

**BEFORE A BOARD OF INQUIRY
NORTHERN CORRIDOR IMPROVEMENTS PROPOSAL**

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a Board of Inquiry appointed under s149J of the RMA to consider notices of requirement and resource consent applications by the New Zealand Transport Agency for the Northern Corridor Improvements Proposal

**CLOSING LEGAL SUBMISSIONS ON BEHALF OF
KIWI SELF STORAGE LIMITED**

DATED 11 AUGUST 2017

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MAY IT PLEASE THE BOARD OF INQUIRY:

INTRODUCTION

1. These legal submissions supplement the opening legal submissions and evidence for Kiwi Self Storage Limited (**Kiwi**). They respond to key issues raised during the hearing of the Northern Corridor Improvements Project (**Project**) on 18 July to 11 August 2017 in respect of Kiwi's self-storage facility located at 12 Holder Place, Albany (**Facility** or **Site**).
2. Overall, Kiwi seeks that the Board of Inquiry cancels in part and / or modifies the notices of requirement sought by NZTA to avoid or at least mitigate the significant impacts of the proposed extension to the Northern Busway to Albany (**busway**) and shared use walking and cycling path (**SUP**) adjacent to Kiwi's Site. The best and most efficient way to mitigate these impacts is to ensure that the busway and SUP are at a lower relative level (**RL**) adjacent to the Kiwi Site compared to the NZTA lodged design.

SCOPE OF LEGAL SUBMISSIONS

3. These submissions address the following key issues:
 - (a) The obligation on NZTA to consider and address the effects of the Project on Kiwi;
 - (b) The purpose built nature of the Kiwi Facility;
 - (c) Kiwi's approach to the Project;
 - (d) The significance of the effects of the Project on Kiwi;
 - (e) The feasibility of Kiwi's proposed solutions to mitigate the effects;
 - (f) Conditions to incorporate Kiwi's proposed solution into the Project;
 - (g) The benefits of Kiwi's proposed solution.

SUBMISSIONS ON KEY ISSUES

4. The following submissions address the key issues identified above.

NZTA is obliged to consider and address the effects of the Project on Kiwi

5. NTZA does not have all necessary interests in land sufficient to undertake the Project. The Project will permanently require a strip of land along the western boundary of Kiwi's Site (an area of approximately 55m²) and during construction an additional 1m strip of land will be required (an area of approximately 53m²). It will also require interests in other private land.
6. NZTA is obliged to consider the environmental effects of the Project. As the Project will require part of Kiwi's Site, and it will have significant adverse effects on Kiwi, NZTA must also give adequate consideration to alternative sites, routes and methods of undertaking the work, which could potentially mitigate the effects of the Project on Kiwi. Section 171 of the Resource Management Act 1991 (**RMA**) clearly requires the decision making body, in this case the Board of Inquiry, to consider whether NZTA has discharged this obligation.

Kiwi's Facility is purpose built along the frontage of State Highway 1

7. The Kiwi Site is a critical site for Kiwi's self-storage business. It is prominently located along the frontage of State Highway 1 (**SH1**) and has high visibility to traffic flows in both directions, particularly south-bound traffic. The Facility was purpose-built at this location and designed to be as visible as possible to passing traffic to market the business and enhance brand awareness. This is recognised in the design of the Facility with its frontage facing SH1. This SH1 frontage of the Facility is critical for the Kiwi business as the Kiwi Site is down a right-of-way off Holder Place, a no exit street, and has no other street presence.

Kiwi's approach to the Project has been to find solutions that will mitigate the effects of the Project on its business

8. Kiwi has approached the Project by trying to find solutions that will mitigate its impact on the Kiwi Facility. In proposing solutions, Kiwi has been cognisant of meeting NZTA's requirements for the Project while also seeking to mitigate the effects of the Project on Kiwi as far as reasonably practicable. The solutions proposed by Kiwi include:

- (a) A private agreement with NZTA that addresses its site specific concerns about construction-related effects, the impact of encroachment into the Facility on vehicle circulation, and ensuring that the fence for the SUP is constructed of a material that does not impede visibility of the Kiwi Facility; and
 - (b) Two proposed alternative designs for the busway and SUP that will reduce their height, reducing the blocking effect of the structures on views to the Facility from SH1.
- 9. While NZTA has engaged with Kiwi in respect of the agreement addressing Kiwi's site specific concerns, NZTA and its expert team have been adamant that they are not willing to assess the Kiwi alternative designs at this stage. They have also not appreciated the benefits of the design to Kiwi and the Project as a whole.

The Project will have significant adverse effects on Kiwi

- 10. The Project in the form of the NZTA lodged design will have significant adverse effects on Kiwi:
 - (a) The blocking effect of the proposed busway and SUP to the Kiwi Site will impact on Kiwi's business operations, customer uptake and brand awareness, resulting in significant business loss:
 - (i) The nature of Kiwi's business means that it has a high customer turnover rate. Kiwi needs to consistently find and attract new customers.
 - (ii) As Kiwi's evidence has demonstrated, from a marketing and branding perspective, a self-storage business is best communicated visually. The visibility of the Kiwi Facility from SH1 is therefore vitally important to attracting new customers to Kiwi's business. This is why the Kiwi Facility was purpose built in its current location, fronting SH1. It is the visibility and public recognition of the buildings as a self-storage facility and not just the signage that is important.

- (iii) Information collected by Kiwi confirms the importance of the visibility of the Facility from SH1. For the year ended 31 March 2017 19% of all new enquiries and 26% of all new sales at the Facility were from “drive-bys (which is consistent with the 2016 financial year).¹ These “drive-bys” can only be as a result of visibility from SH1 due to the lack of any visual presence of the Facility from any other street frontage. The blocking effect of the busway and SUP will directly affect the ability to attract new business, which combined with the high turnover and need to find 14 new customers a week has a compounding impact. The blocking effect will also detract from Kiwi’s brand as a whole, which will have flow-on impacts for customers obtained through other channels and for its other facilities in New Zealand.
 - (iv) Mr Doyle’s evidence is that the Project will reduce Kiwi’s occupancy by approximately 10% as it will no longer be an exceptional site, and advertising costs will increase. Mr Fraser confirmed that sales from other channels, such as the internet, are more price sensitive, and therefore prices will also be reduced.² Mr Doyle considered that the Facility would become less desirable, with secondary locational characteristics, with lower investment yield. As the Kiwi Facility was purchased at a premium due to its exceptional location the loss of this visibility has a significant economic effect.
 - (v) NZTA has not presented any evidence that challenges the significance of the adverse economic effects of the Project on the Kiwi Facility.
- (b) The high retaining walls on the Kiwi Site that will support the SUP will significantly affect the amenity of the Kiwi Facility. As demonstrated in the visual simulations appended to Mr Land’s summary evidence, the busway and SUP will be supported by a retaining wall with a height of 5.7m rising to 9.1m (from the northern to the southern boundary of the

¹ Evidence of Messrs Fraser and Trautvetter at [6.14].

² Summary Evidence of Mr Stephen Doyle at [5(b)].

Kiwi Site).³ The retaining wall will be located only 7 metres from the western façade of the buildings on Kiwi's Site. The shear height of the retaining wall and its close proximity to the buildings on the Kiwi Site will significantly impact on the amenity of the entire length of the western boundary.

(c) In addition to concerns about amenity, the encroachment of the Project onto the Site and the construction of the Project also raises a range of other site-specific issues for Kiwi. This includes safety concerns for customers and their goods due to the lack of visibility and loss of current openness of the Site. It is critical for a self storage business that customers perceive the site as being safe and secure. It is also important as some customers access the Facility on a 24-hour basis.

11. These effects will not only affect Kiwi's existing and future business operations and economic performance but they significantly detract from the high level of investment in the Facility. The existing investment of the Kiwi Facility is an existing use that must be recognised as a physical resource under s 5(2)(a) of the RMA.
12. There is a requirement under the RMA to consider the impacts of these effects on Kiwi, and in this forum to address how the effects can be mitigated to give effect to Part 2 of the RMA.

Kiwi has proposed two alternative design options to mitigate the impacts on its business

13. Kiwi has proposed alternative designs for the busway and SUP that will reduce their height, reducing the blocking effect of the structures on views to the Facility from SH1:
 - (a) The first alternative design reduces the clearance of the Constellation Drive bridge from 6.1m to 5.6m while keeping the busway and SUP gradient at 5% (**Solution 1**).

³ Summary Evidence of Mr Geoffrey Land, Appendix A, Drawing A10a.

- (b) The second alternative is to reduce the clearance of the Constellation Drive bridge from 6.1m to 5.6m and increase the gradient on the busway and SUP to 5.34% (**Solution 2**).
- 14. The Kiwi solutions propose changes to the vertical alignment of the busway and SUP for a discrete section of these structures and effectively ‘tie into’ the existing alignment, and therefore do not require any other changes outside the area of interest to Kiwi.
- 15. NZTA has acknowledged in its opening legal submissions that Kiwi’s solutions constitute “alternative design options”. Kiwi’s alternative design options, being Solution 1 and Solution 2, could be considered either an alternative route or an alternative method of undertaking the Project works under section 171 of the RMA:
 - (a) The terms “route” and “method” are not defined in the RMA and we have not identified any case law authorities that provide a definition.
 - (b) The dictionary definition of the term “route” is “a way or course taken in moving from a starting point to a destination; a regular line of travel or passage” and the dictionary definition of the term “method” is “a way of doing anything, esp[ecially] according to a defined and regular plan”.⁴
 - (c) In light of these definitions, Kiwi’s alternative design solutions could be considered an alternative “route” in that they involve a change to the vertical alignment and gradient of the busway and SUP, or an alternative “method” in that they are an alternative way of giving effect to the purpose and aims of the Project.

No issues have been identified that should prevent Kiwi’s alternative design solutions from being implemented

- 16. No issues have been identified that should prevent Kiwi’s alternative design solutions from being implemented.
- 17. In respect of Solution 1:

⁴ Oxford English Dictionary, “route” and “method” (Oxford University Press, 2017) <<http://www.oed.com>>.

- (a) Only clearance distance over Constellation Drive will be reduced. The maximum gradient of the busway and SUP adjacent to the Kiwi site will not change – it will remain at 5%.
- (b) The length of the busway and SUP at a 5% gradient will reduce from 303m to 228m.
- (c) In expert conferencing and during questioning at the hearing on 19 July 2017 it was confirmed that a reduction in the bridge height to 5.6m would be acceptable.⁵
- (d) Ms King agreed during questioning at the hearing on 9 August 2017 that the Kiwi Solution 1 is a better design for the SUP than that which has been lodged by NZTA.
- (e) It is clear that Kiwi Solution 1 achieves the objectives of NZTA (by reducing the length of gradient at 5%) and substantially mitigates the adverse effects on the Kiwi Facility.

18. In respect of Solution 2:

- (a) The clearance distance over Constellation Drive will be reduced and the maximum gradient of the busway and SUP adjacent to the Kiwi Site will change by only 0.35% from 5% to 5.34%.
- (b) The increase in gradient is only a rise of 1m over a distance of 300m.
- (c) The length of the gradient at 5.34% is only over a distance of 158m. As confirmed by Mr Hall during re-examination, when you have two fixed points, increasing the gradient in one section will result in a decrease in gradient in the balance of the section.
- (d) The change to the gradient over 5% will require assessment under two transportation design guides for busways and SUPs.⁶ As demonstrated by Mr Moore during questioning at the hearing on 19 July, the process

⁵ Joint Witness Statement: Transport and Traffic – Site specific impacts dated 23 June 2017, p 6; Moore Transcript of proceedings on 19 July 2017, p 154.

⁶ AUSTROADS Guide to Road Design Part 6A (section 5.4.3) and the Busway and Design Manual (section 4.4.2a(i)).

for approving a deviation from these guidelines is relatively simple, taking 3-4 weeks, and involving internal approval processes by NZTA and AT (and potentially some input from an external consultant).⁷

- (e) In its legal submissions, NZTA indicated that the reason that it has refused to consider Kiwi's Solution 2 by way of the deviation process is primarily one of safety. However, NZTA has not produced any evidence on the safety implications of Kiwi's Solution 2. Further, Mr Moore advised in questioning at the hearing on 19 July 2017 that the main reason that NZTA refuses to consider Solution 2 by way of the deviation process is not one of safety but because there are too many other parameters in the design of the structures that could be affected by the process. Mr Moore advised that locking in a gradient now may limit the ability to change these parameters or optimise them through the detailed design process.⁸ Mr Hall has confirmed that Kiwi Solution 1 and 2 both tie into the NZTA lodgement design. Mr Hall also described how the conditions proposed by Kiwi setting a maximum bridge clearance and a maximum single point RL level for the busway and SUP deck adjacent to the Kiwi Facility will enable flexibility during the detailed design process.
- (f) Mr Moore also advised during questioning that NZTA takes issue with the increase in gradient in respect of the busway as it will impact on the speed (performance) of double-decker buses.⁹ In response to questioning, Mr Maule also indicated that fully loaded buses coming out of Sunnynook station suffer some speed (performance) reduction when moving into a gradient of 5.34%.¹⁰ Mr Hall has presented evidence that there are a number of important distinctions to be made between the rise adjacent to the Kiwi Site and the existing Sunnynook rise.¹¹ Mr Hall has also advised that a gradient of 5.34% adjacent to the Kiwi site will

⁷ Transcript of proceedings on 19 July 2017, p 154.

⁸ Transcript of proceedings on 19 July 2017, p 160.

⁹ Transcript of proceedings on 19 July 2017, p 154-157.

¹⁰ Transcript of proceedings on 20 July 2017, p 308.

¹¹ Summary of Evidence of Mr Hall at [2(i)].

not require vehicles of any higher specification to be able to navigate the gradient and that the negligible increase in gradient of the busway over the distance proposed by Solution 2 will not result in a measurable change on the busway performance.¹²

- (g) During questioning at the hearing on 9 August 2017, Ms King advised that she considers the increase in gradient of the SUP to be a small difference and a gradient of around 5% in the relevant location cannot be avoided. She agreed that as Solution 2 will only exceed the guideline gradient by 0.34% it is possible that it would proceed through the deviation process without any additional safety mitigation being required (above those already proposed).

Kiwi's alternative design solutions can be incorporated into the Project through the conditions of the designation

19. It is not appropriate having regard to the effects on Kiwi to defer consideration of Kiwi Solutions 1 and 2 to the detailed design phase. Deferring these matters to the detailed design phase does not provide Kiwi with any certainty about the final impact of the Project on its Facility, or whether the adverse effects will be adequately mitigated. It also does not assist the Board in its analysis of the effects of the Project.
20. Kiwi seeks that additional conditions are imposed on the notice of requirement for the Project to ensure that the busway and SUP are at an appropriate height adjacent to the Kiwi Site to maintain sufficient visibility to the Kiwi buildings. The proposed conditions are attached as **Appendix A** and would allow Kiwi's Solution 1, or preferably Solution 2, to be incorporated into the final design.
21. Kiwi's proposed conditions refer to "relative levels". These levels were calculated by taking the RL of the roof of Kiwi building B (RL 52.3m) minus the distance to the alignment of the busway and SUP for Kiwi Solution 1 (blue line at 2.6m) and Kiwi Solution 2 (red line at 3m) to give **RL** of 49.7 and 49.3.
22. The conditions have been drafted with only one RL point as a maximum will provide NZTA with flexibility when it comes to the detailed design stage of the

¹² Summary of Evidence of Mr Hall at [2(k)] and [2(l)].

Project. NZTA will have the ability to change the height of the busway and SUP adjacent to the Kiwi Site, as well as the clearance of the Constellation Drive bridge (noting that the SH1 clearance is 5.3m), to below the levels specified in the conditions. NZTA can also adjust the design, including increasing the height of the SUP and busway, either side of the RL levels.

There are considerable benefits associated with Kiwi's alternative design solutions

23. There are significant benefits to be gained by accepting Kiwi's alternative design solutions:

- (a) Both solutions will reduce the blocking effect of the busway and SUP on views from SH1 to the Kiwi Facility, mitigating the business loss impacts. Solution 2 provides better mitigation in this regard than Solution 1 – it will allow drivers on SH1 to see more of the Kiwi buildings, including the storage units within the glazed mezzanine section of Kiwi's northern building. Identification of the Facility as a storage facility by showing storage units is a key marketing feature.
- (b) There will be significant cost savings if Kiwi's solutions are incorporated into the design of the Project. In response to questioning at the hearing on 19 July 2017, Mr Moore advised that NZTA has estimated a cost difference between the lodged design and Kiwi's Solution 2 in the region of \$1 to \$1.5 million.¹³ It is expected that a similar figure would apply to Kiwi Solution 2.
- (c) Incorporating the conditions sought by Kiwi into the notice of requirement will be consistent with:
 - (i) The wording of NZTA's Revision 3 of the Urban Design Landscape Framework (**UDLF**). Part 5 of the UDLF (attached as **Appendix B**) notes in the 'Outcomes Sought' that the proposal design shall "Provide visibility to existing commercial and industrial landholdings between the Rosedale Wastewater Treatment Ponds and Albany park and ride, and to **Kiwi Self**

¹³ Transcript of proceedings on 19 July 2017, p 153.

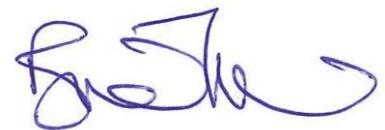
Storage, which are currently seen from the highway (noting commercial benefits)” (**emphasis added**). This recognises that the visibility to commercial properties from SH1 is important for these businesses and shall be maintained in the design outcomes that are sought across the Project.

- (ii) Other conditions proposed by NZTA¹⁴ for the notice of requirement, such as condition UDL. 4, which requires the outcomes of Part 5 of the UDLF to be given effect to through the urban design and landscape treatment of all major structures.

CONCLUSION

- 24. In conclusion, the evidence presented by Kiwi strongly supports the inclusion of the conditions sought by Kiwi into the notice of requirement to give effect to Kiwi’s alternative design for the busway and SUP, and this has not been effectively challenged by the evidence of NZTA and AT. The conditions sought by Kiwi will assist in mitigating the significant adverse effects on the Kiwi Facility caused by the Project and the movement of the motorway onto part of its Site. The incorporation of Kiwi’s alternative design into the Project is also likely to have wider benefits for the Project, including significant costs savings and consistency with the UDLF.

DATED this 11th day of August 2017



Bianca Tree
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Limited**

¹⁴ Supplementary statement of evidence of Mr McGahan, Annexure A.

Appendix A

Conditions sought to be imposed on the notice of requirement and resource consents for the NCI Project

1. New conditions on the notice of requirement to provide for Kiwi Solution 1, with a maximum bridge clearance of 5.6m while retaining a gradient of 5%:
 - (a) The Requiring Authority shall design and construct the Project to ensure that the clearance of the bridge over Constellation Drive for the busway and shared use path is a maximum of 5.6 metres.
 - (b) The Requiring Authority shall design and construct the Project to ensure that the height of the deck of the busway and shared use path at the point directly adjacent to the north west corner of Building B (chainage 3740, [plan reference]) on the Kiwi Self Storage Site at 12 Holder Place, shall be no greater than 49.713 relative level and that the busway barrier be no higher than the standard 1.1m.

2. In the alternative to 1 above, and preferred, new conditions on the notice of requirement to provide for Kiwi Solution 2, of providing a maximum bridge clearance of 5.6m while slightly increasing the gradient of the busway and SUP to 5.34%:
 - (a) The Requiring Authority shall design and construct the Project to ensure that the clearance of the bridge over Constellation Drive for the busway and shared use path is a maximum of 5.6 metres.
 - (b) The Requiring Authority shall design and construct the Project to ensure that the height of the deck of the busway and shared use path at the point directly adjacent to the north west corner of Building B (chainage 3740, [plan reference]) on the Kiwi Self Storage Site at 12 Holder Place, shall be no greater than 49.30 relative level and that the busway barrier be no higher than the standard 1.1m.

Appendix B

Chapter 5, section 5.1 of Revision 3 of the Urban Design Landscape Framework

5 OUTCOMES SOUGHT

The following section outlines the general and specific design outcomes that are sought across the Project. These are informed by the context of the site and the guiding principles outlined in the previous sections of this document. They also derive from the specific interpretation of Bridging the Gap and the Landscape Guidelines, and reflect the stakeholder and community engagement that has taken place during the advancement of the Project.

Critically, the anticipated design outcomes also set out the mitigation requirements recommended in the Assessment of Landscape and Visual Effects lodged as part of the Assessment of Effects of the Project.

This section starts by providing anticipated higher level Project outcomes before identifying specific areas that will warrant greater scrutiny throughout the detailed design process.

5.1. General Urban Design Outcomes Sought

- Provide a cohesive and unifying design that limits visual clutter while responding to elements of the context, to create a sense of place and location along the corridor;
- Reinterpret existing design elements to create consistency/coherence with existing elements, and avoid introducing additional elements that may create a non-cohesive/cluttered landscape;
- Design the Project elements to recognize local identity and contribute to the overall amenity and not become outstanding features in their own right;
- Identify design opportunities along the corridor, for example, connect the landscape at either edge of the Project or create identity through planting/landscaping;
- Optimize whole of life value, for example, using extensive areas of low maintenance native planting instead of large grassed areas, or avoiding high maintenance treatments for areas with difficult access for maintenance staff/ machinery;
- Improve and enhance the existing landscape within the corridor to address environmental and social aspects (including water quality, local ecology, biosecurity, noise effects, air pollution and capture of particulates);
- Use CPTED to address and avoid problems related to the corridor user's safety (including graffiti, theft, access off the highway to private property);
- Celebrate important views, particularly those to the city and from the Rosedale Wastewater Treatment Ponds portion of the Project;
- Provide visibility to existing commercial and industrial landholdings between the Rosedale Wastewater Treatment Ponds and Albany Park and ride, and to Kiwi Self Storage, which are currently seen from the highway (noting commercial benefits);
- Enhance connectivity along and across the Project with appropriate and appealing environments to encourage walking and cycling (particularly around Constellation Bus Station);
- Co-ordinate and integrate as much as possible the proposed structures with existing structures in the wider corridor to be understood as a family of related structures; and
- Develop all landscape treatments boundary to boundary of the final corridor space to deliver whole of life value for maintenance, biosecurity and biodiversity outcomes.



Mass native planting to reduce maintenance and decrease whole of life costs

