

<b>IN THE MATTER OF</b>	The Resource Management Act 1991
<b>AND</b>	
<b>IN THE MATTER OF</b>	a Board of Inquiry appointed under s149J of The Resource Management Act 1991 to consider notices of requirement and applications for resource consent made by the New Zealand Transport Agency in relation to the East West Link roading proposal in Auckland
<b>SUBMITTER</b>	Ngāti Whātua Orākei Trust

**SUMMARY OF EVIDENCE OF ANDREW RODERICK BROWN  
ON BEHALF OF NGĀTI WHĀTUA ORĀKEI**

**PLANNING**

## 1 Corrections to evidence

- 1.1 In my Evidence in Chief (EiC) I considered the parts (a)-(c) of New Zealand Coastal Policy Statement (NZCPS) Policy 10 to be alternatives. They are in fact cumulative. This does not affect my conclusions.

## 2 Key policy conclusions

- 2.1 In EiC I conclude that the proposal is contrary to key policies of the NZCPS regarding reclamation (Policy 10) and Indigenous Biological Diversity (Policy 11). I further conclude that these breaches of key directive NZCPS policies are so significant that they warrant refusal of resource consent.
- 2.2 For the avoidance of doubt, this conclusion is based on a holistic reading of the NZCPS (i.e. reading the policy statement "as a whole"). I do not consider that the weight of enabling provisions is sufficient to counter the direction of Policies 10 and 11.
- 2.3 I based my detailed assessment on the NZCPS rather than the Auckland Unitary Plan (AUP) because:
- a) The provisions of the AUP must give effect to the NZCPS and thus be broadly similar in effect;
  - b) The AUP at time of writing my EiC the AUP was subject to a degree of uncertainty regarding the Coastal Plan provisions (being subject to appeal);
  - c) The NZCPS was therefore a more reliable source of policy direction at the time;
  - d) I largely adopted the assessment of Ms Coombes in relation to the Regional Coastal plan provisions (other than her conclusions);
  - e) I am aware that the NZCPS is not relevant to the s104 RMA test and that there are other considerations that must be addressed under s104 RMA.

### **S104D(1)(b)**

- 2.4 A key issue arising at the hearing is whether the proposal can pass the "second gateway" test of RMA s104(b)(2) - *the application is for an activity that will not be contrary to the objectives and policies of ... the relevant plan,...*
- 2.5 I conclude in EiC that the proposal fails this test. I did not present a detailed analysis against the AUP at the time for the reasons outlined above (para 2.3).
- 2.6 In light of the revised (post-appeal) Coastal Plan provisions of the AUP, salient matters are as follows.

2.7 AUP General Rule **C1.5(2)** states:

*Where different activities within a proposal are subject to different parts (regional, coastal or district) of the Plan, each activity will be assessed in terms of the objectives and policies which are relevant to that activity.*

2.8 In considering the reclamation activities of the proposal it is common ground that the provisions of the AUP Coastal - General Coastal Marine Zone (F2) are key considerations. It is these provisions that give primary direction to coastal decisions.

2.9 In terms of the approach to interpretation I consider that Rule C1.5(2) gives clear direction- i.e. the plan must be read as a whole to the *extent that policies are relevant to the subject proposal*.

2.10 In my view, in considering, for example, Policy F2.2.3(3), which provides (*inter alia*) for reclamation **necessary** to enable the construction and/or efficient operation of infrastructure, it is appropriate to draw on the enabling AUP provisions relating to such infrastructure - otherwise, how is the necessity to be gauged? In this way, the broader provisions of the AUP are relevant in so far as they enable a proper consideration of the core coastal provisions.

2.11 Considerable attention has been given to the interplay between AUP policies **F2.2.3(1)** and **F2.2.3(3)**.

2.12 F2.2.3(1) states:

*(1) Avoid reclamation and drainage in the coastal marine area except where all of the following apply:*

*(a) the reclamation will provide significant regional or national benefit;*

*(b) there are no practicable alternative ways of providing for the activity, including locating it on land outside the coastal marine area;*

*(c) efficient use will be made of the coastal marine area by using the minimum area necessary to provide for the proposed use, or to enable drainage.*

2.13 F2.2.3(3) states:

*Provide for reclamation and works that are necessary to carry out any of the following:*

*(a) maintain or repair a reclamation;*

*(b) enable the repair and upgrade of existing reclamations and seawalls, by way of minor reclamation;*

*(c) carry out rehabilitation or remedial works;*

*(d) maintain or enhance public access or linkages with public open space to, within or adjacent to the coastal marine area;*

*(e) enable the construction and/or efficient operation of infrastructure, including but not limited to, ports, airports, roads, pipelines, electricity transmission, railways, ferry terminals, and electricity generation; or*

*(f) create or enhance habitat for indigenous species where degraded areas of the coastal environment require restoration or rehabilitation.*

2.14 There is an apparent tension between these policies in that F2.2.3 (1) is proscriptive ("avoid"...) whilst F2.2.3 (3) is enabling ("provide for"..). Two alternative approaches have been suggested – in summary:

- a) F2.2.3 (1) is a stronger direction and should be preferred, possibly as a "gateway" to F2.2.3 (3);
- b) F2.2.3 (1) and F2.2.3 (3) are equally directive and should be considered together in the round.

2.15 I suggest a third approach as being more appropriate – the construct is as follows:

- i. F2.2.3(1) requires **avoidance** unless three very specific tests can be met – this is a negative direction.
- ii. F2.2.3 (3) requires **provision...where necessary** – this is a positive direction.
- iii. The key phrase in F2.2.3 (3) is "*where necessary*" – the effect of this is that the directions of F2.2.3(1) and F2.2.3 (3) arrive at the same point from opposite sides of the proposition – i.e. *reclamation should be avoided unless there is an over-riding need*.

2.16 In the current case, the need for improved east-west connectivity is generally agreed. The key question is whether there is an over-riding need (necessity) for a new road to be located in the Coastal Marine Area by way of extensive reclamation. Policy F2.2.3(1) provides the tests.

2.17 These matters are covered in depth in the Memorandum of Counsel and Planner for the Board of Inquiry, 9 June 2017 (*the Memorandum*) in particular in paragraphs 58-71. My observations on this analysis are as follows:

- a) **Will the reclamation provide significant national or regional benefit?** - I concur with the conclusions of *the Memorandum* – there is a benefit (in transport terms);

- b) **No practicable alternative** – I agree with observation in *the Memorandum* that the consideration of what is a "practicable" alternative is key. *The Memorandum* concludes that, " *The applicant's case is considered robust on this matter, **provided the Board is satisfied that the emphasis and weighting of transportation outcomes justify a location within and reclamation of the CMA.***" (emphasis added).

This is arguably the key issue before the Board. In my opinion, the optimisation of transportation outcomes has been given undue priority over directive environmental policies regarding avoidance of reclamation and significant ecological impacts, policies which originate in the NZCPS and are duly expressed in the AUP. It seems clear that NZTA have favoured the coastal route option in pursuit of optimal transport performance at the expense of environmental impact, particularly in terms of an "enduring" transport outcome.

I conclude that the proposal is contrary to this limb of F2.2.3(1)

- c) **Using the minimum area necessary to provide for the proposed use.** – I concur with the assessment of *the Memorandum* that the proposal uses more than the minimum necessary. It can therefore be considered contrary to this limb of the policy.

### **Biodiversity and Significant Ecological Area (SEA) provisions**

- 2.18 The coastal provisions of the AUP have been amended in light of the High Court appeal of the Royal Forest and Bird Protection Society<sup>1</sup>. Policy F2.2.3(2) now states:

*Where reclamation or drainage is proposed that affects an overlay, manage the effects in accordance with the overlay provisions*

- 2.19 In the current case, AUP D9.3 – Significant Ecological Area Overlay applies. These provisions have been strengthened to give effect to the NZCPS.

- 2.20 Ms Coombes notes in her Summary of Evidence, para 5.14 that:

*The proposal is contrary to the biodiversity policy requirement to avoid activities that will have 'more than minor adverse effects on threatened or at risk species' or 'any regular or sustained disturbance of migratory bird roosting, nesting and feeding area that is likely to noticeably reduce the level of use of an area for these purposes'*

Whilst also noting:

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<sup>1</sup> [2017] NZHC 9880

*...the Unitary Plan also recognises that it is not always possible to locate and design infrastructure to avoid SEAs or areas with indigenous biodiversity values.'*

- 2.21 I observe that the restrictive policies D9.3(1) and (by reference) D9.3(9) and (10) are cast in the strongest terms of avoidance, whilst the exception is presented in less directive terms of "managing" and "recognising". Again, I consider that the more directive policies carry greater weight. Reclamation within the footprint of the SEAs is to be managed in accordance with the avoidance requirements of the biodiversity regime.

#### **s104D conclusion**

- 2.22 Taken as a whole, consideration of the AUP coastal provisions for reclamation and biodiversity reinforces the conclusions that I drew in my EiC in relation to the NZCPS – specifically that the proposal does not comply with key directive provisions (A Brown, EiC paragraph 3.30).

- 2.23 I therefore restate my conclusion that the proposal does not pass the test of RMA s104D(1)(b).

- 2.24 This conclusion is based on a reading of the AUP "as a whole". Enabling provisions (such as those found in E26 Infrastructure) are not sufficient in this instance to outweigh the strong presumption against reclamation and the associated significant adverse ecological effects in the subject area.

- 2.25 This is consistent with the approach taken in *Akaroa Civic Trust v Christchurch City Council*, as reported in the Memorandum of Counsel and Planner for the Board of Inquiry (paragraph 36). The extract concludes:

*The usual position is that there are sets of objectives and policies either way, and only if there is an important set to which the application is contrary can the local authority rightly conclude that the second gateway is not passed.*

I consider that this is the applicable situation regarding the coastal policy provisions of the AUP, in particular F2.2.3 (1)-(3).

### **3 Uncertainties**

- 3.1 None of the areas of uncertainty identified in my EiC (4.5) have been resolved.
- 3.2 Of particular concern is the outstanding tension regarding the size of reclamation – with ecology and coastal process consideration driving a desire to minimise the footprint vs. landscape and urban design matters indicating the current proposed extent.

- 3.3 This matters appears intractable - any move towards one side results in increased adverse effects on the other. At the extreme, ecological considerations would drive a reduction in area to the bare minimum required for the road and immediate mitigation – yet it is common ground that the road by itself would be unlikely to gain approval in this location<sup>2</sup>. It cannot be appropriate to leave such a critical matter to "detailed design" and delegated authorisation (by Council officer). To do so would subjugate the consenting process.

#### **4 Newbury principle (nexus)**

- 4.1 My observations regarding the lack of direct linkage between the adverse effects of the road and the purported "mitigation" by way of remedial stormwater treatment for the 611ha hinterland are reinforced by the Memorandum of Counsel and Planner for the Board of Inquiry, which concludes (para 71), after some consideration of this matter:

*The applicant has pointed to the positive effects that would result from the proposed stormwater wetlands (and treatment of surrounding catchment) and landscape features but this becomes a somewhat circular argument when the positive benefits of stormwater and landscape outcomes are used to offset the adverse effects of a significantly larger reclamation that is reasonably needed for efficient use of the CMA. It is also noted that these landscape and wetland features come at the environmental cost of existing habitat for wader birds which form part of the existing wider SEA values for the Manukau Harbour.*

#### **5 Summary of Conclusions**

- 5.1 The proposal fails the s104D(1)(b) test.
- 5.2 Should the Board disagree, then the proposal should to be refused under s104 for the reasons outlined above and in my EiC.

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<sup>2</sup> See, for example, Rickard in reply to cross-exam day 19: "35...in my view the road on its own would probably be a very difficult thing to consent without that additional mitigation around it. It's something that I explained quite a lot on Tuesday. In my view, it's really important not to artificially separate out the road and the rest of the reclamation."