of this airport at its present location. The term "recreational uses" expressly allows for provision of a golf course and associated facilities.

(d) In a subsequent agreement, the parties agreed:

15.2 ... To the extent that the QAC's aerodrome purposes designation has not already been uplifted, QAC shall modify that designation to remove it from Areas A, B, C and D and all legally vested roads along with the other parcels of land described in clauses 3.3 and 6.4 of the 1997 deed.

(e) As a minimum, these dealings gave rise to a legitimate expectation on the part of RPL that QAC (as the requiring authority) and the Environment Court (as the confirming authority) would give due consideration to alternatives that did not involve the taking of RPL's land recently acquired from QAC as part of the transfer agreement.

(f) Contrary to the findings of the Environment Court, there was direct reference of the existence of the land transfer agreements and the reliance on them by RPL. For example RPL's submission stated:[41]

3.21 By way of background, it is important to note that the QAC exchanged land with RPL under a series of formal contractual agreements. This raises estoppel issues. The land now owned by the QAC on the northern side of the airport that it is seeking to rezone to enable urban activities

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and Remarkables Park Limited, October 1997.

41 Refer also to the Statement of Evidence of M Foster at 7.6, Statement of Evidence of S Sanderson at 71, and transcript at Vol. 4 p 1156, Vol. 5 at 1405 and 1415, and see the covenant attached to the notice of requirement.

was previously owned by RPL. RPL exchanged that land for much of the land that is now the subject of the QAC;s NOR. In short, QAC seeks to keep the land it acquired from RPL through the contractual agreements and take back the land it agreed RPL should acquire.

3.22 The land swap referred to above was part of a comprehensive zoning settlement including consent orders endorsed by the Environment Court, to which the QAC and the Queenstown Lakes district council was a party. The QAC is effectively seeking to unravel those agreements and zonings, despite previously consenting and committing to them. In doing so, the QAC is undermining a sustainable and integrated zoning pattern already endorsed by the Court.

(g) The finding also that the prospective use of QAC's land in preference to RPL's land was suppositious was, in light of the historical position up to 2010, not an available conclusion on the evidence.

(h) The reference to PC19, and the scarcity of industrial land, could not justify a finding that the use of QAC land was suppositious (refer [89] and [90]) – and the Court could not properly fill the gap left by QAC's assessment of alternatives with its own supposition about future use of QAC's land.

(i) The Environment Court's approach to s 24(7) and that the question of fairness need not be decided was flawed (referring to [55]).

[100] Mr Kirkpatrick submits that the key evidence relied upon by RPL was never produced to the Court and there are no findings of fact upon which I can reasonably graft a legitimate expectation. He says that the key cl 3.3 was not referred to at the Environment Court hearing and there is no evidence that QAC bound itself to exclude RPL's land from a future designation. He also says that to the extent that there was any contractual right of the nature claimed, it could not fetter the proper exercise of a statutory discretion; though he accepted that whether there was a proper exercise of discretion depended on the circumstances.[42] He also accepted that, if QAC did contract to avoid the use of RPL's land, that this might give rise to a legitimate expectation that RPL's rights would be considered before any final

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[42] Citing *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA) at 548.

decision is made and that this might require an assessment of alternatives not involving RPL's land. He said however that in any event the alternatives were thoroughly considered, either before the NOR and during the Environment Court hearing.

[101] Mr Kirkpatrick also rejects the suggestion that assessment at s 24(7), namely whether the works are "fair, sound, and reasonably necessary", should be applied in the context of s 171(1)(b). He says that the Environment Court is bound, like all Courts, to securing fair process, and that substantive fairness is an element of sustainable management. He also accepts that the language used in both sections should be interpreted consistently. But that does not mean that the criteria expressed at s 171 are overlaid by the fairness and soundness assessments contemplated at s 24(7).

[102] As to the finding that the alternatives were "suppositious", Mr Kirkpatrick says this was a finding available to the Court (and I address the substantive issue below at [115]-[126]). The Court I am told also put various questions to Mr Foster concerning the issues confronting PC19 and provided the parties with an opportunity to comment. Therefore he says, no clear procedural unfairness arises.

Assessment

[103] This ground of appeal brings into focus the fairness of a requirement affecting RPL's land in light of QAC's previous dealings with RPL. RPL's basic contention is that it held a legitimate expectation that Lot 6 would not be used for aerodrome designation purposes, or if it is used, all alternatives not using RPL land would be thoroughly explored. The Court appeared to decline to entertain this argument because fairness is not an express criterion under s 171 and in any event there was no evidence to support a legitimate expectation.[43]

[104] The resolution of this appeal point is vexing because of the way it appears it was argued in the Court below by analogy to s 24(7) of the PWA and the focus of the

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[43] *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [54]-[55].

Court in light of that argument. Nevertheless I consider that the Court erred for the following reasons.

[105] Parliament will be presumed to legislate consistently with minimum standards of fairness, especially when dealing with coercive powers of the State.[44] Moreover, the scheme of the Act dealing with designations is purpose built to secure a fair outcome having regard to the broad criteria specified at s 171 and in light of Part 2, with full rights of participation and then appeal rights on points of law. Indeed, as the Privy Council stated in *McGuire v Hastings District Council*,[45] the jurisdiction of the Environment Court under the RMA is broad, with the administrative law jurisdiction of the High Court very much a residual one. The Environment Court therefore plays the key role in providing judicial oversight in relation to the designation process. The central issue therefore is not whether fairness is a mandatory relevant criterion (as per s 24 of the PWA) but whether fairness or any alleged unfairness is relevant to the evaluation under s 171 in the circumstances of the case. The Court erred because it did not address this central issue.

[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*[46] the High Court recognised that the doctrine of legitimate expectation might be applied in the RMA context.[47] 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.[48] 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

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44 Refer: Lord Steyn in *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC539 (HL) at 591.
45 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [25].
46 *Aoraki Water Trust v Meridian Energy Ltd* [2005] NZLR 268 (HC).
47 At [39]-[42].
48 At [46].

power to do otherwise.[49] 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.[50] In short the Court's jurisdiction, though wide, is framed by the scheme and purpose of the RMA.[51]

[107] Unfortunately the Court's substantive fairness assessment was diverted by the approach taken to the production of the contracts relied upon by RPL. The Court appeared to assume that it did not need to consider the contracts themselves based on submission of counsel. On closer inspection of the record I accept Mr Somerville's contention that the Court was not invited to "interpret" the contracts, there being no serious dispute about the key representations, but that they remained central to the assessment of unfairness.

[108] I also accept Mr Somerville's basic contention that the contracts were themselves evidence of reliance. In short, the contracts represented the exchange of mutually enforceable promises, for valuable consideration with consequences for breach. The contracts recorded land swaps, that future airport development would accord with agreed plans and not otherwise (and I understand no agreed plan was produced showing Lot 6 would be developed for aerodrome purposes), that QAC would withdraw the aerodrome designation from Lot 6 and that Lot 6 would act as a "buffer" zone, i.e. as between airport activities and RPL's activities. Also attached to one of the contracts were plans showing "potential Helicopter Area 7 Hectares" to the north of the main runway."[52] Effect was given to these contracts by the parties, including the imposition of a covenant over Lot 6 and the withdrawal of the aerodrome designation over Lot 6. I understand that these facts were not challenged.

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49 Refer *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

50 *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA).

51 Furthermore, the Environment Court does not have jurisdiction to examine the legality of the decision to notify a NOR. Any challenge to legality of QAC's decision to notify must still be brought by way of judicial review. *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112 at [38].

52 See transcript at 1406.

It is therefore at least arguable that on the face of the agreements it was the expectation of both parties that Lot 6 would remain a buffer zone.

[109] The outcome of all of this is that the Court never correctly assessed the claim based on legitimate expectation to the extent that it might be relevant to the s 171 evaluation.

[110] I deal with the materiality of this error below at [146].

Section 16

[111] Mr Somerville claims that the Court erred by not holding that s 16 applied as if it were an additional criterion. Section 16 imposes the following duty:

> **16 Duty to avoid unreasonable noise**
>
> (1) Every occupier of land (including any premises and any coastal marine area), and every person carrying out an activity in, on, or under a water body or... the coastal marine area, shall adopt the best practicable option to ensure that the emission of noise from that land or water does not exceed a reasonable level.
>
> (2) A national environmental standard, plan, or resource consent made or granted for the purposes of any of sections 9, 12, 13, 14, 15, 15A, and 15B may prescribe noise emission standards, and is not limited in its ability to do so by subsection (1).

[112] He said that it is commonsense to adopt an approach that is consistent to the performance of this duty, that is to take a best practical option approach to the assessment of alternatives for Final Approach and Take Off (FATO) locations. He said that while s 16 was not triggered in every case, it should have been in this case. RPL claims that sites on QAC's land are more likely to meet the best practicable option (BPO) requirement than the proposed sites on Lot 6.

Assessment

[113] I reject this ground. It is necessary to record the key part of the decision:

> [58] We hold section 16 is not to be applied as if it were an additional criterion to subsection (1)(a)-(d) of section 171. In some cases adopting the best practicable option may be useful check for the decision-maker,

particularly when assessing the adequacy of the alternatives under consideration, but not in every case.

[114] The refusal to apply s 16 as an additional criterion must be read together with the observation that "in some cases adopting the best practicable option may be useful check for the decision-maker". Plainly the Court considered whether the s 16 duty and BPO was relevant to the evaluative exercise and decided that it was not. For my part this is an orthodox approach to the assessment of effects. Moreover, the s 16 duty imposes a minimum BPO requirement in circumstances where the effects of the noise are not reasonable. It is not a duty that applies where the noise effects are reasonable to their context. Whether or not noise levels can be mitigated to reasonable levels is a matter for the Court to assess, and whether BPO is required to achieve those levels is an assessment of fact, in each case, for the Court. Accordingly, the Court made no error of law by not insisting on adopting a BPO approach to the assessment of alternatives.

Assessment of Alternatives

[115] Questions 5, 6, 8 and 9 raise concerns with the assessment of alternatives.

[116] Mr Somerville submits that:

(a) The Court erroneously rejected an alternative site involving QAC owned land to the north of the existing designation on the basis that it was suppositious.

(b) The Court should have given weight to the absence of an assessment of this alternative by QAC.

(c) Further, as two of the five major reasons for the designation have been rejected, the alternative assessment by QAC proceeded from a false premise.

(d) Similarly, as the modified position was never assessed as an alternative, it could not possibly satisfy the adequacy criterion at s 171(1)(b). This is linked to the issue of jurisdiction and fairness,

and the implicit requirement that any modification must be one of the assessed alternatives.

[117] Turning to the merits, Mr Somerville says that the finding that the alternative to the north was suppositious was not available to the Court on the evidence. In fact he said that background showed that until 2010 the land was considered as appropriate for expansion. He also says that the Court placed improper reliance on PC19 and the scarcity of industrial land in Queenstown, there being no evidence or submission on the relevance or significance of these matters. He said that the Court must have relied on its own knowledge of those matters, but never afforded the parties the opportunity to comment other than through some questions from the Court to RPL's witness, Mr Foster, about the nature of the aviation activities and whether they might qualify as industrial.

[118] He points to the language of s 171(1)(b) which specifically requires the Court to consider "whether adequate consideration has been given to alternative sites". Thus, he submits, by failing to give weight to the absence of the assessment by QAC of the merits of the use of its own land, the Court has not discharged this statutory duty under s 171(1)(b).

[119] Mr Kirkpatrick responds that the Court had before it various master plans, including proposals to use QAC land to the north and outside of the existing designation. Plainly therefore QAC had previously considered various alternatives, including the one now raised by RPL. He says that there was evidence on which the Court might find that expansion to the north was suppositious.[53] He accepts that the Court did not raise with the parties the significance of the scarcity of industrial land in light of PC19, but that Mr Foster was tested on the proposition that aerodrome uses include industrial activity. In any event, he says the Court made a detailed examination of the alternatives, including on sites to the immediate north and rejected them. He specifically referred me to [112]-[115] of the decision (noted above) to demonstrate the careful assessment undertaken of alternatives by the Court. There was therefore no failure in terms of s 171(1)(b).

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[53] See submissions of Mr Kirkpatrick at [25] in reply to RPL's submissions. Mr Kirkpatrick cited evidence of P West and B Macmillan.

Assessment

[120] It is important to commence this analysis by referring to the language of s 171(1)(b) relevant to this ground of appeal. The Environment Court was required to have particular regard to:

> "whether adequate consideration has been given to alternative sites... if ... the requiring authority does not have an interest in the land sufficient for undertaking the work..."

[121] The section presupposes that where private land will be affected by a designation, adequate consideration of alternative sites not involving private land must be undertaken by the requiring authority. Furthermore, the measure of adequacy will depend on the extent of the land affected by the designation. The greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will need to be.

[122] It is beyond doubt that the extent of private land subject to the proposed designation is significant. As notified 19 ha would be affected. The modified version still encompasses 8 ha. The Court had to be satisfied that the assessment of alternative sites was adequate having regard to this impact. There is authority however that a suppositious or hypothetical alternative need not be considered.[54] But given the statutory requirement to have particular regard to the adequacy of the consideration given to alternatives, it is not sufficient to rely on the absence of a merits assessment of an alternative or on the assertion of the requiring authority. Provided there is some evidence that the alternative is not merely suppositious or hypothetical, then the Court must have particular regard to whether it was adequately considered.[55]

[123] RPL insisted that the Court was required to assess whether adequate consideration was given to locating the general aviation/helicopter precinct on land north of the main runway, including the undesignated land owned by QAC and/or QLDC. The Court responded that this option was suppositious for the following reasons (repeated here for ease of reference):

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54 *Waitakere City Council v Brunel* [2007] NZRMA 235 (HC) at [29].

55 Cf by analogy, *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC) at [36] and [37].

> [89] Conceptual plans prepared by RPL for a general aviation/helicopter precinct north of the main runway included undesignated land owned by QAC within the area of PC19. Under these plans a general aviation/helicopter precinct would displace up to 4.52 hectares of industrial land within PC19. In proposing this option, RPL witnesses did not address the scarcity of industrial land within Queenstown (an important issue that PC19 *inter alia* seeks to address). There was some suggestion by the RPL planner, Mr M Foster, that aerodrome activities are industrial activities for the relevant activity areas within PC19.
>
> [90] We doubt Mr Foster's interpretation is correct and in the absence of any evidence in this proceeding or PC19 addressing the implications of an aviation precinct within PC19, particularly in relation to the urban form and function, we do not consider that PC19 land should be available as part of an alternative location. Activities relating to an aviation precinct appear to be outside those contemplated by the District Council when promulgating PC19.

[124] There are two immediate issues with this reasoning. First the Court introduces the scarcity of industrial land as a reason for rejecting QAC's land to the north of the designation. I am told that scarcity of industrial land was not mentioned in submissions or evidence and Mr Kirkpatrick said that reference to it cannot be found anywhere in the transcript. Second, the Court appears to shift the burden of demonstrating the efficacy of the suggested alternative to RPL in light of PC19. But the task of persuading the Court as to the adequacy of the consideration of alternatives always rested with QAC for the orthodox reason that QAC is seeking to persuade the Court that all relevant alternatives were adequately considered.[56]

[125] Having said all of that, as the Canadian Supreme Court said in *Housen v Nikolaisen*:[57]

> Appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole

[126] And, it is too easy to alight on isolated passages in a judgment and to dismiss the full evaluation undertaken by the Court, based on detailed information, including expert evidence, about the assessment (and efficacy) of the various alternatives.

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[56] Cf *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 (EnvC). And see *Ngati Maru Iwi Authority v Auckland City Council* HC Auckland AP18/02, 7 June 2002.

[57] *Housen v Nikolaisen* [2002] 2 SCR 235 at 250, cited with approval by the Supreme Court of the United Kingdom in *McGraddie v McGraddie* [2013] UKSC 58.

[127] In this regard, the judgment also refers to reports produced in 2005, 2006, 2007 and 2008 considering sites for a new general aviation/helicopter precinct located within the existing aerodrome designation north of the main runway. The 2005 Master Plan expressly rejects such a precinct within Lot 6. It then records that QAC's advisor recommended in a 2007 report that general aviation flight-seeing operations be grouped north of the main runway.[58] However, in 2010, QAC's advisor changed its recommendation, concluding that a north-east precinct "is distinctively inferior".[59] While this north-east precinct appears to be located within the existing designation (and so is not synonymous with RPL's suggested alternative), it identifies problems with a northern location as distinct from a southern location and relevantly that: [60]

> ... the southern site would not require helicopters or fixed wing to cross runway 23/05 when departing to the south or east (a very common flight path), if departing north or west from the proposed northern site, it appears aircraft would still need to track south initially (crossing the main runway....

[128] The point of this observation is not to shore up an alleged deficiency in QAC's or the Court's assessment, but to illustrate with one example the detailed information before the Court and the reason why this Court must be slow to interfere with findings of fact by telescope.

[129] Problematically however, the Court identified "scarcity of industrial land" and PC19 as a key reason for treating the site to the north as suppositious. As there was no evidence about this, and no argument directly addressing its merits, the Court fell into procedural, if not substantive error. It may be that the Court treated scarcity of industrial land in Queenstown as a matter of uncontroverted fact.[61] Certainly recent decisions of the Environment Court and this Court about PC19 refer to the significant need for industrial land in Queenstown.[62] And the Court could not be criticised for referring to PC19 as it was a mandatory relevant consideration.[63] But

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58 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [76]-[81].

59 At [86].

60 Refer Assessment of Environmental Effects, 5.3.4; and Appendix T.

61 While the Environment Court is not strictly bound by rules of evidence, the capacity to take into account uncontroverted facts is allowed by s 128 of the Evidence Act 2006.

62 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817 at [25]; *Foodstuffs (South Island) Ltd v Queenstown Lakes District Council* [2012] NZEnvC 135 at [563].

63 Section 171(1)(a)(iv) and s 43AAC.

RPL should have been invited to submit on the factual issue of scarcity if it was going to be the reason for rejecting RPL's alternative site as suppositious. As a minimum, and in the absence of any party raising the issue of scarcity of industrial land, RPL was entitled to notice of the Court's conclusions about that issue before it was used as a reason to reject RPL's objection. While I would ordinarily afford the Court a significant amount of latitude for the reasons mentioned at [125]-[126], an issue of procedural justice arose when the Court resolved a substantive issue relying on its own knowledge and without notice to the parties.[64]

[130] Accordingly the appeal on this point is allowed. I deal with materiality and relief below. It must be considered in light of my findings on the question of fairness.

Cost benefit analysis

[131] Mr Somerville submits that the Court erred by determining that the NOR was efficient in the absence of a cost benefit analysis.

[132] There is nothing in the language of ss 7(b) or 171(1)(b) that imposes a legal duty on the requiring authority to prepare a cost benefit analysis or requires the Court to consider a cost benefit analysis. As the Court noted, such an analysis may be very helpful and the failure to do one may mean that the Court finds that the assessment of efficiency and/or alternatives is inadequate. But rarely will the failure of the Court to require a cost benefit analysis amount to an error of law. Indeed the full High Court in *Meridian Energy Ltd v Central Otago District Council* considered that the Environment Court erred by requiring a cost benefit analysis.[65] Moreover, it is inherently part of the evaluative function for the Environment Court to determine whether there has been adequate consideration of alternatives or whether the proposal is an efficient use of resources and whether there is a sufficient basis to draw a robust conclusion. In short, the assessment of efficiency and/or alternatives is essentially an assessment of fact, on the evidence, not readily amenable to appeal on a point of law.

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64 Cf *Treaty Tribes Coalition v Urban Maori Authorities* [1997] 1 NZLR 513 (PC) at 522.
65 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC) at [116].

[133] Mr Somerville's submissions sought to distinguish leading authority eschewing the requirement to assess the viability of a project. The submissions also sought to distinguish the observations of the full High Court about cost benefit analysis in *Meridian*. I readily accept the proposition that the case law dealing with viability has nothing to do with cost benefit analysis. Viability is essentially concerned with profitability and the Courts in this context have never been concerned with profitability.[66]

[134] Cost benefit analysis is however concerned with quantifying, in economic terms, whether the costs of a proposed use of a resource exceed the benefits of that use. It is therefore a recognised method for assessing efficiency and/or the relative merits of alternatives, especially in circumstances where the ordinary operation of the market to achieve allocative efficiency cannot be assumed. But, as to the requirement to undertake a cost benefit analysis, the Court in *Meridian* observed:

> [111] Parliament has not mandated that the decisions of consent authorities should be "objectified" by some kind of quantification process. Nor does it disparage, as a lesser means of decision making, the need for duly authorised decision-makers to reach decisions which are ultimately an evaluation of the merits of the proposal against relevant provisions of policy statements and plans and the criteria arrayed in Part 2. That process cannot be criticised as "subjective". It is not inferior to a cost-benefit analysis. Consent authorities, be they councillors, commissioners or the Environment Court, and upon appeal the High Court Judges, have to respect that reality and approach decision making in accordance with the process mandated by the statute. It is not a good or bad process, it simply is the statutory process.

[135] I do not think this reasoning can be readily distinguished, as it is a general statement of principle about the functioning of the RMA. To that extent, it remains apposite to this case. However, unlike s 7(b), the Court under s 171(1)(b) must decide whether "adequate" consideration has been given to alternatives. It may be that a Court might find that the assessment was inadequate without a cost benefit assessment. But whether that is so is an evaluative matter for the Court and is not a mandatory requirement in every case.

[136] I have also reviewed the reasons given by the Environment Court in relation to cost benefit analysis, and I cannot identify any obvious flaw that might warrant

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66 *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC).

further investigation by me or suggest a reviewable error of law. Quite the opposite, the Court assembled the information available to it, examined key considerations of operational efficiency and externalities, and formed a conclusion that was available to it on the evidence.[67] Accordingly, there being no general or specific duty at law to require a cost benefit analysis, this ground of appeal must fail.

Inconsistency of position

[137] Mr Somerville submits that QAC advised the Court that 8.07 ha was sufficient to enable it to undertake its operation, yet it has now sought to exercise powers of acquisition for 15 ha under the PWA. He says the Court relied on the QAC's representation in finally resolving that the modified position was appropriate. He therefore contends that had it known that in fact QAC needed more than 8.07 ha, the Court would have had to cancel the designation in its entirety, because it would not then have had a sound basis for the grant of a designation affecting that land.

[138] Mr Kirkpatrick responds that the PWA process was triggered to provide surety that, in the event that QAC was successful in this appeal, it could acquire the land it needed. He says there is no need to have the designation in place before commencing the PWA procedures. He also indicated that QAC would not seek to complete the PWA process without first having resolved the final scope of the designation.

Assessment

[139] I reject this ground. I do not accept that QAC represented to the Court that 8.07 ha was sufficient. I have the transcript of the relevant passage. I will not lengthen this judgment by quoting it. In short, Mr Kirkpatrick plainly indicated to the Court that compliance with Civil Aviation Authority standards might demand a greater amount of land to accommodate Code C aircraft. He simply confirmed that 8.07 ha was sufficient for general aviation and helicopter aircraft.[68] Accordingly there is no inconsistency of position.

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67 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [226], [235] and [236].
68 Transcript at pp 1419 and 1420.

The substation

[140] Question 12 deals with the inclusion of a substation within the designation. RPL is concerned to ensure that the substation is not affected by the designation, presumably as it is useful infrastructure. Mr Somerville submitted that the substation was beyond the designation boundary.

[141] Mr Kirkpatrick says that it is simply efficient to include the substation within the designation because of access issues. But there is no intention to affect its usual operation.

[142] I was not taken to the original designation to understand its areal extent. But assuming the substation was not contained within the literal boundary of the notified designation, Mr Kirkpatrick advises that there was a great deal of evidence about the substation, so plainly RPL had an opportunity to deal with any prejudice to it. Mr Kirkpatrick also advises that if the substation is relocated before any works are undertaken in respect of the designation, then it may be possible to re-align the boundary of the designation.

[143] To the extent therefore that there might be an issue arising out of the areal extent of the notified designation (which is not clear to me), I do not consider that a material issue of law arises warranting relief given the representations made by Counsel for QAC in its written submissions.[69]

Part D – Outcome

[144] I have identified the following errors (in summary):

(a) The Environment Court did not have regard to the potential disenabling effect of a maximum separation distance of 93m between the main runway strip and the taxiway;

(b) The Environment Court incorrectly excluded fairness as an irrelevant consideration;

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[69] See paragraphs 65-67 of outline of submissions on behalf of QAC in reply to RPL.

(c) The Environment Court did not correctly assess RPL's claims based on legitimate expectation;

(d) The Environment Court did not provide RPL with an opportunity to address the issue of scarcity of industrial land and its relevance or otherwise to the adequacy of the assessment of alternatives under s 171(1)(b).

[145] The first error, raised by QAC, is plainly material. If the Director of Civil Aviation does not approve the 93m separation distance, there may be insufficient land subject to the designation to enable both a Code C taxiway and a general aviation precinct. A key justification for the designation and its coercive effect over Lot 6 may then not eventuate. I cannot dismiss the prospect that the Court, properly apprised of this potentially disenabling effect, might allow more land to be subject to the designation or cancel the designation altogether rather than simply confirm the interim decision.

[146] The three remaining errors, raised by RPL, are interrelated. The central concern is that the Environment Court, by rejecting the relevance of fairness and RPL's asserted legitimate expectations, did not properly frame the alternatives or reasonableness assessment. The Court proceeded on the assumption that it could treat RPL's suggested alternative as suppositious even though the contractual background envisaged that QAC's land to the north might be used for aerodrome expansion, and while RPL's land to the south would remain a buffer zone. Yet there is at least an arguable case that RPL could legitimately expect that Lot 6 would remain a buffer zone, and/or alternatives not involving RPL's land would be thoroughly explored before the decision to designate was notified or confirmed. As a minimum RPL could expect that clear justification for using Lot 6 would be established prior to confirmation.

[147] One real difficulty for RPL is that the Environment Court has closely assessed the effects of the NOR in light of the criteria at s 171 and found clear justification for it. To the extent therefore that there has been any unfairness in the process leading up to the issuance of the NOR, it could be said to have been

remedied by the subsequent Environment Court process. The tipping point however is that the Court referred to scarcity of industrial land to disregard RPL's alternative. RPL was never afforded the opportunity to address the scarcity of industrial land and whether that provided a proper basis for the Court's conclusion. This was procedurally unfair and compounded the failure to have regard to RPL's asserted expectations. I cannot foreclose the possibility that the Court might be persuaded that scarcity of industrial land is not a valid issue, or if it is, that scarcity was and is not a proper reason to foreclose consideration of RPL's alternative, especially in light of the previous contractual arrangements.

[148] I therefore allow the appeals in part, and refer the application back to the Environment Court to reconsider:

(a) Whether the requirement should be cancelled or modified after it has provided the parties with an opportunity to be heard in relation to the separation requirements for a Code C taxiway and the process for confirming those requirements.

(b) The assessment of the adequacy of alternatives and reasonable necessity under s 171(1) (b) and (c) after it has provided the parties with an opportunity to be heard in relation to RPL's legitimate expectation claims and the scarcity of industrial land.

[149] Beyond these specific directions, it will be for the Environment Court to determine how it proceeds to reconsider the above matters and any consequential relief that might follow, if any, including but not limited to further modification or cancellation of the designation.

[150] I note that none of the parties have sought to challenge the findings about the improbability of a precision runway and Code D aircraft. Nothing in this judgment or the relief granted affects those findings or the substantive reduction in areal extent of the designation based on those findings.

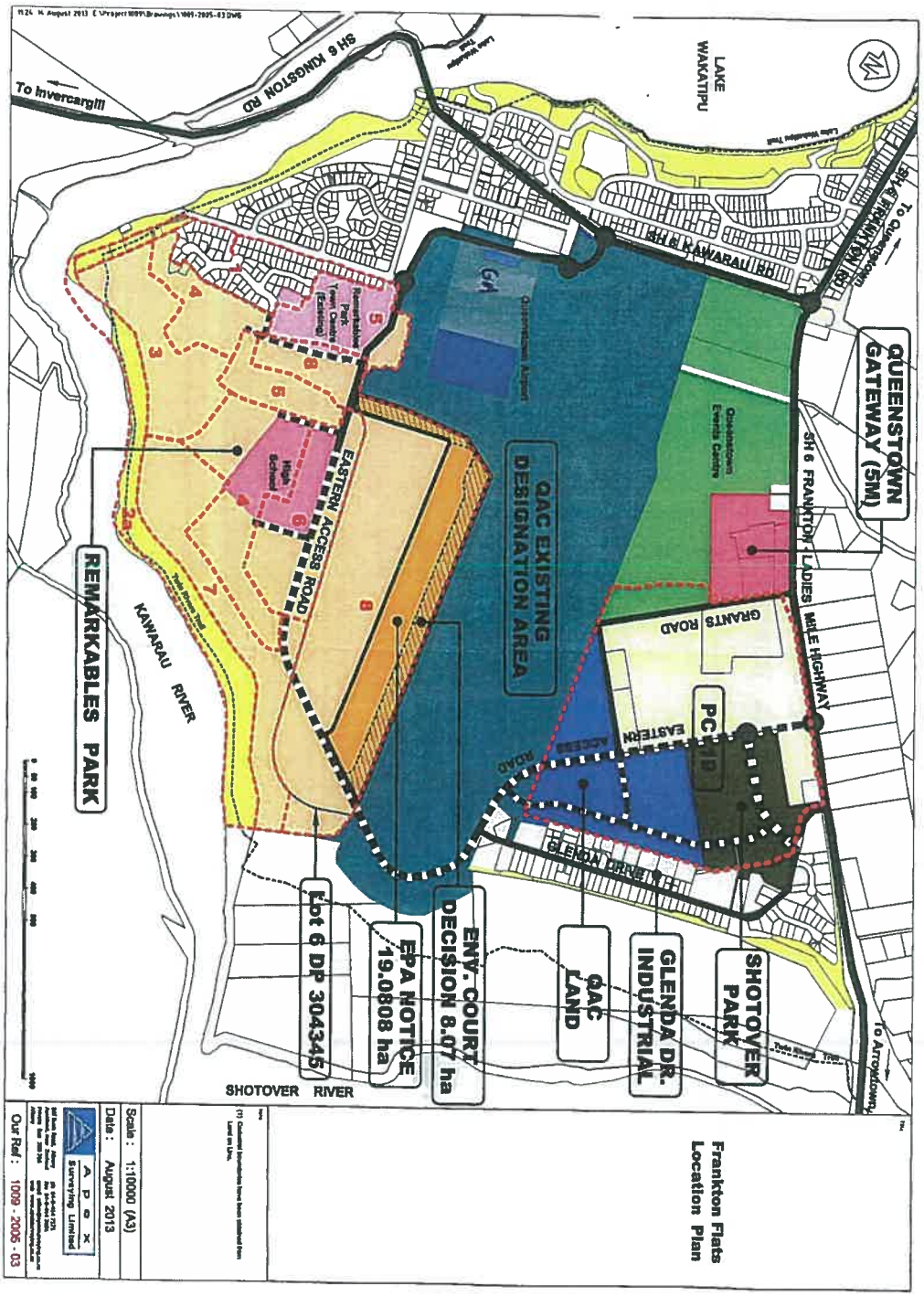
[151] Leave is granted to the parties to seek clarification of my orders if that is necessary. I will separately minute my availability in this regard.

Costs

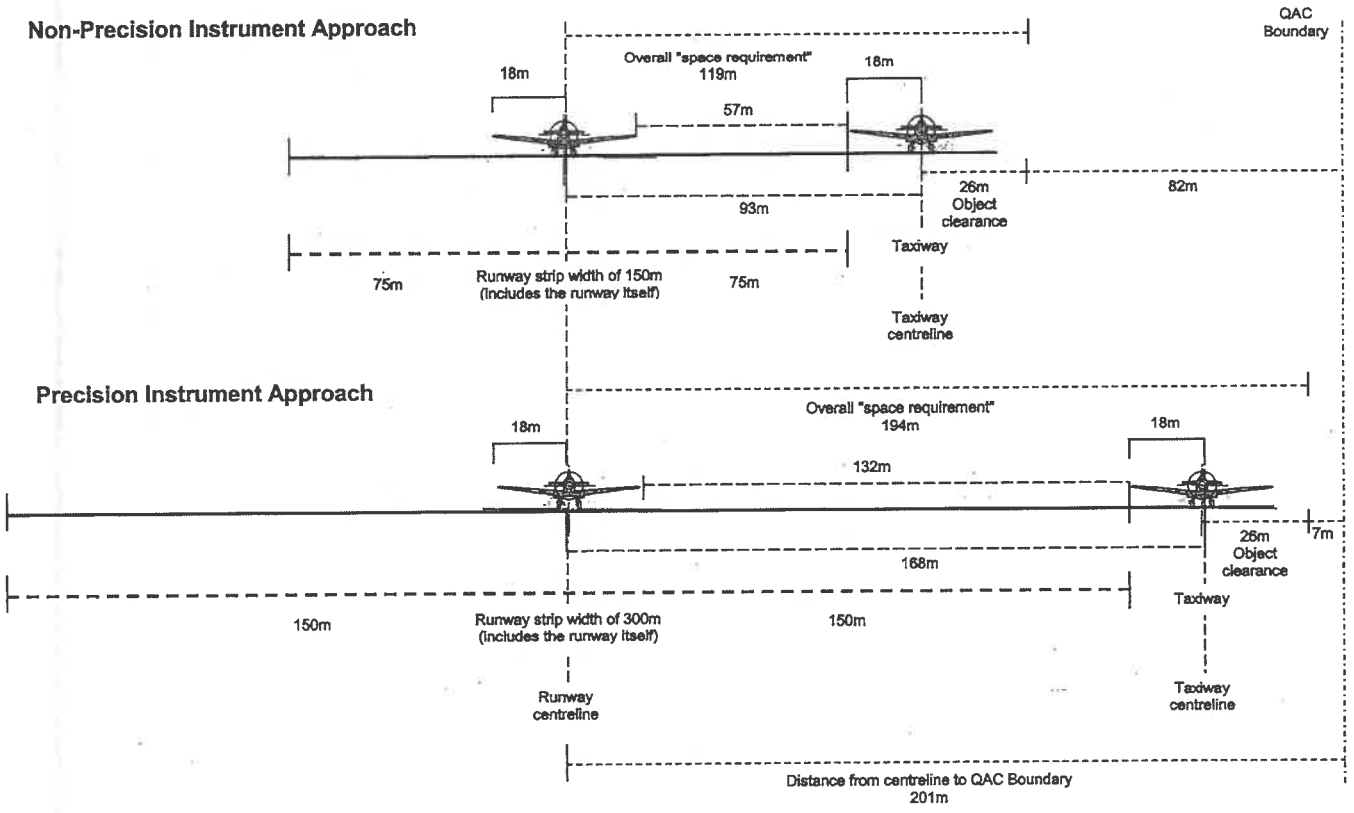
[152] Both appellants have had partial success on their appeals. I am minded therefore to let costs lie where they fall. If the parties do not agree they may file submissions, of no more than three pages in length.

Solicitors:
Brookfields, Auckland
Lane Neave, Christchurch
Russell McVeagh, Wellington

ANNEXURE A


QUEENSTOWN GATEWAY (5M)
QAC EXISTING DESIGNATION AREA
REMARKABLES PARK
EASTERN ACCESS ROAD
GRANTS ROAD
GLENDA DR. INDUSTRIAL
SHOTOVER PARK
QAC LAND
ENV. COURT DECISION 8.07 ha
EPA NOTICE 19.0808 ha
Lot 6 DP 304345
SHOTOVER RIVER
KAWARAU RIVER
LAKE WAKATIPU
SH 6 KINGSTON RD
To Invercargill
SH 6 FRANKTON LADIES MILE HIGHWAY
To Queenstown
To Arrowtown
Queenstown Events Centre
Queenstown Airport
High School
Frankton Flats
Location Plan
Scale : 1:10000 (A3)
Date : August 2013
Our Ref : 1009 - 2005 - 03
Surveying Limited

ANNEXURE B
SEPARATION DISTANCES FOR CODE C AIRCRAFT



2597650 v1

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2014-485-11253
[2015] NZHC 1991

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal under s 149V(1) of the Act against the Report and Decision of the Board of Inquiry into the Basin Bridge Proposal dated 29 August 2014
BETWEEN	NEW ZEALAND TRANSPORT AGENCY Appellant
AND	ARCHITECTURAL CENTRE INCORPORATED & ORS Parties to the appeal under s 302(1) of the Act

Hearing: 20-24, 27-31 July 2015

Counsel: M Casey QC, A F D Cameron, F Wedde and A Cameron for Appellant
K M Anderson and E Manohar for Wellington City Council (Interested Party)
P Milne for Architectural Centre Incorporated (Interested Party)
T Bennion for Mount Victoria Historical Society (Interested Party)
M S R Palmer QC for Save the Basin Campaign (Interested Party) and Mount Victoria Residents Association (Interested Party)

Judgment: 21 August 2015

JUDGMENT OF BROWN J

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Overview

[1] On 17 June 2013 the appellant (NZTA) lodged a Notice of Requirement (NoR) and applications for incidental resource consents for what is commonly referred to as the Basin Bridge Project (Project). The Project was to construct, operate and maintain a two lane one-way bridge on the north side of the Basin Reserve in Wellington City as part of State Highway 1 between Paterson Street and Taranaki Street.

[2] The key aspects of the Project were summarised in NZTA's submissions in this way:

> (a) The Basin Reserve is a key transport node within the Wellington network. [NZTA's] assessment is that the Project area is subject to congestion, delay and journey time variability, particularly during peak periods and weekends, and also has a high accident rate. These problems are predicted to get worse in the future as travel demand grows in the area for all transport modes, and changes in land use occur in the immediate vicinity (Adelaide Road) and the wider Wellington area (Wellington airport and the southern/eastern suburbs).
>
> (b) The Project provides essential infrastructure by grade separating the westbound traffic movements at the Basin Reserve. Grade separation would be provided by way of a bridge (the Basin Bridge), located in the north of the Basin Reserve. The Basin Bridge would carry westbound traffic from the Mt Victoria tunnel to Buckle Street/Arras Tunnel. This would remove that traffic from the roads around the Basin Reserve, which frees up capacity on those roads for public transport improvements and north-south local traffic.
>
> (c) The Project also includes a dedicated pedestrian/cycling path and enables improvements for those transportation modes around the Basin Reserve by reducing conflict between those modes and vehicular traffic.

[3] On 7 July 2013 the Minister for the Environment referred the Proposal to a Board of Inquiry appointed under s 149J of the Resource Management Act 1991 (RMA) to hear and determine the merits of the application. The Minister's reasons for directing the Proposal to a Board of Inquiry were as follows:

National significance

I consider the matters are a proposal of national significance because:

- The proposal is adjacent to and partially within the Basin Reserve Historic Area and international test cricket ground; in the vicinity of other historic places including the former Home of Compassion Crèche, the former Mount Cook Police Station, Government House and the former National Art Gallery and Dominion Museum; and is adjacent to the National War Memorial Park (Pukeahu). The proposal is likely to affect recreational, memorial, and heritage values associated with this area of national significance (including associated structures, features and places) which contribute to New Zealand's national identity.

- The proposal is likely to result in significant and irreversible changes to the urban environment around the Basin Reserve. In particular, the proposed elevating of westbound traffic on SH1 [State Highway 1] is likely to compete with the open space aspect that exists for the current ground level layout of the Basin Reserve roundabout.

- The proposal has aroused widespread public interest regarding its actual or likely effects on the environment, including on heritage values and experiential values associated with the Basin Reserve. This includes on-going media and public attention on the options for traffic improvement around the Basin Reserve, including local, national and international coverage.

- The proposal is intended to reduce journey time and variability for people and freight, thereby facilitating economic development. The proposal is also likely to provide for public transport, walking and cycling opportunities; reduce congestion and accident rates in the area; and improve emergency access to the Wellington Regional Hospital. If realised, these benefits will assist the Crown in fulfilling its public health, welfare, security, and safety functions.

- The proposal relates to a network utility operation (road) that, although physically contained within the boundaries of Wellington City, as a section of the Wellington Northern Corridor Road of National Significance will affect and extend to more than one district and region in its entirety.

[4] Section 149P(1) provides that the Board of Inquiry must have regard to the Minister's reasons for making a direction to refer the Proposal to the Board for decision.

[5] The scope of the hearing was described by the Board in its Final Report in this way:

> [79] The hearing took place in Wellington. It commenced on 3 February 2014 and finished on 4 June 2014. The hearing took 72 sitting days over four months. The length of the hearing was occasioned by the

> volume of material and the strength and perseverance of the opposition to the Project. No stone was left unturned. We make no apology for the length of the hearing. It was necessary to give the Applicant and the Parties the opportunity to fully present their cases.

[6] Having released a Draft Decision on 22 July 2014 in accordance with s 149Q(1) of the RMA, the Board released its Final Report and Decision on 29 August 2014 (Decision). The essence of the determination of the majority of the Board[1] is captured in the final few paragraphs:

> [1324] In the final outcome, we are required to evaluate the significant adverse effects taken together with the significance of the national and regional need for and benefit of the Project. In carrying out this evaluation, we are conscious of the dicta of the Privy Council in *McGuire* that relevantly Sections 6 and 7 are strong directions to be borne in mind, and if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that.
>
> [1325] This tension between the anticipated benefits and the anticipated adverse effects is the crux of the issues that have been debated before us. It reflects the tensions in Part 2. It reflects the tensions inherent in the statutory documents.
>
> [1326] We are conscious of our findings as to the manner in which the Project would be consistent with the integrated planning instruments and documents relating to transportation. We are also conscious of our findings on adverse effects, which are contrary to the themes in the planning instruments on heritage, landscape, visual amenity, open space and amenity. As the planners agreed, the statutory instruments give no guidance on how this conflict should be resolved.
>
> [1327] While the RMA does not require that an (sic) NoR must set out to achieve the best quality outcome, in our view, there are compelling landscape, amenity and heritage reasons why this Project should not be confirmed. The Basin Bridge would be around for over 100 years. It would thus have enduring, and significant permanent adverse effects on this sensitive urban landscape and the surrounding streets. It would have adverse effects on the important symbol of Government House and the other historical and cultural values of the area.
>
> [1328] Government House, like the Basin Reserve, has the important quality of rarity (there is only one such main residence of the Crown in New Zealand). The sensitivity of the area derives not just from Government House and the Basin Reserve but the overall national significance of the whole area from Taranaki Street to Government House.
>
> [1329] The adverse effects are occasioned by the dominance of the Basin Bridge, resulting from its bulk and scale in relation to the present environment, and the future environment, which does not anticipate such a

---

[1] Retired Environment Judge G Whiting, D Collins and J Baynes: an alternate view was provided by D J McMahon.

> substantial elevated structure in this significant open space. The carefully crafted design of the Basin Bridge, together with the meticulously crafted landscape and amenity measures, while offering some offset, do not mitigate the bulk and scale of the Basin Bridge, exacerbated by the Northern Gateway Building.
>
> [1330] The ultimate criterion is whether confirming the NoR for the Project would promote the sustainable management purpose of the RMA. On that criterion, we judge that, even with its transportation and economic benefits, confirming the NoR would not promote the sustainable management purpose described in Section 5. It follows that the requirement should be cancelled. The resource consents, being ancillary to the requirement, are declined.

Scope of appeal

[7] A right of appeal to the High Court against the Board's decision is provided in s 149V "but only on a question of law".

[8] NZTA filed an appeal on 24 September 2014 and the following parties (the respondents) gave notice under s 301 of the RMA of their wish to appear on the appeal:

(a) the Architectural Centre Inc (TAC);

(b) Mt Victoria Historical Society Inc (MVHS);

(c) Mt Victoria Residents' Association Inc (MVRA);

(d) Save the Basin Campaign Inc (STBC); and

(e) Wellington City Council (WCC).

[9] As noted in a Minute of MacKenzie J dated 12 November 2014, some of the respondents contended that aspects of the appeal were not focused on questions of law but related to factual conclusions or the weight which the Board had placed on certain evidence. Although NZTA did not accept those criticisms, it elected to review its notice of appeal in the light of the matters raised. MacKenzie J directed:

> [9] ... The appellant should be given an opportunity to consider the issues raised by the respondents and, if thought appropriate, to amend the notice of appeal. If the parties are then still at odds over whether the issues

> raise (sic) in the appeal do all involve questions of law, a hearing on that question might assist in focusing the issues on appeal, in a way which could potentially save considerable time at the hearing itself.

Timetable directions were made for the filing of an amended notice of appeal and an interlocutory application challenging the scope of the notice of appeal.

[10] On 27 November 2014 NZTA filed an amended notice of appeal together with a memorandum summarising the changes in tabular form. Although the respondents continued to have concerns about the appropriateness of what they described as the "extensive factual related grounds", they advised that they would not be pursuing an interlocutory application because of their limited resources as local community groups.

[11] The scope of the appeal is conveyed in the first paragraph of the amended notice of appeal which divides the appeal into eight issues:

> Issue 1: Misapplication of s 171(1)(b) of the Act (adequacy of consideration given to alternatives);
>
> Issue 2: Inquiring as to the outcome rather than the process of considering alternatives;
>
> Issue 3: Misapplication of s 171(1) of the Act (requirement to have particular regard to matters in paragraphs (a) to (d));
>
> Issue 4: Incorrect approach to the assessment of enabling benefits;
>
> Issue 5: Incorrect approach to the assessment of transportation benefits;
>
> Issue 6: Failure to have particular regard to s 171(1)(a) and (d) matters in assessing heritage and amenity effects;
>
> Issue 7: Incorrect approach to the assessment of the environment; and

Issue 8: Failure to consider options within the scope of the application to address amenity and heritage related effects of the Northern Gateway Building.

Issue 1 is divided into seven subissues and Issue 5 is divided into three subissues. In total 34 questions of law were specified in the amended notice of appeal. However each specified question of law was preceded by alleged "errors of law" and followed by "grounds of appeal". As a consequence of cross-references to those other parts, the number of questions of law expanded.

"A question of law"

[12] As noted above, the right of appeal provided by s 149V is "only on a question of law". Hence this appeal is not a general appeal. It is not the role of the High Court to conduct a rehearing of the application to the Board or to undertake an "on the merits" consideration of whether the Board's conclusion was correct. Nor is it the role of the High Court to determine whether or not the Project would be the best outcome to address the congestion problem at the Basin Reserve.

[13] To adapt the observation of Blanchard J in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* the questions for this Court are the more limited ones of:[2]

(a) has the Board misinterpreted what was required of it by the RMA and in particular under s 171?

(b) if not, are the Board's conclusions nevertheless so misconceived that they are unlawful conclusions?

[14] The nature of that more limited role was explained by the Supreme Court in *Bryson v Three Foot Six Ltd*:[3]

> [24] Appealable questions of law may nevertheless arise from the reasoning of the Court on the way to its ultimate conclusion. If the Court were, for example, to misinterpret the requirements of s 6 – to misdirect

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2 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50].

3 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

itself on the section, which incorporates the legal concept of contract of service – that would certainly be an error of law which could be corrected on appeal, either by the Court of Appeal or by this Court …

[25] An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.

[26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test …

[27] It must be emphasised that an intending appellant seeking to assert that there was no evidence to support a finding of the Employment Court or that, to use Lord Radcliffe's preferred phrase, "the true and only reasonable conclusion contradicts the determination", faces a very high hurdle. It is important that appellate Judges keep this firmly in mind. Lord Donaldson MR has pointed out in *Piggott Brothers & Co Ltd v Jackson* the danger that an appellate Court can very easily persuade itself that, as it would certainly not have reached the same conclusion, the tribunal which did so was certainly wrong:

> "It does not matter whether, with whatever degree of certainty, the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option. To answer that question in the negative in the context of employment law, the appeal tribunal will almost always have to be able to identify a finding of fact which was unsupported by *any* evidence or a clear self-misdirection in law by the Industrial Tribunal. If it cannot do this, it should re-examine with the greatest care its preliminary conclusion that the decision under appeal was not a permissible option …"

[28] It should also be understood that an error concerning a particular fact which is only one element in an overall factual finding, where there is support for that overall finding in other portions of the evidence, cannot be said to give rise to a finding on "no evidence". It could nonetheless lead or contribute to an outcome which is insupportable.

[15] In *Vodafone*, after reference to *Bryson*, Blanchard J elaborated on the point with particular reference to the nature of the interpretative problem:[4]

> [54] The nature of the interpretative problem in the present circumstances and the caution which must be exercised before it can be said that an interpretation is in error, or before it can be said that a statutory provision has been misapplied, is well illustrated in the judgment of Lord Mustill, speaking for the House of Lords in *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd*. What was in issue was much less complicated than "net cost" in the present case. It was the construction of the words "a substantial part of the United Kingdom" in statutory criteria applying to the investigation of mergers of transport services. Lord Mustill drew attention to the "protean nature" of the word "substantial", ranging from "not trifling" to "nearly complete". He cautioned against taking an inherently imprecise word and "by redefining it thrusting on it a spurious degree of precision". Accordingly, he concluded that the area referred to as "a substantial part" must only be "of such dimensions as to make it worthy of consideration for the purposes of the Act". Applying that test (the criterion) to the facts involved asking, first, whether the Monopolies Commission had misdirected itself, and, second, whether its decision could be overturned on the facts.
>
> [55] His Lordship said that it was quite clear that the Commission had reached an appreciation of "substantial" which was "broadly correct". Speaking generally about how a question of the nature of the second question should be approached, his Lordship said:
>
> > Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history. The judgment now proceeds unequivocally on the basis of the criterion as ascertained. So far, no room for controversy. But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards v Bairstow* [1956] AC 14.
>
> Lord Mustill said that *South Yorkshire* was such a case:
>
> > Even after eliminating inappropriate senses of "substantial" one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. Approaching the matter in this light I am quite satisfied that there is no ground for interference by the court, since the conclusion at which the commission arrived was well within the permissible field of judgment.

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4 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, above n 2.

> [56] The issue about "net cost" involves an imprecise criterion where "different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case".
>
> [57] Some guidance is also to be obtained from this Court's decision in *Unison Networks Ltd v Commerce Commission*. That case was about a statutory regime for controlling electricity line companies. The Commission's task was to set thresholds for declarations of control. It differs from the present case because it involved the use of a broadly expressed power designed to achieve economic objectives, rather than, as here, the calculation of an amount of net cost. But it was alleged in *Unison* that the Commission had misconstrued the requirements of Part 4A of the Commerce Act 1986 and applied the wrong legal test when exercising its power. As to that, this Court said that the statute contemplated that the Commission, as a specialist body, would exercise judgment in constructing the thresholds. That requirement, the Court said, could have been lawfully tackled in one of two ways. Both approaches were within the terms of the provisions in the relevant subpart of Part 4A. The Commission chose one of them and that was lawful. Importantly, it can be added that if the Commission had chosen the other, it too would have been lawful.
>
> [58] So there are two stages. First, whether the Commission has misinterpreted the language of the statute. This in part turns on its appreciation of the function of the word "unavoidable". And, secondly, whether, if its interpretation was correct, it has nonetheless exercised its judgment about what was "net cost" in a way that contradicts the true and only reasonable conclusion available on the facts and has thereby committed an error of law in terms of *Edwards v Bairstow*.

[16] Several of the questions of law in the amended notice of appeal utilise the formulation whether the Board made findings to which "it could reasonably have come on the evidence".[5]

[17] I recognise that in identifying the circumstances in which it is permissible to interfere with a tribunal's decision a number of High Court judgments have included the formula "a conclusion [the tribunal] could not reasonably have come to".[6] However I consider that there is significant potential for confusion when such a formulation is reframed without the inclusion of a negative with the consequence that the question becomes: is the conclusion one to which a tribunal could reasonably have come on the evidence?

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5 For example, the questions of law listed as 4(b), 7(b)(i)–(iii), 19(a) and (d), 22 and 36(b).

6 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC); *Ayrburn Farms Estate Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [34].

[18] The potential for confusion is compounded when the ground of appeal is expressed as was ground 5(d) in the amended notice of appeal:

> … the finding that sufficiently careful consideration had not been given to alternatives was not a reasonable finding on the evidence.

In similar vein in NZTA's written reply it was contended that:

> A question of law can arise where a decision-maker has reached a finding without any reasonable evidential foundation.

[19] It is useful, I suggest, to recall why Lord Radcliffe preferred his third description in *Edwards v Bairstow*, namely one in which the true and only reasonable conclusion contradicts the determination:[7]

> … Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

[20] In my view paraphrasing the established tests by reference to "not a reasonable finding on the evidence" or "without any reasonable evidential foundation" does not advance the analysis and has the potential to extend the inquiry beyond the proper boundary of what constitutes a question of law.

[21] In the context of an appeal against the exercise of a discretion (which the present appeal is not) it has long been recognised that on the same evidence two different minds might reach widely different decisions without either being appealable.[8] The same point has been made employing the word "reasonably":[9]

> The reason for the limited role of the Court of Appeal in custody cases is not that appeals in such cases are subject to any special rules, but that there are often two or more possible decisions, any one of which might reasonably be thought to be the best, and any one of which therefore a judge may make without being held to be wrong.

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7 *Edwards v Bairstow* [1956] AC 14 (HL) at 36.
8 *Bellenden v Satterthwaite* [1948] 1 All ER 343 (CA) at 345.
9 *G v G* [1985] 2 All ER 225 (HL) at 228.

[22] However in the third of Lord Radcliffe's descriptions in *Edwards v Bairstow* where "reasonable" appears, it is quite clear that only one possible conclusion was in contemplation as being reasonable:

> one in which the true and only reasonable conclusion contradicts the determination.

[23] Consequently, in the interests of clarity, when addressing those questions of law in NZTA's amended notice of appeal which adopt the "could reasonably have come to on the evidence" formula, I propose to reframe the question to align precisely with Lord Radcliffe's third description.

[24] From time to time there was reference in the course of NZTA's submissions to another formula, namely a conclusion "where there is no reliable, probative evidence to support the determination". Authority for that formula as demonstrating an error of law was said to be found in *Chorus Ltd v Commerce Commission*.[10] Kós J there remarked:

> [177] Thirdly, I find the Commission did not fail to determine what inferences could reliably be drawn from the benchmark data about the likely cost of providing the UBA service in New Zealand. This was very much a tertiary argument to the two primary arguments. Had the Commission had reason to believe that the benchmark evidence was not reliable, probative evidence or that the proposed IPP outcome, based on the benchmark evidence and allowing for consideration of s 18, was irrational and likely to produce an outcome substantially removed from the likely ISLRIC found under the FPP, the Commission would have had a duty to inquire further. But those were not the circumstances here. The benchmark evidence was reliable and probative. The IPP outcome was not evidently irrational, however unpalatable it may have been to Chorus. The mechanism to correct the IPP price lay not in further protracted analysis to produce a more perfect IPP price. It lay in the statutory mechanism, under s 42, to obtain a full pricing review using the FPP.

[25] On appeal the Court of Appeal[11] endorsed the High Court's finding that there was no reason to believe that the benchmark evidence that the Commission obtained through its questionnaire was not reliable, probative evidence.[12] However I do not consider that the Court of Appeal's judgment is to be read as extending the grounds

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10 *Chorus Ltd v Commerce Commission* [2014] NZHC 690 at [154] and [177].
11 *Chorus Ltd v Commerce Commission* [2014] NZCA 440. References omitted.
12 At [121].

upon which a judgment may be challenged as wrong in law. Indeed it is apparent that the Court of Appeal was reiterating the traditional approach.

[26] The introductory paragraphs bear repeating. Having noted that the appeal was not a general appeal against the merits of the Commission's determination and that Chorus did not challenge the Commission's interpretation of any of the relevant statutory provisions, the Court said:

> [109] Instead Chorus challenges the Commission's determination on the basis that the proper application of the law required a different answer. Chorus does this by alleging, in the first five questions of law, that the Commission made factual errors and thereby erred in law.
>
> [110] It is well-established, however, that to succeed on the basis of allegations of this nature Chorus must show that the Commission has exercised its judgment about the application of the IPP:
>
> > ... in a way that contradicts the true and only reasonable conclusion available on the facts and has thereby committed an error of law in terms of *Edwards v Bairstow*.
>
> [111] This is a high hurdle for Chorus to surmount. It is well-established that unless the Commission's application of the statutory provisions is factually "unsupportable" it will not have erred in law. It is for the Commission, as a specialist body, to exercise judgment in carrying out the requisite "benchmarking" exercise and in weighing up the relevant facts in that context. It will therefore having erred only if there is no evidence to support the factual findings it made in reaching its determination.
>
> [112] In the absence of a right of general appeal, it is not the role of the Court in an appeal on a question of law to undertake a broad reappraisal of the Commission's factual findings or the exercise of its evaluative judgments. Care should also be taken to avoid a technical and overly semantic analysis of the Commission's determination in an endeavour to create a question of law. In making factual findings it is for the Commission, and not the Court, to decide what weight should be given to the relevant evidence and what inferences, if any, should be drawn from the evidence. An inference must be logically drawn from proven facts and not be mere speculation or guesswork. At the same time, as counsel for the Commission acknowledged, if the Commission has made a factual error that makes its application of the statutory provisions "unsupportable" it will have erred in law.

Section 171

[27] The Board was required to consider the NoR under s 149P(4) which provides:

(4) A board of inquiry considering a matter that is a notice of requirement for a designation or to alter a designation—

(a) must have regard to the matters set out in section 171(1) and comply with section 171(1A) as if it were a territorial authority; and

(b) may—

(i) cancel the requirement; or

(ii) confirm the requirement; or

(iii) confirm the requirement, but modify it or impose conditions on it as the board thinks fit; and

(c) may waive the requirement for an outline plan to be submitted under section 176A.

[28] Consequently the Board was required to make its decision on the NoR by applying s 171(1) which provides:

(1) 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—

(a) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(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 a significant adverse effect on the environment; and

(c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and

(d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

[29] Issues relating to the interpretation of s 171(1) comprised a significant part of the appeal. In this portion of the judgment I briefly traverse the legislative history of s 171 together with some relevant authorities. In the course of doing so I identify a number of the primary interpretation issues in contest. However it is convenient first to draw attention to s 171(1)(c), relating as it does to the objectives of a requirement.

Section 171(1)(c)

[30] NZTA's objectives for the Project were:[13]

> **Objective 1**: To improve the resilience, efficiency and reliability of the State network:
>
> (i) By providing relief from congestion on SH1 between Paterson Street and Tory Street;
>
> (ii) By improving the safety for traffic and persons using this part of the SH1 corridor; and
>
> (iii) By increasing the capacity of the SH1 corridor between Paterson Street and Tory Street.
>
> **Objective 2**: To support regional economic growth and productivity:
>
> (i) By contributing to the enhanced movement of people and freight through Wellington City; and
>
> (ii) By, in particular, improving access to Wellington's CBD employment centres, airport and hospital.
>
> **Objective 3**: To support mobility and modal choices within Wellington City:
>
> (i) By providing opportunities for improved public transport, cycling and walking; and
>
> (ii) By not constraining opportunities for future transport developments.
>
> **Objective 4**: To facilitate improvement to the local road transport network in Wellington City in the vicinity of the Basin Reserve.

[31] The Board found that the works were reasonably necessary to achieve those objectives.[14] The Board also recorded that there was no real dispute that the NoR (i.e. designation) was reasonably necessary for achieving the objectives.[15]

---

13 Final Decision, at [1225].
14 At [1230].

Original form of s 171(1)

[32] Section 171 as originally enacted in 1991 included Part 2 of the RMA as one of five matters to which a territorial authority was required to have particular regard:

> **171 Recommendation by territorial authority–**
>
> (1) When considering a requirement made under section 168, a territorial authority shall have regard to the matters set out in the notice given under section 168 (together with any further information supplied under section 169), and all submissions, and shall also have particular regard to–
>
> (a) Whether the designation is reasonably necessary for achieving the objectives of the public work or project or work for which the designation is sought; and
>
> (b) Whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work or project or work; and
>
> (c) Whether the nature of the public work or project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route, or method; and
>
> (d) All relevant provisions of national policy statements, New Zealand coastal policy statements, regional policy statements, regional plans, and district plans; and
>
> (e) Part II.

Section 104 concerning resource consent applications and s 191 concerning requirements for heritage orders had a similar structure.

1993 Amendment

[33] The reference to Part 2 was relocated in 1993[16] when the words "Subject to Part II" were placed at the commencement of the subsection. An equivalent amendment was made to both ss 104 and 191.

[34] The 1993 Amendment also introduced s 168A providing for the public notification of requirements. Under s 168A(3) a territorial authority was to have regard to the matters set out in s 171.

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15 At [1218] –[1219].

16 Resource Management Amendment Act 1993, s 87.

[35] The speech of the Minister of the Environment on the second reading of the bill explained the motivation for the amendments. Having noted that the RMA seeks to provide certainty to all parties and that the law must provide a clear framework for the courts and others to work with, the Hon Rob Storey said:[17]

> The Bill, therefore, addresses those sections of the Resource Management Act in which at present there is a lack of clarity. There are some who believe that the Act should be left untouched until case law demonstrates that, because of ambiguous wording, Parliament's intent has not been exactly converted into the law.
>
> If Parliament intends a particular policy direction, I think that direction has to be clearly expressed. To do otherwise would be a dereliction of the trust placed in us as members of Parliament. It is one thing to use language that allows a flexibility of outcomes, when Parliament probably knows what it intends as the result; it is quite another matter to have language that allows a variety of outcomes, when there is meant to be only one.
>
> Sorting out the ambiguities in a legal setting also puts a very large cost on everybody – citizens, local government, central government, and potentially on the environment itself. I think that the House would want to do better than that, and therefore it has to remove the necessary ambiguities and costs.

[36] Specifically in relation to references within the RMA to Part 2, the Minister said:

> As I said, the Bill makes a number of technical amendments and I certainly do not intend to go through all of them. Part II of the Resource Management Act sets out the purpose of the Act. The current references in the Act to Part II have been in danger of being interpreted as downgrading the status of Part II. Amendments in the Bill restore Part II to its proper overarching position.

[37] The significance of the "subject to" drafting method had been the subject of direct consideration some four years earlier in *Environmental Defence Society Inc v Mangonui County Council*.[18] Section 3 of the Town and Country Planning Act 1977, the predecessor of the RMA, related to matters of national importance which were in particular to be recognised and provided for in the implementation and administration of district schemes. Section 36, which related to the contents of district schemes, included the phrase "subject to section 3".

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17 (17 June 1993) 535 NZPD 15920.

18 *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA) at 260.

[38] With reference to the significance of the inclusion of that phrase Cooke P said:

> The decision of the Tribunal now in question contains no discussion of the relationship between s 3 and the other sections, but Chilwell J observes in his judgment that the Tribunal has consistently held that the change in wording making certain sections subject to s 3 does no more than make explicit what was previously implicit and that the *Waimea* decision applies to the present Act. The High Court Judge also adopted that view and it may fairly be said, I think, to have been both an express basis of his decision and an underlying assumption of the Tribunal's decision. Read as a whole, their reasoning appears to involve an overall balancing of the various considerations in ss 3 and 4 on the lines approved in the *Waimea* judgment.
>
> With respect, I am unable to agree that this is a correct view. Rather I agree with the view taken by Dr K A Palmer in his *Planning and Development Law in New Zealand* (2nd ed, 1984) vol 1 at p 202 that the 1977 change was significant. **The qualification "Subject to" is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict.** This Court had occasion to say so expressly in a reported case the year before the 1977 Act: *Harding v Coburn* [1976] 2 NZLR 577, 582. **There was no need nor reason to insert those words in ss 4 and 36 of the 1977 Act if the legislature had intended that the s 3 matters were no more than matters to which regard was to be had, together with district considerations, in preparing a district scheme.** The explanation of the insertion of the words that leap to the eye, as it seems to me, is that the argument for the Minister of Works rejected in *Waimea* was henceforth to prevail. There is an analogy with the legislative guidelines provided by declaring a special object for the amending Act considered by this Court in *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc* [1988] 1 NZLR 78, 87-88; see also per Bisson J at pp 94–95 and per Chilwell J at pp 97–99.
>
> (emphasis added)

[39] Section 171 in its 1993–amended form was considered in a number of noteworthy judgments. Delivering the advice of the Privy Council in *McGuire v Hastings District Council* Lord Cooke of Thorndon said:[19]

> [22] ... By s 171 particular regard is to be had to various matters, including (b) whether adequate consideration has been given to alternative routes and (c) whether it would be unreasonable to expect the authority to use an alternative route. ...; but, by s 6(e), which their Lordships have mentioned earlier, [Hastings] is under a general duty to recognise and provide for the relationship of Maori with their ancestral lands. So, too, Hastings must have particular regard to kaitiakitanga (s 7) and it must take into account the principles of the Treaty (s 8). **Note that s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that**

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19 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577.

> **the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.**
>
> (emphasis added)

[40] While strictly speaking those observations in relation to the operation of s 171 were obiter dicta, as *Auckland Volcanic Cones Society Inc v Transit New Zealand* recognised, they were "very strong obiter dicta".[20] The High Court there added:

> [59] ... The specific considerations in s 171 (alternative methods or routes in particular) are subject to Part II of the RMA. Parties involved in the administration and application of the RMA are very familiar with the requirement to have regard to other considerations subject to Part II. On an application for resource consent, consent authorities and on appeal the Environment Court must have regard to the considerations in s 104 of the RMA. The s 104 considerations are expressed to be subject to Part II. There is a well-established body of case law confirming the primacy of Part II and how that is applied in relation to the s 104 considerations. The drafting technique used in s 171 to provide the considerations in that section are subject to Part II is not unique to s 171.
>
> [60] In the present case the effect of ss 171 and 174 is to require Transit and the Environment Court on appeal to have particular regard to the matters at s 171(1)(a), (b), (c) and (d) but always subject to Part II of the RMA.

2003 Amendment

[41] Section 171 was substantially redrafted in the 2003 Amendment.[21] One change was the relocation of the reference to "subject to Part II" from its location at the commencement of the subsection:

> 171 **Recommendation by territorial authority**
>
> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part II, consider the effects on the environment of allowing the requirement, having particular regard to–
>
> ...

Although a similar change was made to s 104(1), there was no equivalent amendment to s 191(1) and consequently the phrase "Subject to Part 2" remains at the commencement of that subsection.

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20 *Auckland Volcanic Cones Society Inc v Transit New Zealand* [2003] NZRMA 316 (HC).

21 Resource Management Amendment Act 2003, s 63.

[42] Section 186A(3) was substantially redrafted in terms identical to s 171(1).

[43] One of the contested points of interpretation turns on the fact of that relocation of the phrase within s 171(1). Whereas TAC contended that the phrase continued to render the totality of the consideration of effects as being subject to Part 2, NZTA argued that the relocation had the consequence that the phrase related to the consideration of effects rather than to the (a) to (d) matters.

[44] Most recently s 171 was considered in *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council*.[22] Citing *McGuire*, Whata J said:

> [68] It will be seen that the focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. **The import of this is that the purpose, policies and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement. Indeed, in the event of conflict with the directions in s 171, Part 2 matters override them.** Paramount in this regard is s 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.
>
> [69] Part 2 also requires that in achieving the sustainable management purpose, all persons exercising functions shall recognise and provide for identified matters of national importance; shall have regard to other matters specified in s 7 and shall take into account the principles of the Treaty of Waitangi.
>
> [70] The reference at s 171(1)(d) to "any other matter" is qualified by the words "reasonably necessary". Given the Act's overarching purpose, however, the scope of the matters that may legitimately be considered as part of the effects assessment must be broad and consistent with securing the attainment of that purpose.
>
> (emphasis added)

Sections 171(1) and 104(1) compared

[45] It is convenient at this juncture to note the different structure of s 104 following the 2003 Amendment:[23]

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22 *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 [*Queenstown Airport*]. References omitted.

23 Section 104(1)(b) was replaced on 1 October 2009 by s 83(1) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

104 **Consideration of applications**

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part II, have regard to–

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of–

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[46] Two points of difference between ss 104 and 171 material to the statutory interpretation arguments in this case are:

(a) in s 104 the effects on the environment comprises one of the matters to which regard is to be had whereas in s 171 it is the focus of consideration;

(b) s 171 requires that the matters listed are to be the subject of "particular" regard.

[47] Having noted what it described as the "subtly different language" in the two sections, the Board concluded that the difference in wording did not require a substantively different approach to considering effects on the environment arising from NoRs from that for determining consent applications.[24] That conclusion is also in issue in contest on this appeal.[25]

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[24] At [194] of the Final Decision.
[25] Question 28A: see [72] below.

The relevance of King Salmon

[48] The Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*[26] was released on 17 April 2014 part way through the hearing before the Board.[27] *King Salmon* involved an application for a change to the Marlborough Sounds Resource Management Plan under s 66 of the RMA. It did not concern s 171. The relevance of *King Salmon* to the present appeal arises from the Court's discussion of Part 2[28] and the decision-making process known as the "overall judgment" approach.

[49] NZTA's submissions stated that *King Salmon* has significantly modified the approach to decision-making under the RMA and in particular the meaning of "subject to Part 2". The respondents rejoined that the ratio of *King Salmon* was confined to plan changes and that the decision was of little moment in relation to designations.

Sequence of consideration of the Issues

[50] As earlier noted[29] the amended notice of appeal grouped the questions of law under eight broad issues by reference to subject matter.

[51] In its written submissions NZTA stated that it had "further refined" the questions of law comprised in Issues 3 and 6. Although these submissions were presented as filed, the redefinition provoked some debate which led to NZTA filing a memorandum on the fourth day of the hearing formally recording the intended "restatement" of the questions of law relevant to Issues 3 and 6 and summarising the principles relating to the Court's power to amend a notice of appeal.[30]

[52] The Issue 3 questions, being Q 28(a), (b) and (c), were refined as five questions which I will refer to as Q 28A to 28E. The Issue 6 question, being Q 45

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26 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*].

27 At [91] of the Final Decision.

28 A change to a regional plan under s 66 must be "in accordance with [inter alia] the provisions of Part 2": s 66(1)(b).

29 At [11] above.

30 Memorandum of counsel for the Appellant in relation to questions of scope and the Court's power to amend (if necessary) dated 23 July 2015.

(albeit with the cross-reference to the errors of law listed in para 44 of the amended notice of appeal), was refined as five questions which I will refer to as Q 45A to 45E.

[53] It is convenient to set out the refined Issue 3 questions of law:

> 28A Does the difference in wording between s 104 and s 171 require a substantively different approach to considering effects on the environment arising from notices of requirement as that for determining consent applications?
>
> 28B Was the Board in error by considering the effects of the environment of allowing the requirement without having particular regard to the matters listed in s 171(1)(a)–(d)?
>
> 28C When considering a requirement under s 171(1) RMA, how are the words 'having particular regard' to be interpreted?
>
> 28D When considering a requirement under s 171(1) RMA, how are the words 'subject to Part 2' to be applied (in particular, following the recent Supreme Court decision in King Salmon)?
>
> 28E As a consequence of those errors, did the Board make findings of fact that it could not otherwise have come to on the evidence?

[54] That "refinement" of the Issue 3 questions of law was particularly significant as it introduced in an explicit way as Q 28C and 28D[31] fundamental questions concerning the interpretation of s 171(1). The answers to, or more accurately the discussion of, those two questions has significance for a number of the other specified questions of law.

[55] Consequently, although the structure of the parties' submissions helpfully tracked the sequence of the Issues in the amended notice of appeal, I propose to first address the key issues of statutory interpretation and the arguments concerning the implications of *King Salmon*. Having done so, the judgment will then traverse the remaining questions of law in the sequence of the identified Issues.

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[31] Q 28(a), (b) and (c) in the amended notice of appeal remained as Q 28A, 28B and 28E.

The meaning of "having particular regard to" in s 171

[56] NZTA's intention to call into question the interpretation of the phrase "having particular regard to" was arguably implicit in Q 28(a) and Q 28(b) in Issue 3. However the issue was squarely raised in the restated Q 28C:

> When considering a requirement under s 171(1) RMA, how are the words "having particular regard" to be interpreted?

The 23 July 2015 memorandum[32] explained that it was necessary to address Q 28C when determining the Q 28 questions in the amended notice of appeal.

[57] The phrase is used not only in s 171(1) (and relatedly in s 168A(3)) but it also appears in 191(1) and notably in s 7 in Part 2. By contrast what is usually viewed as the lesser obligation of "have regard to" is employed in s 104(1) and in a variety of other sections.[33]

[58] A curious interface between the two phrases is highlighted in s 149P which concerns the matters to be considered by a board of inquiry. As noted earlier a board is required to "have regard to" the Minister's reasons.[34] In the case of a notice of requirement for a designation or for a heritage order a board is required to "have regard to" the matters set out in s 171(1)[35] and s 191(1)[36] respectively. However both ss 171(1) and 191(1) direct that such matters are to be the subject of "particular regard". I raised with counsel the possibility that, given the terms of s 149P, the obligation on a board might be only to "have regard" to the matters in s 171(1). That would have the consequence of equality of treatment between the s 171(1) matters and the Minister's reasons. However neither side was attracted to that interpretation.

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32 At [51] above.
33 Resource Management Act 1991, ss 131(1), 138A and 142.
34 At [4] above.
35 Section 149P(4)(a).
36 Section 149B(5)(a).

"have regard to"

[59] Taking the phrase "have regard to" as the starting point, in *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* Wylie J (sitting with Mr R G Blunt) said:[37]

> We do not think there is any magic in the words "have regard to". They mean no more than they say. The tribunal may not ignore the statement. It must be given genuine attention and thought, and such weight as the tribunal considers appropriate. But having done that the tribunal is entitled to conclude it is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function[.]

[60] It follows that the phrase "have regard to" does not mean "to give effect to". In *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* Cooke P agreed with and adopted the following analysis of McGechan J at first instance:[38]

> ... He is directed by s 107G(7) to 'have regard' to any submissions made. Such submissions are to be given genuine attention and thought. That does not mean that industry submissions after attention and thought necessarily must be accepted. The phrase is 'have regard to' not 'give effect to'. They may in the end be rejected, or accepted only in part. They are not, however, to be rebuffed at outset by a closed mind so as to make the statutory process some idle exercise.
>
> Section 107G(7) in its direction that the Minister 'have regard' to five stated criteria does not direct that any one or more be given greater weight than others. In particular it does not direct that (a) value of ITQ is to have greater or lesser regard paid than (b) net returns and likely net returns. Weight, in the end and provided he observes recognised principles of administrative law, is for the Minister.

[61] Specifically in an RMA context John Hansen J took a similar approach in *Foodstuffs (South Island) Ltd v Christchurch City Council*:[39]

> I do not consider the term "shall have regard to" in s 104 RMA should be given any different meaning from the cases referred to above. In my view, the appellant is seeking to elevate the term from "shall have regard to" to

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37 *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601 (HC) at 612.

38 *New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 551. Similarly see *R v Police Complaints Board, ex parte Madden* [1983] 2 All ER 353 (QBD) at 369–370 where a number of English decisions are discussed.

39 *Foodstuffs (South Island) Ltd v Christchurch City Council* (1999) 5 ELRNZ 308, [1999] NZRMA 481 (HC) at 487.

> "shall give effect to". The requirement for the decision-maker is to give genuine attention and thought to the matters set out in s 104, but they must not necessarily be accepted.

[62] One of the authorities cited by John Hansen J was *R v CD*,[40] a judgment of Somers J who expressed the view in the context of the Costs in Criminal Cases Act 1967 that the expression "shall have regard to" is not synonymous with "shall take into account". However I note that in a number of subsequent decisions in Australia the two phrases have been treated as equivalent.[41]

[63] In my view the expression "to take into account" is susceptible of different shades of meaning. I consider that the two phrases can be viewed as synonymous if the phrase "to take into account" is used in the sense referred to by Lord Hewart CJ in *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Maryleborne* "of paying attention to a matter in the course of an intellectual process".[42] The key point is that the decision-maker is free to attribute such weight as it thinks fit to the specified matter but can ultimately choose to reject the matter.

"having particular regard to"

[64] Plainly the phrase "shall have particular regard to" conveys a stronger direction than merely "to have regard to". Section 7 (which includes the phrase) is one of the four sections in Part 2 which *McGuire* described as being "strong directions".[43]

[65] The issue is most recently informed by the discussion of Part 2 in *King Salmon*.[44] Having observed that s 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA, which is given further elaboration by the remaining sections in Part 2 (ss 6, 7 and 8), Arnold J writing for the majority of the Supreme Court said:

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40 *R v CD* [1976] 1 NZLR 436 (SC) at 437.

41 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 25 ALR 497 (HCA); *Queensland Medical Laboratory Ltd v Blewett* (1988) 84 ALR 615 (FCA) at 623; *Minister for Immigration and Ethnic Affairs v Baker* (1997) 45 ALD 136 (FCA) at 142; *Friends of Hinchinbrook Society Inc v Minister for the Environment* (1997) 147 ALR 608 (FCA) at 627.

42 *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Maryleborne* [1923] 1 KB 86 (CA) at 99.

43 At [39] above.

44 *King Salmon,* above n 26.

> [26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. **As between ss 6 and 7, the stronger direction is given by s 6 – decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters.** The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. **The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).**
>
> [27] Under s 8 decision-makers are required to "take into account" the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the sense that the principles of the Treaty may have an additional relevance to decision-makers.
>
> (emphasis added)

[66] While NZTA submitted that the (a) to (d) matters in s 171(1) were to be carefully weighed in coming to a conclusion, no submission was advanced in the course of argument on the interpretation issue to the effect that the matters to which particular regard was to be had were required to be the subject of extra weight.[45] On that issue I share the view of Sir Andrew Morritt V-C in *Ashdown v Telegraph Group Ltd*:[46]

> It was submitted that the phrase 'must have particular regard to' indicates that the court should place extra weight on the matters to which the subsection refers. I do not so read it. Rather it points to the need for the court to consider the matters to which the subsection refers specifically and separately from other relevant considerations.

[67] In the event NZTA and the respondents appeared to be on the same page on the interpretation of the phrase. Both sides cited the decision of the Planning

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45 However NZTA's submissions argued that the Project's enabling effect for future projects was a highly relevant effect that ought to have been considered and "given sufficient weight" by reason of the requirement to have particular regard in s 171(1).

46 *Ashdown v Telegraph Group Ltd* [2001] 2 All ER 370 (Ch) at [34] where the phrase "must have particular regard to" in s 12 of the Copyright Act 1988 with reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms was considered.

Tribunal in *Marlborough District Council v Southern Ocean Seafoods Ltd* where the following view was expressed:[47]

> The duty to have particular regard to these matters has been described in one case as "a duty to be on inquiry" *Gill v Rotorua District Council* (1993) 2 NZRMA 604, 2 NZPTD Part 5. With respect in our view it goes further than the need to merely be on inquiry. To have particular regard to something in our view is an injunction to take the matter into account, recognising it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion.

[68] I agree that that is an appropriate interpretation provided that the reference to "take the matter into account" is understood in the sense explained at [63] above.

Did the Board adopt the correct approach?

[69] NZTA's real complaint was that the Board failed to adhere to the identified standard. It placed particular reliance on the Board's comments at [175]:[48]

> [175] What is required (subject to consideration of the *King Salmon* decision, which we address next) is a consideration of the effects on the environment of allowing the requirement having particular regard to the matters set out in sub-sections (a)–(d). This means that the matters in (a)–(d) need to be considered to the extent that our finding on these matters are to be heeded (or borne in mind) when considering our findings on the effects on the environment.

[70] I would agree with NZTA that merely to heed or bear in mind matters would fall below the requisite level of attention which the phrase "have particular regard to" imports. However I do not consider that the comments at [175], which were introductory in character, accurately reflect the Board's approach which is more evident at [181]–[182]:

> [181] By contrast, in considering the NoR we are required to have *particular regard to* the relevant instruments.
>
> [182] The phrase have *particular regard to* has been interpreted as requiring that we specifically turn our mind to each of the listed matters, and give them some greater weight than those to which we are only required to have *regard*. This is a different and lesser test than the requirement to *give effect to*, as was being considered in *King Salmon*. The Supreme Court interpreted *give effect to* as simply meaning *implement*, and considered that this requirement was *intended to constrain decision makers*.

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47 *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 at 228.

48 Attention was also drawn to the use of the verb "informed" in [196].

[71] That such turning of their minds was required separately in respect of each of the listed matters was acknowledged in the Board's subsequent endorsement at [194] of a passage from the Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project (NIGUP).[49]

[72] It is convenient at this point to address Q 28A which states:

> Does the difference in wording between s 104 and s 171 require a substantively different approach to considering effects on the environment arising from notices of requirement as that for determining consent applications?

[73] This ground of appeal was directed to the Board's statements at [193]–[194]:

> [193] … We acknowledge (as [NZTA] noted) that the obligation to assess effects with respect to NoRs under Section 171(1) is expressed in subtly different language from the equivalent obligation arising with respect to resource consents under Section 104(1). Specifically, Section 171(1) requires consideration of the effects on the environment having particular regard to the matters in sub-sections (a)–(d). Whereas under Section 104(1), the activity's actual and potential effects are instead listed as one of the matters to which a decision maker must *have regard*, alongside those in Section 104(1)(b) and (c). Both Sections 104(1) and 171(1) though, are subject to Part 2.
>
> [194] However, we do not consider that difference in wording requires a substantively different approach to considering effects on the environment arising from NoRs as that for determining consent applications, as counsel for [NZTA] claimed. Indeed in our experience, it does not. To the contrary, we adopt the findings of the *Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project*, that Section 171(1) is to be applied as follows:
>
> [a] The language … *consider the effects* … *having particular regard to* … expresses a duty to do both together, without necessarily giving one primacy over, or making one subordinate to, the other;
>
> [b] The language *having particular regard* expresses a duty for us to turn our mind separately to each of the matters listed, to consider and carefully weigh each one. The words do not carry a meaning that the matters listed in (a)–(d) are necessarily more or less important than the effects on the environment of allowing the requirement; and

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[49] At [73] below.

> [c] We must make our own judgment, based on the evidence and in the circumstances of the case, about the effects on the environment, about the matters listed in (a)–(d), and about the relative importance of each in all the circumstances.

[74] NZTA's objection to that analysis was directed both to the equivalence of treatment of the two sections and to the issue of "subject to Part 2". That latter issue is addressed below in the context of my consideration of Part 2.

[75] NZTA's argument was that the Board misapplied s 171(1) by in effect inserting the word "and" into the subsection (presumably before the phrase "having particular regard to") so that it read to the same effect as s 104(1). As its written submissions stated:

> 28.7 ... By inserting 'and' into s 171(1), the Majority has given it a different meaning. On the Majority's interpretation of s 171(1) a decision-maker is required to:
>
> a Make its own judgment, through Part 2, concerning the effects on the environment of allowing the requirement; and
>
> b Make a separate judgment concerning the matters listed in paragraphs (a)–(d); and
>
> c Make its own overall judgment, subject to Part 2, regarding the relative importance of each in all the circumstances.
>
> 28.8 This is not what s 171(1) requires. The correct approach to s 171(1) is to consider the effects of the proposed requirement 'having particular regard to' (in the sense of 'through the lens' of) the (a) to (d) matters and then come to a decision on the basis of that assessment of effects. Where there is a conflict in the (a) to (d) matters, the decision-maker will have recourse to Part 2 (we return to the meaning of 'subject to Part 2' in the section below).

[76] I accept the respondents' submission that, while there is a difference in wording between ss 104 and 171, in its analysis of those sections at [193]–[194] the Board has not misinterpreted s 171 in the manner suggested by NZTA. As noted above, in discharging the obligation to have "particular" regard to the specified matters the Board has recognised that each specified matter is to be the subject of separate attention.

[77] The Board transparently stated its intended decision-making process at [199]:

> [199] We therefore propose to structure this part of our decision (appropriately applying the guidance from *King Salmon*, as just identified) as follows:
>
> [a] To identify and set out the relevant provisions of the main RMA statutory instruments that **we must have particular regard to under Section 171(1)(a)**, and the relevant provisions of the main non-RMA statutory instruments and non-statutory documents that **we must have particular regard to under Section 171(1)(d)**;
>
> [b] To consider and evaluate the adverse and beneficial effects on the environment informed by the relevant provisions of Part 2; the relevant statutory instruments; and other relevant matters being the relevant conditions and the relevant non-statutory documents;
>
> [c] **To consider and evaluate the directions given in Section 171(1)(b)** as to whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work;
>
> [d] **To consider and evaluate the directions given in Section 171(1)(c)** as to whether the work and designation are reasonably necessary for achieving the objectives for which the designation is sought; and
>
> [e] In making our overall judgment subject to Part 2, to consider and evaluate our findings in (a) to (d) above, and to determine whether the requirement achieves the RMA's purpose of sustainability.

[78] I do not consider that that formulation is susceptible to challenge so far as the appropriate consideration of the 171(1)(a) to (d) matters is concerned.

[79] It is convenient at this point to address the contention at ground of appeal 29(b) that the matters listed in s 171(1)(a) to (d) ought to have been determined prior to the Board's substantive consideration of the Proposal's effects. This complaint is directed to the observation in the Decision at [197]:

> [197] In applying Section 171(1) of the RMA, there is also no explicit obligation that our determination regarding the matters in Section 171(1)(b) must be made in advance of our substantive consideration of effects.

[80] The Board proceeded to note that the Wiri Prison Board[50] had undertaken a substantive effects assessment, and determined that that project would result in some significant effects, before moving on to consider the s 171(1)(b) matters. The Board favoured that approach:

> [198] We adopt the same approach, as we consider it:
>
> [a] Allows us to fully consider all mitigation being offered by [NZTA], and whether there actually will be significant adverse effects remaining once that mitigation is taken into account;
>
> [b] Would be consistent with the High Court's comments in *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* that the greater the impact on private land (or similarly, the more significant the project's adverse effects), the more careful the assessment of alternative sites, routes and methods will need to be. We will have a better understanding of the significance of the Project's adverse effects (and therefore the robustness of the alternatives assessment required), if we undertake our substantive effects assessment before considering the adequacy of the [NZTA's] alternatives assessment; and
>
> [c] Would appropriately reflect the fact that as Section 171(1) is subject to Part 2, some consideration of the relevant matters from that Part is required in terms of forming a view on potential effects. As such, we consider we need to have some understanding of the evidence/effects assessments to reach a view on whether effects are in fact likely to be significant.

[81] Having made the argument at [75] above, on this issue NZTA's submission was:

> 28.21 The Majority was required to assess the effects having particular regard to the (a) to (d) matters as something important to be considered and carefully weighed in coming to a conclusion, rather than simply as matters that needed to be borne in mind. It was therefore necessary (inter alia) to have addressed the (a) to (d) matters before then considering the effects 'having particular regard to' those matters.

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50 Final Report and Decision of the Board of Inquiry into the Proposed Men's Correctional Facility at Wiri, September 2011.

[82] I do not accept that the sequence of consideration is required to be as NZTA maintains. The Board's reasoning in [198] appears to me to be sound. As Burchett J remarked in *Friends of Hinchinbrook Society Inc v Minister for the Environment*:[51]

> ... What is the effect of a requirement that "[i]n determining whether or not to give a consent ... the Minister shall have regard only to the protection, conservation and presentation ... of the property"? An instant's reflection shows that these words just cannot be applied mechanically. The minister must consider the application made to him and ascertain what it involves before he can have regard to the protection, conversation and presentation of the property in relation to it.

The effect of the phrase "subject to Part 2" in s 171

[83] The only question of law in the amended notice of appeal which specifically raised Part 2 was Q 13 [subissue 1D] which states:

> Does s 171(1)(b) require the requiring authority's consideration of alternatives to incorporate Part 2 considerations; including (in particular) the weight given to particular evaluation criteria.

[84] However the fundamental nature of NZTA's Part 2 argument emerged more clearly in the further refinement of the Issue 3 questions, in particular restated Q 28D:

> When considering a requirement under s 171(1) RMA, how are the words 'subject to Part 2' to be applied (in particular, following the recent Supreme Court decision in *King Salmon*)?

The issue of the capacity for the Board to "resort to Part 2" was also implicit in restated Q 45E:

> What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?

[85] As noted in the brief discussion of legislative history,[52] two primary arguments were advanced by NZTA concerning the role played by Part 2 in the s 171(1) consideration:

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51 *Friends of Hinchinbrook Society Inc v Minister for the Environment*, above n 41, at 627.

52 At [43] and [49] above.

(a) did the relocation of the phrase within s 171(1) have the consequence contended by NZTA that the phrase related to the consideration of effects rather than to the (a) to (d) matters?

(b) did *King Salmon* change the approach to the application of this phrase in s 171(1)?

The relocation of the phrase within s 171(1)

[86] It was not apparent either from NZTA's submissions to the Board or in the Board's Decision whether this line of argument had prominence. However the argument as developed before me is conveniently summarised in NZTA's written reply as follows:

> 11.22 The 2003 amendment separates the (a)–(d) matters from the overriding 'subject to Part 2' direction that was clear in the previous drafting. It is well established that differences in wording between repealed provisions and those enacted is an aid to statutory interpretation and may throw light on the intended meaning. It is submitted that if Parliament intended the whole of the s 171(1) assessment still to be 'subject to Part 2', it would have retained more of the previous wording, such as follows:
>
> > *(1) Subject to Part 2, when considering a requirement and any submissions received, a territorial authority must consider the effects on the environment of allowing the requirement and shall also have particular regard to–*
>
> 11.23 Parliament did not do this. Instead, it moved the position of the 'subject to Part 2' direction to relate to the assessment of effects and used the words 'having particular regard to' to qualify the consideration of effects such that the (a)–(d) matters are not directly made subject to Part 2.

[87] There appears to have been no judicial consideration of the implications of the relocation. Nor do the *travaux preparatoires* throw any express light on the question. If the implications of the movement of the phrase were as significant as NZTA's argument suggests, then one would have expected that there would have been some sign on the legislative trail. One would also expect that the same change as made to ss 104(1), 168A(3) and 171(1) would also have appeared in s 191(1).

[88] The first manifestation of the relocation was in the Resource Management Amendment Bill[53] which was the culmination of a review of the RMA which started in August 1997. The bill had its first reading on 13 July 1999 and was referred to the Local Government and Environment Committee. The bill made changes to ss 104, 168A and 171 but not to s 191 which may account for the fact of the current point of difference.

[89] Because the form of s 171 proposed in 1999 was different from the section in its ultimate form in 2003, I set out its original terms:

> 171(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part II, consider the effects on the environment of allowing the requirement, having regard to–
>
> (a) Any relevant provisions of the plan or proposed plan; and
>
> (b) If the requiring authority does not own the land or it is likely that the designation will have a significant adverse effect on the environment, whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work; and
>
> (c) Whether the designation is reasonably necessary for achieving the objectives of the requiring authority; and
>
> (d) Any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.
>
> (2) A requirement must not conflict with any relevant provisions of a national policy statement or a New Zealand coastal policy statement.

An equivalent amendment was proposed as s 168A(3) and (4).

[90] However the structure of s 104 was substantially different, particularly inasmuch that a distinction was made in relation to the consideration of resource consents for controlled activities, restricted discretionary activities and discretionary activities. Only in relation to discretionary activities was there a reference to "Part II": that reference appeared in the first subparagraph:

> 104(3) When considering an application for a resource consent for a discretionary activity and any submissions received, a consent authority–

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[53] Resource Management Amendment Bill 1999 (313–2) (Select Committee Report).

(a) Must, subject to Part II, consider the effects on the environment of allowing the application, having regard to–

(i) Any relevant provision in a plan or proposed plan:

(ii) Any other matter the consent authority considers reasonably necessary to decide the application; and

(b) May grant or refuse the application; and

(c) If it grants the application, may impose conditions.

[91] The fact and the implications of the different activities were usefully explored in the judgment of Randerson J in *Auckland City Council v John Woolley Trust*.[54]

[92] The Committee's report to the House on 8 May 2001[55] did not support the proposal that Part 2 of the Act would not be required to be considered in respect of controlled and restricted discretionary activities. While agreeing that s 104 should be simplified, the Committee said:

> … However, we are not prepared to remove explicit reference to Part II and significant planning documents such as national and regional policy statements and relevant or proposed plans. We recommend that a new, overarching subsection be added to new section 104, requiring consent authorities to consider all applications subject to Part II and to have regard to matters that include the above planning documents.

The amendment proposed as s 104(1A) was identical to s 104(1) in the 2003 Amendment.

[93] With reference to ss 168A and 171 the Committee's report said:

> Section 168A specifies the matters a territorial authority must consider on a notice of requirement for a designation in its own district for a work for which that territorial authority itself has financial responsibility. Section 171 specifies the matters a territorial authority is required to consider when assessing a notice of requirement for designation by another requiring authority. Proposed amendments to these two sections are set out in clauses 56 and 58 respectively. As introduced, the new provisions place greater emphasis on environmental effects when considering a requirement, and the need to consider alternatives is reduced. **These clauses also make sections 168A and 171 more consistent with the proposed new wording for the consideration of resource consents**. Finally, the emphasis is shifted

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54 *Auckland City Council v John Woolley Trust* (2008) 14 ELRNZ 106, [2008] NZRMA 260 (HC) at [24]–[29].

55 Above n 52.

> from considering whether a designation is necessary, to whether or not the work is necessary in achieving the objectives of the requiring authority.
>
> (emphasis added)

[94] No further progress was made on the 1999 bill in the House after the Committee had reported and the report was not debated by the House. The order of the day for consideration of the report was discharged on 24 March 2003. The Resource Management Amendment Bill (No 2) was introduced on 17 March 2003 and referred to the Committee on 20 March 2003. An instruction from the House stated that the Bill was referred to the Committee for the purpose only of the Committee receiving a briefing from officials and the Committee was required to report to the House by 28 April 2003.[56]

[95] With reference to s 171 the report stated:

> [it] requires a territorial authority to consider environmental effects when considering a requirement and to have particular regard to various other matters. Alternative sites, routes, or methods will now only need to be considered if the requiring authority does not have a legal interest in the land or it is likely that the designation will have a significant adverse effect on the environment. The application of the "reasonable necessity" test is clarified. This amendment complements the amendment to section 168A.

[96] A consideration of that history leads me to infer that:

(a) the catalyst for the relocation of the phrase was the proposed s 104(3),[57] the structure of which precluded the phrase being located at the commencement of the subsection;

(b) sections 168A(1) and 171(1) were amended for consistency with s 104;

(c) section 191(1) was left unchanged because it was not addressed in the 2003 Amendment.

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[56] Resource Management Amendment Bill 1999 (No 2) (39–2) (Select Committee Report).

[57] At [90] above.

[97] However there is nothing to suggest that the relocation of the phrase within s 171(1) (and similarly within s 168A) was for the significant purpose contended for by NZTA, namely to change the focus of application of Part 2 within s 171. I also note that such an argument could not logically be mounted in relation to s 104(1) given its structure (with effects on the environment being only one of the matters to which regard is to be had). Yet the phrase was also relocated within that subsection.

[98] For these reasons I do not accept that the relocation within s 171(1) of the phrase "subject to Part 2" had the purpose or effect of making any material change to the application of that section. I reject NZTA's contention at [86] above that the consequence of that amendment was that the phrase "subject to Part 2" related only to the assessment of effects and that the (a) to (d) matters were no longer directly subject to Part 2.

The implications of King Salmon

[99] It is fair to say that NZTA's approach to the role of Part 2 with reference to the NoR evolved not only throughout the course of the hearing before the Board but also on the appeal in this Court.

[100] Its opening position was recorded in the Decision in this way:

> [190] In opening, [NZTA] submitted that when considering its NoR, we must (*among other things*):
>
> > [a] Consider the effects on the environment of allowing the NoR; and
> >
> > [b] Have particular regard to the matters in Sections (sic) 171(1) as if we were a territorial authority, namely:
> >
> > > [i] The relevant provisions of planning instruments;
> > >
> > > [ii] Whether adequate consideration has been given to alternative sites, routes and methods of undertaking the work;
> > >
> > > [iii] Whether the work and designation are reasonably necessary for achieving [NZTA's] project objectives, as set out in the NoR;
> > >
> > > [iv] Any other matters we consider reasonably necessary to determine the NoR; and

[v] Above all, consider Part 2 matters.

[101] In closing before the Board NZTA submitted that, notwithstanding *King Salmon*, an "overall judgment" approach remained relevant in the consenting and designation context. It submitted that Part 2 was relevant to the Board primarily because of the presence in s 171 of the phrase "subject to Part 2", drawing attention to that part of *McGuire* highlighted in [39] above. It said:

> 16.12 It is submitted that the position as expressed in *McGuire* above, has not been upset by *King Salmon*. The Supreme Court did not consider sections 104 and 171 of the RMA, or the way in which Part 2 matters are approached in a consenting context.
>
> 16.13 Nonetheless, the Supreme Court's conclusions may in certain respects be taken as impacting on the approach taken to RMA decision-making more broadly. For instance, paragraph 151 of the Court's decision quoted above is noticeably broad in its language (it refers to "*planning decisions*" generally).
>
> ...
>
> 16.16 It is submitted that, in the context of ... the applications for this Project, and adopting the reasoning of the Supreme Court:
>
> a Sections 104 and 171 are expressly subject to Part 2, and the provisions in Part 2 remain relevant;
>
> b Section 6 elaborates on the guiding principle in section 5. It does not 'trump' it in the way suggested for TAC and NRA;
>
> c Section 5 supports the approval of this Project, but [NZTA] is not relying on this section alone;
>
> d The following discussion of effects will allow the Board to conclude as to each of the elements of Part 2, before undertaking an overall judgment.

[102] In the section of its Decision headed "Overview of the statutory and legal context" the Board recorded its understanding of the established framework for considering s 171(1) before addressing whether that framework had been modified by *King Salmon*. Its analysis commenced in this way:

> [169] We are required to consider the matters set out in Section 171(1) *subject to Part 2*. This has been interpreted as meaning that the directions in Part 2 are therefore paramount, and are overriding in the event of conflict. The relevant Part 2 directions therefore apply to:

[a] Our evaluation of specific effects on the environment; and

[b] Our evaluation in the final analysis.

[170] The focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. The import of this is that the purpose, policy and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement. Paramount in this regard is Section 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.

[103] Having set out key passages from *McGuire*, the Decision stated:

> [174] The reference being *subject to Part 2* does not entitle us to ask whether some other project alignment or design better meets the requirements of Part 2, as the Act does not direct a particular use or require the best use of resources. All that is required is a careful assessment of the Project in and of itself to determine whether it achieves the RMA's purpose. A matter that we will consider in detail at the time of our overall judgment.

There then followed [175] previously quoted.[58]

[104] Having recorded its view that, where an evaluation under Part 2 (and in particular s 5) was required or permitted, that should continue to involve an overall broad judgment as held in *NZ Rail Ltd v Marlborough District Council*,[59] the Board stated its understanding of the *King Salmon* decision:

> [177] While the Supreme Court reviewed the previous *overall broad judgment* and *environmental bottom line* jurisprudence around the correct application of Section 5 (where required), it did not go on to substantively consider or evaluate that issue. We accordingly understand that where an evaluation under Part 2 (and in particular Section 5) is required (or permitted), this should continue to involve an *overall broad judgment* as held in *NZ Rail* and outlined above.
>
> [178] The majority of the Supreme Court in *King Salmon* found that the plan change at issue … *did not comply with [Section] 67(3)(b) ... in that it did not give effect to the NZCPS.* In doing so, it found that in considering whether the New Zealand Coastal Policy Statement had *been given effect to*, and finally determining the plan change before it, that Board was not entitled by reference to the principles in Part 2, to carry out a balancing of all relevant interests in order to reach a decision. Rather, the plan change should have been dealt with in terms of the New Zealand Coastal Policy Statement, without reference back to Part 2. This was primarily because of what the Court considered to be *strongly worded directives* in two of the New Zealand Coastal Policy Statement policies that were particularly

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58 At [69] above.

59 *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

relevant in that case, which the Board found would not be *given effect to* if the plan change was granted.

[105] The Board then said:

> [179] Again, we consider that properly construed, this aspect of *King Salmon* does not directly affect our determination of [NZTA's] NoR, for the following reasons. *King Salmon* involved consideration of a plan change, and therefore different statutory tests from those applying to [NZTA's] NoR. Importantly, the Supreme Court observed that Section 67(3)(b) provides a *strong directive, creating a firm obligation on the part of those subject to it*, to give effect to the New Zealand Coastal Policy Statement.
>
> [180] Reading the majority decision as a whole, we consider that this specific statutory context was clearly central to the Supreme Court's decision. …
>
> [181] By contrast, in considering the NoR we are required to have *particular regard to* the relevant instruments.

There then followed [182] previously quoted.[60]

[106] NZTA disagreed with the Board's analysis of *King Salmon* and with its reliance on *McGuire*. Its principal written submissions on appeal stated:

> 29.7 *King Salmon* has significantly modified the approach to decision-making under the RMA and in particular, what 'subject to Part 2' means. In other words, when is recourse to be had to Part 2?
>
> …
>
> 29.11 While the decision was in the context of a plan change, the Supreme Court's findings in relation to the planning framework, and the application of Part 2 to decision-making generally, have wider application.
>
> …
>
> 29.13 We submit that the Supreme Court has given a clear direction that it is the planning documents that generally form the basis for decision-making under the RMA. Parliament has provided for a hierarchy of planning documents, relevant to planning decisions under the RMA. These documents are drafted 'in accordance with Part 2' and 'flesh out' the provisions of Part 2 in a manner that is increasingly detailed both as to content and location.

[107] Then, under a heading "Application of *King Salmon* to s 171(1)", NZTA contended:

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60 At [70] above.

29.16 For the reasons summarised in para 29.13, the planning documents give effect to Part 2. Decisions made in reliance on those documents therefore achieve the sustainable management purpose of the Act, as provided for in Part 2.

29.17 The Supreme Court held that s 5 (the purpose of the Act) is not an operative provision. Nor therefore is Part 2 as a whole given that ss 6, 7 and 8 are a further elaboration of that purpose. Part 2 provisions are particularised (both as to substantive content and locality) by the planning documents, from national policy statements down to district plans.

...

29.22 Section 171(1) directs that when considering a notice of requirement, a decision-maker's assessment of effects on the environment is 'subject to Part 2'. However, on the basis of the principles established by the Supreme Court in *King Salmon*, and consistent with *McGuire*, Part 2 will be relevant if one of the three caveats is established or there is a conflict in the exercise of the statutory duty under s 171(1)(a) to (d). In this case the planning framework did contemplate the Project and therefore there was no conflict so as to bring Part 2 into play.

[108] In response TAC maintained the primacy of Part 2 and criticised NZTA's submission for failing to address how the "subject to Part 2" direction is to be complied with. NZTA's reply submissions were interesting on both those points:

11.15 ... We agree with the submissions of TAC to the effect that Part 2 retains primacy.

11.16 The approach by the Appellant to the application of Part 2, assumes primacy, but the question remains as to how that primacy is to be provided for. How it is provided for is cogently summarised at [30] of *King Salmon*. The crucial point is that the Supreme Court has determined that it is the planning documents which give effect to s 5 and Part 2 more generally unless one of the three caveats apply or there is a conflict. Following *King Salmon*, the primacy of Part 2 is maintained and applied through the planning documents; both as to substantive content and the locality to which those documents apply.

11.17 It follows that the phrase 'subject to Part 2' in s 171(1) (or in s 104 for that matter) does not imply the re-litigation of previously settled planning provisions where no caveats or conflict arise. This is why at [151] the Supreme Court determined that s 5 is not intended to be an operative provision in the sense that it is not a section under which particular planning decisions are made. It is the hierarchy (cascade) of planning documents which flesh out the principles in s 5 and the remainder of Part 2, and it is those documents which form the basis of decision-making; in this case being the framework in which effects are to be considered.

[109] It is only proper that I record that, when in the course of his oral reply I explored with Mr Casey QC the issue of the scope of NZTA's argument before the Board on the implications of *King Salmon*, Mr Casey acknowledged that the submission relating to caveats and conflicts had not been developed before the Board to the extent that it had on appeal. In particular para 16.16(a)[61] did not indicate how primacy was to be given whereas NZTA's current stance is that such primacy is via the plan in the absence of any conflict.

[110] While the provisions in Part 2 are not operative provisions (in the sense of being sections under which particular planning decisions are made),[62] they nevertheless comprise a guide for the performance of the specific legislative functions. As *King Salmon* said with reference to s 5:

> (a) [it] states a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation;[63]
>
> (b) [it] is a carefully formulated statement of principle intended to guide those who make decisions under the RMA.[64]

The other three sections supplement the core purpose in s 5 by stating the particular obligations of those administering the RMA in relation to the various matters identified.[65]

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61 At [101] above.
62 *King Salmon*, above n 26, at [151]; see also [129].
63 At [24(a)].
64 At [25].
65 At [26].

[111] Consistent with that view, in *John Woolley Trust* Randerson J observed:[66]

> [47] ... Given the primacy of Part 2 in setting out the purpose and principles of the RMA, I do not accept the general proposition mentioned at para [94] of the decision in *Auckland City Council v Auckland Regional Council*, that the words "subject to Part 2" in s 104 mean that Part 2 matters only become engaged when there is a conflict between any of the matters in Part 2 and the matters in s 104. **Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the RMA.**
>
> (emphasis added)

[112] The role of Part 2 is reinforced and reiterated in certain sections (specifically s 104(1), 168A(3), 171(1) and 191(1)) by the presence of the phrase "subject to Part 2". As the Privy Council stated in *McGuire*:[67]

> [22] ... Note that s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.

The meaning of the "subject to" drafting method had been previously explained by Cooke P in *Mangonui County Council*.[68]

[113] However the provisions with which *King Salmon* was concerned did not contain that phrase. Furthermore the role of Part 2 in s 66(1) had to be viewed in the light of the direction in s 67(3) which the Supreme Court described as follows:

> [85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) Part 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to Part 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" Part 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

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66 *Auckland City Council v John Woolley Trust*, above n 53, at [47]; the highlighted words were referred to in *Ayrburn Farms Estate Ltd v Queenstown Lakes District Council*, above n 6, at [99] and in *Man O'War Station Ltd v Auckland Regional Council* (2011) 16 ELRNZ 475, [2011] NZRMA 235 (HC) at [20].

67 *McGuire*, above n 19.

68 At [38] above.

[114] In a sense *King Salmon* might be viewed as a case where, to adopt the phrase of Randerson J in *John Woolley Trust*, Part 2 was limited in application by other specific provisions of the RMA although I consider that it would be more accurate to say that its application was provided for in a particular way.

[115] The Board's error in *King Salmon* lay in considering that it was entitled, by reference to the principles in Part 2, to carry out a balancing exercise of all relevant interests in order to reach a decision whereas it was obliged to deal with the plan change application in terms of the NZCPS and failed to do so.[69] The Supreme Court summarised the Board's approach in this way:

> [83] On the Board's approach, whether the NZCPS has been given effect to in determining a regional plan change application depends on an "overall judgment" reached after consideration of all relevant circumstances. The direction to "give effect to" the NZCPS is, then, essentially a requirement that the decision-maker consider the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS) before making a decision. While the weight given to particular factors may vary, no one factor has the capacity to create a veto – there is no bottom line, environmental or otherwise. The effect of the Board's view is that the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations …

[116] I consider that the Decision in the present case demonstrates that the Board correctly analysed and well understood the ratio of the *King Salmon* decision.[70]

[117] However the Board's task in the present matter was different, as reflected in Mr Palmer QC's submission:

> 8.10 Rather, the Board is required by s 171, "subject to Part 2, to consider the effects on the environment of allowing the requirement", "having particular regard" to various factors including the adequacy of alternatives and the relevant provisions of the planning documents. So consideration of the effects, subject to Part 2, having particular regard to the stated matters is (as the Board said, at [170]) the "focal point of the assessment". Planning documents do not determine the outcome of a s 171 decision, unlike the NZCPS which can determine a plan change decision under s 67.

[118] It is apparent that the Board understood not only the different nature of its task in considering an application under s 171[71] but also the implications of the "subject to Part 2" component:

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69 *King Salmon*, above n 26, at [153]–[154].

70 [179]–[180] of the Final Decision at [105] above.

> [183] Further and perhaps more importantly, as we have already noted, Section 171(1) and the considerations it prescribes are expressed as being *subject to Part 2*. We accordingly have a *specific statutory direction* to appropriately consider and apply that part of the Act in making our determination. The closest corresponding requirement with respect to statutory planning documents is that those must be prepared and changed *in accordance with ... the provisions of Part 2*.
>
> [184] For the above reasons, the statutory framework and expectation of Section 171(1) relevant to our current decision can be contrasted with the situation in *King Salmon*. The plan change being considered in that case was required to *give effect to* a higher order planning document which the Supreme Court considered should already *give substance to pt 2's provisions in relation to ... [the] coastal environment*. By contrast, here we are required to consider the environmental effects of the NoR, *subject to Part 2* and having *particular regard to* the relevant statutory planning documents.

Consideration of alternative options – an overview

[119] The Decision recorded that NZTA acknowledged that both prerequisites in s 171(1)(b) applied with respect to the Project. In any event the Board concluded that the Project would have significant adverse effects, including heritage, amenity and landscape matters.[72]

[120] Consequently the Board was required in considering the effects on the environment under s 171(1) to have particular regard to whether adequate consideration had been given by NZTA to alternative sites, routes or methods of undertaking the work.

[121] As the Board noted in its introduction to the s 171(1)(b) issue,[73] a feature of the hearing process was the strong assertions by some of the parties that there had not been adequate consideration of alternative options. The Board recorded that an enormous amount of information had been put before it about the methodology of the option selection process and how that process took into account the significant effects of the Project.

[122] Opponents of the application presented alternative options to the Board in order to establish that such options were not suppositious and should have been

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71 [181]–[182] at [70] above.
72 At [1084(c)].
73 At [1082]–[1083].

explored as part of the option evaluation process. The Board's conclusion that there had been a failure to adequately assess non-suppositious options is the focus of Issue 1B.

Chronology

[123] In what the Board described as a "somewhat complex chronology"[74] the Decision provides a thorough review of the historical background and the chronology of the option process spanning [1097] to [1164] under the following headings:

(a) March 2001: Scheme assessment report by Meritec;

(b) 2006 to 2008: Ngauranga to Wellington Airport strategic study and the Corridor Plan;

(c) 2008 to 2009: Basin Reserve Inquiry-By-Design workshop;

(d) January 2011: Feasible Options Report;

(e) July and August 2011: Public engagement and refinement of the preferred option;

(f) Tunnel options;

(g) BRREO option.

[124] At the Inquiry-By-Design workshop five options were selected for further consideration comprising one at-grade option (with a variation) and four grade-separated bridge options. In order that the discussion below of the several Issue 1 questions may be comprehensible to those who may not read the Decision, I set out certain key passages from the Board's chronology:

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[74] At [1165].

[1118] Between 2009 and 2010, the five options were subjected to further detailed analysis, which resulted in one of the at-grade variants being discarded. During this process, one more option was uncovered and added. During 2010, as a result of the government signalling a possibility of contributing financially to a tunnel under the proposed NWM Park, a tunnel option (Option F) was added, making six options in all.

...

[1122] The Feasible Options Report on page 67 sets out the conclusions and recommendations:

> Our team recommended options A and B as preferred options if more weight is given to urban design, social impacts, and long term strategic fit. Of those two options, option A is the better of the two when giving more weight to these criteria. Option A requires the relocation of the [former Home of Compassion] Crèche. We acknowledge that while relocating heritage buildings is not favoured, this may be mitigated to some extent by being able to relocate the Crèche building to provide improved connections to Buckle Street or to relocated the Crèche to a larger historic precinct closer to the War Memorial.

[1123] Following development of the options and before the evaluation of the options, the tunnel option (Option F) was removed and the explanation given was:

> Following development of the options the specialists received a data-pack containing a description of Options A to E together with sufficient information to enable them to undertake peer assessment. It is important to note that the specialists are only comparing the options which permit SH1 to be at-grade in front of the War Memorial: Options A to E. **Once the government makes a decision on whether to fund the War Memorial Tunnel, Option F will be assessed with other options which permit SH1 to be located in a tunnel in front of the War Memorial.**
>
> [*our emphasis*]

...

[1125] This suite of five options was assessed against evaluation criteria as reported in Section 5.3 of Technical Report 19. Using a pair-wise comparison and a weighting process, the workshop participants recommended Option A and Option B – both grade-separated bridge options. Option A eventually evolved into the Project.

...

[1138] In mid-2012, the government was exploring whether it would construct the NWM Park in time for the 100th Gallipoli Remembrance in 2015, including the idea of locating Buckle Street under the park. [NZTA] asked the Project team to reappraise the cost of Option F. This review was carried out with respect to both Options F and X. By letter dated

3 July 2012, Opus set out what it termed an *alternate review*. The letter concluded:

> **Conclusions**
>
> 1. NZTA has previously determined that Option F was unaffordable. A decision by the government to underground Buckle Street will not change this decision.
>
> 2. Option X is likely to be more expensive than Option A while having no more (possibly less) transportation benefits. It is unlikely that Option X would prove to be preferable to Option A.
>
> 3. A decision by the government to underground Buckle Street will not change the outcomes of the option evaluation process used to compare alternatives at the Basin Reserve.
>
> 4. Option A remains the preferred option even if the government decides to underground Buckle Street.

[1139] On 7 August 2012, the government announced that the NWM Park would be completed by April 2015 and that empowering legislation would be enacted and that it would be contributing $50m towards the costs of undergrounding Buckle Street.

...

[1132] On 17 August 2012, [NZTA] confirmed and announced Option A as the preferred option. They also confirmed that a pedestrian and cycling facility would be added to the Basin Bridge to provide a link between Mt Victoria Tunnel and Buckle Street.

...

[1151] In January 2013, Richard Reid and Associates supplied to the City Council conceptual drawings for improving the lane configuration around the Basin Reserve roundabout. Before us, Mr Reid produced an enhanced proposal he called the Basin Reserve Roundabout Enhancement Option (**the BRREO Option**). ...

[1152] Essentially, but somewhat simplistically, the BRREO Option proposes an upgrading of the existing roundabout by widening Paterson Street westbound up to the Dufferin Street stop line and widening Dufferin Street to between Paterson Street and Rugby Street, in each case to three lanes. This would provide three continuous lanes westbound around the roundabout from the exit from the Mt Victoria Tunnel to Buckle Street. It also proposes to add a third lane on Paterson Street for westbound traffic in the event of the duplication of the Mt Victoria Tunnel.

The Board's general approach

[125] In a section of the Decision spanning [1085] to [1096] the Board directed itself on the proper approach to and the application of s 171(1)(b). After a discussion of aspects of *Queenstown Airport*[75] (which is the focus of the questions in Issues 1A and 1B) and after considering the meaning of adequate consideration, the Board described its task as follows:

> [1090] Subsection 1(b) requires a judgement on whether an adequate process has been followed, including an assessment of what consideration has been adopted. The enquiry is not into whether the best alternative has been chosen. It is not incumbent on a requiring authority to demonstrate that it has considered all possible alternatives or that it has selected the best of all available alternatives. Rather, it is for the requiring authority to establish an appropriate range of alternatives and properly consider them.

[126] The Board's findings on the consideration of alternatives stated:

> [1215] Clearly, the purpose of the statutory direction in Section 171(1)(b) of the RMA is to ensure that the decision to proceed with the preferred option is soundly based and other options (particularly those with reduced adverse environmental effects) have been dismissed for good reason. Adequate consideration becomes even more relevant when the Project, as here, involves significant adverse environmental effects.
>
> [1216] We find the consideration of alternatives has, in the circumstances of this case, been inadequate for the reasons set out above, which include:
>
> [a] A lack of transparency and replicability of the option evaluation; and
>
> [b] A failure to adequately assess non-suppositious options, particularly those with potentially reduced environmental effects.

[127] In Issues 1A to 1G addressed below NZTA challenges various aspects of the Board's approach in coming to the conclusion that NZTA had not given adequate consideration to alternatives to the proposed flyover. The questions of law which NZTA invites the Court to consider include several in the *Edwards v Bairstow* category.

[128] The respondents contend that most of NZTA's points of contention are dressed up in the legal language of "tests" and "thresholds" but are, in effect,

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[75] *Queenstown Airport*, above n 22.

challenges to the Board's view of the facts and hence beyond the proper ambit of this appeal.

Subissue 1A: Relating the measure of adequacy to the adversity of effects

[129] The general requirement in the original s 171[76] to have particular regard to whether adequate consideration had been given to alternative sites, routes or methods of achieving the work was confined in 2003 to two scenarios,[77] namely if:

(a) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(b) it is likely that the work will have a significant adverse effect on the environment.

[130] The former scenario was the subject of consideration in *Queenstown Airport.*[78] Queenstown Airport Corporation wished to provide for the expansion of Queenstown Airport and to achieve that objective it issued a notice of requirement seeking in effect to acquire approximately 19 hectares of land owned by Remarkables Park Ltd. The Environment Court rejected that part of the NoR seeking to provide for a precision instrument approach runway and a parallel taxiway and as a consequence the area of land subject to the NoR was reduced to 8.07 hectares.

[131] In the course of considering s 171(1)(b) on appeal Whata J said:

> [121] The section presupposes that where private land will be affected by a designation, adequate consideration of alternative sites not involving private land must be undertaken by the requiring authority. Furthermore, the measure of adequacy will depend on the extent of the land affected by the designation. The greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will need to be.

[132] In its closing statement to the Board NZTA contended that *Queenstown Airport* was relevant for three purposes, the first of which was:

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76 At [32] above.
77 At [95] above.
78 *Queenstown Airport*, above n 22.

> ... it establishes that the concept of adequacy in section 171(1)(b) is a sliding scale, with the measure of adequacy depending on the extent of private land affected by the designation. The extent of land required for the Basin Bridge Project is shown on the preliminary land requirement plans and schedule (sheets 2A.01–03). These show that, of the 46 titles affected by the NOR footprint, only 8 are privately owned. Expressed in land area, 0.3 ha of the 2 ha to which the NOR relates is privately owned. Applying the reasoning in the *Queenstown Airport Corporation Limited* decision, this would suggest that a less careful assessment of alternative sites is required. However, [NZTA] has not sought to undertake a less careful assessment of alternatives. Instead, it considers that the assessment it has undertaken is thorough and robust.

[133] After setting out para [121] of *Queenstown Airport*, the Board said:

> [1087] In this case, the extent of private land subject to the proposed designation is not significant. However, as we have said, [NZTA] acknowledged (and our assessment confirms) that the work would be likely to have a significant adverse effect on the environment. While Justice Whata's comments applied to the impact on private land, the same logic must apply to the extent of the Project's adverse effects. The measure of adequacy of the consideration of alternatives will depend on the impact on the environment of adverse effects.
>
> [1088] Accordingly, we must be satisfied that the assessment of alternative sites was adequate, in light of our findings as to the Project's effects on the environment. The more significant the adverse effects (as we have found them to be), the more careful the assessment of alternatives that is required.

[134] On appeal NZTA seeks to resile from its stance before the Board, proposing to argue that the Board erred in law by adopting the logic of *Queenstown Airport* and extending it to s 171(1)(b)(ii). It seeks to argue first that different considerations apply according to whether the designation will impose restrictions on private land and secondly that there is no "sliding scale" according to the degree of adverse effect. NZTA accordingly invites the Court to consider the following question of law:

> Does s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?

[135] NZTA's change in stance was resisted by Mr Palmer who cited an impressive list of authorities deprecating reversals of position in lower courts.[79] While mindful

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[79] *Ihaka Te Rou v Love* (1891) 10 NZLR 529 (CA); *Grobbelaar v News Group Newspaper* [2002] 1 WLR 3024 (HL); *TV3 Network Services Ltd v ECPAT New Zealand Inc* [2003] NZAR 501 (HC); *Wymondley against the Motorway Action Group Inc v Transit New Zealand* [2004] NZRMA 162

of the reasons that have been advanced over time, I consider in the circumstances of this case where the issue involved is a question of law that it is in the broader interest to consider the argument which NZTA wishes to advance. In doing so I am particularly influenced by the approach of the Privy Council in *Foodstuffs (Auckland) Ltd v Commerce Commission*:[80]

> Their Lordships gave leave to do so on the basis of this lack of material prejudice and also because they considered it important, albeit the issue is now essentially spent, to determine the case on the correct legal footing. Not only does that accord with justice between the parties, but it also seemed appropriate from the point of view of ascertaining the true intention of Parliament when the amending legislation was enacted.

Q 4(a): Does s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?

[136] NZTA's argument was structured as follows:

(a) the two scenarios in s 171(1)(b)(i) and (ii) are thresholds for any consideration of alternatives and do not give rise to a need for "closer" scrutiny;

(b) the RMA does not mandate any "hard-look" or "anxious scrutiny" concept such as have been considered in the context of judicial review and applied where fundamental human rights are at stake;

(c) Whata J erred in introducing the concept of a different measure of adequacy according to the level of impact of the designation on private land;

(d) the Board was equally, if not more, wrong to extend that logic to the degree of adverse effects;

(e) if *Queenstown Airport* was correct in importing a sliding scale of adequacy, then such should only apply to the first limb of s 171(1)(b).

(HC); *New Zealand Meat Board v Paramount Export Ltd (in liq)* [2005] 2 NZLR 447 (PC); *Patcroft Properties Ltd v Ingram* [2010] NZCA 275, [2010] 3 NZLR 681.

80 *Foodstuffs (Auckland) Ltd v Commerce Commission* [2004] 1 NZLR 145 (PC) at [9].

[137] The section requires that where either scenario exists not only must there be consideration of alternative sites but that such consideration should be "adequate". It appeared to be common ground that the meaning of "adequate" was as stated by the Environment Court in *Te Runanga O Ati Awa Ki Whakarongotai Inc v Kapiti District Council*:[81]

> ... The word 'adequate' is a perfectly simple word and we have no doubt has been deliberately used in this context. It does not mean 'meticulous'. It does not mean '*exhaustive*'. It means 'sufficient' or 'satisfactory'.

No challenge was made to the Board's analysis of the meaning of adequate at [1089].

[138] It was the respondents' contention that the adequacy (or sufficiency) of consideration in any given case must be circumstances dependent and that that must be so for both scenarios, given that the phrase "adequate consideration" appears in the chapeau to subparagraphs (i) and (ii).

[139] Mr Palmer drew attention to the decision of the Supreme Court in *King Salmon*,[82] in particular to the highlighted part of the following passage:

> [170] This brings us back to the question when consideration of alternative sites may be necessary. This will be determined by the nature and circumstances of the particular site-specific plan change application. For example, an applicant may claim that that (sic) a particular activity needs to occur in part of the coast environment. If that activity would adversely affect the preservation of natural character in the coast environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, **particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site**. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.

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81 *Te Runanga O Ati Awa Ki Whakarongotai Inc v Kapiti District Council* (2002) 8 ELRNZ 265 (EnvC) at [153].

82 *King Salmon*, above n 26.

[140] In my view the analysis in *Queenstown Airport* is correct. I consider that it must logically apply to both the scenarios described in s 171(1)(b). It is simply common sense that what will amount to sufficient consideration of alternative sites will be influenced to some degree by the extent of the consequences of the scenarios in s 171(1)(b)(i) and (ii). That said, I doubt the utility of the expression "sliding scale" as a description of the extent of the consequences because it conveys an unduly mechanical approach to the extent of consideration required.

[141] Accordingly I consider that the Board's approach at [1087] to [1088] is not vulnerable to criticism.

[142] So far as Q 4 is concerned, the word "require" is problematic. A more careful consideration of alternatives may or may not be required: it will be very much circumstances dependent. I would answer in the affirmative either of the following rephrased questions of law:[83]

(a) *May* s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?

(b) Does s 171(1)(b) of the Act *permit* a more careful consideration of alternatives when there are more significant adverse effects of allowing the requirement?

[143] In the context of Subissue 1A NZTA poses a second and alternative question of law:

> Q 4(b) In the alternative, was the finding that [NZTA] had not given sufficient careful consideration to alternatives a finding to what the Board could reasonably have come on the evidence?

[144] Mr Casey addressed this question in conjunction with the similarly expressed Q 22 in Subissue 1G. I adopt the same approach.

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[83] Although I have retained the word "careful", because that word is employed in *Queenstown Airport* and hence in the question posed, I suggest that it may be preferable to avoid the notion of degrees of "care". My preference would be a phrase such as "greater scrutiny".

Subissue 1B: The requirement to consider all non-suppositious options with potentially less adverse effects

[145] Following paragraph [121] addressed in Subissue 1A above, Whata J further said:

> [122] It is beyond doubt that the extent of private land subject to the proposed designation is significant. As notified 19 ha would be affected. The modified version still encompasses 8 ha. The Court had to be satisfied that the assessment of alternative sites was adequate having regard to this impact. There is authority however that a suppositious or hypothetical alternative need not be considered. But given the statutory requirement to have particular regard to the adequacy of the consideration given to alternatives, it is not sufficient to rely on the absence of a merits assessment of an alternative or on the assertion of the requiring authority. Provided there is some evidence that the alternative is not merely suppositious or hypothetical, then the Court must have particular regard to whether it was adequately considered.

[146] The third respect in which NZTA contended before the Board that *Queenstown Airport* was relevant concerned this issue:

> 11.2(c) Third, should the Board find that any alternative suggested by a submitter (such as BRREO) is not hypothetical or suppositious, then the Board must have particular regard to whether it was adequately considered.

[147] Specifically in the context of the assessment of alternatives NZTA recorded that the parties were in agreement that:

> Speculative, suppositious or hypothetical alternatives need not be considered. However, provided there is some evidence that an alternative is not merely suppositious or hypothetical, then the Board must have particular regard to whether it was adequately considered.

NZTA's case was that all relevant alternatives had been adequately considered.

[148] Under the heading "Non-Suppositious Options, with Potentially Reduced Environmental Effects" the Board said:

> [1182] Because of the Project's significant adverse environmental effects (as we have found them to be) it was necessary for [NZTA] to give adequate consideration to alternatives, particularly those options with reduced environmental effects. As we have said, the measure of that adequacy would depend on how significant the adverse effects would be. In this case, we have found that there would be significant adverse effects.

> [1183] A number of options were referred to in the evidence. The option evaluation team considered some of them at various stages of the process. The Architectural Centre and Richard Reid and Associates, on behalf of the Mt Victoria Residents Association, put options before us. This was not for the purpose of persuading us that their options were better, but to establish that these options were not suppositious, would potentially have reduced environmental effects than the Project before us, and should have been explored as part of the option evaluation process.
>
> [1184] The evaluation teams considered both tunnel and at-grade options. The tunnel options were synthesised down to a tunnel option known as Option F. The Architectural Centre's Option X, proffered during 2011, was another variant of a tunnel option.
>
> ...
>
> [1186] The BRREO Option consisted of improving the lane configuration around the Basin Reserve. When introducing his concept, Mr Reid told us:
>
> > 19. The existing network has sustained NZTA's many attempts to engineer a motorway 'solution' over the past 50 years. These 'solutions' have almost always diverted highway traffic northwards from its current route around the Basin Reserve roundabout and involve a flyover or tunnel structure which invariably destroys the amenity of the Basin Reserve and the urban structure of the city.
> >
> > 20. I believe the existing network will continue to have sufficient flexibility, tolerance and resilience to serve the city well into the future. The objectives to the project can be met without the need for the Basin Bridge proposal.
>
> [1187] We heard a considerable amount of evidence on these options. The evidence reached the threshold of requiring our careful consideration. We propose to consider first the tunnel options and secondly the at-grade options.

[149] In concluding its discussion of certain options the Board then said:

> [1213] As we have said, it is not for us to determine which is the best option. The statutory requirement directs us to have particular regard to the adequacy of consideration of alternatives. Mr Justice Whata said in the *Queenstown* case that, where there is evidence that the alternative is not merely suppositious or hypothetical, then the Court (or in this case this Board) must have particular regard to whether it was adequately considered.

The Board concluded that NZTA's consideration of alternatives had been inadequate for reasons which included a failure to adequately assess non-suppositious options, particularly those with potentially reduced environment effects.[84]

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[84] At [126] above.

[150] NZTA acknowledged that before the Board it had accepted the proposition which is reflected in [1213]. However it submitted that on reflection the proposition at [122] of *Queenstown Airport* goes too far or should be limited to the first limb of s 171(1)(b). NZTA again sought on appeal to reverse its stance before the Board and it proposed for consideration the following question of law:

> Q 7(a) Does s 171(1)(b) require the requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environmental effects?

[151] On this issue also I am prepared to consider the question of law, thereby permitting NZTA to reverse its stance below, for the same reasons as stated in the context of Subissue 1A at [135] above.

Q 7(a): Does s 171(1)(b) require the requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environmental effects?

[152] As is apparent from ground of appeal 8(b), NZTA's contention is that the Board had required NZTA to demonstrate that it had considered every non-suppositious option with potentially less adverse effects. NZTA's argument was that in so doing the Board had elevated the standard of consideration beyond "adequacy".

[153] Referring to what it described as the classic approach, namely that a requiring authority is not required to eliminate speculative alternatives or suppositious outcomes, NZTA submitted:

> 16.7 In *Queenstown Airport* and the Majority's decision, this test has been inverted to require *every* non-suppositious option to have been considered. Indeed, the Majority's decision takes the test a step further and requires other options with potentially less adverse effects to have been dismissed only for good reason.
>
> 16.8 This takes the test of adequacy too far. In any significant project there are likely to be any number of options and variations of options that could be considered. It is unreasonable to expect a requiring authority to give detailed consideration to every permutation of the non-suppositious. That is, there may be any number of permutations of the (for example) at-grade option; [NZTA] does not have to show that it specifically addressed each and every one.

[154] I do not accept that the Board approached its task in the manner suggested by NZTA. On the contrary (as NZTA acknowledged) the Board said:

> [1090] Subsection 1(b) requires a judgement on whether an adequate process has been followed, including an assessment of what consideration has been adopted. The enquiry is not into whether the best alternative has been chosen. It is not incumbent on a requiring authority to demonstrate that it has considered all possible alternatives or that it has selected the best of all available alternatives. Rather, it is for the requiring authority to establish an appropriate range of alternatives and properly consider them.

[155] Mr Palmer neatly captured the point here when he submitted:

> NZTA appears to wish to elide the point that witnesses identified non-suppositious options with reduced environmental effects with the point that NZTA's consideration of alternatives was not adequate, to create a straw man that the Board required NZTA to examine every possible alternative. It certainly did not.

[156] The answer to Q 7(a) is, therefore, in the negative.

[157] While not accepting that s 171(1)(b) creates a duty to consider all non-suppositious options, in section 17 of its primary submissions NZTA mounted a reasonably extensive argument that it had in fact considered the options identified by the Board as non-suppositious and that its consideration had been adequate.

[158] The respondents attacked this argument as being blatantly a disagreement with the Board's assessment of the facts and not a question of law as required by s 149V(1).

[159] As noted in the discussion of "a question of law"[85] the Board's conclusions on fact can only be challenged on an *Edwards v Bairstow* basis. NZTA recognises that reality by the formulation of the questions comprising Q 7(b)(i), (ii) and (iii). I proceed to address them, albeit reframed to align precisely with Lord Radcliffe's third description for the reasons explained at [16] to [23] above.

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[85] At [12]–[15] above.

Q 7(b)(i): Is the case one in which the true and only reasonable conclusion contradicts the determination that BRREO was a non-suppositious option?

[160] With reference to at-grade options (including BRREO) NZTA first submitted that the Board's finding, that such options had not been adequately considered, "was not a finding that it could reasonably have come to on the evidence". That, of course, was not the nature of the *Edwards v Bairstow* question framed in relation to BRREO.

[161] The argument was then developed in this way:

(a) the Majority failed to evaluate the evidence of the independent peer reviewers and to determine whether an at-grade solution, such as BRREO, could meet the Project objectives;

(b) in the absence of a finding from the Majority to the contrary, the Minority's finding that an at-grade option could not meet the Project objectives must stand;

(c) an option that does not meet the Project objectives should be considered to be a suppositious option.

[162] However the issue which I am required to determine is not whether BRREO was or was not a suppositious option but whether the true and only reasonable conclusion contradicts the Board's conclusion. In addressing the reframed question I remind myself of the Supreme Court's direction in *Bryson* that appellate judges must keep firmly in mind that on a challenge of this nature an appellant faces a very high hurdle.[86]

[163] The nature of the Board's consideration of and conclusion on the BRREO option is apparent from the following paragraphs:[87]

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86 At [14] above.

87 The issue is also touched on at [1210] and [1214].

> [1162] We do not propose to resolve the apparent conflicts in the evidence relating to BRREO. It is not for us to determine the best option. The question is whether this less-harmful option is hypothetical or suppositious. We bear in mind that BRREO is still at an indicative stage and could be subject to more detailed analysis, such as to geometry and intersection control phasing, by an option evaluation process.
>
> [1163] At its worst, Mr Dunlop acknowledged that general traffic and freight would receive some benefit from the BRREO Option, now and following duplication of the Mt Victoria Tunnel, but he quantifies that the transport benefits (over 40 years) would be approximately 40% less than the benefits the Project can achieve. However, following a detailed assessment, he noted that both the Project and BRREO displayed significant journey time savings over the do-minimum scenario, which includes improvements to the Vivian Street/Pirie Street and Taranaki Street/Buckle Street intersections.
>
> [1164] We are satisfied the BRREO Option, particularly having regard to the adverse effects we have identified with regard to the Project, is not so suppositional that it is not worthy of consideration as an option to be evaluated.

[164] Given the preliminary nature of the Board's appraisal and the material to which it referred I do not consider that it could fairly be said that the Board's finding on the BRREO option was insupportable. The answer to Q 7(b)(i) is No.

Q 7(b)(ii): Is the case one in which the true and only reasonable conclusion contradicts the determination that Option X was an option with potentially less adverse effects?

[165] NZTA's submissions on Option X echoed its BRREO submission in combining different points of complaint:

(a) in the absence of an explicit finding by the Majority, the Minority's finding that Option X had been adequately considered must stand;

(b) a finding that Option X had not been adequately considered was not a finding that could reasonably be reached on the evidence;

(c) there was no evidence to support a finding that Option X was an option with potentially less adverse effects.

Only the third of those points of criticism engages with Q 7(b)(ii).

[166] The genesis of Option X was described at [1135]:[88]

> [1135] During the period from 2007–2009, the Architectural Centre developed a concept that later became known as Option X. It provided for westbound State Highway 1 traffic to travel at grade in front of the Basin Reserve northern entrance. All vehicles travelling between Adelaide Road and Kent and Cambridge Terraces would be diverted around the western sides of the Basin Reserve along Sussex Street. Local traffic would pass over a War Memorial Tunnel providing grade separation. The removal of circulatory traffic on the eastern side of the Basin Reserve would enable the Dufferin/Rugby Street corner to be developed into a park area.

[167] In the course of its conclusions the Board at [1319][89] stated that it was satisfied on the evidence that similar transportation benefits as those from the Project could be achieved by a tunnel option or variant similar to Option X and that such should have been included in a robust option evaluation process.

[168] Mr Palmer contended that the Board did not make a finding that Option X was an option with potentially less adverse effects. Neither the amended notice of appeal nor NZTA's submissions indicated where in the Decision such a finding was made.

[169] While I was unable to identify a specific finding to that effect, I inferred that the basis for the allegation was the second of the two overarching themes which the Board at [1171] described as being worthy of careful consideration, namely "the consideration given to non-suppositious options, with potentially reduced environmental effects".[90] As Option X was discussed in the section which followed, then it could fairly be assumed that it met that description.

[170] It was Mr Milne's submission by reference to several items in the transcript that there was evidence from which it could have been found that Option X or a variant of it, if it had been properly considered within the context of the National War Memorial Tunnel, might have less adverse effects. He also made the point that NZTA had found Option X to have sufficient merit to warrant preliminary and later more detailed consideration, as had WCC. He submitted that that of itself was

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88 It is then discussed at several points in the Board's analysis: [1136]–[1138], [1143]–[1146], [1191], [1195]–[1196], [1199]–[1200].

89 At [234] below.

90 At [178] below. Essentially the same statement was made at [1183].

indicative that both entities accepted that an Option X variant could potentially have lesser environmental effects.

[171] On the basis of that material I consider that there was evidence which warranted the Board including Option X within the category of options which had "potentially" reduced environmental effects. NZTA has not demonstrated that a different view was the true and only reasonable conclusion.

Q 7(b)(iii): Is the case one in which the true and only reasonable conclusion contradicts the determination that a long tunnel option was a non-suppositious option?

[172] Ground of appeal 8(a)(iii) asserted that the evidence showed that NZTA considered the long tunnel option to be unaffordable, that the Board acknowledged at [1206] that affordability is properly a matter for the requiring authority and that consequently the Board could not reasonably conclude that the long tunnel option was non-suppositious.

[173] While cost can be exclusionary, it was apparent the Board had reservations about the consistency in the assessment of cost among the options and the omission to undertake a reassessment subsequent to the government's decision to underground Buckle Street. Under the heading "Affordability" the Board observed with reference to Option F:[91]

> [1204] As we have said, notwithstanding that Option F provided better overall outcomes than Option A in respect of the simplified evaluation criteria, Option F was dismissed on the basis of being unaffordable. Mr Durdin pointed out in the Abey Peer Review Report that the additional weighting given to economic efficiency, when comparing Option A to Option F, was inconsistent with the approach used to identify Options A and B as being preferred to Options C and D, in the evaluation of the initial options. In that instance, the assessment concluded that a difference in Benefit-Cost Ratio of approximately 0.5 was insignificant for a project of this scale, yet the difference in BCR between Option A and Option F is of a similar magnitude given the additional costs of Option F and the similar level of benefits generated by each option. He concluded:

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91 At [1184] the Board noted that the tunnel options were synthesised down to a tunnel option known as Option F.

> The apparent inconsistency and lack of transparency in the underlying process by which options have been compared in different stages of the project is a significant concern of the reviewers.

[1205] In his concise summary of evidence, Mr Durdin again said:

> My concern is that Technical Report 19 provides its recommendation on preferring Option A over Option F on the basis of affordability. The lack of transparency around this process has led me to question the extent to which this can be considered a substantive assessment of alternatives.

[1206] We agree with Mr Cameron that the question of affordability is a matter for [NZTA]. As pointed out by Mr Cameron, the cost of an option could make the option unrealistic. However, affordability is a relative term. In the context of this case, where we have found that there would be significant adverse effects, there is a greater need to test the cost against the adverse effects in a transparent and comparative evaluation against other options. This should have been done at the Feasible Options Report stage. It was not.

[1207] Option F was removed from that process on the grounds of affordability. At the time it was removed there was a clear statement of intent in the Feasible Options Report to assess Option F once the Government made a decision whether to fund the NWM Park and Buckle Street Underpass. This was not done once that decision was made by the Government. Rather, an ex post facto comparison of Options A, F and X was appended as Appendix B to Technical Report 19. At this stage [NZTA] had indicated a preference for the Basin Bridge (Option A) and were preparing to lodge the application documents.

[174] Although a number of items of evidence were cited by the respondents in their opposition on this issue, in my view those observations of the Board suffice to repel the argument that a different determination on the non-suppositious nature of Option F was the true and only reasonable conclusion.

Subissue 1C: Interpreting adequacy as requiring transparency and replicability

Context

[175] To comprehend the nature of NZTA's complaint it will assist to refer in a little more detail to aspects of the chronology of events and the Board's discussion.

[176] With reference to the suite of five options referred to in [1125][92] the Board said:

> [1125] This suite of five options was assessed against evaluation criteria as reported in Section 5.3 of Technical Report 19. Using a pair-wise comparison and a weighting process, the workshop participants recommended Option A and Option B – both grade-separated bridge options. Option A eventually evolved into the Project.
>
> [1126] The option evaluation did not identify whether certain evaluation criteria were given more weight than others until the end of the process. This made following the process to arrive at the preferred option difficult to follow.
>
> [1127] Mr Milne's cross-examination of Dr Stewart focused on this apparent lack of transparency at some length. While it became apparent that weighting was applied at different stages of the process, just how those weightings were applied was not explained. A clear expression of the weighting factors would have made it much easier to follow and would have enabled a replication of the selection process.
>
> [1128] Abley Transportation Consultants, instructed by the Board to peer review aspects of the transportation issues including alternatives, attempted to replicate the selection process used to arrive at the preferred options. Several scoring systems were applied to the negative and positive effects ratings presented in Technical Report 19. By assuming equal weighting for each criteria, their analysis concluded that the at-grade Option D should receive the highest ranking. This highlights the sensitivity of the outcome to the relative weightings of the criteria.
>
> [1129] Of note also are the following comments from page 65 of the Feasible Options Report:
>
> 3. If we give more weight to the built heritage then we should select Options C, D or B but not A.
>
> 4. If we give more weight to social impacts and urban design then we should select Options A or B and not C or D.

[177] After discussing the March 2013 option evaluation recorded in Technical Report 19, the Board referred to the Traffic and Transportation Effects Peer Review of 25 November 2013 by Abley Transport Consultants which concluded with the observation:

> The apparent inconsistency and a lack of transparency in the underlying process by which options have been compared at different stages of the project is a significant concern of the reviewers.

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92 At [124] above.

[178] In turning to address the many criticisms levelled at the process and its underlying methodology, the Board reminded itself of the limitation on its function:

> [1167] At this stage, it is important to remind ourselves that Parliament has stopped short of giving this Board the jurisdiction to direct that any other alternative must be selected. It would thus become an exercise in futility if we were required to examine, in detail, and adjudicate upon, in detail, the merits of the various alternatives.
>
> [1168] While there were numerous criticisms made, we propose to identify those that we consider cogent to an overall appraisal of the process …
>
> [1171] From these criticisms, we distil two overarching themes that we consider worthy of our careful consideration:
>
> [a] The transparency and replicability of the option evaluation; and
>
> [b] The consideration given to non-suppositious options, with potentially reduced environmental effects.

The transparency and replicability of the option evaluation

[179] While [1172] is the primary focus of NZTA's complaint, NZTA's submissions analysed the Board's observations in several subsequent paragraphs. It is useful to record them:

> [1172] It was accepted that any evaluation process needed to be transparent. Dr Stewart acknowledged the need for this during his cross-examination by Mr Milne. Mr Durdin was also of the same view. This is necessary in order that what occurred during the option evaluation process can be fully understood, particularly if weightings are given to evaluation criteria. Mr Durdin also considered it is important that any process be replicable so that its robustness can be tested. Thus, transparency and replicability go hand in hand.
>
> [1173] It was clear from the questioning of Mr Stewart and other witnesses that each specialist applied weighting at various stages of the process. However, this was not explicit and was not documented. We have already expressed our concern about how the option evaluation, particularly as summarised in Technical Report 19, did not identify whether certain evaluation criteria were given more weight than others. This made it difficult to follow.
>
> [1174] The problem manifested itself by the fact that Mr Durdin was unable to replicate the selection process used to arrive at the preferred options in the Feasible Options Report. The November 2013 Peer Review (Report 1) included a test of the decision-making process using a non-weighted multi-criteria analysis approach. As Mr Durdin pointed out in his evidence-in-chief, the test was completed to check the robustness of identifying Option A as the preferred option. That process showed that

> Option A could have been selected, but equally Options B, C or D could have been selected using that approach.
>
> [1175] Dr Stewart has accepted, both in the Joint Witness Statement – Transportation, February 2014 and in cross-examination that:
>
> > Put simply, if a different process was used, a different recommendation may have resulted.
>
> [1176] All of the experts at that conference agreed.
>
> [1177] As Mr Durdin pointed out, this demonstrated the selection is highly reliant on the assessment technique used. He said:
>
> > Ideally, the preferred option would be identified independent of the assessment technique thereby providing greater confidence in the robustness of selecting one option over another. That is not the case in this instance, as Option A was selected using the pair-wise analysis method, Option D would be selected using the NZTA incremental BCR method and Option A, B, C or D could have been selected using multi-criteria analysis.
>
> [1178] This emphasises, or highlights, the need for transparency in explicitly setting out the weightings that are used, and the reason why they have been used, in any multi-criteria analysis. This would enable a decision-maker, in this case this Board, to adequately carry out its statutory functions under Section 171(1)(b). Parliament has directed decision makers to have particular regard to whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work. We take that explicit direction seriously.

The issue

[180] NZTA contended that the Board erred in law in finding that, in order to be adequate under s 171(1)(b), the consideration of alternatives must also be "transparent and replicable". It framed the following question of law:

> Q 10 Does the inquiry into adequacy under s 171(1)(b) require that the consideration of alternatives be transparent and replicable; or is it sufficient that the consideration is apparent?

[181] NZTA contended that the paragraphs quoted above demonstrated that the Board descended into a level of enquiry that is neither permitted nor appropriate under s 171(1)(b). It argued that, by requiring "replicability", the Board sought to audit NZTA's consideration of alternatives and in doing so engaged with the outcome as opposed to the process, which is not its role. In its primary submissions NZTA said:

> 18.7 While the consideration of alternatives must be apparent in order for the adequacy of the consideration to be assessed, the Majority erred in law by requiring that the consideration be 'transparent and replicable'. The Majority heard detailed and lengthy evidence regarding the consideration of alternatives, such that the consideration given was readily apparent.
>
> 18.8 The Act does not require that the consideration given to alternatives be replicable, or mandate the Board to conduct an audit of the requiring authority's selection process. It clearly contemplates that the requiring authority will have exercised judgement in selecting the preferred option.
>
> ...
>
> 18.11 ... the correct approach under s 171(1)(b) ... recognises that it is for the requiring authority to exercise judgement and make a policy decision as to which option to pursue. The decision-maker should not seek to ensure that the 'best' option has been selected by auditing the consideration of alternatives, in particular, by seeking to replicate the selection process.

[182] As with some of NZTA's other specified questions of law, I consider that the inclusion of the verb "require" misdirects the inquiry. Certainly the Board did not suggest that in all cases a conclusion on the adequacy of consideration of alternatives will necessitate demonstrating replicability. If the question is viewed as importing such a general requirement the answer would be No.

[183] The issue of replicability has arisen in this case because of the fact that weightings were applied to various evaluation criteria at various stages of the process.[93] The Board's complaint was that the selection process is in effect opaque in the absence of information about the different weightings applied. Given the Board's perception that NZTA's preference for Option A had become entrenched,[94] the Board was not satisfied that the consideration of other non-suppositious options had been adequate. It felt the need to state that it viewed its obligation "seriously".

[184] NZTA's complaint is that the Board took its role too seriously. Both the form of the question and its submissions emphasised that the inquiry is whether the requiring authority's consideration of alternatives is "apparent". Mr Milne's submissions for TAC construed that approach as being:

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93 At [176] above.
94 At [1200].

> trust us … measure adequacy by the volume of paper we produce not the quality of the process.

[185] I do not accept NZTA's submission[95] that the Board was seeking to ensure that the "best" option had been selected by auditing the consideration of alternatives. I consider that the Board had a clear understanding of the confined nature of its role: see [1090][96] and [1167].[97] While I can understand how NZTA might perceive the Board's concern about weightings as approximating to an audit, it is clear in my view that that was not the Board's objective. The Board's concern as expressed at [1181] was that, absent an understanding of the weightings applied, it was not possible to determine that adequate consideration had been given to relevant alternative options.

[186] In my view in some, but by no means in all, cases it may be necessary for the decision-maker to gain access to the weightings in a multi-criteria analysis in order to be satisfied that adequate consideration has been given to alternatives. The cases will inevitably be circumstances dependent. I do not consider that that is an unreasonable approach given the context of s 171(1)(b) where:

(a) as I have held with reference to Issue 1A above, the measure of adequacy of the consideration of alternatives will depend on the impact on the environment of adverse effects; and

(b) the subject of s 171(1)(b) is one of the matters to which particular regard is to be had.

[187] I am unable to discern an error of law in the Board's approach to this question. Indeed I perceive that this is another instance where NZTA is in effect inviting the Court, under the guise of a question of law, to second-guess the Board's conclusions. There is force in Mr Palmer's submission that NZTA's argument at para 18.9 of its primary submissions, that the Board placed "too much weight on the opinion evidence of Mr Durdin", serves to illustrate that NZTA's real complaint amounts to a disagreement about a matter of factual inference and assessment.

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95 At para 18.11 in [181] above.
96 At [125] above.
97 At [178] above.

Subissue 1D: Requiring the assessment methodology to incorporate Part 2 weightings

[188] NZTA's challenge on this issue is directed at the Board's concluding observations following those considered in Issue 1C above, in particular the emphasised words:

> [1180] A failure to explain the reasons for any weighting (if any) can create difficulty for us in exercising our statutory function by making it difficult for us to assess any such weightings against Part 2 and the objectives of the Project. **While we accept that each alternative does not need to be assessed against Part 2, nevertheless, Part 2 considerations should be reflected in any weight given to a particular evaluation criteria (sic) over another, as is clear from the North Island Grid Upgrade Project Board of Inquiry decision, quoted earlier.** Furthermore, as was pointed out in the Feasible Options Report, a key focus of the evaluation process was that the preferred option can be considered as that option that best meets the Project objectives with the least overall social, community and environmental impacts.
>
> [1181] The failure for either the evidence or the reports to explicitly explain what weightings were given at each of the option evaluation stages makes it difficult, if not impossible, to determine if adequate consideration was given to alternative options.
>
> (emphasis added)

[189] The amended notice of appeal at paragraph 12 contended that the Board erred in law by finding at [1180] that considerations under Part 2 of the Act should be reflected in the weight given to particular evaluation criteria, and consequently in finding at [1181] that the failure explicitly to explain the weightings given to criteria made it difficult, if not impossible, to determine if adequate consideration was given to alternative options.

[190] NZTA posed the following question of law:

> Q 13 Does s 171(1)(b) require the requiring authority's consideration of alternatives to incorporate Part 2 considerations; including (in particular) the weight given to particular evaluation criteria?

[191] NZTA criticised the highlighted passage on two counts. First it contended that the second sentence contained inconsistent findings. Secondly it said that the NIGUP decision was not authority for the proposition that Part 2 considerations must

be reflected in any weight given to a particular evaluation criterion over another during the consideration of alternatives.

[192] NZTA submitted that each alternative does not have to be tested against Part 2, citing *Volcanic Cones Society*[98] and *Queenstown Airport*.[99] The Board acknowledged that that is so. Indeed the Board had emphasised that point in the quotation from the NIGUP decision at [1094].

[193] NZTA developed the argument in this way:

> 19.3 The only purpose of requiring Part 2 to be reflected in weightings could be to ensure that the alternative met the requirements of Part 2 – in other words, to test the alternative against Part 2. Thus, by finding that Part 2 considerations should be reflected in any weight given to a particular evaluation criteria over another, the Majority effectively required alternatives to be tested against Part 2 (which the Majority was obliged to acknowledge is not the legal test). These findings are inconsistent.

[194] NZTA's argument was that, by recognising a requirement for evaluation criteria weightings to reflect Part 2 considerations, the Board was in effect requiring each individual alternative to be assessed against Part 2 despite the Board disclaiming such an intention.

[195] The issue is a subtle one. The Board's statement needs to be read in context, namely its consideration of the transparency and replicability of the option evaluation. The passage at [1180] follows the discussion at [1173] to [1177][100] of the significance for the outcome of the weighting of the evaluation criteria and the fact that it was not known whether certain evaluation criteria had been given more weight than others.

[196] That discussion had prompted the Board's observation at [1178] about the need for transparency in explicitly setting out the weightings used in any multi-criteria analysis. All of that had been preceded by the chronology which had

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98 *Volcanic Cones Society*, above n 20, at [61].
99 *Queenstown Airport*, above n 22, at [50].
100 At [179] above.

included the significant paragraphs [1128] and [1129][101] where the sensitivity of the outcome to the relative weightings of the criteria had been noted.

[197] I do not consider that the Board's intention was to subvert the established position, which it clearly recognised, that each alternative does not have to be tested against Part 2. My impression is that the Board was saying that, if a range of alternatives are to be the subject of evaluation by criteria which are to be variably weighted, then the selection of the different weightings should "reflect" Part 2 considerations.

[198] In view of the discussion of the role of Part 2 in both *McGuire* and *King Salmon* I do not view that suggestion as controversial. While each alternative does not need to be measured against Part 2, it is not unreasonable that a mechanism which provides the basis for the comparison of alternatives *inter se* should not be subject to the infusion of Part 2. Consequently I do not consider that the second ("nevertheless") part of the highlighted sentence of paragraph [1180] is erroneous in law.

[199] NZTA's second point was that the Board misapplied the NIGUP decision. The answer to this criticism is simpler. As Mr Palmer acknowledged, the sentence structure is a little puzzling. I agree that the NIGUP decision is not authority for the "nevertheless" proposition. However, as the Board had already recognised at [1094], it is clear authority for the first statement that each alternative does not need to be assessed against Part 2. In my view the Board was intending to say no more than that. Although located at the end of the sentence, its reference to the NIGUP decision was not intended as support for the observation about weightings reflecting Part 2 considerations.

[200] Reverting to Q 13, I do not consider that the question as framed is sufficiently precise to permit an answer reflecting my reasons above. An affirmative answer could be construed as departing from the established position that individual alternatives do not have to be separately tested against Part 2. I consider that a more accurate way of encapsulating my view of this aspect of the Board's decision is to

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[101] At [176] above.

say that, in circumstances where the requiring authority's consideration of alternatives involves the application of evaluation criteria which are variably weighted, the decision to allocate the variable weightings should be subject to Part 2.

Subissue 1E: Conflation of s 171(1)(b) and (c) considerations

[201] The question of law posed under this heading is:

> Q16 Does the test of adequacy under s 171(1)(b) require a requiring authority to select the option that best meets the transportation objectives while minimising environment effects?

[202] In relation to that question the amended notice of appeal at paragraph 15 states that the Board erred:

> (a) By inferring at [1180] that the assessment of alternatives must result in selecting the alternative ("the preferred option") that best meets the project objectives with the least overall social, community and environmental impacts.
>
> (b) By inferring at [961] that the project objectives ought to have included an environmental objective so that the Proposal could be tested against transportation effects and adverse environmental effects.

[203] Paragraph [961] appears in a discussion of the marked conflict of evidence between NZTA's expert witnesses and the witnesses called by the opposing parties. It states:

> [961] Both at the Feasible Options Report stage and at the hearing before us, there appeared to have been an overemphasis on transport and related benefits (which reflects the Project's objectives) rather than an assessment of the relevant amenity and environmental effects of the Project (which are absent from the objectives), assessed by reference to what is sought to be protected, maintained or enhanced in the statutory instruments.

[204] With reference to that paragraph NZTA submitted:

> 20.2 This comment is provided against the context of the Majority's assessment that the urban design and landscape evidence called by [NZTA] was influenced by the transportation objectives of the Project and the acceptance that grade separation by way of a bridge

> is the only way of achieving those objectives. However, it is submitted that this criticism has also permeated the Majority's assessment of the Appellant's consideration of alternatives.

[205] Then, after referring to [1180][102] and [1198], NZTA submitted that, while NZTA's aim throughout the process of considering alternatives was to select the option that best met the project objectives with the least environmental effects, NZTA did not accept that s 171(1)(b) required that test to be applied or met. NZTA argued that the Board's approach unnecessarily conflated ss 171(1)(b) and (c).

[206] I do not consider that the Board made any error of law as suggested. I agree with Mr Palmer that [961], read in the context of the relevant discussion, is simply designed to explain why there might have been a conflict of evidence between the witnesses on the opposing sides. I also accept his submission that the final sentence of [1180] on what NZTA relies is an attribution to NZTA's own Feasible Options Report. I am unable to discern a conflation error of the nature advanced.

[207] While in those circumstances I consider that Q 16 is inapt, the answer is in the negative.

Subissue 1F: Finding that adequate consideration was not given to alternatives following the Government's decision to underground Buckle Street

Context

[208] The short chronology in the overview of the consideration of alternative options referred to the letter from Opus to NZTA dated 3 July 2012.[103] The Decision continued in this way:

> [1196] The five-page document was essentially a brief summary or overview of Option F and Option X. It briefly referred to the decision being made that Option A was preferred over Option B. It touched on other options. It was not a careful evaluation of options in light of the decision by the government to underground Buckle Street. It could not be compared to the rigour of the Feasible Options Report stage. At most it could be called nothing but a cursory review of the situation.

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102 At [188] above.
103 In [1138] at [124] above.

[1197] Following its public announcement on 17 August 2012 that Option A was the preferred option, [NZTA] then proceeded to prepare its documentation for lodging its application with the EPA. The application was lodged on 17 June 2013.

[1198] Our concern is that the playing field changed with the likelihood of the Buckle Street Underpass and the bringing forward of Mt Victoria Tunnel duplication options. These should have resulted in re-evaluation of the options, including Option F, against the Project objectives. The Feasible Options Report, as we have said, itself specifically states the need to reconsider the ability of options to work in with a possible underpass. This was not done. There was no proper reconsideration of options once the underpass became a certainty.

[1199] Nothing further was done until the City Council decided on 19 December 2012 to order an assessment of Option RR (the precursor of the BRREO Option), Option X and Option A. An Option X transportation assessment was prepared by Opus for the City Council and was published on 20 February 2013. The overall assessment was completed on 28 March 2013. It concluded:

> **Overall Conclusions**
>
> From an urban design perspective, the preference would be for an at-grade solution – that is, a solution that does not require any elevated structures. However, it may not be possible to achieve the required transport benefits with an at-grade option.
>
> In that case, the preference is for the simplest structure – one does not make this part of the city harder for people to find their way around, or compromise access to neighbouring facilities.

[1200] It was not until late March that [NZTA] acted. In late March 2013, the Project team carried out an option evaluation of Options A, F and X. According to the introduction of the Comparison of Options, the evaluation was undertaken to confirm the decision previously made by [NZTA] that Option A was the preferred option. The document is dated June 2013, and by this time, the application documents for Option A would have been well advanced, as they would have been in late March when the evaluation commenced. Furthermore, it would appear from the letter dated 19 December from Mr Dangerfield, the CEO of [NZTA], to the CEO of the City Council that [NZTA] had become entrenched with Option A well before November 2012. It had, as we have said, made its decision, making Option A its preferred option on 17 August 2012.

[1201] We were not provided with any documentation or evidence as to why the Project team was asked to do its assessment in March 2013. Nor was any reason given for the failure to carry out a feasible option type assessment soon after the Government's decision to underground Buckle Street, as was foreshadowed in the Feasible Options Report.

[1202] The chronology of events and the failure to carry out the clear statement of intent to reassess options in the event of the undergrounding of Buckle Street raises doubts as to the adequacy of consideration of alternatives. This is particularly so having regard to Mr Durdin's comments on the March 2013 comparison of options:

> 37. The simplified decision matrix for the comparison between Options A and F consolidates down to four evaluation criteria, mainly Built Heritage, CPTED, Transportation and Visual. That process shows Option A as considered positive against two criteria (CPTED and Transportation) and negative against the other two. In comparison, Option F is considered positive against all four criteria.
>
> 38. Given that the decision-making process is premised around selecting the option "... with the least social, community and environmental impacts" it would follow that Option F should have been selected.

Issues

[209] NZTA asserted that in those paragraphs the Board made three errors of law:

(a) By finding at [1196] that the review of alternatives carried out in July 2012 was "cursory".

(b) By inferring at [1200] that NZTA's consideration of alternatives in March 2013 was too late because the application documentation would have been well advanced, and NZTA appeared to have been entrenched with its preferred option by that time.

(c) By finding at [1201] that NZTA was required to carry out a "feasible option type assessment" following the Government's decision.

[210] Those errors translated into four different questions of law:

> 19(a) Was the Board's finding that the review of alternatives carried out in July 2012 was 'cursory' a finding to which it could reasonably have come on the evidence, including in relation to suppositious options (refer Subissue 1B)?
>
> 19(b) In order for the consideration of alternatives to be relevant must the consideration be completed before the application documentation is well advanced?

19(c) Is a requiring authority required to prepare a 'feasible option type assessment' when the environment changes? Or is it entitled to rely on earlier work?

19(d) Was the Board's finding that adequate consideration was not given to alternatives following the Government's decision a finding to which it could reasonably have come on the evidence?

Q 19(a) [recast]: Is this a case in which the true and only reasonable conclusion contradicts the determination that the review of alternatives carried out in July 2012 was cursory?

[211] Referring to the Opus letter and an undated cost estimate for Option F of 19 July 2012, NZTA's short submission was that, while those documents were not a "feasible options type assessment", they reflected a level of consideration appropriate to the circumstances. In particular it was said that the two documents provided expert advice that:

(a) Option F remained significantly more expensive than the Project; and

(b) Option X remained a less desirable option due to cost and other concerns.

[212] The question whether the 3 July 2012 review of alternatives was cursory is to be viewed, as NZTA says, in the context of the circumstances. Those circumstances included the stance earlier taken that Option F was to be assessed with other options which permitted SH1 to be located in a tunnel in front of the War Memorial once the government had made a decision on whether to fund the War Memorial Tunnel.[104]

[213] The Opus letter set out what it termed an alternate review.[105] The Board did not view it as a careful evaluation of options in light of the government's decision to underground Buckle Street, observing that it could not be compared with the vigour of the Feasible Options Report stage. It is apparent that the Board regarded the letter as superficial.

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104 [1123] at [124] above.
105 [1138] at [124] above.

[214] It may be that an alternative view was available. However, on the facts as recited in the Decision such an alternative view could not be said to be compelling. There was ample basis for the Board's assessment of the situation. Consequently it cannot be concluded that the true and only reasonable conclusion contradicted the Board's view.

Q 19(b): In order for the consideration of alternatives to be relevant must the consideration be completed before the application documentation is well advanced?

[215] NZTA submitted that s 171(1)(b) does not set a deadline by which alternatives must have been considered in order for that consideration to have been adequate. I agree. However, whether the consideration of alternatives, which occurs comparatively late in the process, will be adequate or not is a matter of fact.

[216] That point is illustrated by the authority cited by NZTA, *Nelson Intermediate School v Transit New Zealand*.[106] As NZTA notes, the Environment Court there did not find that alternatives needed to have been considered prior to a particular date. However it found that Transit's development and consideration of alternatives during an appeal hearing was not adequate.

[217] That was not a finding of law. Nor was the view reached by the Board in the present case, that NZTA had become entrenched with Option A well before November 2012, a finding which contains an error of law. For that reason I do not answer the question which, in any event, is inappropriately vague.

[218] Any attack on the Board's view would need to resort to an *Edwards v Bairstow* type challenge. That is the nature of NZTA's fourth question in Issue 1F to which I now turn.

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106 *Nelson Intermediate School v Transit New Zealand* (2010) 10 ELRNZ 369 (EnvC).

Q19(d) [recast]: Is this a case in which the true and only reasonable conclusion contradicts the determination that adequate consideration was not given to alternatives following the Government's decision?

[219] NZTA's primary submissions stated:

> 22.1 … on 20 February 2013, Opus briefed [NZTA's] specialists to assess Options A, F and X for the purposes of Technical Report 19: Alternative Options Omnibus. The results of that exercise are summarised in Technical Report 19: Alternative Options Omnibus at Appendix B.
>
> 22.2 The Majority gave this exercise little or no weight in its assessment of [NZTA's] consideration of alternatives. No explicit reason for this is given. However, at [1200] the Majority stated that it would appear that [NZTA] was "entrenched with Option A well before November 2012".
>
> 22.3 Absent an explicit finding of bias or predetermination, there was no reasonable basis on the evidence for the Majority to find or infer that [NZTA's] consideration of alternatives in March 2013 was too late.

[220] In my view NZTA falls well short of the high hurdle of establishing that the Board's view was insupportable. Indeed, with reference to NZTA's submission at para 22.3, I consider that there were ample grounds for the Board's view on the basis of the 19 December 2012 letter alone.

[221] Accordingly the answer to Q 19(d) is No.

Q 19(c): Is a requiring authority required to prepare a "feasible option type assessment" when the environment changes? Or is it entitled to rely on earlier work?

[222] In the heading to this issue in its primary submissions NZTA posed the question: was NZTA required to "start again" following the Government's decision? It acknowledged that the Opus letter and the updated cost estimate[107] were not a feasible option type assessment but submitted:

> 21.6 It is appropriate (and economically responsible) for a requiring authority to rely on its earlier consideration of alternatives when the environment for a project changes. It is not required to carry out a new 'feasible option type assessment' whenever the environment for receiving the project changes.

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[107] At [211] above.

[223] The response (it is obviously not an "answer") to this question is: it depends. It is dependent on the nature and extent of the change to the environment and the extent of the reconsideration that such change necessitates. A comparatively minor change would be unlikely to require a requiring authority to "start again". The earlier work could no doubt be relied upon in large part. However a significant change to the environment might require a substantial revisiting of the prior work.

[224] The relevant event here was the government's decision concerning funding of the War Memorial Tunnel. Whether that event was of such significance as to require a more thorough-going reconsideration than was reflected in the 3 July 2012 letter is essentially a question of fact. There is no question of law to be answered.

Subissue 1G: Adequacy of the consideration

[225] In support of an alleged error of law in finding that adequate consideration was not given to alternatives, NZTA advances the following grounds of appeal:

(a) The evidence was of a lengthy, detailed and thorough consideration of a range of alternatives.

(b) For the reasons set out under Issues 1A to 1F, the Board applied the wrong legal tests to what was required of NZTA in its consideration of alternatives. Had the Board applied the correct test it should have found on the evidence before it that the consideration was adequate.

(c) Further, the Board allowed itself to be distracted by the merits of alternatives preferred by submitters (including BRREO, Option X and the long tunnel option) and failed to properly consider the evidence of the consideration given by NZTA to alternatives. Section 171(1)(b) requires decision-makers to inquire as to the process, rather than the outcome of the consideration given to alternatives.

[226] From that footing NZTA proposed the following question of law:

> Q 22 Is the Board's finding that adequate consideration was not given to alternatives a finding that it could reasonably have come to on the evidence?

[227] For the reasons explained at [16] to [23] that question is reframed in this way:

> Is the case one in which the true and only reasonable conclusion contradicts the determination that adequate consideration was not given to alternatives?

As earlier noted[108] that question effectively subsumes the alternative question in Issue 1A which reframed is:

> Is the case one in which the true and only reasonable conclusion contradicts the determination that NZTA had not given sufficiently careful consideration to alternatives?

[228] NZTA's argument relied on Annexure A to its primary submissions which traversed the history of events from the Meritec Scheme Assessment Report in March 2001 to the lodgement of the NoR in June 2013.

[229] Clearly there was a large volume of evidence before the Board which it appears to have diligently considered. Further, given that Mr McMahon, in his alternate view at Part 2 of the Report, accepted that adequate consideration had been given to alternative sites, routes and methods of undertaking the work, it may well be that this is a case where different decision-makers, each acting rationally, might reach differing conclusions.[109]

[230] However the issue for me is whether the Board's decision is within the category of rare cases where its conclusion is so clearly untenable as to amount to an error of law because the proper application of the law requires a different answer.[110]

[231] If the law is as I have found in the course of my consideration of the earlier parts of Issue 1, then I consider that, on the basis of the Board's consideration of the

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108 At [144] above.
109 *Vodafone*, above n 2, at [56].
110 At [52].

dual issues of transparency/replicability and assessment of non-suppositious options, the answer to the questions in their reframed form can only be in the negative.

Issue 2: Inquiring as to the outcome rather than the process of considering alternatives

[232] In the course of considering Issue 1C reference was made to NZTA's contention that the Board had engaged inappropriately with the outcome rather than the process.[111] That theme is developed in Issue 2 where two errors of law are alleged:

> (a) When exercising its overall judgement in accordance with s 5, applying *McGuire v Hastings District Council* [2001] NZRMA 557 to hold that if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that (at [1324]. See also [1319] and [1182]–[1187]).
>
> (b) By assessing the effects of the Proposal by reference to alternatives that the Board considered would have less adverse effects on the environment (in particular, BRREO, Option X and tunnel options). (See [403], [510], [643], [1241], [1319]).

[233] Those dual errors give rise to a single question of law, Q 25, which incorporates two alternatives:

> Q 25 Is a decision-maker (in this case the Board) permitted to compare an option against other alternatives that it considers would have less adverse effects on the environment, either in assessing the effects of the Proposal under s 171(1), or in exercising its overall judgment in accordance with s 5?

[234] In Issue 1B reference was made to the circumstances in which and the reason why various options were put before the Board.[112] Those paragraphs, together with the following two paragraphs from that part of the Decision headed "Exercise of judgment in accordance with Section 5", are referred to in the first of the alleged errors of law:

> [1319] Having said that, we are satisfied on the evidence that similar transportation benefits that would give effect to such integrated management could be achieved by a tunnel option or variant similar to Option X. We are also satisfied on the evidence that an at-grade option, along the lines of the

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111 At [181] above.
112 [1182]–[1187] at [148] above.

> BRREO Option, could facilitate some benefits, albeit not as well as the Project, at least until the Mt Victoria Tunnel duplication and possibly well beyond. We consider such options should have been included as part of a robust option evaluation process.
>
> ...
>
> [1324] In the final outcome, we are required to evaluate the significant adverse effects taken together with the significance of the national and regional need for and benefit of the Project. In carrying out this evaluation, we are conscious of the dicta of the Privy Council in *McGuire* that relevantly Sections 6 and 7 are strong directions to be borne in mind, and if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that.

[235] NZTA noted that *McGuire* was focused on Māori land rights and jurisprudence around the Treaty of Waitangi, including the processes in ss 6(e), 7(a) and 8 of the RMA. It said that the Privy Council's reference to "the spirit of the legislation" can only be read as referring to the particular discussion of Treaty jurisprudence and its place in the RMA. It argued that the Board was wrong in [1324] to extend those observations more generally.

[236] NZTA also relied on *Quay Property Management Ltd v Transit NZ*[113] in support of the proposition that a decision-maker should not cross the line into adjudication of the merits of the options and by that measure determine whether the chosen route was reasonable.[114] Hence it submitted:

> 23.6 The Majority therefore erred by comparing the Project to alternatives when assessing the Proposal's effects under s 171(1) or exercising its overall judgement in accordance with s 5. (See [403], [510], [643], [1241], [1319] and [1324].

[237] I do not consider that the Board was purporting or attempting to "cross the line" as described in *Quay Property*. The Board's understanding of the nature of its task is readily apparent from paragraphs to which reference has already been made. I consider that the respondents are correct when they say that a comparison of the relative effects of various aspects of the Project with those of alternatives was a natural corollary of the Board's considering whether NZTA had given adequate consideration to those alternatives.

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113 *Quay Property Management Ltd v Transit NZ* EnvC Wellington W28/00, 29 May 2000 at [152] applied in *Queenstown Airport*, above n 22, at [50].

114 [1090] at [125] above and [1167] at [178] above.

[238] I consider that the analysis of Mr Milne for TAC fairly responds to NZTA's complaint:

> 156. The Board did not assess the overall merits or effects of the alternatives. The Board did not draw a conclusion as to whether the alternatives referred to would have been *better* options overall. Rather, it considered whether Option X-type options, tunnel options and BRREO-type options were non-suppositious and whether it was likely that they might have less impact on heritage and amenity values. It reached the inevitable conclusion that such options would potentially have fewer adverse effects on amenity values and heritage values. It was necessary for the Board to understand the extent to which the various alternatives which submitters claimed had not been properly considered, had the potential to address project objectives with lesser environmental effects; so that it could reach a conclusion as to whether those alternatives should have been adequately considered.

[239] Consequently for these reasons I answer Q 25 in the affirmative.

Issue 3: Misapplication of s 171(1) of the Act

[240] The refined Issue 3 questions of law are recorded at [53] above. Three of those questions have been addressed in the course of the analysis of the statutory interpretation issues, namely:

- Q 28A at [72] to [76];
- Q 28C at [64] to [68];
- Q 28D at [99] to [118].

[241] It remains to address Q 28B which states:

> Was the Board in error by considering the effects of the environment of allowing the requirement without having particular regard to the matters listed in s 171(1)(a) to (d)?

[242] No light is shone on that very general question by reference to the error of law pleaded at paragraph 27(c) of the amended notice of appeal which simply alleges a failure by the Board to assess the effects of the environment of allowing the requirement having particular regard to the matters in s 171(1)(a) to (d).

[243] However some clarification is derived from the following grounds of appeal at paragraph 29:

> (c) In terms of the matters in s 171(1)(a) and (d), the Board failed to have particular regard to the following relevant matters when assessing the Proposal's effects:
>
> (i) the Proposal's consistency with regional/city transportation strategies, as discussed by the Board at [520]–[526], in particular, when considering what weight to give to the Proposal's 'enabling benefits' for future transportation developments (see below under Issue 3); and
>
> (ii) relevant matters in the District Plan when assessing the Proposal's effects on historic heritage and amenity values (see below under Issue 6).
>
> (d) In terms of s 171(1)(b), for the reasons set out above under Issue 1, the Board ought to have found that adequate consideration had been given to alternatives and assessed the Proposal's effects having particular regard to this finding.
>
> (e) In terms of s 171(1)(c), when assessing the Proposal's effects, the Board failed to have particular regard to its finding at [1230] that the work is reasonably necessary to achieve the objectives of the requiring authority.

[244] With reference to the s 171(1)(a), (b) and (d) matters, it will be observed that the grounds of appeal incorporate cross-references to other issues, namely Issues 1, 4[115] and 6. I did not receive discrete argument on these matters in the context of Issue 3 and consequently, like counsel, I treat these matters as addressed in the context of those other Issues. The point concerning s 171(1)(c) is addressed in the context of Q 45B at [356] below.

Issue 4: Incorrect approach to assessment of enabling benefits

A stand-alone project

[245] The Decision notes that a consistent issue during the hearing was the implications of NZTA's having sought approvals for the project separately from those for related parts of the network, particularly the Mt Victoria Tunnel

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[115] The reference to Issue 3 in para 29(c)(i) should be a reference to Issue 4 which relates to enabling benefits.

duplication, and in advance of details of the Public Transport Spine Study and its outcomes being finalised.[116]

[246] NZTA's closing statement to the Board of 3 June 2014 explained its reasons for the Project being pursued on a stand-alone basis:[117]

> 12.9 It is for [NZTA], together with WCC and GWRC, to decide when applications for its various projects are lodged, and the make-up of each project. It would be ridiculous to suggest that, in Auckland for example, applications for all Auckland State highway and local roading improvements should be lodged at the same time, so that their inter-relationships can be explored. For Wellington, the Ngauranga to Wellington Airport Corridor Plan signalled in 2008 that the Basin Bridge Project is to be implemented before 2018, whereas the Mt Victoria and Terrace Tunnel duplication projects are described as "*measures that may be implemented (beyond 10 years)*". [NZTA] has structured the Project (and sought approvals for that Project) in a manner which is entirely consistent with that description.
>
> 12.10 Mr Blackmore's evidence is that one of the reasons for separating the Basin Bridge and Mt Victoria Tunnel Duplication Projects was [NZTA's] wish to improve the Basin Reserve road network and thereby facilitate public transport improvements (and increased use) prior to the duplication of the Mt Victoria and Terrace Tunnels. This is supported by the GWRC. In addition, [NZTA's] view was that the environmental and social aspects of both Projects were sufficiently different in nature that there was no need to combine the two Projects for consenting purposes. Mr Blackmore's evidence was that the Basin Bridge Project is a standalone project which is not dependent on the Mt Victoria Tunnel Project proceeding, and will have benefits for north-south traffic regardless of what happens at Mt Victoria. By comparison, the Mt Victoria and Terrace Tunnel Duplication Projects, and the Bus Rapid Transport Project, are reliant on the Basin Bridge Project being in place.

[247] The Board said:

> [232] We accept [NZTA's] submission that this is not a case where the Project itself requires further consents or authorisations under the RMA which are not currently before us. Rather, the issue is the extent to which the Project and its effects, can be properly understood and assessed having regard to the current status of the Public Transport Spine Study, and in isolation from the Mt Victoria Tunnel duplication project in particular.

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116 At [225].
117 Noted at [230].

> [233] The power to defer a matter lodged with the EPA under Part 6AA while other related applications are made lies with the Minister, not the Board. Further, this power is to be exercised before notification of the original applications. The matter now having been referred in accordance with Section 147(1)(a), we are required to make a determination on the Project before us, having regard to the effects of the Project (both positive and negative), and that Project alone. We address the scope of the relevant future state of the environment and effects (including additive and cumulative effects) we can consider (particularly with respect to the Mt Victoria Tunnel duplication) elsewhere in our decision.

[248] The Board accepted TAC's submission that it must take the position "as it is". It said:

> [234] … we must determine whether the project before us meets the Act's sustainable management purpose as a stand-alone Project (i.e. in the absence of the Mt Victoria Tunnel duplication), and on the basis of the information regarding the outcomes of the Public Transport Spine Study available to us. That is the key consequence of [NZTA's] decision to seek approval for the Project as a stand-alone project separate from that of the Mt Victoria Tunnel duplication, and in advance of the Public Transport Spine Study and its outcomes being finalised.

Effects and benefits – terminology and meaning

[249] The fact of the stand-alone nature of the Project was the catalyst for a significant debate about the benefits which could fairly be attributed to the Project, including contingent benefits and enabling effects. As Mr Cameron observed in the course of closing arguments before the Board, these are elusive concepts.[118]

[250] "Effects" are defined in s 3 of the RMA:

> In this Act, unless the context otherwise requires, the term **effect** includes–
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects–

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[118] Transcript page 8146 line 27, 4 June 2014.

regardless of the scale, intensity, duration, or frequency of the effect, and also includes–

(e) any potential effect of high probability; and

(f) any potential effect of low probability which has a high potential impact.

[251] In its written closing statement to the Board NZTA stated that future effects, cumulative effects arising over time or in combination with other effects, and uncertain effects, are all relevant effects. Challenging the opposing contention that contingent benefits (being those benefits reliant on another consenting process or event in order to materialise) should not be taken into account by the Board, NZTA contended that the cumulative and in-combination effects to be considered by the Board included the Project's effects in combination with contingent benefits of works which are yet to receive RMA or another type of approval, citing as examples the Mt Victoria and Terrace Tunnel duplications.

[252] TAC's submissions on appeal argued that NZTA had shifted its emphasis on appeal from "strategic fit" with objectives to "enabling benefits". Although NZTA's closing statement used the phrase "facilitate/enable", as the Decision recognises, in oral submissions NZTA had submitted that "enabling effects" were a separate and identifiable benefit of the Project and that the Board should treat them as such.[119]

[253] In its written reply submissions NZTA maintained that there is a difference between the strategic fit of a project and its enabling benefits. It explained:

22.12 To be clear, in response to the submissions of TAC, [NZTA] considers that there is a difference between 'strategic fit' of a project and 'enabling benefits'. An 'enabling benefit' is an effect of a proposal that facilitates or creates an opportunity for the achievement of an outcome. Such an effect is an identifiable positive benefit of a project. Of course, what that might be is dependent on context.

22.13 In the context of this Project, the positive enabling effect is how the Project facilitates (will not frustrate) the development and potential implementation of related projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study ('PTTS'). [NZTA] is not referring to the benefits from the actual implementation of the wider Roads of National Significance

[119] At [507] in [256] below.

> ('RoNS') programme or the PTSS. Rather, it is the fact that this Project enables/facilitates/provides the opportunity for those other projects to be implemented.

The Board's Decision

[254] The Board accepted as correct NZTA's final analysis of the existing or future state of the environment.[120] In addition it stated that the approved sections of the Wellington Northern Corridor RoNS should appropriately be considered as part of the environment for assessment of the Project, being the Transmission Gully and the Mackays to Peka Peka and Peka Peka to Otaki (Kapiti Expressway) sections of the Wellington Northern Corridor.

[255] At [343] to [346] the Board considered the issue whether contingent benefits, (benefits flowing from related projects which are intended but not consented) should be attributed as flowing from the Project. It recorded that at the end of the hearing it was agreed that the benefits from a second Mt Victoria Tunnel and a third lane as part of the Buckle Street Underpass should not be attributed to the Project because the tunnel duplication had yet to be consented to and the Buckle Street Underpass was part of the existing environment.

[256] At [506] to [519] the Board proceeded to address the issue of "enabling effects", namely the consequence that the Project facilitates (or at least does not frustrate) the development of related projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study. The following paragraphs provide the context for and are referred to in the discussion of the several questions of law posed in Issue 4:

> [506] One of the issues raised before us was whether (and if so, how) we are able to take into account the *enabling effect* of the Project. That is, how should we deal with [NZTA's] argument that the Project facilitates (or at least does not frustrate) the development of related projects, particularly the Mt Victoria tunnel duplication and Public Transport Spine Study.
>
> [507] In closing, Mr Cameron submitted that such effects are a separate and identifiable benefit of the Project, and we should treat them as such. We were not provided with any case law authority to support this submission. Nor are we aware of any.

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[120] At [336].

[508] We acknowledge that the Project *enabling* element may arguably be viewed as a potential positive future effect which arises from the NoR before us, and thus is within the scope of what we are tasked to consider under Sections 149P(4) and 171(1). The RMA's definition of effects in Section 3 may also be wide enough to encapsulate or incorporate such effects. In particular, it includes any positive effects – although notably, unless the context otherwise requires. As the High Court held in *Elderslie* in the context of a resource consent application:

> … To ignore **real** benefits that an activity for which consent is sought would bring necessarily produces an artificial and unbalanced picture of the real effect of the activity.
>
> [*our emphasis*]

[509] However, even if we accept (without finally determining the matter) that we can treat the project's enabling element as a separate and identifiable positive benefit, we consider this is largely a moot point. That is because in our view, any such *benefit* can be given little (if any) weight, primarily for the reasons set out below.

[510] Even if we assume that some modifications to the Basin Reserve gyratory are required in order for the Mt Victoria Tunnel duplication and Public Transport Study to proceed, the Basin Bridge Project is only one of potentially several solutions that might be put in place for that purpose. Such solutions could equally (or to a greater or lesser degree) facilitate (or not frustrate) the progression of those projects.

[511] We do not consider the evidence before us sufficiently establishes that the *enabling* element of the Project is something unique to, or which can only be achieved by, [NZTA's] current NoR.

[512] Perhaps more importantly, we have no guarantee that either (or both) of those projects would in fact go ahead. Indeed, as outlined elsewhere in our decision, we are required to make our determination on the basis that the Mt Victoria Tunnel duplication does *not* form part of the future state of the environment, and on the basis of the limited information currently available to us regarding the Public Transport Spine Study outcomes.

[513] That is the key result of [NZTA's] election to seek approval for the Project separately from that for the Mt Victoria Tunnel duplication, and in advance of the Public Transport Spine Study and its outcomes being finalised. In having made that strategic decision, [NZTA] must now accept the consequences of doing so. Put simply, and using the wording from *Elderslie*, we cannot place any significant weight on a supposed (but not quantified) Project benefit which is not real – in that we have no certainty or assurance it would actually materialise.

…

[516] As we have already found, the Mt Victoria Tunnel duplication should not be assumed to occur for the purposes of evaluating the Project. Further, we do not see our approach in this regard as inconsistent (nor do we in any way disagree) with the Environment Court's observations in *Cammack* (cited to us by [NZTA] in opening) that the RMA's:

> ... concept of sustainable management does not require the status quo to simply continue. Provided the imperatives contained in s 5(a)–(c) can be justified, RMA contemplates management of use, development and protection, not just retention of the status quo.
>
> [517] Rather, it is a reflection of our view that it would not be sustainable, or provide for sustainable management, to approve projects such as this, primarily because they were necessary to facilitate future developments, which may (or may not) proceed.
>
> [518] Accordingly, we consider the most appropriate way to take into account the Project's facilitating or enabling element is not as an identifiable benefit in and of itself, but in the context of Section 171(1), and particular sub-sections (a) and (d). That is, the extent to which the Project is consistent with the strategies identified and in the context of the other RoNS related projects.

[257] In that part of the Decision headed "Exercise of Judgment in accordance with Section 5" the Board said:

> [1318] The Project would have an enabling element to the extent that it would fit well with the proposed works planned to implement the City Council's Growth Spine form Ngauranga to the Airport. To this extent, it would be consistent with the transportation theme identified by the planning caucus and the integration of land use and transport planning.

There followed [1319][121] which has been discussed already in the context of Issue 2.

[258] On this aspect of the appeal it is appropriate to also note the distinctly different view of Mr McMahon:

> [1510] In my consideration, the Project's *enabling effect* is of considerable importance and should be acknowledged as an important and determinative transportation benefit of the Project.
>
> [1511] For the record, I should clarify that I am not referring to the other benefits that may result from the actual implementation of the wider RoNS programme or Public Transport Spine Study that are not part of this Project. Those are contingent benefits and I wholly accept that these should not form part of the Board's substantive consideration of this Project. Rather, what I am referring to is how the Project facilitates (or at least does not frustrate) the development and potential implementation of related Projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study.

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[121] At [234] above.

The parties' positions

[259] NZTA mounted a comprehensive attack on this aspect of the Decision which is encapsulated in the following extract from its primary written submissions:

> 31.7 There are significant errors of law in this aspect of the Majority's decision, including:
>
> a It has failed to treat enabling benefits as separate and identifiable positive effects of the Project that properly fall within the scope of 'effect' as defined by s 3 RMA.
>
> b It has failed to assess the effects of the Project 'having particular regard to' the fact that the Project is part of a programme of works set out in the relevant statutory and non-statutory documents under s 171(1)(a) and (d).
>
> c It has failed to access the effects of the Project 'having particular regard to' the requiring authority's objectives, which explicitly include 'not constraining opportunities for future transport developments'.
>
> d By requiring that a project's enable effects be 'unique' to the project (and to the particular option), it has failed to assess the effects of allowing the requirement and has instead engaged in a comparative exercise with other alternatives.
>
> e It has required the Appellant to demonstrate the certainty of benefits, when the RMA does not require this standard.
>
> f It has conflated the concepts of 'environment' and 'effects'.
>
> g Although it claims to have taken into account the enabling elements of the Project as a relevant factor under s 7(b) when exercising its overall judgment, the rest of the Majority's decision shows that this effect has been given little, if any, weight.
>
> 31.8 As a result of these errors of law, the Board wrongly attributed little, if any, weight to this highly relevant positive effect of the Project.

Seven questions of law were posed with reference to the Board's consideration of enabling benefits.

[260] While the burden of the opposition on this topic was carried by Mr Milne, Mr Palmer took the fundamental point that the seven different instances of alleged error all suffered from the same difficulty that the Board did treat enabling effects as relevant. He maintained that NZTA's real objection was that the Board did not give those enabling effects sufficient weight, a point which he reinforced by listing the

repeated references to weight in the relevant part of NZTA's primary written submissions.

Q 31(a): Is a project's enabling benefit an effect in terms of s 3 that can and should be taken into account under s 171(1) and/or s 5?

[261] There is no doubt that the Board took into account and gave at least some weight to the enabling element of the Project. NZTA's complaint concerns the manner in which the Board did so, as explained in ground of appeal 30(a):

> (a) At [506]–[519], by failing to treat and/or give weight to the enabling benefits of the Proposal as a positive effect in terms of s 3 and/or s 171(1) of the Act; and instead finding:
>
> (i) at [518] that the most appropriate way to take into account the Proposal's enabling element is by considering the extent to which the Proposal is consistent with the strategies identified in relevant documents identified under s 171(1)(a) and (d);
>
> (ii) at [519] that the enabling component is a matter which could be taken into account under s 7(b) (noting that this did not appear in the Board's reasoning in its draft Decision).

[262] It is apparent that the approach which the Board should adopt was traversed in oral closing submissions before the Board. NZTA's written reply submissions on appeal explained:

> 22.3 TAC submits that [NZTA] has shifted its emphasis from 'strategic fit' with objectives and transport plans, to 'enabling benefits'. This is incorrect. [NZTA's] closing submissions before the Board asked the Board to count the contingent benefits of the Project as relevant effects. This was the subject of some discussion between counsel and the Board. Counsel accepted that the Board may choose to consider the enabling aspect of the project as a relevant matter under s 171(1)(a) and (d), however, in doing so, it was anticipated that this aspect of the Project would be given appropriate weight. However, the effect of the Board's approach is to relegate the enabling benefit to an almost irrelevant 'other matter'.
>
> 22.4 It is of considerable importance that this issue is corrected as a matter of law. As discussed in [NZTA's] Primary Submissions, the Majority has made findings in relation to the 'enabling element' of the Project that [NZTA] says are wrong in law. The Minority has not. This appeal seeks to address those errors.[122]

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[122] The reference to the Minority was to [1511] at [258] above.

[263] Both ground of appeal 30(a) and that extract from NZTA's reply submission provide traction for Mr Palmer's criticism that NZTA's real objection concerns the weight which the Board accorded to enabling benefits, a view with which I agree.

[264] However Q 31(a) as framed does appear to raise a question of law, at least with reference to the "can" rather than the "should" component. That said, I do not consider that the Board made an error of law of the nature implied. It did not reject the contention that an enabling benefit could be a potential positive future effect in terms of s 3.[123] In fact, it did not actually determine the point as it expressly acknowledges at [509]. Instead, it proceeded to take the enabling element into account at [518] in the manner which counsel had agreed was acceptable.[124]

[265] The enabling effect or benefits of a project will inevitably be circumstances specific. As the Board recognised in relation to this particular Project, in some cases the enabling element may properly be viewed as a potential positive future effect. In that sense I consider that an affirmative answer can be given to the question whether a project's enabling element "can" constitute an effect to be taken into account under s 171(1) and/or s 5.

[266] However, whether it will be appropriate to do so or instead to proceed as the Board did in this case at [518] will turn on the particular circumstances. The "should" component of Q 31(a) does not raise a question of law and is not susceptible of answer in abstract terms.

Q 31(b): Where a project's enabling benefits are consistent with a programme of infrastructure development that is recognised in relevant documents under s 171(1)(a) and (d), should those enabling benefits be given considerable weight as an effect of the project under s 171(1) and/or s 5?

[267] This question, which is directed to the weight to be given to a project's enabling benefits, does not involve a question of law. In any event a question framed in terms of "considerable" weight is too imprecise to sound in a useful answer.

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123 At [508].
124 In paragraph 22.3 at [262] above.

Q 31(c): In order to be taken into account, must a project's enabling benefits be unique to that project, guaranteed to go ahead, and able to be quantified?

[268] In my view the answer to this question is No. Nor do I consider that the Board made the erroneous finding alleged, namely that in order to be given weight, enabling benefits must be unique to a project, guaranteed to go ahead and able to be quantified.

[269] The Board certainly observed at [511]–[512] that the Project did not incorporate those characteristics. However I do not construe the Board's decision as stipulating that such characteristics were prerequisites to enabling elements being taken into account. If it had viewed such features as necessary pre-conditions, then the Board would not have taken the enabling element into account at all. Yet the Board did so. In my view the Board referred to those matters as bearing on the weight to be attributed to the enabling effects. Because those features were not present, the weight which the Board allocated to enabling elements was correspondingly less.

Q 31(d): Does the definition of the future environment constrain the ability of a decision-maker to consider the enabling benefits of a project?

[270] The concern which prompted this question is revealed in the relevant ground of appeal:

> 30(c) At [512] by wrongly conflating the environment with effects, and thereby finding that because the Mt Victoria Tunnel duplication and Public Transport Spine Study outcomes do not form part of the future state of the environment, the Board is prevented from giving weight to the enabling benefits of the Proposal for those future projects.

[271] Noting that s 171(1) directs a decision-maker to "consider the effects on the environment of allowing the requirement", NZTA drew attention to the direction of the Court of Appeal in *Royal Forest and Bird Protection Society of New Zealand v Buller District Council*[125] that decision-makers are required to distinguish the environment from the effects of a proposal:

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[125] *Royal Forest and Bird Protection Society of New Zealand v Buller District Council* [2013] NZCA 496, (2013) 17 ELRNZ 616 at [23].

> [W]e cannot see how s 3(f) comes into play at all in determining what is the "environment" against which the actual and potential effects of allowing the activity for which consent is sought are to be considered. In determining what the "environment" is, the attention of the consent authority or a court on appeal is directed toward the physical environment as it exists at the relevant time, modified by those considerations required to be taken into account by the Act and applying *Hawthorn*, treating any permitted activity or any activity for which resource consent has been granted and which is likely to be implemented as included in the "environment". None of this has anything to do with the definition of "effect" in s 3. The definition of "environment" is a prior question to consideration of the effects of the proposed activity on the environment.

[272] Submitting that the two exercises must be kept separate, NZTA contended:

> 31.32 The Majority has wrongly conflated the concept of 'environment' with the meaning of 'effect' by determining that the enabling benefit of the Project should not be considered to be/or attributed any weight as an 'effect' because the Mt Victoria Tunnel duplication is not considered to be part of the future state of the environment. In doing so, the Board unduly limited the meaning of 'effect' to the Board's assessment of what constitutes the environment, rather than ensuring that effects of the Project are properly identified and considered. This is a fundamental error of law.
>
> 31.33 With respect, what is considered to be part of the future state of the environment (whether that includes the Mt Victoria Tunnel Duplication or the Public Transport Spine outcomes) has nothing to do with the identification of the effects of the Project. What is important is that the evidence shows that the enabling benefit of the Project (being what this infrastructure project facilitates) is an effect attributable to the Project. As we have submitted, the evidence established that the Project will facilitate planned developments (whatever their final form may take) and that without this Project, future development will be frustrated/not enabled.

[273] Mr Milne observed that NZTA did not take issue with the Board's conclusion that the tunnel duplication process did not form part of the future state of the environment while at the same time it suggested that the Board should have treated the facilitation of such a project as a positive effect on the environment. In his submission the fatal flaw in NZTA's argument was that s 171 is concerned with effects on the environment, and an effect which does not affect the environment is not a relevant effect.

[274] I agree with Mr Milne that the Board decided as a first step what the environment was by resolving the contest about the existing, permitted and reasonably foreseeable future environment and concluding that the Mt Victoria

Tunnel duplication was not part of that environment. I do not consider that it is fair to say, as NZTA contends, that the Board conflated the environment with effects.

[275] The Board recognised the Project's enabling element.[126] However it considered that the most appropriate way to take that enabling benefit into account was in the manner explained at [518].

[276] Reverting to the content of Q 31(d), if "constrain" is given the same meaning as "prevent" (in ground of appeal 30(c)), then, as the Board's Decision demonstrates, a decision-maker is not precluded by the definition of the future environment from considering the enabling effect of a project. However, again as the Board's Decision demonstrates, the decision-maker's conclusion on the state of the future environment may influence the manner in which the decision-maker chooses to take an enabling benefit into account.

[277] Consequently I do not consider that Q 31(d) is susceptible of a simple Yes or No answer. As the explanation above indicates, the finding as to the state of the future environment is likely to be material to, and even influential on, the way in which a decision-maker considers and weighs a project's enabling elements.

Q 31(e): In order for the positive effects of a future development to be taken into account must the approvals for that development be sought at the same time as (or in advance of) the project?

[278] The answer to that question (which refers to the positive effects "of" a future development) must be in the affirmative. On that point I apprehend the Board was unanimous.[127]

[279] The error of law alleged in the amended notice of appeal read:

> 30(d) By finding at [513] that in order for the positive effects of a future development to be taken into account the approvals for that development must be sought at the same time or in advance of a project.

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126 [1318] at [257] above.
127 The majority at [233] at [247] above; Mr McMahon at [1511] at [258] above.

[280] However in the course of presentation of NZTA's submissions Mr Casey indicated that the preposition "of" should in fact have read "on". The consequence of that amendment was to significantly change the meaning of the question. Indeed, to make sense I consider that the question needs to be redrafted to introduce a reference to the project into the subject of the sentence.

[281] In my view a negative answer applies to the following reframed question:

> In order for a prior project's enabling effects on a future development to be taken into account on the prior project, must the approvals for the future development be sought at the same time or in advance of the project?

[282] In any event I do not discern any error in the Board's approach. It clearly did take into account the Project's facilitating or enabling element.[128]

Q 31(f): Is it consistent with sustainable management (in terms of s 5) to approve an infrastructure project because it is necessary to facilitate future developments; and does it make a difference if the project is primarily necessary to facilitate those future infrastructure developments?

[283] This question reflected what was said to be the Board's error in allegedly finding at [517] that it was not sustainable management to approve a project primarily because the project is necessary to facilitate future developments.

[284] Neither this question, nor Q 31(g) below, received attention in NZTA's presentation of its case. It was not a matter included in the list of significant errors of law listed in paragraph 31.7 at [259] above.

[285] The Board's statement at [517] was by way of explanation for its previously expressed view that the Mt Victoria Tunnel duplication should not be assumed to occur for the purposes of evaluating the Project,[129] which also appeared to be the view of Mr McMahon.[130] In [517] the Board stated that that approach was "a reflection" of the view criticised in the current question.

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128 At [518].
129 [234] at [248] above.
130 [1511] at [258] above.

[286] I do not consider that at [517] the Board was purporting to formulate any statement of general principle. It was an expression of view about a particular category of projects, namely those necessary to facilitate future developments which may or may not proceed. I do not discern an error of law in the Board's observation.

[287] In any event I do not consider that Q 31(f) aligns with, and hence is responsive to, the Board's statement at [517]. The question does not incorporate the component that the future development may or may not proceed.

Q 31(g): In the alternative, given its conclusion that the Proposal was necessary primarily to enable future roading projects, did the Board err in law by failing to consider conditions to address this concern?

[288] Although an error of law was alleged at para 30(f) in essentially the same terms as Q 31(g), there was no suggestion in NZTA's submission either that relevant conditions had been proposed to the Board or that the Board had failed to consider conditions which had been proposed. Indeed it is not apparent to me how a condition could be crafted which would address the issues the subject of Issue 4. In those circumstances I do not consider that Q 31(g) requires a response.

Issue 5: Assessment of transportation benefits – an overview

[289] It will be recalled that improvements in transportation featured prominently in the Project Objectives recorded at [30] above.

[290] The subject of transportation is addressed at length in the Decision from [260] to [505]. The breadth and structure of that consideration is conveyed in the opening paragraph:

> [260] The Project is a transport infrastructure project and the transportation effects are central to our consideration. In this part of our decision we set out the central transportation issues, briefly identify the key provisions of relevant statutory and other documents which provide guidance for our consideration of transport effects, then discuss the existing situation and appropriate baseline against which to assess the transport effects. We then discuss those transport effects, and assess them in terms of the stated objectives of the Project and the intended outcomes of the relevant statutory instruments and non-statutory documents, and the purpose of the RMA set out in Part 2 of the Act.

[291] The Board noted that regard had also been had to the fourth matter in the Minister's reasons for referring the Project to the Board:[131]

> The proposal is intended to reduce journey time and variability for people and freight, thereby facilitating economic development. The proposal is also likely to provide for public transport, walking and cycling opportunities; reduce congestion and accident rates in the area; and improve emergency access to the Wellington Regional Hospital. If realised, these benefits will assist the Crown in fulfilling its public health, welfare, security, and safety functions.

[292] NZTA's challenge to this part of the Decision was presented as three subissues:

(a) standard of proof required to demonstrate transportation benefits: subissue 5A;

(b) assessment of immediate transportation benefits: subissue 5B;

(c) requiring the proposal to demonstrate benefits that go beyond NZTA's objectives: subissue 5C.

Subissue 5A: Standard of proof required to demonstrate transportation benefits

[293] The focus of this aspect of the appeal was on two paragraphs in that part of the Decision which addressed underlying assumptions about traffic growth:

> [484] We have no doubt that the assumptions fed into the traffic models are the best estimates of competent and experienced people. The point rightly made by critics however is that these assumptions largely determine the outcomes of the complex modelling exercise. Any errors in the assumptions compound when they are used to project traffic flows beyond the immediate future.
>
> [485] The issue would not be important if we were considering infrastructure improvements with minimal adverse environmental effects. In that situation it would not be important from an RMA perspective if the works proved to be premature or not needed at all. The situation here is that, as discussed later in this decision, the Basin Bridge would have significant adverse effects, so the level of confidence we can have in the modelled need and benefits, which depend on the underlying assumptions, is important.

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131 At [3] above.

Q 36(b): If the Board applied the wrong standard of proof, were the Board's findings regarding the transportation benefits of the Proposal ones that the Board could reasonably have come to on the evidence?

[302] Given my view that the Board did not apply the wrong standard of proof, this question is otiose.

Subissue 5B: Assessment of immediate transportation benefits

[303] Under this heading the amended notice of appeal asserted a single error of law:

> The Board erred in law by finding at [517] that the Proposal is *primarily* necessary to facilitate future developments, and thereby failing to have regard to the immediate transportation benefits of the Proposal as a stand-alone project. (See also [466]).

[304] Paragraph [466], which was located in the Board's summary of transportation effects,[136] stated:

> [466] The Project has been put forward on the basis that it is a multi-modal, long term, integrated solution and is part of a sequence of road improvements along the Wellington Northern Corridor, most of which are consented and some of which are under construction. The evidence was that much or even most of the transport benefits from the Basin Bridge Project depend on completion of that sequence of road improvements and can be regarded as *contingent benefits*.

[305] Although paragraph [517] has already been noted in the consideration of enabling benefits it will be convenient to set it out again:

> [517] Rather, it is a reflection of our view that it would not be sustainable, or provide for sustainable management, to approve projects such as this, primarily because they were necessary to facilitate future developments, which may (or may not) proceed.

[306] The question of law framed under this heading contained two limbs:

> Q39 Did the Board fail to have regard to immediate transportation benefits of the Proposal, such that:

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136 [464]–[476].

(a) it failed to take into account relevant matters; and/or

(b) its decision regarding the immediate transportation benefits of the Proposal is not a decision that it could reasonably have come to on the evidence?

Q 39(a): Did the Board fail to take into account a relevant matter in failing to have regard to the immediate transportation benefits of the Proposal?

[307] NZTA submitted that the passages at [466] and [517] showed that the Board decided that the Project did not offer "any significant or worthwhile immediate benefit". It argued that that finding stemmed from the Board's "reductive approach" to the transportation benefits of the Project, which failed to have regard to the following matters said to be relevant under s 171(1)(a) to (d):

- a planning framework that recognises the importance of the Basin Reserve transportation node;
- a planning framework that provides for the immediate implementation of bus priority; and
- NZTA's objectives for the Project.

[308] NZTA advanced this aspect of its case by reference to three matters to which it contended the Board had failed to have regard or given any weight:

- the failure to resolve the critical issue of congestion;
- bus priority; and
- economic criteria.

[309] Each of these matters was addressed succinctly but comprehensively by Mr Palmer. Rather than attempting to paraphrase his responses I believe it is useful to recite them in full:

7.8 First, NZTA says (at 32.7) the Board gave no weight to the relief of congestion from Paterson St to Tory St but "analysed the time travel savings only". But the Board was explicit (at [329]) that is

considered congestion in terms of indicators that the consensus of experts agreed on, including "difficulties getting through controlled intersections in a single phase and major variability in travel times". It considered these benefits extensively, in particular at [305]–[316] and [359]–[381] and in its overall summary at [1242], [1244]–[1247] (noting the time savings were substantially less than originally put forward when the third lane at Buckle Street and the effect of the Mt Victoria tunnel duplication are accounted for). It noted that the proposed flyover requirement would provide a time saving for the west-bound journey of 90 seconds in 2021 (at [330], [365], [1244]).

7.9 Second, NZTA says (at 32.15) the Board failed to have regard to the immediate benefit of providing for bus priority. But one of the paragraphs NZTA cites (at 32.12) in the Board's report ([405]) demonstrates the opposite:

> We are satisfied the improved journey times discussed earlier would improve journey times for buses passing through the Basin Reserve area. [NZTA's] modelling shows that the partial bus lanes proposed as part of the Project would not prevent other vehicular traffic also gaining similar time savings. We can accept that the increased priority for public transport provided by the Project could be viewed as a precursor to BRT promoted by the Regional Council, but we have no evidence about the effect of what is proposed here on mode share, which is an objective of the planning documents.

...

7.11 Finally NZTA says (at 32.16, 32.19) that the Board failed to reference the quantification of economic benefits. The Board did (at [536], [539], [543], [545]–[550] and [552]), noting (at [543]) that "[a] number of Benefit-Cost Ratio figures were presented to us in the application documents and in the evidence". If the Board hadn't referenced specific evidence that would not justify NZTA's complaint. But it did even that, citing (at [542] the evidence of NZTA's expert, Mr Copeland, whose economic assessment of the project relied upon the BCRs developed by Mr Dunlop upon which NZTA now seeks to rely. The Board's conclusion (at [550]) is reached after seeing how contested were the BCR assumptions. Again the objection is to weight.

[310] I accept the respondents' argument on these three points. Mr Palmer made the further point that much of NZTA's complaint concerned the weight accorded to the relevant factors, drawing attention for example to NZTA's submission in the context of bus priority that it was a matter to which the Board should have given "considerable weight". I agree that the Board did not err in the manner asserted. The answer to Q 39(a) is in the negative.

The meaning of Q 39(b)?

[311] Question 39(b) attempts to combine an error in failing to have regard to a matter (immediate transportation benefits) with an *Edwards v Bairstow* type question directed to the conclusion on that same matter. As such, it does not make sense. That can be demonstrated by my attempt to reframe the *Edwards v Bairstow* question by reference to Lord Radcliffe's third formulation:

> Is this case one in which the true and only reasonable conclusion contradicts the determination that there were no immediate transportation benefits of the Proposal?

[312] Once it is accepted, as I have found in relation to Q 39(a), that the Board did not fail to have regard to the immediate transportation benefits of the Proposal, I have difficulty seeing how an *Edwards v Bairstow* type question can be appropriately framed.

Subissue 5C: Requiring the Proposal to demonstrate benefits that go beyond the requiring authority's objections

[313] The question of law posed under this heading is:

> 42 Did the Board err in requiring [NZTA] to demonstrate that the Proposal would achieve specific benefits that were not part of the project objectives (namely, mode shift and providing a long-term solution for eastbound State Highway traffic)?

Mode shift

[314] It will be recalled that Project Objective 3 stated:

> To support mobility and modal choices within Wellington City:
>
> (i) by providing opportunities for improved public transport, cycling and walking; …

[315] With reference to that objective, NZTA's grounds of appeal stated that the project objectives did not include an objective "actually to achieve mode shift" and that the Board erred in requiring NZTA to demonstrate that the Proposal would achieve mode shift/mode share. Two errors of law were alleged:

(a) By finding at [405] that [NZTA] was required to establish (and quantify) the extent and benefits of mode share (or mode shift) that would be achieved by the Proposal when the project objectives were to support modal choices, inter alia, by providing *opportunities* for improved public transport.

(b) By finding at [441] that the Proposal is not a truly multi-modal, integrated long-term solution for cycling and walking in the project area, when the project objectives were to support modal choices, inter alia, by providing *opportunities* for improved cycling and walking.

[316] The two paragraphs to which reference was made stated:

> [405] We are satisfied the improved journey times discussed earlier would improve journey times for buses passing through the Basin Reserve area. [NZTA's] modelling shows that the partial bus lanes proposed as part of the Project would not prevent other vehicular traffic also gaining similar time savings. We can accept that the increased priority for public transport provided by the Project could be viewed as a precursor to BRT promoted by the Regional Council, but we have no evidence about the effect of what is proposed here on mode share, which is an objective of the planning documents.
>
> ...
>
> [441] In summary, the Project would make some improvements for circulation of cyclists and pedestrians in the Basin Reserve area, but as these are mostly in the form of shared paths they would introduce potential conflicts between these modes, especially if these modes continue to increase in popularity. We do not see this package of proposals as a truly multi-modal, integrated, long term solution for cycling and walking in the project area. ...

[317] Specifically with reference to the provision of "opportunities" in Objective 3(i) NZTA argued:

> 33.7 It is submitted that framing its objectives in this way is appropriate. In this context, [NZTA] has requiring authority status under s 167 RMA for the construction and operation of any State highway or motorway. While [NZTA] has a significant role under the LTMA investing in outcomes for public transport, cycling and walking; in its capacity as requiring authority its role is to provide infrastructure which assists or facilitates such outcomes rather than providing them directly.

[318] To my mind the distinction which NZTA seeks to draw is excessively fine. I consider that the sense of the word "opportunities" (which is the plural) in Objective 3(i) means a state of affairs favourable for a particular action or aim. It was in that sense that I consider that the Board considered the implications for

improved cycling and walking. It noted that, like the shared pathway on the bridge itself, all of the proposed facilities for pedestrians and cyclists were shared paths[137] in relation to which the Board had a general concern about safety.[138]

[319] I do not consider that the Board can be criticised for its consideration (and rejection) at [441] of the package of proposals as amounting to a truly multi-modal, integrated long term solution for cycling and walking in the area when, as recorded in [418], it was NZTA's own case that the proposed pedestrian and cycling facilities would have significant benefits, with the phrase "multi-modal solution" featuring often in submissions and cross-examination.

[320] Finally there is the point made by Mr Milne that the Board was obliged to consider certain RMA and non-RMA documents under s 171(1)(a) and (d). By way of example he pointed to the Wellington RLTS's key outcomes which include increased mode share for pedestrians and cyclists. Mr Milne submitted, and I accept, that consideration of the extent to which the Project would contribute to mode shift was therefore necessary in order for the Board to consider the Project against those documents.

[321] For these reasons I do not consider that the Board erred in law in its consideration of mode shift.

The issue of a long-term solution

[322] The Board's lengthy discussion of transportation issues[139] concluded with the following comments:

> **A Long Term Solution?**
>
> [498] Counsel for [NZTA] made frequent reference to the Project being a *long term* and *enduring* solution. The first objective for the Project is: *To improve the* ***resilience****, efficiency and reliability of the State Highway network.* [our emphasis], although the methods then listed for achieving this refer only to the section of the westbound part of State Highway 1 from Paterson Street to Tory Street. We have a concern about the longer term

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137 At [433].
138 At [1252].
139 At [290] above.

resilience (ability to cope with change) of the eastbound part of State Highway 1 through the central city.

...

[502] The City Council's report: *Basin Reserve – Assessment of Alternative Options for Transport Improvements* notes that if the Project proceeds, in addition to the mitigation measures proposed by [NZTA] there should be:

> Commitment to consolidating state highway traffic away from Vivian Street and into a single east-west corridor.
>
> and:
>
> Consideration of how consolidating state highway traffic away from Vivian Street can be accommodated.

[503] This raises the question of whether the Basin Bridge would facilitate or impede that long term option. Only Mr Reid commented on this and his view was that a bridge in the position proposed would make it more difficult to bring the State Highway one-way pair together into a single corridor.

[504] There is of course no obligation for [NZTA] to convince us otherwise. The evidence is that Vivian Street would have to be revisited in about five years time (to allow time for planning another upgrade), and that the creation of additional eastbound capacity, especially at intersections, can be expected to have significant environmental implications.

[505] Thus we do not consider the Project can be credited with being a long term solution.

[323] With reference to those observations NZTA's ground of appeal stated:

> c The project objectives included 'to improve the resilience, efficiency and reliability of the State Highway network' inter alia, 'by providing relief from congestion on State Highway 1 between Paterson Street and Tory Street'.
>
> d The project objectives clearly related to the westbound section of the State Highway in this location.
>
> e The project objectives did not include providing a long-term solution for eastbound State Highway traffic in this location. The Board erred in requiring [NZTA] to demonstrate that the Proposal would address this issue.

[324] Mr Milne suggested a different interpretation of the relevant objectives. Noting that the identified section of SH1 did not specify a direction of travel, he contended that the objectives identified two roads (Paterson Street and Tory Street) between which two sections of SH1 lie, one eastbound and the other westbound. I

do not accept that interpretation. I note that at [498] the Board construed the objective as referring to the section of the westbound part of SH1 "from Paterson Street to Tory Street".

[325] Consequently I accept NZTA's submission that the project objectives clearly related to the westbound section of SH1 in this location. That view is reinforced by the reference to westbound traffic in the Minister's direction.

[326] However, if the Board had considered the eastbound part of SH1 through the central city to be part of its brief, then I am sure that the topic would have received much greater attention than in the closing paragraphs of the transportation discussion. In my view that very limited discussion was in the nature of a postscript which was responsive to what the Board referred to at [498] as NZTA's frequent references to the project being a long term and enduring solution. At [505] the Board rejected that proposition for the reasons given in that short discussion.

[327] While it may be thought to have been unnecessary for the Board to engage at all with NZTA's "solution" proposition, the fact that it did so does not suggest to me that the Board was requiring NZTA to demonstrate such a "solution" as a prerequisite for the approval of the NoR. Consequently I do not consider that the Board made the error alleged of wrongly interpreting the objective as applying to the eastbound part of SH1.

[328] For these reasons I answer Q 42 in the negative.

Issues 6, 7 and 8: Questions of law relevant to heritage and amenity

The refinement of the questions of law

[329] Issue 6 in the amended notice of appeal contained a single question:

> Q 45 For all or some of the reasons outlined above under paragraph 44, did the Board fail to have particular regard to relevant matters under s 171(1)(a) and (d) in assessing the effects of the Proposal on historic heritage and amenity?

[330] Paragraph 44 recited a series of alleged errors of law and para 46 listed 16 quite detailed grounds of appeal, including the contention at 46(e) that:

> The Board's finding at [782]–[783] that the Proposal constitutes an inappropriate development of historic heritage in terms of s 6(f) of the Act is based on the Board's finding that the environment constitutes a heritage area.

[331] Issue 7 posed questions Q 48(a) and Q 48(b) while Issue 8 specified a single question, Q 51.

[332] Although the amended notice of appeal contained distinct Issues 6, 7 and 8, NZTA's principal written submissions stated at para 35.2 that the questions of law relevant to heritage and amenity identified in those three issues had been refined to six questions which were set out and addressed in the submissions. Those refined questions were revised still further in the memorandum of 23 July 2015[140] as follows:

> In relation to Issue 6, we seek to refine the questions of law as outlined at para 35.2 of [NZTA's] Primary Submissions:
>
> [45A] When assessing the heritage or amenity effects on the environment under s 171(1), must the decision-maker do so 'through the lens' of the relevant plans under s 171(1)(a) and, if relevant, s 171(1)(d) documents? That is, should the effects be assessed 'through the lens' of the recognition and protection provided by those plans and/or documents?
>
> [45B] Further, should the Board have assessed the effects having particular regard to its finding at [1230] that the works were reasonably necessary to achieve the objectives under s 171(1)(c)?
>
> [45C] When there is no 'invalidity, incomplete coverage or uncertainty of meaning' in the relevant plans under s 171(1)(a), is it appropriate for a decision-maker to assess effects against s 6(f) (for historic heritage) and s 7(c) (for amenity values)?
>
> [45D] Did the Board correctly apply the definition of 'historic heritage' under s 2?
>
> [45E] What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?

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[140] At [51] above.

Q 45A: When assessing the heritage or amenity effects on the environment under s 171(1), must the decision-maker do so 'through the lens' of the relevant plans under s 171(1)(a) and, if relevant, s 171(1)(d) documents? That is, should the effects be assessed 'through the lens' of the recognition and protection provided by those plans and/or documents?

[333] This question invokes NZTA's *King Salmon* argument. NZTA contends that the effects on the Project of heritage and amenity must be assessed having particular regard to the recognition and protection provided for in the Regional Policy Statement and the District Plan because those documents were prepared in accordance with and to give effect to Part 2. Consequently it argues that the correct approach to the assessment of heritage and amenity effects was:

> not within the framework of Part 2, rather it is through the lens of s 171.

The nub of the respondents' rejoinder is that planning documents do not determine the outcome of a s 171 decision.[141]

The planning framework

[334] The current Regional Policy Statement became operative in 2013 and the District Plan has been the subject of two plan changes in the last decade. Within that process new heritage items were added and the District Plan's objectives, policies and rules were amended in response to heritage becoming a matter of national importance under the RMA.

[335] The heritage items within the vicinity of the Basin Reserve and the wider bounds of the Project listed in the District Plan are:

(a) The Museum Stand;

(b) The Memorial Fountain;

(c) Government House;

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[141] At [117] above.

(d) Former Home of Compassion Crèche; and

(e) The Carillon.

As Mr McMahon noted,[142] neither the Basin Reserve generally nor its surrounds have been recognised in the planning documents as a listed heritage item or area.

[336] The District Plan recognises and provides for the protection of historic heritage in particular ways. Policy 20.2.1.4 is to ensure that the effects of subdivision and development on the same site as any listed building or object are avoided, remedied or mitigated. Other policies are to discourage demolition or relocation and to promote conservation and sustainable use (policies 20.2.1.1 and 20.2.1.3).

The Board's decision

[337] The Board suggested that in terms of heritage issues the case was somewhat unusual in that the Project did not result in the actual loss of any listed heritage fabric. However it considered that the geographical and historical context for the Project contained an unusual concentration of buildings, structures and places of heritage interest.[143]

[338] It recognised that the primary means for giving effect to the recognition of historic heritage is to include items of historic heritage in the District Plan under Schedule 1. However it stated that even if a place or area is not so scheduled, the requirement in s 6(f) would still apply.[144]

[339] The Board proceeded to recognise a "wider heritage area"[145] which it considered could be affected by the Project, which stretched from Taranaki Street in the west through the Basin Reserve and Council Reserve areas to Government House and the Town Belt in the east.[146]

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142 At [1603].
143 At [566].
144 At [556].
145 At [577].
146 At [588].

[340] In its summary of findings on heritage effects across the wider heritage area of interest it said:

> [757] Regarding adverse effects on historic heritage, we find that two issues stand out:
>
> (a) The risk to the status of the Basin Reserve as a venue for test cricket is confounded by the significance of the adverse effects on the heritage setting that arise from the mitigation required to address the risk to test-cricket status; and
>
> (b) The cumulative adverse effects of dominance and severance caused by the proposed transportation structure and associated mitigation structure in this sensitive heritage precinct, particularly on the northern and northeastern sectors of the Basin Reserve Historic Area setting.

[341] It is useful also to record Mr McMahon's different view on which NZTA placed emphasis:

> [1600] In respect of Section 6(f), I fully accept and support that the protection of historic heritage from inappropriate development is inextricably linked with sustainable management practice. In making an overall determination on any particular proposal's ability to fit with this strategic aim, I also find that the significance of the heritage resource(s) relevant in this case must also be factored in. In this respect, the settled provisions of the District Plan provide – for me – a critical filter through which significance is defined; and, in turn through which accordance with Section 6(f) can ultimately be determined.
>
> [1601] In this respect, I reiterate that there was agreement that there is no direct adverse effect arising from the Project on any heritage items currently identified (as significant and worthy of protection) in the operative District Plan. The evidence strongly suggests, therefore, that the Project is most certainly consistent with Section 6(f) as it relates to those listed items.

[342] After discussing the District Plan, the changes made to it and the non-inclusion of the Basin Reserve and its surrounds as a listed heritage item or area, Mr McMahon said:

> [1604] I am inclined, for this reason, not to afford the wider site the same significance that would otherwise be afforded to listed items. To do so would (in my view) undermine the integrity of the District Plan and the inherent effectiveness of the listing method as the primary tool to implement the District Plan's objectives and policies relating to the protection of historic heritage. This implementation role is important as it enables a process to test development against those policies and objectives which have already been deemed to be the most effective provisions to give effect to Section 6(f) and the Act's purpose.

He concluded that the Project did not represent inappropriate development in terms of s 6(f).

The parties' contentions

[343] NZTA submitted that, particularly in light of *King Salmon*, there was no mandate for a decision-maker on either a resource consent or designation to "re-write" the District Plan, citing the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd*:[147]

> The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed.

[344] NZTA developed that theme in this way:

> 36.15 There is a comprehensive suite of rules and criteria in Chapters 20 and 21 by which the District Plan recognises and provides for the protection of historic heritage from inappropriate use and development. This must be assumed to be a deliberate choice, tested and confirmed by the public participatory process. It is entirely appropriate in a built up, central city environment. Not only has the Majority failed to have particular regard to these provisions when considering the effects of the Project, it has imposed a wholly different regime for the recognition and protection of unlisted historic heritage well beyond what the Plan itself does.
>
> 36.16 Just as it would not have been permissible for the Board to find that any of the listed items was not a historic heritage value, nor is it open to the Board to substantially rewrite the Plan by adding items or, as in this case, whole 'precincts', which the Plan does not contemplate.
>
> ...
>
> 36.19 [NZTA] submits that the Majority was wrong to undertake a sand-alone assessment of heritage within the Part 2 framework, as discussed above. Further, the Majority failed to have particular regard to the relevant planning documents when assessing the effects of the Project on historic heritage by finding heritage features in this location requiring protection under s 6(f); these being features

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147 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [10].

> beyond what the District Plan protects. This also led to the Majority finding that the Project was 'inappropriate' in relation to historic heritage without addressing that in the context of the District Plan and its regime for protection against inappropriate use and development.

[345] In his notes for oral reply Mr Casey emphasised that resort to Part 2 is only required in the case of conflict (or where a caveat applies, to which Q 45C relates). The point was made that there is no conflict between the planning documents and Part 2 and no conflict between the Project and the planning documents (including the derivative documents). It was submitted:

> The Board is required (before resorting to Part 2) to first assess effects having particular regard to the (a)–(d) matters and then consider whether a conflict exists that requires resolution. A 'thoroughgoing attempt' to resolve any apparent conflict must be made. If a conflict cannot be resolved, resort to Part 2 will be required.

[346] NZTA's position derived significant support from WCC on whose behalf Ms Anderson presented a thoughtful submission confined to the Issue 6 questions. Although aligned with NZTA's position on the historic heritage issue, WCC's submissions were not partisan in nature but reflected the fact that, as creator and regulator of the District Plan, WCC has a particular interest in how the District Plan is applied and interpreted.

[347] Key points made by WCC were:

- The effects of allowing the requirement must be considered "through the lens" or "in light of" the s 171(1)(a) to (d) matters. That means that the District Plan is a key "filter" of whether the effects that arise from a proposal are acceptable or appropriate;

- That analysis is supported by the requirement in s 171(1) to have "particular regard" to the listed matters which include the District Plan. That is to be contrasted with the lesser obligation to "have regard to" in s 104(1), albeit that both are subject to Part 2;

- Because of the lack of recognition of the Basin Reserve in the District Plan, the Board could not resort to Part 2 as justification for its elevated treatment of unlisted heritage items and views;

- The Board erred in recognising an extended important heritage area which was inconsistent with the significance the District Plan gives to the heritage values in the area.

[348] Although, like NZTA, WCC accepted that simply because the Basin Reserve or the view along Kent and Cambridge Terraces is not listed or specifically identified in the District Plan did not mean that they were not of any heritage value or importance, nevertheless the decision-maker cannot resort to Part 2 as justification for the elevated treatment of unlisted heritage items and views.

[349] WCC's position was that the District Plan is a key basis for decision-making under the RMA and its provisions "must be applied as written". In response to my question whether the District Plan is exhaustive on the topic of historic heritage, Ms Anderson replied in the affirmative.

[350] The respondents' submissions in response were no less comprehensive. In summary they submitted:

(a) NZTA's argument was based on an erroneous application of *King Salmon* to the present circumstances;[148]

(b) the adverse effects which the Board identified at [757][149] were directly relevant to the inquiry not only because they were environmental effects under s 171 but also under s 149P because concerns about them were an important part of the Minister's decision to refer the proposal to the Board;

(c) all that the Board was required to do was to have particular regard to the various plans, and it duly did so;

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148 See at [117] above.
149 At [340] above.

(d) the Board's concern about the adverse effects was consistent with the guidelines in Part 2 to which its s 171 consideration was subject.

Analysis

[351] The extensive argument which I heard convinced me that phrasing the question by reference to "through the lens" or by way of a "filter"[150] is more likely to confuse than to clarify.[151] The search for meaning inevitably invites elaboration of the theme, an example of which appeared in TAC's submissions:

> ... Contrary to the Appellant's submissions, s 171 the (a–d) matters do not form themselves into a combined *lens* which magnify the benefit of a proposed designation and diminish or blur its adverse effects.

I prefer to focus on the words of the statute.

[352] It is plain that the Board was required to have particular regard to inter alia the District Plan including the heritage items listed in Schedule 1. As NZTA says, it would not have been permissible for the Board to purport to find that any of the listed items was not of historic heritage value. Nor would it have been permissible for the Board to ignore them. The Board was required to consider the s 171(1)(a) matters specifically and separately from other considerations.[152] That said, the obligation on the Board in a s 171(1) context is to have "particular regard to", not "to give effect to".

[353] How much weight the Board gives to an item to which it is required to have regard or particular regard is a matter solely for the Board in the context of an appeal that is confined to questions of law, subject of course to any *Edwards v Bairstow* challenge. The issue which I am required to decide is whether as a matter of law the Board was permitted to have regard to other areas or items of historic heritage beyond that specified by the District Plan. In other words: Is the Plan exhaustive on the topic?

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150 At [341] and [347] above.
151 Kim Lewison *Metaphors and Legal Reasoning*, The Chancery Bar Association Lecture 2015.
152 See [66] above.

[354] In my view the Board was not so confined. Its consideration of Part 2 considerations was not restricted to instances of unresolvable conflict. Provided it discharged the obligation to have particular regard to the specified matters, in pursuance of its Part 2 obligation the Board was not precluded from also taking into consideration as effects on the environment the adverse effects of the requirement on other items it identified as being of significant historic heritage. In doing so it did not inevitably fail to have particular regard to the Plan as a s 171(1)(a) matter.

[355] NZTA's submission was that the Board had imposed a wholly different regime for the recognition and protection of unlisted historic heritage that went "well beyond what the Plan itself does". However it is not the function of the Court on an appeal such as this to undertake a qualitative assessment. The question to be answered must be confined to whether the Board made an error of law in reaching its conclusion. In my view it did not do so.

Q 45B: Further, should the Board have assessed the effects having particular regard to its finding at [1230] that the works were reasonably necessary to achieve the objectives under s 171(1)(c)?

[356] This question was derived from ground of appeal 29(e) (in the context of Issue 3) which asserted that the Board had failed to have particular regard to the finding at [1230] that the work was reasonably necessary to achieve NZTA's objectives. The 23 July 2015 memorandum described Q 45B as a development of Q 28(b) in its application to the original Q 45.

[357] The answer to Q 45B is plainly in the affirmative. That is simply the statutory obligation.

[358] However the reality is that NZTA's contention is directed not to the nature of the obligation but to whether the obligation was in fact discharged. While such an inquiry could be pursued on a general right of appeal, I do not consider that it is properly the subject of an appeal limited to questions of law only. However, in the event that my analysis is incorrect, I make the following further observations.

[359] I apprehend that at least one of the reasons for the contention that the Board did not have "particular" regard to the finding at [1230] is that in its description of its proposed decision structure at [199][153] the Board did not include the word "particular" in its reference to s 171(1)(c) in subpara (d).[154] NZTA's submissions stated that one of three noteworthy aspects of [199] was:

> 28.5(b) The Majority explicitly separates the s 171(1)(b) and (c) considerations from the consideration of effects. That is, it says that it will consider the effects of the requirement; then consider the (b) and (c) matters separately. It does not say that it will consider the effects of the requirement, having particular regard to whether [NZTA] has adequately considered alternatives (s 171(1)(b)); or whether the designation and the work is reasonably necessary for [NZTA] to achieve its objectives (s 171(1)(c)).

[360] However it is quite apparent that the Board did have particular regard to the s 171(1)(c) consideration. In addition to the discussion spanning [1217] to [1230] under the heading "Reasonably necessary for achieving objectives (s 171(1)(c))", the Board touched again on the issue of [1277] to [1278] and implicitly in the course of its ultimate conclusion at [1317].

Q 45C: When there is no 'invalidity, incomplete coverage or uncertainty of meaning' in the relevant plans under s 171(1)(a), is it appropriate for a decision-maker to assess effects against s 6(f) (for historic heritage) and s 7(c) (for amenity values)?

[361] This question also invokes NZTA's *King Salmon* argument. In essence it asks whether it is appropriate to address Part 2 considerations in the absence of one of the three caveats explained in *King Salmon*,[155] namely:

(a) if the relevant plan is invalid;

(b) if the relevant plan does not "cover the field";

(c) if there are uncertainties as to the meaning of the particular policies in the plan.

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153 At [77] above.
154 The same is true in relation to the reference to s 171(1)(b) in subpara (c).
155 *King Salmon*, above n 26, at [88].

[362] WCC supported NZTA's case on this point, submitting that the key findings in *King Salmon* at [84]–[85] were as applicable to District Plans as to Regional Plans. It contended that *King Salmon* removed the ability for a decision-maker to have recourse to Part 2 when giving effect to or interpreting a plan unless one of the three specific caveats applied. This, it was said, was significantly different from the previous treatment of Part 2 as the "engine room"[156] of the RMA. Its submissions also explained why the second and third caveats were not of application in this case.

[363] I am unable to accept that submission. The role of the caveats identified in *King Salmon* was to address the situation where there was, what one might describe generically as, some inadequacy in the plan. The caveats accordingly qualified the obligation to give effect to such an inadequate plan and preserved the avenue of reference back to Part 2 which the "give effect to" formula had removed.

[364] As explained earlier, the manner of recourse to Part 2 in the context of s 171 (and other sections stated to be "subject to Part 2") is not limited in the manner described in *King Salmon*.[157] Of course the three caveats may still have application in relation to inadequate plans so far as concerns the obligation to have particular regard to them.

[365] I have some reservation about the formulation of the question so far as it incorporates the word "appropriate". As the Supreme Court remarked in *King Salmon*,[158] the scope of that word is heavily affected by context. I tend to think that the words "permissible" or "legitimate" would have been preferable.

[366] However, assuming that the consideration of an application under s 171 does in fact engage historic heritage or amenity values, for the reasons above the answer to Q 45C is in the affirmative.

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156 *Auckland City Council v John Woolley Trust*, above n 54; see also [111] above.
157 At [85] in [113] above.
158 *King Salmon*, above n 26, at [100].

Q 45D: Did the Board correctly apply the definition of 'historic heritage' under s 2?

[367] One of the matters of national importance listed in s 6 as (f) is the protection of historic heritage from inappropriate subdivision, use and development. "Historic heritage" is defined in s 2 of the RMA as follows:

> **historic heritage**–
> (a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
> (i) archaeological:
> (ii) architectural:
> (iii) cultural:
> (iv) historic:
> (v) scientific:
> (vi) technological; and
> (b) includes–
> (i) historic sites, structures, places, and areas; and
> (ii) archaeological sites; and
> (iii) sites of significance to Māori, including wāhi tapu; and
> (iv) surroundings associated with the natural and physical resources.

[368] The nature of the Board's alleged error in its interpretation of s 2 was described in ground of appeal 40(c) as follows:

> The Board wrongly applied paragraph (b)(iv) of the definition of 'historic heritage' in s 2 of the Act and thereby extended its consideration beyond the surroundings associated with the natural and physical resources constituting the historic heritage within the project area (being the Basin Reserve and listed heritage items) to conclude that the wider setting to those resources was of itself a heritage area.

The parties' contentions

[369] NZTA's primary written submissions developed the argument in this way:

> 37.3 While the definition includes 'historic' places and areas it does not specifically provide for heritage precincts or landscapes. The fact that there may be a collection of heritage items within the locality does not make it an historic place or area, unless that locality is a place or area of historic significance in its own right. As a matter of law it was not open to the Majority to conclude that the wider Project area is a heritage precinct/landscape.
>
> 37.4 By establishing a heritage precinct at this location, the Majority has developed a heritage landscape construct which it found stretches from Taranaki Street in the west through the Basin Reserve and Canal Reserve areas to Government House and the Town Belt in the

> east and applied it to the wider Project site. It did so on the basis that there is an unusual concentration of heritage buildings, sites and places at this location, such that the Project is contained within what it describes as an important heritage area.
>
> 37.5 By establishing a heritage landscape of this scale in this location, the Majority has purported to confer s 6(f) protection over the entire landscape rather than the particular heritage items within it. This level of protection is not provided for in the District Plan which, as noted, protects scheduled sites and features while ensuring that the diversity of development provided for within the planning framework relevant to this location is not constrained.

[370] NZTA acknowledged that the Environment Court in *Waiareka Valley Preservation Society Inc v Waitaki District Council*[159] had been satisfied that a purposive interpretation of s 6(f) enabled that provision to describe a collection of historic sites, places or areas as a heritage landscape and had concluded that the nomenclature 'landscape' could easily be substituted by 'area' or 'surrounds', depending on the particular context.

[371] However NZTA noted that the Court has since expressed considerable caution regarding the extension of (b)(i) of the definition to include a collection of historic sites, places or areas as a "heritage landscape". In *Maniototo Environment Society Inc v Central Otago District Council*,[160] the Environment Court noted that such usage:

> ... may be dangerous under the RMA where the word "landscape" is used only in s 6(b). Further, the concept of a landscape includes heritage values, so there is a danger of double-counting as well as of confusion if the word "landscape" is used generally in respect of section 6(f) of the Act.

Similarly in *Gavin H Wallace Ltd v Auckland Council*[161] the Court also expressed caution over the use of the term and its inclusion in the lexicon of the RMA.

[372] Consequently NZTA submitted, having regard to the definition of "historic heritage", the case law and the District Plan, that the RMA does not envisage protection being extended under s 6(f) to a central city urban landscape of the scale

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159 *Waiareka Valley Preservation Society Inc v Waitaki District Council* EnvC Christchurch C058/2009, 13 August 2009 at [230]–[231].

160 *Maniototo Environment Society Inc v Central Otago District Council* EnvC Christchurch 103/09, 28 October 2009 at [208].

161 *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120 at [66]–[67].

determined by the Board. To do so would result in all activities within that location being "effectively trapped" within a special heritage landscape thereby "locking up" future urban development contemplated by the planning framework.

[373] In brief summary the respondents submitted that:

(a) the definition of "historic heritage" is broad and explicitly "includes" historic sites, structures, place and areas as well as surroundings associated with physical resources;

(b) NZTA's interpretation is unduly narrow and at odds with the text and purpose of the RMA;

(c) the Board examined whether there was an area of historic heritage, as the definition permits, but NZTA wrongly suggests that the Board concluded that there was some formal heritage precinct or landscape.

Analysis

[374] The competing perspectives in the contest before the Board are captured in the following paragraphs:

> [614] Some heritage experts have chosen to focus their assessments on individual heritage items, particularly listed or registered items, while others give attention to considerations of heritage setting as well. With reference to terminology, this is partly a distinction between *built heritage* and *historic heritage*.
>
> ...
>
> [616] The Assessment of Environmental Effects prepared by [NZTA] refers explicitly to *Built Heritage* as the title for Section 26 of the document, and Technical Report 12 is similarly entitled *Assessments of Effects on Built Heritage*. [NZTA's] closing submissions confirmed this thematic focus.
>
> ...
>
> [617] ... The City Council's closing submissions made no reference at all to section 6(f) of the RMA, nor to *historic heritage*, choosing rather to focus on issues related specifically to listed or registered heritage items.
>
> ...

> [622] Mr Milne, in his closing submissions, made numerous references to *historic heritage* and argued explicitly that the focus of [NZTA's] case on heritage matters *was wrongly limited to built heritage*. Mr Bennion, in his closing submissions, having cited explicitly the relevant RMA sections, similarly made numerous references to *historic heritage* and argued for the proper recognition of *setting* when assessing effects on historic heritage.

[375] As earlier noted,[162] while the Board recognised the District Plan as the primary means of giving effect to the recognition of historic heritage, it proceeded on the basis that even if a place or area was not scheduled s 6(f) still applied.

[376] There are a number of reasons why it is not easy to attribute to the Board a particular interpretation of the definition of "historic heritage" in s 2. First, the Board's discussion under the heading "Heritage, Cultural and Archaeological" is extensive, spanning [535] to [783], and the evidence is exhaustively analysed. That said, within that thorough review there are certainly references to precincts and landscapes, which are the focus of NZTA's submission.

[377] Secondly, the protection of particular sites or areas is not confined to the District Plan. Although the Basin Reserve is not included in the schedule to the Plan, it is registered as an historic area under the Heritage New Zealand Pouhere Taonga Act 2014.[163] Similarly the Board viewed the fact of the creation of the National War Memorial Park under its own empowering legislation[164] as an indicator of its national significance.

[378] Thirdly, the mosaic which the Board was required to consider was augmented by the Minister's reasons for direction to which the Board was directed by s 149P(1)(a) to have regard. Relevant to the issue of historic heritage those reasons stated:

> - The proposal is adjacent to and partially within the Basin Reserve Historic Area and international test cricket ground; in the vicinity of other historic places including the former Home of Compassion Crèche, the former Mount Cook Police Station, Government House and the former National Art Gallery and Dominion Museum; and is adjacent to

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162 At [338] above.

163 At [562]. The definition of "historic area" in s 6 means an area of land that contains an inter-related group of historic places and forms part of the historical and cultural heritage of New Zealand.

164 National War Memorial Park (Pukeahu) Empowering Act 2012.

> the National War Memorial Park (Pukeahu). The proposal is likely to affect recreational, memorial, and heritage values associated with this area of national significance (including associated structures, features and places) which contribute to New Zealand's national identity.

[379] There is force in the respondents' submission that it is difficult to see how the Board could have complied with its obligation to have regard to the reasons of the Minister in referring the proposal to it without taking the approach it did to the "area" of historic heritage.

[380] Indeed one of the instances of the Board's use of "precinct" was with reference to three of those places of importance when, in relation to an anticipated Anzac Day centenary celebration, it said:[165]

> Such an event would clearly link the NWM Park, the Basin Reserve, and Government House – covering the entire precinct we have described.

[381] In seeking to identify from the Board's broad review the interpretation which the Board placed on s 2, there are three paragraphs which I consider are particularly instructive:

> [557] The protection given by Section 6(f) extends to the curtilage of the heritage item and the surrounding area that is significant for retaining and interpreting the heritage significance of the heritage item. This may include the land on which a heritage building is sited, its precincts and the relationship of the heritage item with its built context and other surroundings.
>
> ...
>
> [615] In defining *historic heritage*, the RMA makes a clear distinction between historic sites and historic heritage. At their conferencing, the experts drew attention to *the definition of historic heritage in the RMA – which includes (b)(iv) surroundings associated with the natural and physical (historic heritage) resources.*
>
> ...
>
> [623] We agree that we are obliged to consider the effects on historic heritage and that historic heritage includes not only built heritage but the surroundings and setting in which the built heritage exists. In our view, the explicit focus of [NZTA], Wellington City Council and Heritage NZ heritage assessments on *built heritage*, as distinct from *historic heritage*, unduly limited the scope of those assessments.

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[165] At [589].

The third of those paragraphs represented the Board's conclusion on the competing contentions in the extracts at [374] above.

[382] While for the reasons in [376] to [379] above Q 45D has proved to be one of the more difficult issues in the case, my conclusion is that there was no error in the Board's interpretation of the definition of "historic heritage". I do not accept NZTA's submission that in its application of the definition the Board "went well beyond the surrounds and setting of historic heritage".[166]

[383] NZTA's submissions further argued that if s 6(f) protection as found by the Board was unobjectionable, then the Board had erred in law "by applying this concept to the Project area without any methodology being identified or followed on which to base such a significant finding". I do not address that submission because I do not consider that it involves either a question of law or an issue sufficiently connected to Q 45D.

Q 45E: What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?

[384] The bracketed words in the question reflect the fact that this question is conditional upon an affirmative answer to Q 45C and a rejection of NZTA's argument that it was not appropriate for the Board to assess historic heritage under Part 2.

[385] NZTA's argument in summary form was:

(a) prior to *King Salmon*, "inappropriate" in the context of s 6 was understood as having a wider meaning than "unnecessary" and was to be considered on a case by case basis;

(b) *King Salmon* held that the former approach did not accurately reflect the proper relationship between ss 5 and 6;

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[166] See [757] in [340] above.

(c) *King Salmon* held that "inappropriateness" is heavily affected by context and that the standard relates back to the attributes to be preserved or protected rather than the activity proposed;

(d) *King Salmon* also gave a clear direction that it is the relevant planning documents that provide the basis for decision-making under the RMA. This includes a decision-maker's evaluation of "inappropriateness" in the context of s 6.

[386] Consequently NZTA submitted:

> 38.6 … Therefore, in the absence of any allegation of invalidity, incomplete coverage or uncertainty of meaning; a decision-maker is required to assess s 6(f) matters as particularised by the relevant planning documents before them, from National Policy Statements down to district plans.
>
> 38.7 Even if the Majority was right to go beyond the District Plan in determining what constituted historic heritage, it should still have assessed what was appropriate by having particular regard to the scale and nature of the protection conferred by the District Plan. It did not do so.

[387] Mr Palmer raised the objection that this argument did not appear in the amended notice of appeal. However in my view the proposition advanced is in essence a variation on the theme reflected in Q 45A and Q 45C, in particular the "through the lens" argument.

[388] I first note that the Board explicitly recognised the guidance of *King Salmon* on the meaning of "inappropriate" in s 6(f):

> [558] Importantly, for this matter, we are guided by the Supreme Court in *King Salmon* as to the application of the word *inappropriate* as it is used in Section 6(f). Where the term inappropriate is used in the context of protecting historic heritage, the natural meaning is that inappropriateness should be assessed by reference to what it is that is being protected. That is, within the context of the heritage elements that exist within and around the Basin Reserve area, their value and the effects of the project on those values.

[389] In support of its conclusion at [783] that the Project was not consistent with s 6(f) the Board said:

> [780] Our overall evaluation is not simply a matter of considering effects on listed heritage items or confining our evaluation to a consideration only of the loss or restoration of heritage fabric, although such historic heritage

> effects are part of the cumulative picture. We must consider the character and significance of the whole wider heritage area and the appropriateness of such a structure within it.
>
> [781] We noted in our introduction to this section that the common theme in the relevant statutory documents – the RMA, Regional Policy Statement and District Plan – is to protect heritage from inappropriate use and development. We concluded in our findings from the sub-area analysis reported earlier in this decision two important issues: the inherent conflict in mitigating adverse effects, and the cumulative adverse effects of severance within the heritage setting. It appears to us that those conclusions align clearly with the final assessment of Mr Salmond on *appropriateness* and the findings of Ms Poff from her Part 2 assessment.
>
> [782] Consequently, we find that the evidence of historic heritage supports the conclusion that the Project before us constitutes an inappropriate development within this significant heritage area of the city.

[390] It is apparent in my view from [781] and a number of other paragraphs that the Board did have particular regard to the District Plan and other relevant documents. NZTA's complaint is with the Board's ultimate conclusion, as reflected in the submission:

> 38.8 … the Majority should have concluded that, because there was no direct adverse effect arising from the Project on any heritage items identified as significant and worthy of protection in the District Plan, the Project is consistent with s 6(f) as it relates to those listed items and therefore does not represent inappropriate development in terms of s 6(f).

[391] In effect NZTA's case is that the Board erred in not reaching a conclusion in accordance with (ie by giving effect to) the District Plan. As my earlier findings reflect, I do not agree that the Board's task under s 171(1) was so confined.

[392] I do not consider that there was any error of law in the Board's consideration of inappropriateness in s 6(f). In this context it is desirable to reiterate that this is not a general appeal by way rehearing and I am not sitting in judgment on the merits of the Board's conclusion.

Issue 8: Failure to consider options within the scope of the application to address amenity and heritage related effects to the Gateway Building

[393] Although this item was omitted from the memorandum of 23 July 2015[167] there was no issue that it remained live and the parties' written submissions addressed the following question:

> Q 51 Did the Board fail to have regard to a relevant matter, being options within the scope of the application that could balance the effects of the Proposal on the playing of cricket with other effects (heritage and amenity)?

[394] NZTA's grounds of appeal were:

> 52 The grounds of appeal in relation to this issue are:
>
> (a) The Board found at [965] that the cricketing experts were of the uncontested view that the 65m Northern Gateway Building was necessary to mitigate the effects on cricket when the evidence of Dr Sanderson was that a Northern Gateway Building of 45m would be sufficient to mitigate the risk of visual distraction to batters.
>
> (b) As a consequence, the Board found at [758] to [761] that there is an inherent conflict in mitigating the adverse effects on heritage. In particular, by finding that a Northern Gateway Building of 65m is required to mitigate the effects on cricket, but that mitigation has of itself other adverse heritage-related effects, including effects on views and amenity.
>
> (c) Consequently, the Board failed to consider as a relevant matter, options within the scope of the application to balance the needs of cricket with any other effects (historic heritage or amenity) of a longer structure, in particular by:
>
> (i) failing to consider a Northern Gateway Building of 45m or 55m;
>
> (ii) failing to consider a Northern Gateway Building of 65m together with conditions to ensure that the Building remain a sense of openness between 45 and 65 metres.
>
> (d) In the alternative, by rejecting the evidence of Dr Sanderson, the Board implicitly found that the evidence of the cricketers was more persuasive in assessing the Proposal's effects on the Basin Reserve. The Board therefore could only have reasonably found in accordance with the cricketers' evidence on amenity effects that the Northern Gateway

[167] At [332] above.

> Building would appropriately protect the ambience of the Basin Reserve (contrary to the Board's finding at [653]).

[395] It is quite apparent that the Board was cognisant of the options involving a Northern Gateway Building (NGB) of reduced length. At [36] the Board notes that the key elements of the Project included:

> (f) A new structure, known as the Northern Gateway Building, approximately 65m long and 13m high at or about the northern end of the Basin Reserve, adjacent and to the east of the R.A. Vance Stand. Shorter alternatives to the proposed structure within the same approximate 65m long and 13m high envelope/area are also proposed, together with landscaping;

[396] The primary function of the NGB was to screen the moving traffic on the Basin Bridge from views within the Basin Reserve so as to mitigate the effects of the Basin Bridge on cricket and amenity within the Basin Reserve. NZTA made it clear that it had no interest in developing the building, except as mitigation for the effects of the Basin Bridge.[168]

[397] Hence the longest option was naturally the focus of the Board's consideration because the cricketing experts were of the universal view that that option was necessary to mitigate the effects on cricket. So far as Dr Sanderson's evidence was concerned, Mr McMahon noted:[169]

> [1383] … The cricket evidence from the Basin Reserve Trust is preferred to the evidence of Dr Sanderson for the Applicant, who generously acknowledged that, despite his technical evidence in respect to ophthalmology, he should defer to cricket experts on the extent of the length of screening necessary to avoid distracting movement on the Basin Bridge for cricket players.

[398] I agree with Mr Palmer's submission that it is apparent from the Decision and from the Draft Decision (which included proposed conditions regarding design) that the Board did not fail to have regard to other options or conditions. I note the irony in his closing observation that NZTA appeared to be complaining that the Board did not consider options which would have had an even greater impact on historic heritage than the option it did focus on.

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168 [1424].
169 [1383].

Summary

[399] A decision on an appeal "only on a question of law" which raises more than 35 questions of law is not well-suited to a succinct summary. That is especially so when ten of the questions asked whether the Board's conclusions on various issues were findings to which it could reasonably have come on the evidence, that is, whether those conclusions were so insupportable that they amounted to errors of law.

The judgment finds that the Board's Decision does not contain any of the errors of law alleged. Although it is not practicable to recite each finding, attention is drawn to the following points of general application.

The meaning of s 171(1)

The provision in s 171(1) to have "particular regard to" the matters specified in (a) to (d) required the Board to consider these matters specifically and separately from other relevant considerations but did not indicate that extra weight should be placed on those matters.[170]

The relocation of "subject to Part 2" did not change the meaning of s 171(1).[171] The Board's role under s 171(1) was different from that in *King Salmon* where the obligation under s 67(3) was to give effect to the NZCPS. *King Salmon* did not change the import of Part 2 for the consideration under s 171(1) of the effects on the environment of a requirement.[172]

Adequate consideration of alternative options

Section 171(1)(b):

> (a) permits a more careful consideration of alternatives when there are more significant adverse effects of allowing a requirement;[173] and

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170 [64]–]68] above.
171 [86]–[98] above.
172 [99]–[118] above.
173 [140]–[142].

(b) does not require a requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environment effects.[174]

In some, but by no means in all, cases it may be necessary for the decision-maker to gain access to the weightings in a multi-criteria analysis in order to be satisfied that adequate consideration has been given to alternatives.

Enabling effects

A project's enabling benefit can constitute an effect to be taken into account under s 171(1) and/or s 5.[175] In order to be given weight the enabling benefit need not be unique to a project, guaranteed to go ahead or able to be quantified.[176]

Transportation benefits

Where a project will have more than minimal adverse effects no higher standard of proof is required to demonstrate the project's transportation benefits.[177]

Heritage and amenity

On a s 171(1) application a District Plan is not exhaustive concerning items of historic heritage. The decision-maker's consideration of Part 2 considerations is neither restricted to instances of unresolvable conflict[178] nor confined to situations where one of the three *King Salmon* caveats is applicable.[179]

The Board did not err either in its interpretation of the definition of "historic heritage" in s 2[180] or in its approach to the application of "inappropriateness" in s 6(f).[181]

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174 [156].
175 [265]–[266].
176 [268].
177 [299].
178 [354].
179 [363]–[364].
180 [382].
181 [392].

Disposition

[400] For the reasons above, NZTA has not established that in its Decision the Board made any error of law of the nature reflected in the several questions of law in the amended notice of appeal, as revised by the 23 July 2015 memorandum. Consequently NZTA's appeal under s 149V(1) is dismissed.

[401] The parties requested the opportunity to make submissions on costs. In view of the outcome of the appeal:

(a) the respondents are to file any costs memoranda by 11 September 2015;

(b) NZTA is to file a costs memorandum by 2 October 2015; and

(c) the respondents may file any memoranda strictly in reply by 16 October 2015.

Leave is reserved to apply to amend that timetable if necessary.

[402] Finally I record my appreciation to all counsel for the quality of their submissions and the assistance which they provided to the Court in navigating a course through this complex matter.

Brown J

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BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 46

IN THE MATTER	of the Resource Management Act 1991
AND	of an application pursuant to s 149T of the Act
BETWEEN	QUEENSTOWN AIRPORT CORPORATION LIMITED (ENV-2011-WLG-41) Applicant

Court:	Environment Judge J E Borthwick Environment Commissioner R M Dunlop Environment Commissioner D J Bunting
Hearing:	at Christchurch on 27 and 28 February 2017
Appearances:	M Casey QC and C Somerville-Frost for Queenstown Airport Corporation Ltd Dr R J Somerville QC and B Milo for Remarkables Park Ltd
Date of Decision:	31 March 2017
Date of Issue:	31 March 2017

DECISION OF THE ENVIRONMENT COURT

A: Pursuant to s 149U(4) RMA the notice of requirement to extend Designation 2 is confirmed, subject to the conditions attached to and labelled "A" forming part of this decision. The extent of the designation that is confirmed is shown on Figure 1 also attached to and labelled "B" forming part of this decision.

B: Costs are reserved.

REASONS

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Litigation history

[1] This is the final decision concerning Queenstown Airport Corporation Limited's notice of requirement to alter Designation 2 of the Queenstown Lakes District Plan to extend the aerodrome at Queenstown Airport.

[2] We appreciate that the litigation history is well known to the parties but it is necessary to recap on it here since it provides the context for this decision.

[3] The Environment Court released an Interim Decision in 2012[1] confirming the notice of requirement ("NOR"), modifying the same by reducing the extent of land to be designated. The reduction followed on from our finding that there was no nexus between the Airport's objective for the requirement and the enablement of Code D aircraft operating at Queenstown Airport. The predicted growth in regular passenger transport services could be achieved using Code C aircraft operating on an appropriately configured runway and single taxiway.

[4] More particularly the modification enabled all of the proposed works including a new parallel taxiway for Code C aircraft separated 93m from the main runway. After the Interim Decision was released, Queenstown Airport Corporation Limited resiled from its position that under the Civil Aviation Rules the runway-taxiway separation distance for Code C aircraft was 93m, contending the distance was at least 168m. If that was correct, then all of the land in the NOR was required.

[5] The Interim Decision was successfully appealed by Queenstown Airport Corporation Limited ("QAC") and Remarkables Park Limited ("RPL"). Notwithstanding the appeal the parties agreed that the court should release its final decision,[2] which confirmed the notice of requirement and attached conditions. As it turned out this was not to be the court's final decision for this proceeding.

[6] The High Court referred parts of the Interim Decision back to the Environment Court for further consideration.[3] In the first of two decisions following the High Court

[1] [2012] NZEnvC 206; (2012) 18 ELRNZ 489.
[2] [2013] NZEnvC 95.
[3] [2013] NZHC 2347.

appeal, which for convenience we refer to as the "Legitimate Expectation Decision",[4] we found that RPL could legitimately expect, other relevant considerations aside, that QAC would use its own land for airport purposes, and not RPL's land. However, we confirmed our earlier finding that, in accordance with s 171(1)(b) of the RMA, the QAC had given adequate consideration to alternative sites – including the use of its own land.[5]

[7] In the second decision following the High Court appeal ("the Separation Distance Decision")[6] we reconsidered the separation requirements for a Code C runway and taxiway. We found under the Civil Aviation Rules an acceptable means of compliance was a separation distance of 168m, and at Queenstown Airport this separation should be viewed as a minimum. This issue was overtaken during the hearing by evidence concerning the Airport's proposal for a dual parallel taxiway south of the main runway. The dual taxiway was the subject of very little evidence during the 2012 hearing and RPL responded on a broad front challenging the proposed works, including the proposal for general aviation and helicopter facilities located on Lot 6. RPL argued that in the absence of an aeronautical study the NOR should be cancelled or, at the very least, the court should defer the final resolution of this proceeding until any Civil Aviation determinations that are required have been made.

[8] In this decision we consider whether the designated land is able to be used for the purpose of achieving the requiring authority's objectives for which the designation is sought.

Is work and designation reasonably necessary?

[9] For the purposes of s 171(1)(c) RMA the work and designation are reasonably necessary where:

- there is a nexus between the works proposed and the achievement of the requiring authority's objectives for which the designation is sought;
- the spatial extent of land required is justified in relation to those works; and

[4] [2014] NZEnvC 244.
[5] [2014] NZEnvC 244.
[6] [2015] NZEnvC 222.

- the designated land is able to be used for the purpose of achieving the requiring authority's objectives for which the designation is sought.

[10] If any of the above statements proved negative, QAC could not say that the works and designation are reasonably necessary for achieving the objectives of the requiring authority under s 171(1)(c).[7] This list is not exhaustive; in other cases different considerations may apply.

[11] Our enquiry into whether QAC can use the land arose out of the following key findings in the Separation Distance decision:

- the designation is required to ensure the continued safe and efficient functioning of the Airport by the expansion of its aerodrome to meet projected growth. This is to be achieved by the integrated development of airport facilities;[8]
- the proposed expansion of the passenger terminal will displace the existing general aviation (GA) and helicopter facilities;[9]
- an array of factors – including safety – militate against a northern location of GA and/or helicopter facilities.[10] QAC gave adequate consideration under s 171(1)(b) RMA to locating the Code C taxiway together with a proposed new GA Precinct to the north of the main runway;[11]
- some of the proposed works require the approval of the Director of Civil Aviation and will be the subject matter of an aeronautical study. At that time the Airport had not formally consulted with its stakeholders regarding operational restrictions that may be imposed in relation to the new aerodrome configuration. It is possible that the configuration of the proposed aerodrome extension will be modified as a result of the aeronautical study and stakeholder consultation;[12]
- the court was not in a position to know whether the works could be operationalised (that is put into operation or use);[13]

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[7] [2015] NZEnvC 222 at [270].
[8] [2015] NZEnvC 222 at [244].
[9] [2015] NZEnvC 222 at [244].
[10] [2014] NZEnvC 244 at [103].
[11] [2015] NZEnvC 222 at [229] and [252].
[12] [2015] NZEnvC 222 at [232].
[13] [2015] NZEnvC 222 at [218] and [267].

- the Airport's response to the Director's approval for the works, including any operational restrictions recommended following the aeronautical study, are material to the consideration of s 171(1)(c) and, subject to Part 2, the ultimate determination of the proceedings;[14] and finally
- if the Airport was unable to obtain the Director's approval it was unlikely that the court would regard the designation as being reasonably necessary for achieving the objective for which the designation was sought.

[12] The upshot was that we declined to make a final decision on the notice of requirement and directed QAC report back on matters under the jurisdiction of the Director of Civil Aviation.[15]

Aeronautical study

[13] In response to the directions given in the Separation Distance Decision, QAC submitted an aeronautical study, including proposed changes to its exposition, to the Director of Civil Aviation on 20 August 2016. The aeronautical study was required under the Airport's exposition as the dual taxiway, final approach and take-off helicopter area ("FATO") establishment and the development of the GA Precinct would change the operating environment.[16] The study addressed how the Airport would be operated with these facilities in place[17] for the purpose of establishing whether the proposed operation of the dual taxiway is acceptable to the Director of Civil Aviation.[18]

[14] A copy of the draft aeronautical study was provided to RPL on 4 July 2016. Without having received a response from RPL within the timeframe indicated, QAC then submitted the final aeronautical study to the Director of Civil Aviation in August 2016. RPL provided feedback directly to the Director on 23 September 2016 in a report prepared by The Ambidji Group Pty Ltd entitled "A Review of the Draft Aeronautical Study New General Aviation Precinct, Proposed Dual Taxiway and FATO Operation."[19]

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[14] [2015] NZEnvC 222 at [270].
[15] [2015] NZEnvC 222at [272].
[16] Queenstown Airport – New General Aviation Precinct Aeronautical Study, 20 August 2016, Version V2 at [2.4].
[17] Queenstown Airport – New General Aviation Precinct Aeronautical Study, 20 August 2016, Version V2 at [3.2].
[18] Queenstown Airport – New General Aviation Precinct Aeronautical Study, 20 August 2016, Version V2 at [3.2].
[19] Dated September 2016.

The Ambidji Report was highly critical of the Aeronautical Study.[20]

[15] On 30 September 2016 the Manager of Aeronautical Services for the Civil Aviation Authority, Mr S Rogers, acting pursuant to a delegation by the Director, responded to the Aeronautical Study. He advised under the Civil Aviation Rules, pt 139.13, the proposal represents a significant change to the aerodrome layout. He confirmed the purpose of an aeronautical study prepared under AC 139-15 is to provide a holistic view of aerodrome operational environment from a macro perspective. Without referring to the Ambidji Report, Mr Rogers said the proposal was deemed acceptable in that it allows for the continued compliance with Civil Aviation Rules pt 139.51(d)(1)(i) to (vii), 139.51(d)(2) and 139.101(4). He noted that:

> ... a task Specific Case will be submitted to provide more detailed mitigation for the risk associated with each phase of the introduction to service of the new aerodrome layout. Specifically the risks associated with the dual taxiway, the new FATO and the GAP.[21]

Request for a final determination

[16] Following receipt of the Director's letter QAC requested the court release a final determination of the proceeding on the papers.[22] RPL on the other hand opposed this course and sought to call evidence to determine whether the Aeronautical Study satisfactorily addressed the operational issues identified by the court and second, whether it demonstrates the proposed arrangement can support acceptably safe airport operations in accordance with Aviation Circular 139-15. RPL contended the "veracity" of the Aeronautical Study is relevant to the court's consideration and recognition of RPL's legitimate expectation.[23]

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[20] The Ambidji Report reviewed the draft aeronautical study dated 1 July 2016 – Version V1. The final aeronautical study is dated August 2016 – Version V2. Mr E L Morgan for RPL states at [3.1] of his December 2016 brief that there is no material difference between the draft and final versions of the Aeronautical Studies. The Ambidji Report concludes, amongst other matters, that the study had not been conducted in accordance with the Civil Aviation Authority's standards and guidelines; no quantifiable data were presented to validate risk levels; presents insufficient operational information and assessment for an effective safety risk review (and approval) of the proposed changes; the proposed changes to the aerodrome layout do not represent best practice in delivering the efficiency gains required to meet forecast demands; the study does not apply fundamental safety design principles to minimise the major accident category (including runway or taxiway incursions); and fails to consider alternative options that could deliver enhanced safety.

[21] "GAP" means General Aviation Precinct.

[22] By memorandum dated 26 October 2016 QAC confirmed that it could make operational the works outlined in the Aeronautical Study and that it was "comfortable" with the changes proposed to its exposition (which will not be made operative until the works are established).

[23] RPL memorandum dated 9 November 2016.

[17] As the parties could not agree on how to proceed, the matter was set down for a pre-hearing conference. Having heard from counsel the court directed a hearing limited to the following matters:[24]

(1) how far does the court have to go to satisfy itself as to s 171(1)(c) and Part 2 of the Act?

(2) in its memorandum of 18 November 2016 at [12] QAC states that it cannot go further to progress the intended works, or establish any physical work (and actually amend its exposition), until the designation is approved by the court. Three questions arise from that statement:

  (a) is the statement correct?

  (b) if so, does the evidence before the court exhaust the proper extent of the court's enquiry?

  (c) if not, should QAC furnish the court (or the Director) with task specific safety case(s) to provide more detailed mitigation for risk associated with each phase of the introduction of the new aerodrome layout?

(3) whether the Director in accepting QAC's aeronautical study (August 2016) must be taken to have correctly addressed the relevant safety issues that arise under QAC's layout.[25]

[18] The court reiterated in a subsequent Minute that the evidence was limited to the assertion by QAC that it cannot progress the intended works, or establish any physical work, until the designation is approved by the court.[26]

[19] RPL subsequently filed extensive evidence challenging the Aeronautical Study; two witnesses going so far as to challenge the finding by CAA (Mr Rogers) as to compliance with Civil Aviation Rule pt 139.[27] The admissibility of most of RPL's evidence is challenged in turn by QAC.[28]

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[24] Record of PHC dated 23 November 2016.
[25] We have in mind that the maxim "all things are presumed to be done in due form" may apply.
[26] Minute dated 6 December 2016.
[27] Morgan at [3.4] and [5.4]. Selwyn EiC 22 December 2016 at [8.3].
[28] With the consent of the parties the witnesses were called and their evidence provisionally admitted subject to the court's determination of its relevance to any matter in issue.

Issue 1: How far does the court have to go to satisfy itself as to s 171(1)(c) and Part 2 of the Act

[20] RPL accepts the findings of the court that QAC did give adequate consideration to the use of alternative sites, including the use of its own land. It seeks to distinguish ss 171(1)(b) and 171(1)(c), saying the former is concerned with an inquiry into process and the latter an inquiry into outcome.

[21] RPL submits under ss (1)(c) the court is to evaluate the "outcome".[29] The "outcome" – namely the proposed works and designation of Lot 6, can only be justified where there is a "satisfactory",[30] "sufficient"[31] or "overriding" reason"[32] for QAC not to give relief to RPL's expectation that QAC use its own land for airport purposes. The outcome would be justified where, for reasons of public safety and efficiency, QAC cannot use its own land and the need to acquire Lot 6 is therefore "pressing" or "essential".[33] Evidence that is capable or sufficient of proving that it is unsafe and inefficient to use QAC's own land must be "compelling".[34]

[22] While RPL accepts the findings of the court that QAC gave adequate consideration to the use of alternative sites under s 171(1)(b), it argues that in the absence of an aeronautical study fully assessing the operational safety and efficiency of the existing airport layout the court cannot be satisfied that it is unsafe and inefficient to locate the GA Precinct on QAC land. Without such a study the evidence cannot objectively prove the requirement for RPL's land is pressing or essential[35] and, it follows, the court cannot be satisfied that the NOR is reasonably necessary to designate Lot 6 land for the same works.[36]

[23] QAC does not agree with RPL that the works and designation must be "essential" in order for them to satisfy the criteria in s 171(1)(c). The orthodox approach, approved by Justice Whata, enables a court to apply a threshold assessment that is proportionate to the circumstances of the particular case. Thus provided that

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[29] Somerville, submissions 10 February 2017 at [2.12].
[30] *B v Waitemata District Health Board* [2016] NZCA 184 at [55].
[31] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 at 525.
[32] Refer RPL 2015 submissions dated 15 June 2015 at [2.35] *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32 at [37]-[38].
[32] *R v North and East Devon Health Authority*, ex parte Coughlan [2001] QB 123 (Eng CA) at [57].
[33] Transcript at 78.
[34] Somerville, submissions 10 February 2017 at [2.31].
[35] Transcript at 79, Somerville, submissions 10 February 2017 at [2.32].
[36] Transcript at 79.

they are more than simply an expedient or desirable[37] way by which to achieve the objective,[38] the works and designation may be reasonably "necessary" even though they are not essential. We add, if the court is satisfied the works are clearly justified there is no error of law approaching the threshold test of reasonable necessity in this manner.[39] Given the now extensive evidence before the court and the findings it has made in the previous proceedings, QAC submits that the court has gone as far as it can in order to satisfy itself that the proposed NOR is reasonably necessary in terms of s 171(1)(c) and Part 2 of the Act.[40]

Discussion

[24] The fact that QAC owns designated land to the north of the main runway does not mean, as RPL contends, the designation of Lot 6 is not reasonably necessary.[41]

[25] We find that there is an error in RPL's reasoning arising through the definition of "outcome" in two ways: both in relation to the subject site (Lot 6) and also in relation to QAC's own land. Under RPL's approach the test in s 171(1)(c) can only be satisfied if the works and designation are essential to achieving the objective because the use of QAC's own land is excluded for reasons of public safety and efficiency. Separately, RPL is also saying something about the sufficiency of evidence contending that "compelling" evidence in the form of an aeronautical study is required to exclude the use of QAC's land.

[26] The considerations under s 171(1)(b) and (1)(c), while inter-related, are separate enquiries. In the 2012, 2014 and 2015 decisions we held that if there is an alternative site for undertaking the work that is owned by QAC, this begs the question whether the requirement for RPL's land is reasonably necessary.[42] In the Interim Decision, and again in the Legitimate Expectation decision, we found an array of factors – including safety and efficiency – militate against a northern location of GA and/or helicopter facilities.[43] We also found that the use of QAC land would not promote the sustainable management of natural and physical resources.[44] We made these findings based on the evidence before us; the findings were not informed by an aeronautical

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[37] *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZHC 2347 at [19].
[38] Casey, submissions 10 February 2017 at [48].
[39] [2013] NZHC 2347 at [94]-[95].
[40] Casey, submissions 10 February 2017 at [55].
[41] Somerville, submissions 10 February 2017 at [2.10].
[42] See [2012] NZEnvC 206 at [94], [2014] NZEnvC 244 at [90]-[91], [2015] NZEnvC 222 at [252].
[43] [2014] NZEnvC 244 at [103].
[44] [2014] NZEnvC 244 at [103].

study of QAC's land.[45] These findings have not been appealed.

[27] Once again RPL seeks to re-litigate matters that are the subject of earlier decision(s) by enlarging upon the examination of the alternative sites through the vehicle of s 171(1)(c) and indirectly challenging the adequacy of evidence which the court relied on in its earlier decisions. While RPL disavows an argument that the test under s 171(1)(c) is to examine whether a reasonable decision maker could arrive at a decision to locate GA facilities on Lot 6 land,[46] we consider this also a purpose in its argument.

[28] To substantiate its argument RPL focuses on the law of legitimate expectation although the court's jurisdiction is founded in the relevant sections of the RMA. While we have carefully considered the cases referred to us, we prefer Whata J's articulation of the law in *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZHC 234, grounded as it is on the RMA. RPL may legitimately expect compliance with the assurance given by QAC, and upon which it has relied, subject only to an express statutory duty or power to do otherwise. At [106] Whata J stated:

> 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.
>
> [Footnotes omitted].

[29] RPL is right to say the outcome in these proceedings must be a fair and proportionate response.[47] The law of legitimate expectation is based on fairness, the broad principle being that good administration requires that public bodies deal straightforwardly and consistently with the public.[48] Fairness implores an outcome which is consistent with those expectations provided, however, that the outcome meets the statutory criteria and achieves the statutory purpose.

[45] See [2015] NZEnvC 222 at [252].
[46] Somerville, submissions 10 February 2017 at [2.12].
[47] Transcript at 78.
[48] *Nadarajah* v *The Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68].

[30] RPL submits the only way to justify interference with its private property rights on a "proportionality review" is on the basis of a "compelling case" in the public interest or "compelling evidence"[49] to show that confirming Lot 6 in breach of the substantive legitimate expectation is justified in the public interest.[50]

[31] RPL does not explain what it means by "proportionality review". The phrase "proportionate response" occurs in the English Court of Appeal case of *Nadarajah v The Secretary of State for the Home Department*.[51] Laws LJ, discussing the law of legitimate expectation (obiter), said at [68]:

> A public body's promise or practice as to future conduct may only be denied, and thus the standard departed from, in circumstances where to do so is on the public body's legal duty or is otherwise a proportionate response having regard to a legitimate aim pursued by the public body in the public interest. The court is the judge of whether it is a proportionate response.

[32] When expressed in the language of the RMA, the question of whether the NOR is a "proportionate response" under s 171(1)(c) is to be considered relative to QAC's objectives.

[33] Since 2012 we have sought clear justification from QAC that it has given adequate consideration to alternative sites and, separately, that the works and designation are reasonably necessary to achieve the objective for the designation. We have been mindful of the fact that QAC does not own the land to be designated. Bringing RPL's legitimate expectation to account in the particular context of s 171(1)(c), the NOR would not be a proportionate response in circumstances where there is either no nexus between the works proposed and the achievement of the requiring authority's objectives or where the spatial extent of land to be designated exceeds the land required by the works. It would also be unfair to RPL to designate the land if QAC were unable to use the same for the proposed works. In each of these circumstances it could not be said that the works and designation are reasonably necessary to achieve QAC's objective under s 171(1)(c) which brings us back to the first issue raised at the beginning of this section.

[49] Somerville, 10 February 2017 at [2.18].
[50] Somerville, 10 February 2017 at [2.22].
[51] *Nadarajah v The Secretary of State for the Home Department* [2005] EWCA Civ 1363.

Outcome

[34] Section 171(1)(c) is concerned with whether the proposed works and designation for the subject site are reasonably necessary for achieving the requiring authority's objective. The enquiry does not extend to an examination of the existing aerodrome, including land owned by QAC. Accordingly, the court does not require QAC to conduct a further aeronautical study examining the use of its own land for GA and the other services.

Issue 2: Can QAC progress the intended works, or establish any physical work (and actually amend its exposition), before the designation is confirmed?

[35] Opposing QAC's request that the court make a final determination on the papers confirming the NOR, RPL submitted that the Aeronautical Study that was prepared by QAC was deficient and even though the Study was accepted by the Director of Civil Aviation, it does not address the operational issues highlighted in the Separation Distance decision and demonstrate acceptably safe airport operations. RPL sought to call evidence and be heard on these issues.[52]

[36] QAC responded stating that the requirements under the Civil Aviation Act 1990 are, to the extent that they are able to be, met at this stage of the process. It cannot go further to progress the intended works, or establish any physical works (and actually amend its exposition), until the designation is approved by the court.[53] If correct, this bears on how far the court can go to satisfy itself as to s 171(1)(c) and Part 2 of the Act.

[37] Mr Clay, the General Manager Operations and Safety for Queenstown Airport gave evidence that there will be changes to the rest of the Airport's operational infrastructure consequential upon the construction of a Code C taxiway within the existing airport designation. Airport operations are made up of multiple interdependent processes; changes to the passenger terminal and apron stands will encroach upon the existing GA precinct. It would be irresponsible of the Airport to incur the cost of constructing the Code C taxiway (a cost largely born by the airlines) without being in a position to realise the NOR objectives.[54]

[52] RPL memorandum dated 9 November 2016.
[53] QAC memorandum dated 18 November 2016 at [12].
[54] Clay, EiC dated 22 January 2017 at [23]-[26].

[38] Mr Clay's observation that the Airport's operations are made up of multiple interdependent processes accords with the observations we made in an earlier decision as to the integrated development of airport facilities:[55]

> The NOR is required to ensure the continued safe and efficient functioning of the Airport through the expansion of its aerodrome to meet projected growth.[56] When the whole of the NOR is considered it is plain this is to be achieved by the integrated development of airport facilities. Amongst the many changes to the physical characteristics of the aerodrome proposed to achieve its objective, the expansion of the passenger terminal and associated facilities will displace the GA (including helicopters) from its present location.

[39] It is therefore not entirely correct for Mr Casey to say that QAC can go no further to progress the intended works or establish any physical works until the designation is approved by the court.[57] Rather, the decision to go no further pending the court's final determination is a decision that is open to a prudent airport operator. However, that is not the end of the matter and we consider next whether the evidence before the court establishes, subject to Part 2 of the Act, that QAC can actually achieve its objective were the Lot 6 land to be designated, having particular regard to the need for the Director to consider (at least) task specific safety cases for components of the work.

[40] One final comment before we move on. RPL argued the confirmation of the NOR was irrelevant to the issue whether QAC can or cannot progress works within the existing designation. QAC could progress the works associated with the Code C taxiway as this would be constructed within the existing designation, with the GA Precinct to be constructed after its formation. For reasons that are not entirely clear RPL called evidence intended to prove that the airspace capacity is limiting growth in regular passenger transport services. The constraints in airspace capacity are addressed in the Separation Distance decision. Mr Clay's evidence at this hearing, which was unshaken in cross-examination, was that airspace would be enhanced through the introduction of the parallel taxiway. This accords with the observations we made on the same topic in the Separation Distance decision from [178] et ff, including in particular [193].

[55] [2015] NZEnvC 222 at [244].
[56] NOR, Form 18 at [1.3].
[57] We accept QAC cannot amend its exposition until the works have been constructed.

Issue 3: Should QAC furnish the court (or the Director) with task specific safety case(s) to provide more detailed mitigation for risk associated with each phase of the introduction of the new aerodrome layout?

[41] In the Separation Distance decision, subject to appropriate restrictions on aircraft movements, we were satisfied that the dual taxiway could operate safely.[58] At RPL's instigation we declined to issue a final determination giving QAC an opportunity to complete an Aeronautical Study and seek the Director's approval (or more accurately "acceptance") of the proposal.

[42] The principal elements of the NOR works and their indicative layout are described in the Aeronautical Study. The works and layout are the same as those presented to the court at earlier hearings. Attached to the Study is a copy of the 2015 decision and the Study records the court's wish to know what approvals may be required from the Director.

[43] The purpose of the Aeronautical Study is stated – it is to establish whether all relevant Civil Aviation requirements can be satisfied or addressed in a manner that is acceptable to the Director of Civil Aviation. The Study uses a methodology evidently agreed upon between CAA and QAC. The methodology employs a qualitative, not numerical, risk assessment (a matter of some considerable criticism by RPL's witnesses).

[44] In response the Director confirmed under Civil Aviation Rules, pt 139.131 the proposal entails significant change to the aerodrome layout and that it was practical (in this case) for an aeronautical study to be submitted to the CAA before project commencement. As the proposal is compliant with the relevant Civil Aviation rules it is deemed acceptable. The Director elaborates, not only are the proposed physical characteristics obstacle limitation surfaces, visual aids, equipment and installations compliant with the Civil Aviation Rules (pt 139.51(1)(i) to (vii)), but they are also acceptable to the Director (pt 139.51(d)(2)).

[58] [2015] NZEnvC 222 at [267].

[45] Importantly, the Director determined QAC will continue to meet the standards and comply with the requirements of Subpart B of the Civil Aviation Rules prescribed for aerodrome certification (pt 139.101(4)). QAC cannot operate the aerodrome except under the authority of an aerodrome operator certificate granted by the Director under the Civil Aviation Act and in accordance with the relevant rules (pt 139.5).

[46] The Director's decision makes clear that the continued compliance with the aerodrome certification does not mean that the operation of the dual taxiway and runway in conjunction with the proposed helicopter and GA facilities on Lot 6 is without risk. How risk is to be managed is to be addressed in the task specific safety cases.

[47] RPL submits QAC should furnish the court (or Director) with the task specific safety cases before a decision on the NOR is made[59] as the safety cases may result in design changes to mitigate potential risks or unacceptable design outcomes;[60] may bear on the amount of Lot 6 land required[61] or even as to whether the proposal can be operationalised.[62] In the absence of evidence on how risks are to be managed on Lot 6 it says the court is not in a position to make a decision under s 171(1)(c) or be satisfied in terms of Part 2.[63] RPL submits that the safety cases are needed irrespective of its legitimate expectation that QAC would use its own land.

Discussion

[48] We commence by making a general observation: the court cannot abrogate its decision-making under the RMA to the Director of the Civil Aviation Authority. Indeed the Environment Court cannot delegate its function in relation to safety issues in so far as they are a relevant RMA matter.[64] The court is entitled to hear expert evidence and come to its own conclusions.[65]

[49] The NOR is not an application for resource consent wherein QAC seeks authorisation for certain activities, with the actual and potential effects of those activities

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[59] Selwyn, EiC dated 22 December 2017 at [8.5(b)]. Morgan, EiC 22 December 2016 at [6.10]. Sachman, EiC 22 December 2016 at [7.9].
[60] Morgan, EiC 22 December 2016 at [6.10].
[61] Selwyn, EiC dated 22 December 2017 at [8.5(b)].
[62] Transcript at 119.
[63] Transcript at 77.
[64] *Dart River Safaris Ltd v Kemp* [2001] NZRMA 433 (HC); *Southern Alps Air Ltd v Queenstown Lakes District Council* [2008] NZRMA 47.
[65] *Cammack v Kapiti Coast District Council* (EC) W069/09; *Dome Valley District Residents Society Inc v Rodney District Council* (EC) A099/07; *Director of Civil Aviation v Planning Tribunal* [1997] 3 NZLR 335.

on the environment being a matter which the decision-maker is to have regard (s 104). The wording in s 171(1) is different and, subject to Part 2, we are to consider the effects on the environment of allowing the requirement having particular regard to the matters stated in ss (1)(a)-(d).

[50] There is no bright line distinguishing between matters that may be properly regarded as "the effects on the environment of allowing the requirement" under s 171 and the consenting process under s 104 which is to consider "actual and potential effects on the environment of allowing the activity". Where we draw the line in this case is at the task specific safety cases. While both resource consent applications and notices of requirement are broadly concerned with proposed works, NORs have two key distinguishing features that are relevant to the scope of our deliberations.

[51] The first feature is that the final layout and design of the work may be a matter left for a future outline plan (s 176A). We do not recollect RPL having previously taken issue with the proposal being subject to an outline plan, and this is the subject of agreed conditions. The point being the content of the outline plan will overlap with the subject matter of the task specific safety cases, and this work has not yet been done.

[52] The second feature concerns the effect of including a designation in a district plan; namely the exemption of the work from the restrictions that otherwise apply to the use of land under s 9(3). Section 176 is enabling of the use and development of land, as it exempts the requiring authority's work from land use controls in the District Plan. "Use" in relation to land is defined in the Act.[66] The matters to be addressed in the task specific safety cases are only indirectly (if that) concerned with the use of land, and would not typically be the subject matter of rules in a district plan (for example, the timing and sequencing of work or the bringing into service of the new facilities). In this case the court has closely examined the proposed use of land and the effects, including on safety, arising from the use of land for activities such as the taxiways, FATOs and buildings. Our approach to safety is informed by the Act, including s 171 and Part 2.

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[66] use, —
(a)means in ss 9, 10, 10A, 10B, 81(2), 176(1)(b)(i), and 193(a), means—
(i) alter, demolish, erect, extend, place, reconstruct, remove, or use a structure or part of a structure in, on, under, or over land:
(ii)drill, excavate, or tunnel land or disturb land in a similar way:
(iii)damage, destroy, or disturb the habitats of plants or animals in, on, or under land:
(iv)deposit a substance in, on, or under land:
(v)any other use of land; and
(b)in sections 9, 10A, 81(2), 176(1)(b)(i), and 193(a), also means to enter onto or pass across the surface of water in a lake or river.

We have been careful to consider not only the risk to public safety arising out of the use of land, but to be satisfied that QAC can still achieve its objective for the NOR subject to any future restrictions that may be imposed to adequately mitigate those risks.[67] We have drawn the line at the point of mitigating any residual risk as that is an operational matter, only indirectly related to the use of land, for QAC and the Director of CAA.

[53] The furnishing of the task specific safety cases is not a complete answer to RPL's submission that we are to evaluate the "outcomes" under s 171(1)(c). As we have previously observed, risk is managed within a known context. The management of risk responds on an ongoing basis to changes within the environment. Evidently what is meant by "task specific safety case" is not defined in the Civil Aviation Act or its Rules. However, the Advisory Circular AC 139-15 attempts to draw a distinction between an aeronautical study and a task specific safety case, stating that aeronautical studies should be viewed as providing "a holistic view of an aerodrome's operational environment e.g. the macro perspective as compared to a safety case study which is a task specific document e.g. the micro view."

[54] RPL has not sought a judicial review of the Director's decision, but nevertheless is highly critical of the same. While RPL's witnesses would have preferred to see risk exhaustively addressed in the Aeronautical Study, it is not a purpose of an aeronautical study to address the micro level management of risk (although we accept in individual cases this may be done). The approach taken by QAC is supported by AC 139-15.

[55] Mr Clay explains in his evidence[68] that the safety of the new aerodrome layout and how it is intended to be operationalised by QAC has been assessed through the Aeronautical Study which the CAA has deemed acceptable. The task specific safety cases will ensure that the development of the airport is implemented and made operational in a safe way. He says that a task specific safety case is the mechanism the CAA uses to ensure compliance with the Aeronautical Study and to have progressive overview of QAC's management of risk. We accept Mr Clay's statement that the management of risk inherently needs to be progressive, with continual

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[67] See, for example, discussion in [2015] NZEnvC 222 at [157]-[158]. A similar approach was taken by Judge Dwyer in *Cammack and Evans & ors v Kapiti Coast District Council* (EC) W069/2009 at [41] et ff, and in particular the limits to jurisdiction discussed at [90]-[91]. In that case Judge Dwyer was considering a plan change. The court held that there are limits to the court's jurisdiction under the former section, s 9(8). Declining to introduce certain rules outside the scope of s 9(8) in the plan change left operational controls for the airport authority.

[68] Clay, EiC 10 February 2017 at [10]-[12].

assessment, review and feedback, especially as elements of the proposal are sequenced and constructed.[69]

[56] It is not suggested by RPL or by its witnesses that the Director has failed to take into account a relevant CAA rule (or the converse). RPL aviation consultant, Mr Morgan, expressly acknowledged the proposal was deemed acceptable under the relevant rules, the majority of which are design elements that have a material effect on the final design.[70] While RPL's witnesses are concerned that the Aeronautical Study does not achieve its purpose and provide a holistic view of the aerodrome operational environment, their concerns were addressed through the Director's guidance that a detailed safety case will need to be provided for each stage of the introduction to service of the proposed airport changes.[71] We conclude that the Director has not gone through a simple tick the box exercise but has considered the Aeronautical Study in accordance with AC 139-15 and Civil Aviation Rules pt 139.

[57] We take notice of the powers and functions of the Director of Civil Aviation which include enforcing statutory and regulatory requirements of the Civil Aviation Act. It is a purpose of the Civil Aviation Act to promote aviation safety through the rules of operation and assigned responsibilities and auditing participants' performance against the prescribed safety standards and procedures. The Court of Appeal recently noted this function is likened to oversight responsibility, rather than one which requires participation in operational issues which are the province of the airline operators.[72] We anticipate there is an ongoing requirement to produce task specific safety cases as part of the concomitant obligation on QAC as the holder of an aerodrome operator certificate to continue to meet the standards and comply with the requirements prescribed for aerodrome certification under the rules (pt 139.101).

[58] Finally, we do not accept RPL's mild suggestion that the Director's acceptance of the proposal was conditional upon the presentation of the task specific safety cases. That submission is not open to us on our reading of the decision.[73] While Ms Selwyn seems to revisit that argument by suggesting that the safety cases may have a bearing

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[69] Clay, rebuttal 10 February 2017 at [11.6]
[70] Morgan, EiC 22 December 2016 at [5.1]-[5.2].
[71] Selwyn, EiC 22 December 2017 at [6.5]. Morgan, EiC 22 December 2016 at [5.10].
[72] *New Zealand Air Line Pilots' Association Industrial Union of Workers Inc v Director of Civil Aviation* [2017] NZCA 27 at [14]-[17].
[73] CAA letter dated 30 September 2016.

on the amount of Lot 6 required,[74] we found in the last decision there is no evidence to support this proposition. Nothing we have heard during this hearing has changed our view on this.

Outcome

[59] In the Separation Distance decision the court declined to make a final determination because we were concerned that if QAC could not use the land for the works the designation would not be reasonably necessary for achieving the objectives for which the designation is sought (ss 171(1)(c)). The Director's confirmation that QAC will remain compliant with its aerodrome operating certificate answers our question in the affirmative: the proposal can be operationalised. How this is to be achieved, in micro terms, will appropriately be the subject matter of the task specific safety case(s) in accordance with the Civil Aviation Act and its rules.[75]

[60] For the reasons that we have given on this occasion we do not require QAC to furnish the court with the task specific safety cases.

[61] Pursuant to s 171(1)(c) we find that the works and designation are reasonably necessary to achieve the requiring authority's objective.

Red Oaks Drive

[62] The proposed GA Precinct is to have separate road access from the aerodrome terminal. Determining how that is appropriately provided is complicated by existing road conditions and the timing of planned improvements. QAC advises that Red Oaks Drive has (still) not been extended to provide for a connection to the boundary of the area to be designated. This was not disputed by RPL. The area of land required for access from Hawthorne Drive to the General Aviation Precinct is therefore to be included within the area to be designated. Condition B(1)–(5) in the court's 2013 decision is confirmed.

[74] Selwyn, EiC 22 December 2016 at [8.5(b)].
[75] We note Dr Somerville addresses the Safety Case in terms of "how" risk is to be managed at Transcript 13.

Activities and lapse period for the designation

[63] Condition 1 contains a statement of the activities which are permitted within the area to be designated. The fact that the designation will be included in the District Plan does not mean that the implementation of these activities will proceed or that QAC has a timeframe in mind.

[64] Mr Clay, for QAC, would not be drawn on a statement contained in the Aeronautical Study that QAC anticipates the Code C taxiway to be built within five years and prior to the development of the GA Precinct. We remind QAC under s 184 RMA the designation will lapse after the expiry of five years unless one of ss (1)(a)-(c) applies.[76]

Part 2

[65] RPL argues that as there is a conflict between the s 171(1)(b) and (c) considerations Part 2 should be used to resolve that conflict. Consequently the NOR should not be confirmed because it does not meet the objective of sustainable management.[77] We have not, however, found any conflict.

[66] Following the High Court decision of *New Zealand Transport Authority v Architectural Centre Inc*[78] (referred to as the *Basin Reserve* decision) the phrase "subject to Part 2" as it occurs in s 171 is a specific statutory direction to consider and apply Part 2 in making a determination on a designation. It follows Part 2 is relevant, whether or not there are conflicting assessments under ss(1)(a)-(d).[79]

[67] Mr Casey submits the law is now less clear with the recent High Court decision of *Davidson Family Trust v Marlborough District Council,*[80] an appeal against a decision declining resource consent. He submits that Justice Cull having noted the similarities between ss 171 and 104 RMA in that they both list matters "subject to Part 2", does not explain why in *Davidson Family Trust* she adopts an interpretation of "subject to Part 2" that is inconsistent with the *Basin Reserve* decision. We suggest the observation made in *Basin Reserve* as to the different role that planning documents may play in RMA proceedings (in that case comparing and contrasting NOR and plan change

[76] [2012] NZEnvC 95 at [33]-[36].
[77] Somerville, submissions 10 February 2017 at [2.56].
[78] [2015] NZHC 1991.
[79] At [112-7].
[80] [2017] NZHC 52.

proceedings) may be pertinent to the interpretation taken in *Davidson Family Trust* which was considering an application for resource consent. In this case although we are to pay particular regard to the planning documents they do not determine the outcome of a notice of requirement; per *Basin Reserve.*[81]

[68] We are aware that *Davidson Family Trust* has been appealed to the Court of Appeal but regardless of the outcome we distinguish it on the basis that it is a resource consent appeal and deals with different provisions of the Act. We consider we are bound by the High Court decision of *Basin Reserve* since it is a designation proceeding.

[69] Ultimately the exercise of any decision-making discretion under s 149U(4) RMA is to be undertaken in a principled manner. The discretion is to be exercised for the purpose that it was conferred and unless the context clearly indicates otherwise, under the RMA this will be for the purpose of promoting the sustainable management of natural and physical resources.

[70] QAC's objective is to "provide for the expansion of Queenstown airport to meet projected growth while achieving the maximum operational efficiency as far as possible." In order to achieve that objective, operations at the aerodrome must, as "far as possible," be both safe and efficient.

[71] We conclude with the words of Whata J. The court, like QAC, cannot be bound to give effect to RPL's expectations where to do so is inconsistent with the requirements of s 171. Regrettably for RPL we have found the use of QAC land would not achieve the statutory criteria and achieve the statutory purpose.[82]

[72] The matter does not end there. We have reconsidered our findings in light of the directions in Part 2, including the further planning evidence produced during the Separation Distance hearing (which we said we would return to in the final decision).[83] Having done so we are satisfied that the NOR, subject to the conditions we approved earlier, will promote the sustainable management of natural and physical resources.

[81] *New Zealand Transport Authority v Architectural Centre Inc* at [117].
[82] [2014] NZEnvC 244 at [103].
[83] [2015] NZEnvC 222 at [34].

Admissibility of evidence called on behalf of RPL

[73] Finally, the Evidence Act 2006 sets out the fundamental principle that all relevant evidence is admissible[84] in a proceeding (s 7(1)). Evidence that is not relevant is not admissible in a proceeding (s 7(2)). Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding (s 7(3)).

[74] While the Environment Court is not bound by the rules of law about evidence that apply to judicial proceedings (s 276(2) RMA), and may receive anything in evidence that it considers appropriate to receive (s 276(1)(a) RMA), that does not mean that it has no regard for the Evidence Act and that "anything goes".[85]

[75] We have carefully considered the evidence Mr Douglas Sachman, Mr Eric Morgan and Ms Heather Selwyn called on behalf of RPL. To the extent that each of them respond to evidence given by Mr Michael Clay, General Manager, Operations and Safety for QAC, the evidence is relevant and is admitted.[86]

[76] Our present enquiry does not necessitate an examination of alternative sites. We have found in earlier decisions that QAC gave adequate consideration under s 171(1)(b) RMA to locating the Code C taxiway together with a proposed new General Aviation (GA) Precinct to the north of the main runway.[87] The evidence on this issue is not relevant to any issue before the court, and we have not had regard to it.

[77] The balance of the evidence addresses the Aeronautical Study and in particular the absence of a risk assessment supporting detailed design of the aerodrome. This is relevant to the issue whether the works can be operationalised, and is admitted. Having had regard to the evidence, we place little weight on the opinions expressed by RPL's witnesses criticising the Aeronautical Study. The Study has been accepted by the Director of CAA, and RPL has not sought a judicial review of his decision. Second, and notwithstanding the witnesses' criticism, any residual safety risk is able to be addressed in the task specific safety cases.

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[84] Subject to the two exceptions stated in s 7(1) of the Evidence Act.
[85] *Re Meridian Energy Ltd* [2013] NZEnvC 59 at [60].
[86] Mr Clay addresses the issue presented by the court, namely QAC's asserted inability of progress the intended works until the designation is approved by the court.
[87] [2015] NZEnvC 222 at [229] and [252].

RPL memorandum filed after the reserve of the court's decision

[78] After we reserved this decision RPL filed further submissions addressing the recent Court of Appeal decision *New Zealand Air Line Pilots' Association Industrial Union of Workers Inc v Director of Aviation* [2017] NZCA 27 and attaching a press release concerning QAC's purchase of land adjacent to Wanaka Airport.[88] QAC objected as RPL did not seek the prior leave of the court and was concerned that RPL was endeavouring to delay the release of this decision and distract the court from the matters in issue.[89] While it does not say RPL's conduct amounts to an abuse of the court's process, it has throughout these proceedings raised concern that RPL was prosecuting its interests without due regard to the matters referred back for reconsideration by the High Court and to the directions of this court.

[79] RPL should have sought prior leave of the court before filing its memorandum. That said, we have had regard to RPL and QAC's memoranda as, first, the earlier judgment of the High Court ([2016] NZHC 1528) was the subject of submissions and, second we heard evidence concerning the Wanaka land purchase. The evidence before us does not support an inference that the requirement for Lot 6 is no longer reasonably necessary as QAC has an alternative site for GA at Wanaka Airport. RPL also submits that the Director needs to carry out an Aeronautical Study on all aspect of relevant airport layout safety issues. We find this is what QAC has done (with an emphasis on "relevant" and of the Director's acceptance of the Study). The Court of Appeal decision is not authority for the proposition that the task specific safety cases must be included as part of an aeronautical study.

Decision

[80] Pursuant to s 149U(4) RMA we confirm the notice of requirement to extend Designation 2, subject to the conditions attached to this decision and approved by the court in its decision [2013] NZEnvC 95. The extent of the designation is shown on Figure 1 attached. For completeness, we confirm that the designation is to have a lapse period of five years from when it is included in the District Plan (s 184).[90]

[88] Dated 17 March 2017.
[89] Dated 21 March 2017.
[90] [2013] NZEnvC 95 at [36].

[81] Costs are reserved, but not encouraged. Any application for costs is to be filed by 21 April 2017, with replies by 5 May 2017.

For the court:

J E Borthwick
Environment Judge

Annexure A
Conditions of the extension to designation 2

A. Purpose of the Designation

[1] Insert into Designation 2 clause 1(f) the following statement of activities permitted within the Aerodrome Designation:

Within the General Aviation Precinct located on Part Lot 6 DP 304345:

- general aviation operations, including private aircraft traffic, rotary wing and helicopter operations, and
- hangars, including those for Code C aircraft; and
- associated activities, offices, aircraft servicing, fuel supply and storage, maintenance, buildings, signage and infrastructure, navigational aids and lighting, vehicle access, car parking, and landscaping.

B. Approved conditions for Traffic/Access Arrangements to Lot 6

[1] In the event that the Eastern Access Road (EAR) is formed and operational from Hawthorne Drive through to Glenda Drive, and access from the EAR to the eastern end of the General Aviation Precinct (the GAP) is constructed and operational then the eastern access shall become the primary access to the GAP. The eastern access shall have a controlled intersection with the EAR approved by the road controlling authority and allow all movements from all approaches. Any access arrangement at the western (Hawthorne Drive) access shall revert to left-in access only.

[2] In the event that a connection to the GAP is constructed and operational from a northern extension of Red Oaks Drive, then the western access from Hawthorne Drive shall be closed and full access and egress to the precinct shall be made from the Red Oaks Drive connection, irrespective of whether an eastern access to the precinct is constructed and operational.

[3] If development within the GAP occurs prior to the construction and operation of an eastern access, and no extension from the current termination of Hawthorne Drive

toward the western access has occurred, then access to the GAP shall occur through an extension of Hawthorne Drive by the QAC to the western access point, in a manner generally consistent with Figure 1.

[4] If development within the GAP occurs prior to the construction and operation of an eastern access, and Hawthorne Drive has been extended beyond its current termination past the western access but not as far as Red Oaks Drive, then full ingress and egress will be allowed at the western access.

[5] If development within the GAP occurs prior to the construction and operation of an eastern access and Hawthorne Drive is extended to or beyond Red Oaks Drive (which is to be either a roundabout or signal controlled at the discretion of the road control authority) then the western access at the connection with Hawthorne Drive shall operate on a left in and left out basis with pre-signals controlling traffic travelling east on Hawthorne Drive to enable egress from the western access in a manner generally consistent with Figure 2.

Advice Note: all intersections and roading improvements shall be designed and constructed to Council standards and be subject to Council approval as road controlling authority.

C. Approved Landscape and Design Conditions

[1] Not less than three (3) months prior to an outline plan for the GAP being submitted to the territorial authority pursuant to section 176A of the Act, the requiring authority shall prepare and submit to the territorial authority for certification an "Integrated Design Management Plan". The purpose of the Integrated Design Management Plan shall be to provide a structure plan showing the general configuration of roading, parking and areas of landscaping, open space and key view corridors and to determine the approach to be adopted ~~to~~ for the design and development of buildings and infrastructure (including signage). No outline plan shall be submitted by the requiring authority until such time as the territorial authority has certified that the Integrated Design Management Plan achieves the following objectives:

Outstanding Natural Landscapes:

Identify and maintain ~~key~~ views to the surrounding mountains ~~including~~ and Outstanding Natural Landscapes ~~identified in the District Plan, and~~ including those referred to in the Remarkables Park Zone. This may be achieved by:

(i) providing sufficient separation between buildings and infrastructure to ensure that identified views to the mountains from neighbouring land to the south and north of the GAP are maintained;

(ii) Interspersing ~~carparking and/or open space with~~ buildings and infrastructure with carparking and/or open space;

(iii) Clustering of buildings.

Landscaping:

(b) Provide landscaping within the GAP that achieves a high level of onsite and offsite amenity and ensures that any adverse effects on neighbouring land arising from development of the GAP are appropriately mitigated. This may be achieved by:

(i) landscaping of buildings, infrastructure and carparking areas that softens, integrates and where possible screens built form when viewed from neighbouring land and from the airport passenger terminal;

(ii) where necessary, planting along the boundary of the GAP to provide for the screening of buildings and infrastructure within the site and/or visual integration within the surrounding landscape;

(iii) a planting palette with sufficient range to enable the creation of character areas, but with elements that remain consistent throughout the GAP so as to create a consistent theme;

(iv) a hard landscaping ~~element~~ palette including paving, retaining structures, drainage grates, kerb profiles, bollards, fencing , light standards and any other ~~public~~ GAP infrastructure. More than one paving type may be included to enable the creation of character areas but all other hard elements should be consistent so as to create a consistent theme;

(v) a consistent carpark design, including soft and hard landscaping in all locations but allowing for some variation to enable the development of character areas.

Buildings and Signage:

(c) Design and locate buildings so they are recessive and integrated within the surrounding landscape (including the immediately adjoining Remarkables Park Zone), whilst recognising and providing for the buildings' function and use. This may be achieved by:

(i) avoiding linear arrangements of buildings where practicable;

(ii) varied rooflines that avoid uniformity, particularly when viewed from the south and elevated viewpoints;

(iii) limiting roof colours to ~~mid-~~browns, ~~mid-~~greens and ~~mid-~~greys with a reflectivity of less than 36%, with no signage permitted on the roofs of buildings;

(iv) limiting the external colour of the material used for walls of ~~reflectivity of all external colours and materials used on~~ buildings to a natural range of browns, greens and greys with a reflectivity of ~~to~~ less than 36%, with the exception that the trims, highlights and signage totalling up to 10% of the façade area may exceed this level and be of contrasting colours in order to add visual interest;

(v) ensuring variation in the bulk, form and scale of buildings;

(vi) providing interesting detailing and articulation of building facades, particularly when viewed from the south;

(vii) the identification of signage platforms on buildings.

Infrastructure:

(d) Mitigate any adverse visual and amenity effects of infrastructure for visitors to the airport and users of neighbouring land. This may be achieved by:

(i) locating aviation related infrastructure on the airside part of the GAP land where practicable and where possible ~~not significantly impractical,~~ ensuring such infrastructure is integrated into the development by appropriate landscaping measures;

(ii) providing details of methods for managing stormwater and earthworks for the purpose of avoiding, remedying or mitigating any relevant adverse effect.

[2] The Integrated Design Management Plan shall allow for staged implementation of development within the GAP. If staged development is provided for then an overall plan showing the ~~various~~ likely stages and the method for ensuring a consistency of design and landscaping approach across the development of the entire GAP shall be included in the Integrated Design Management Plan. If the development is to be staged then the development of a precinct accessway ~~the road corridor~~ shall be part of Stage 1.

[3] The requiring authority shall ensure that all outline plans submitted pursuant to section 176A of the Resource Management Act 1991 ~~shall~~ demonstrate that the works subject to it are to be developed in a manner that achieves the objectives of the Integrated Design Management Plan. Outline plans shall contain a detailed landscape design plan including planting and maintenance plans to achieve objectives (a) and (b) of the Integrated Design Management Plan on an on-going basis. Each outline plan shall also contain details of buildings, signage, parking, and other built infrastructure to demonstrate how objectives (c) and (d) of the Integrated Design Management Plan are to be achieved. Each outline plan shall be accompanied by a report from a suitably qualified and experienced landscape architect addressing how the outline plan achieves the objectives of the Integrated Design Management Plan.

[4] The requiring authority may seek the approval of the territorial authority to make any necessary amendment to the Integrated Design Management Plan, without an application under the Resource Management Act 1991 to make such a change, provided that such amendments do not result in changing the purpose, or derogating 0from the purpose and the objectives of the Integrated Design Management Plan set out in condition [1].~~without an explicit application to make such a~~ change.

[5] If a review of the Integrated Design Management Plan is undertaken by the requiring authority then that review shall be undertaken in consultation with the consent authority.

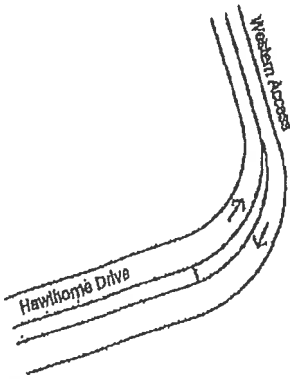


Figure 1

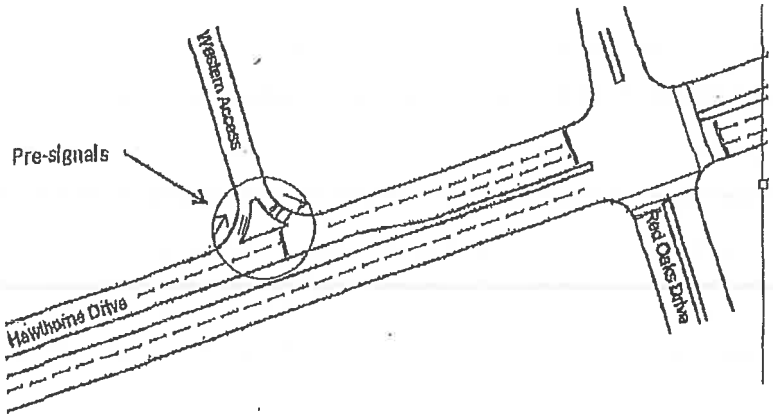
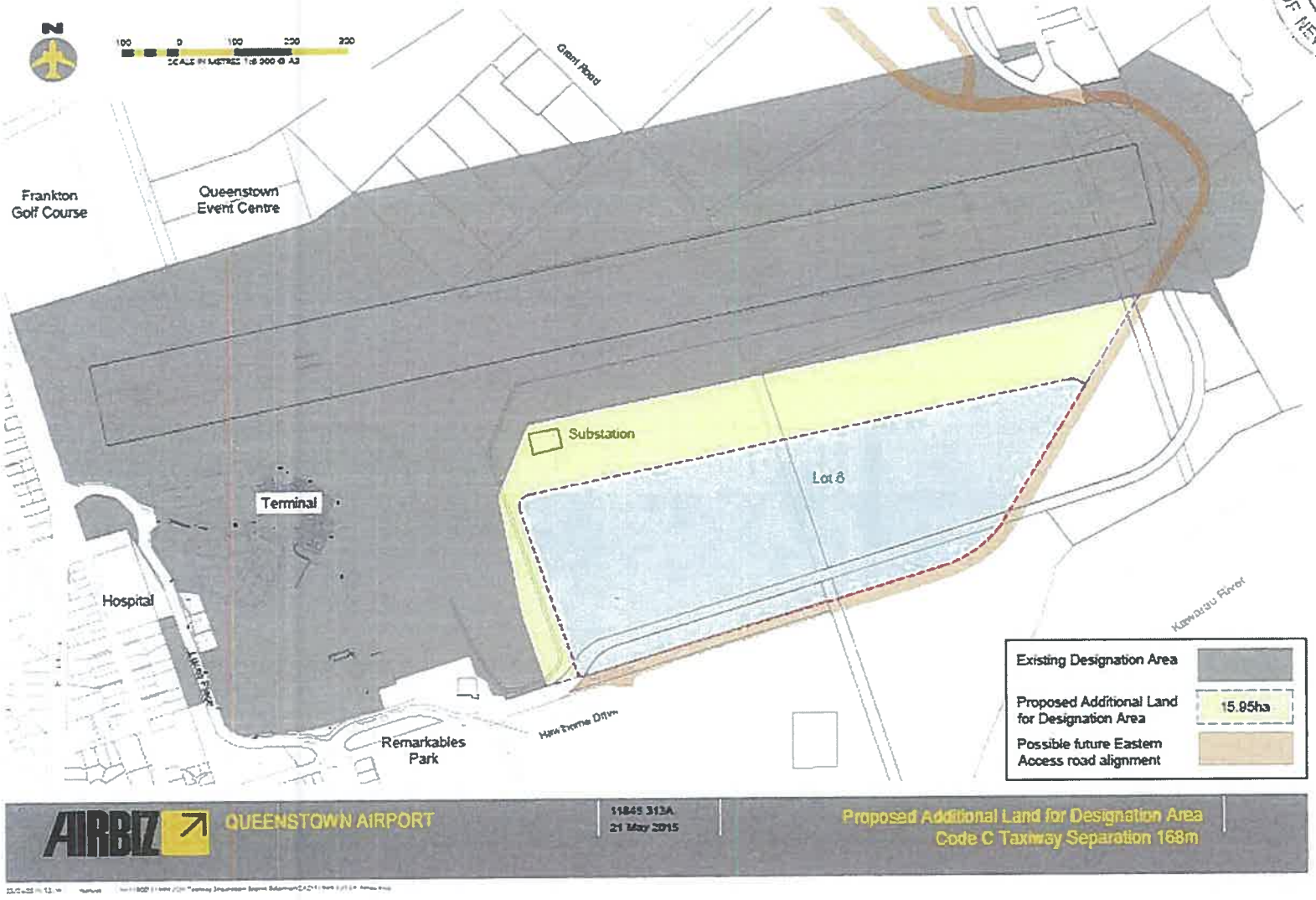


Figure 2

Traffic Management Conditions



Annexure B