

BOARD OF INQUIRY

Northern Corridor
Improvements Proposal

TRANSCRIPT OF PROCEEDINGS

BOARD OF INQUIRY

Northern Corridor Improvements proposal

Hearing held at: QBE STADIUM, Stadium Drive, Albany, Auckland

on 14 August 2017

BOARD OF INQUIRY:

Judge Melanie Harland (Chair)

Mr Conway Stewart (Member)

Mr Nigel Mark-Brown (Member)

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~Day 10, 14 August 2017 (9.02 am)

JUDGE HARLAND: Good morning.

5 So, I hope that Ms McIndoe you've got the message regarding Mr Clark just to take his time and there's no problem accommodating that?

MS MCINDOE: I understand he will be here about 10 o'clock.

JUDGE HARLAND: So, I think we're starting with you are we Mr Berry

~Closing Submissions from Counsel to Assist the Board (9.03 am)

10 MR BERRY: Yes, Your Honour, I'm here today with Ms Vella as co-counsel and just before we commence Your Honour we were figuring that you probably don't need both of us -- I think it's important for counsel assisting to be here for the Applicant's closing. But if you require assistance following today, I will be in France.

15 JUDGE HARLAND: I don't think we will, no disrespect, but I think we're actually okay.

MR BERRY: Okay, I thought nevertheless we'd be happy for Ms Vella -- if I could be excused after our closing; if the Board will like us to be present we can or else we could vacate, so you might want to think about that.

JUDGE HARLAND: Well I'm not sure that you do need to be here. I'm pretty relaxed
20 about that, if you feel that to fulfill your obligations at least one of you needs to remain for the Applicant's closing that's just fine.

MR BERRY: It would only be if you thought you did require assistance Your Honour, so I think -- with that signal we're happy to --

JUDGE HARLAND: Let's hear what you've got to say, because we don't know what's
25 going to come up in the Applicant's closing, they might hit us with a bombshell that we haven't thought of before and then we think we need you back.

MR BERRY: Your Honour, there won't be any bombshells, as I said very early in the hearing, peace has been breaking out all over the place.

JUDGE HARLAND: Wow, perhaps this is something that could be modeled on a
30 global scale!

MR BERRY: Just to commence, I hope you've got the script that we've handed in. The Board has requested counsel to present closing submissions on a limited number of issues and, I guess, given where we started, the fact that these are within a very narrow compass shows just the progress that has been made over
35 the course of the hearing and beforehand.

Procedural issues relevant to the Waste Management settlement are now resolved, as I understand it so I don't propose to address those.

5 These submissions therefore address the remaining issues the Board has raised with counsel assisting or vice versa given that we raised some issues early on and can report on those.

10 So, we cover conditions, noise and vibration -- conditions generally, and primarily in relation to the management plan issues, and the -- which authorisation does which consent condition attach to and so forth; noise and vibration conditions; the scope of the Board's jurisdiction in relation to the Alexandra underpass, and the scope of the Board's jurisdiction to require mitigation for the closing of the off-ramp. And I'll get Ms Vella to address you on that point.

15 In terms of proposed conditions, we just note that counsel assisting attended meetings with other counsel and planning consultants in relation to conditions on the dates we've set out there.

In addition, various other communications have taken place by telephone or email in what has been a very productive process.

20 Counsel for the Agency helpfully circulated a number of revised versions of the proposed conditions starting on 29 July. We reviewed these and provided further input and then the one that we've all been working off was that of 4 August from Mr McGahan.

25 In our opening we raised a number of issues in relation to the structure and drafting of the conditions proposed that related to management plan conditions; whether there should be a rubric as we call it, obligation, that the Agency has to meet in respect of which management plan and so forth.

Hard and fast requirements -- whether hard and fast requirements including monitoring conditions should be contained in separate conditions or in the management plane itself. And then which conditions should attach to which consents.

30 For the most part, the issues that we raised in our opening have been addressed.

35 In terms of management plan conditions, Mr McGarr raised our concerns with respect to the management plan conditions at the planners' conferencing as, we noted earlier, and as a result the conditions now contain more specific obligations to at least avoid or minimise adverse effects rather than manage the effects of the Project.

The key remaining issue that we saw as being out of step with Wood, and you will recall Wood is the sort of authority on management plan conditions, that Your Honour followed in the Wiri case, contained "hard" -- related to the fact that many management plans conditions themselves
5 contained "hard and fast requirements" that we considered to be more appropriate in a condition in their own right, having said which we also submitted that the obligations contained in those management would likely be enforceable given that the management plan must be certified by the Council and in light of the fact that those conditions would be enforceable we've
10 generally deliberately taken a somewhat light handed approach to seeking amendments to those conditions.

Essentially, if the Board is happy with them. We don't see a problem with it. They're not unusual. And as I think we said in our opening you could probably see them as counsels for perfection from someone who is a bit old
15 fashioned like me.

In terms of the Dust Management Plan, we raised an issue at the conditions workshop with respect to the obligations contained in the Dust Management Plan, because it was not entirely clear to us whether these obligations were intended to be absolute obligations, guidelines or trigger levels
20 for further action.

The Agency now proposes an amendment to that plan to include a new DMP.1A which imposes obligations as hard and fast requirements and we're now satisfied that that addresses that issue.

In terms of which conditions are attached to which consents. The conditions have been restructured in order to relocate various conditions
25 previously attached to the resource consents to the designations as set out in Mr McGahan's evidence. And he now considers that all conditions remaining under resource consents are to address effects generated by the activity authorised by the regional consents.

Counsel for the Council has indicated that Council agrees with the approach proposed by Mr McGahan. Given that Council is now comfortable with the location of the conditions, counsel assisting is satisfied that this issue
30 has now been appropriately addressed.

The Agency has also proposed a "sunset" condition on the designation, which ensures that the conditions which have been imposed to address effects
35 of the construction of the project, as distinct from operational matters, cease to

have effect. We were involved in the development of that condition and we are satisfied that it is appropriate and within the jurisdiction of the Board to impose those.

5 So, those were our hand wringing concerns at the outset that have now all been addressed.

And now the issues raised by the Board:

10 Council noted via email to the EPA that the Board may wish to address the following issues with the Agency's witnesses and counsel: Whether there ought to be a condition requiring monitoring of traffic effects during the construction period, and whether conditions should be imposed requiring amendment to the Project which NZTA has agreed to including additional SUP connections, provision of stairs in addition to the ramp at Rosedale Road and an extension to the existing T2 lane.

15 The Board raised these issues with counsel on 10 August and the EPA forwarded our email to counsel on that day so we address each of those issues below.

We note, and won't read in the opening, some aspects did not have monitoring conditions at all and specified construction traffic effects.

20 We raised the issue with the Agency at the conditions workshop on 27 July and Mr Clark has now provided supplementary evidence on the issue to the effect of that set out in 2.18, and if you're happy Your Honour and members of the Board, I won't read that out to you.

25 Mr Clark's evidence sets out the reasons why he considers that a monitoring condition is not required in relation to the effects identified. In doing so, he distinguishes between the NCI Project and other projects, including Water view, where monitoring of the construction traffic effects was required. In relation to that he concludes that:

30 "While I supported the concept of traffic monitoring in other locations, I consider that the benefit of introducing further monitoring in the NCI conditions will offer limited value. If any condition is to be considered, it should relate to the period of time when right turns are banned between State Highway 18 and Paul Matthews Road".

35 So, obviously the Board will need to assess Mr Clark's evidence in light of the submissions and evidence that it's heard and determine whether in light of that evidence it considers that monitoring of traffic during construction is required.

In our opening submissions we raised a possibility that the Board may wish to "pin down" by way of specific conditions particular aspects of the proposal, for example, where a change in design may result in unacceptable adverse effects, including by way of a requirement to undertake the work in accordance with a particular plan. It may also be appropriate for the Board to "pin down" aspects of the Project which the Agency has agreed to undertake. One such example relates to the Alexandra Underpass. Notwithstanding the finding that the Board ultimately makes with respect to the upgrade required of the underpass, and NZTA has offered to make some improvements to the underpass which were set out there, realignment and lighting and so forth.

And in response to our discussions with the Agency new conditions are proposed by which these improvements will be required by conditions. And there's UDL.13 and 14 just there.

We support the inclusion of these conditions, although submit that UDL.13 could be imposed by providing greater certainty as to the purpose of the path realignment. We have raised this issue with counsel for Agency who have advised that the minimum requirements provide that the realignment to the underpass shall suit a minimum cyclist design speed of 15 kilometres per hour but that the Agency would prefer that the condition be amended as we have set out there.

In our view, this is a sensible and appropriate amendment to the condition.

We raised other issues relating to amendments to the SUP connections, and we understand that some of these amendments will be provided for via side agreement with Auckland Transport and some will be provided in the UDLF and this will be clarified by counsel for the Agency in closing. We are aware of that.

JUDGE HARLAND: And you are aware of the contents of what's proposed to be submitted to us?

MR BERRY: Yes, we've reviewed late drafts of the closings of our friends, which seems a responsible approach, because it could assist you more if we did it that way.

JUDGE HARLAND: That's very helpful, thank you for that counsel.

MR BERRY: AT sought the inclusion of stairs in addition to the ramp at the SUP connection at Rosedale and NZTA agreed to that solution and suggested that be included at detailed design stage in consultation with Auckland Transport.

Mr Fogarty sought certainty that the existing T2 lane will be extended once the existing bus ramp into Constellation Bus Station is removed.

5 There are no conditions requiring any of the specific amendments to the Project referred to at (a) to (c) above. Whether this should be required depends upon the Board's view as to their importance. In other words, if the Board considers that they're nice to have you but not necessary, then a specific condition is not required. If the Board wishes to ensure that these amendments are made, then the Board can and should impose conditions requiring them. In that case, we suggest the Board request that the Agency provide proposed
10 wording for its consideration.

~Comments from the Board (9.14 am)

JUDGE HARLAND: Well, let's just hold that thought for a moment. There is a third option in there, it seems to me, which is that even if they were nice to have
15 there would be some more public confidence in the process if they were more openly included and if that is a conclusion we reach, how would we go about dealing with that? Because it's not an interim decision, I suppose, and the ability to comment on the draft report that we give for feedback thereafter is reasonably limited. Are you suggesting that we adjourn at the end here -- how
20 would we deal with that practically?

MR BERRY: I think that's something you may be better to raise with counsel for the Agency, because it strikes me that it wouldn't take very long to address these issues and that it would be possible -- if you did need to adjourn it wouldn't be for more than a day or two, I would have thought. Although you'll need -- I
25 guess you'll need to think about that. I'd suggest that you have a conversation with my friend for the Agency.

JUDGE HARLAND: Well, it's not contentious anyway is it, either way, because it's being offered by the Agency, it's just the way in which it's being offered.

All right, that's helpful thank you.

30 MR BERRY: I guess, the short point is if you want any enforceability around it, then obviously it needs to be a condition. Otherwise, there's a moral obligation that would be reflected on the face of your decision, and we would have expected the Agency as a responsible Crown Agency to perform that obligation. So, if the Board were satisfied with that, we certainly wouldn't have any issue with it,
35 which is why we're being somewhat delicate around the issue, we're not necessarily -- we're leaving that choice to the Board. But if you were to record

that that offer had been made and the Board -- that the Agency intends to do it, then I would have thought that that would be adequate.

JUDGE HARLAND: Thank you.

5 ~Closing Submissions from Counsel to Assist the Board continues (9.17 am)

MR BERRY: Turning now to noise and vibration conditions and the fact that this chapter is a page long is a testament to the very good work that both the noise and vibration experts and the planners have done around this. I suspect the lawyers just got in the way. But we'll see.

10 By the time the noise and vibration experts presented evidence the proposed conditions relating to noise and vibration had been agreed between those experts and the planners.

And just turning to two fairly minor matters: At the hearing Mr Styles noticed the proposed conditions CNV.6 and 7 relating to site specific construction noise management plans had been linked to the Outline Plan of works process and that that would not be workable. And Mr Hegley and Ms Wilkening agreed. As a result of that agreement, Mr Hegley presented his evidence at the hearing and he outlined further amendments to the proposed conditions as we've set out in (a) and (b), and so those are attached just to ensure that they're formally entered if they haven't been by other witnesses.

JUDGE HARLAND: Yes. All right thank. I think they're the same one -- are they the same ones, Ms Robertson, we got this morning in the sheet? Thank you, yes.

MR BERRY: And then as to the operation of CNV.6 the members of the Board raised a number of issues with the noise and vibration experts, as you will recall, regarding the meaning and operation of those conditions. All of the experts agree that the condition meant that an SSCNMP was not required if the construction noise standards in that Table exceeded by up to 5 decibels during the day time for up to 14 consecutive days or during the night time of up to two consecutive nights.

30 All of the experts considered that the exception to the requirement for a management plan of that nature was acceptable. Ms Wilkening noted that exceedances would not be continuous, given the nature of construction, and Mr Styles noted that he considered the exception to the requirements for the SSCNMP, that's not much shorter to say than the words, would only result in minor adverse effects.

35 In response to questions from the Board, Mr Styles read out possible new wording for those conditions to make them clearer while noting that the

wording he was reading was a work in progress. After Mr Styles presented his evidence, he prepared amendments to those conditions to make them clearer and those amendments were circulated to counsel for the Agency and the Council on 11 August and provided to the Board on the same day. And those proposed amendments are also shown in Appendix 1 to these submissions, and both the agency and the Council have advised that they are acceptable.

So, as far as we as counsel assisting are concerned, we think that anything outstanding in relation to noise and vibration has landed. And I will recall your attention to Mr Hegley's comment that they're actually proud of these conditions and that they seem to be progress in terms of the general canon of prudence and wisdom in relation to noise and vibration conditions, so I think that's a very good outcome from this hearing.

~Comments from the Board (9.20 am)

15 JUDGE HARLAND: Well, the other thing that I just wanted to raise now is the complaints process if there is a problem. Now, you mightn't have been here all the time when we've discussed this, but I'm just flagging that maybe for these special situations where there is an exceedance there's some tightening or understanding that there's a very prompt response. I read somewhere, and I'm sorry I can't be more specific than this, but Ms McIndoe will know exactly where it is, that there was an expectation that people would be gotten back to within 24 hours. But that's not much point if there's a noise going on in the middle of the night and people want an answer now. And I think the theme of our questions has been people want to know who do they go to, what's the phone number and that there's going to be immediate action on that. Not a noise complaints officer that may turn up or may not.

So, I don't know if that's anywhere in the conditions, there's anything like that? Rather than a generic, or whether there would be -- it would be desirable for that to be very clear. But you don't have to answer that on the hop, I'm putting that out there.

MR BERRY: Yes, not that I know of.

JUDGE HARLAND: No.

MR BERRY: But obviously it's something that Ms McIndoe will want to address you on if that's the case. I certainly am not aware of it, but I haven't been looking for that either.

JUDGE HARLAND: Well, it's all very well to say that well they will be covered in the plan, the SCP, but that again it's a public confidence issue that we need to consider and it's much better for us to be able to put that right out there rather than to say it will be dealt with at a later date by other people. So, the public
5 can have confidence. All right, so you wouldn't have a difficulty with that?

MR BERRY: No, not at all.

~Closing Submissions from Counsel to Assist the Board continues (9.22 am)

Turning now to the Alexandra Underpass issue. As everyone's aware,
10 it's an existing underpass which provides a cycling and walking connection between State Highway -- beneath the State Highway between the residential areas of Unsworth Heights and Rook Reserve to the industrial area to the north of the State Highway. The Agency proposes a shared use path along the northern side of the State Highway which will pass close to the underpass, thus
15 providing increased access to it. All relevant parties acknowledge that the existing state of the underpass is less than desirable, particularly in terms of its width -- and I may be overstating that actually, Your Honour, I'll later that to say a number of parties acknowledge that the existing state of the underpass is less than desirable, particularly in terms of its width, angle and substandard
20 sightlines which may affect the safety of its users in terms of CPTED principles.

The Council has taken the position that the underpass should be upgraded as part of the project, particularly given that it would be very difficult and expensive to undertake an upgrade once the Project is complete and the State Highway itself has been upgraded.

25 The Agency's position is that the underpass has existing CPTED issues and an upgrade is not required to address adverse effects of the Project, nor is the Project required to perfectly fulfill all of the Agency's objectives.

So, the key issue is whether the Board has jurisdiction to impose conditions granting the relief sought by the Council. We first summarise the
30 respective positions of the parties, which of course we don't need to take you to in detail, and then consider the legal position in light of the evidence and submissions.

So, the Council's position, as we've said, is that it should be upgraded. And I've set out there for completeness, but not for the purpose of reading it,
35 Mr Bangma's opening submission for the Council on that issue.

And two witnesses, Stephen Brown, the landscape architect, and Duncan Tindall, the transport planner, addressed the issue.

And Mr Brown's evidence is set out there, that the underpass could afford a meaningful connection between Unsworth Heights and the new SUP, but is not suitable for that role at present. It is quite inadequate functionally in terms of CPTED, et cetera.

5 Now, in addition to the lack of aesthetic appeal and potential safety issues, Mr Brown considers that the under underpass would provide one of only two connections between the large residential catchment of Unsworth Heights and the proposed SUP proposed for the northern side of the State Highway, so that:

10 "It is an integral component of the proposed walkway/cycleway network proposed by NZTA."

In Mr Brown's view, the failure to upgrade the underpass exacerbates the isolation of the SUP from the Unsworth Heights residential area and its reserve network.

15 Under cross-examination, Mr Brown indicated that he considered that the existence of the SUP, by its presence, will generate more traffic than the underpass would need to accommodate. His opinion then is that the Unsworth Heights catchment and the broader catchment extending towards Glenfield would generate both daily commute and recreational use. He also
20 considered that weekend recreational cyclists who do a circuit around Upper Harbour would use the SUP. His conclusions were based on general and personal knowledge as a recreational cyclist who cycles in the area, rather than surveys of existing users or predictions of future use generated by the SUP.

25 When cross-examined about whether the lack of upgrade to the underpass would curtail any increase in numbers using the underpass, Mr Brown considered that if there are more people using it, it may still be subject to an increased level of use.

30 In response to questions from the Board, Mr Brown was resolute in his view that the existence of the SUP would create pressure to improve the underpass, and that the increase in number of users of a substandard underpass is an adverse effect of the Proposal that should be mitigated.

35 Mr Brown considered that the short survey of users undertaken by the agency was inadequate insofar as it did not capture the potential for the SUP to generate considerable amounts of traffic intermittently and maintained his opinion that the upgrade of the State Highway would result in severance

effects that should be mitigated by upgrading the Alexandra Street underpass.

I just make a note here, that in considering those points, the Board may wish to reflect on the fact that Mr Brown is presenting evidence as a landscape architect, but also has planning qualifications. So, obviously, if it was strictly a landscape issue, then you may -- it may diminish the weight you wanted to accord to that evidence, but we also note there, and we take no position on it, but there was an element of personal observation as well in what Mr Brown had to say.

10

~Comments from the Board (9.28 am)

JUDGE HARLAND: So, we couldn't give that extra weight, because we'd have to separate out the function, or that evidence, as a personal matter, rather than as an expert matter, or does it just -- are you saying it just gives more weight to the expert opinion because he has personal knowledge on top of that?

15

MR BERRY: I think probably what you need to do is, without being too forensic about it, that to the extent that he was qualifying himself as landscape architect, many of these conclusions don't derive directly from that. Well, I guess it becomes a question of when landscape architecture and the effects associated with design, urban design issues, which Mr Brown is also qualified to comment on, stop. Where his personal observations sit. I guess what I'm saying, and I have called Mr Brown before as a witness myself and frequently it helps to know that the commentary that he is offering is also backed by a planning qualification.

20

25

So that's the only point I'm making.

JUDGE HARLAND: Oh, I don't have a difficulty with that idea, it's what to do with his personal observations about well, you know, "I ride and whatnot, and I know from my personal experience that if this is available people will use it."

30

MR BERRY: Well, I think you just need to put it into that category and maybe make the observation that that may not be his expert opinion, but it does inform his expert opinion.

Probably a very small point, I'm not being critical of Mr Brown.

JUDGE HARLAND: No, but it's actually quite a tricky point. You don't want to make a meal out of it, but I think, as you probably know, I'm -- I have a bit of an issue about evidence, and an issue about what's within expertise and what's

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not within expertise and what people should be allowed to talk about and not talk about. We'll think about that one, thank you.

MR BERRY: By raising it I probably didn't help, but I am aware of your views in that regard Your Honour.

5

~Closing Submissions from Counsel to Assist the Board continues (9.30 am)

10 So, in terms of Duncan Tindall's evidence, that was to the effect that an upgrade of the underpass is required in order to mitigate the increased severance effects arising from the proposed new form of the State Highway, particularly in light of the fact that the cyclists would be prohibited from riding on the upgraded State Highway 18 and would therefore be limited to crossing the State Highway at specific locations.

15 In response to cross-examination as to how easy it would be for cyclists to cross the State Highway in the current environment, Mr Tindall conceded that while he considers there appears to be a loss of connectivity arising from the upgrade, that the loss of connectivity is 'from a level of a relatively hostile or a hostile environment to nothing at all'. So, it's not from good to bad or bad to worse, it's from worse to nothing.

20 In response to questions from the Board, Mr Tindall acknowledged that the crossing facilities at the Paul Matthews Drive and the Alexandra underpass were safer than using the State Highway itself.

25 He considers that the upgrade of the underpass is required to deliver the objectives of the Project to deliver a Shared Use Path and connections to local transport and the local network. He elaborated on that in response to questioning from Your Honour, noting that in order to deliver safe walking and cycling facilities, the communities on either side of the State Highway who wish to use the SUP would need to be able to get on to it via the Alexandra Underpass.

30 However, in response to questions from the Board in relation to whether the improvements proposed by the agency would offset or mitigate any adverse effects he said:

35 "My view of the adverse effects relate to the difficulty in providing a wider, straighter underpass at this location in the future and the significant costs that would arise resulting from that. The provision of lighting et cetera ..."

So, I guess in that regard, "... would not from a traffic and transport perspective, see that as a significant offsetting of that, no."

So, again, I guess you might ask a similar question about the adverse effects and whether they're traffic effects, but Mr Tindall is obviously entitled to a view in that regard, in my view. Given that clearly the underpass is a transportation asset.

In terms of the Agency, they take the position that the underpass should not be upgraded as part of the Project; that the works requested do not represent an adverse effect, and would not achieve the objectives of the project, and we've just set out opening submissions there, and refer to the evidence of Shannon Bray and Ian Clark, being the equivalent witnesses to the two we've just addressed.

Other witnesses were questioned in relation to this issue, including Mr Schofield, and we've just noted that in the footnote.

Mr Bray's Evidence in Chief is set out there. I won't read that to you if you're happy for that. He recognises the current design is less than desirable and that a widened facility would be beneficial.

And Mr Bray referred to the rebuttal evidence of Mr Clark which is to the effect that while the demand for the underpass may increase as a result of the SUP, that would be offset by the reassignment of some walking/cycling trips to the new connection on the Paul Matthews Road overbridge and the existing connection to the Alexandra Creek path from Omega Street.

Under cross-examination by counsel for AC, Mr Bray acknowledged that the Agency's proposed upgrade of the underpass is not consistent with the Agency's UDLF, and that Council's preferred upgrade option would better achieve the UDLF.

Mr Bray also conceded that the underpass would not achieve the Agency's objective to provide safe walking and cycling facilities, but considered the Agency's objectives in terms of connectivity were being met overall and improving the current situation. He considered that those objectives have to be viewed in terms of the project as a whole. We note here that Mr Bray is a landscape architect, not a planner, and we query whether Mr Bray is sufficiently qualified to undertake this assessment with respect to the Project as a whole, as opposed to in the context of landscape and design matters.

So, again, not being critical of the witness, but just aware of your views, Your Honour, in terms of the edge of expertise.

~Comments from the Board (9.35 am)

5 JUDGE HARLAND: Yes, well, I probably should have said before that it's -- it's all to do -- and I don't mean to hammer the point, but it's all to do with the power of the opinion and the reason why the laws of evidence were very constrained about the power of an opinion to influence an outcome.

MR BERRY: We only make that comment, Your Honour, in relation to the Court's
10 practice note and the comment in relation to seeing it as a Project as a whole. Because I think that is opining on the ultimate issue, or seeing how a particular aspect should be seen in the context of the entire Project is something which probably only -- the only expert who should opine on that is the planner, rather than one of the component parts.

15 Again, there is no criticism there, and all of the rest of the technical points made are worthy of due weight.

~Closing Submissions from Counsel to Assist the Board continues (9.36 am)

20 We note in that regard that we have observed in relation to many amendments or additions proposed by various parties the Agency witnesses express the same view that the proposed amendment is not part of the Project and is not required to mitigate an effect of the Project. And this is true of the witnesses that addressed the Alexandra Underpass. Whether the
25 amendments proposed by other parties are within the scope of the Project, or within the scope of the Board's jurisdiction to modify the proposal or impose conditions, is a legal issue. And again, the Board may wish to consider this in assigning the weight to be accorded to that evidence.

30 Mr Clark's evidence was that there's no need to mitigate adverse effects related to severance because the Project will reduce and not increase transportation severance.

So, this was just a walk around the houses of that just to set the issue in context again.

35 In terms of the Board's jurisdiction and discretion to impose a condition requiring the type of works is governed by the provisions obviously of the RMA in light of the interpretation of those provisions by the courts.

And Your Honour and Members of the Board will be well familiar with the statutory provisions and legal tests. We've set out some of them for completeness.

5 The power to impose conditions under section 149 was addressed in opening, and I won't set that out again.

Needless to say, that the Board has a broad discretion to imposing conditions on a designation. However, the broad discretion is limited by the administrative law principles which govern the validity of conditions.

10 The starting point obviously for determining whether a condition is valid in law is Newbury, and in order to bring that to front of mind of I've simply quoted from our opening submissions in which I noted Your Honour's dicta from the correctional facility case.

15 We then go on on the next page to say that those principles were endorsed by the Supreme Court in the Waitakere City Council and Estate Homes case which clarified the second limb of the Newbury test as follows:

20 "...[that the] law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development. This limit on the scope of the broadly expressed discretion to impose conditions under s 108 is simply that the Council must ensure that the conditions it imposes are not unrelated to the [proposal]. They must not for example relate to external or ulterior concerns. The limit does not require that the condition be required for the purpose of the subdivision."

25 And so, we would extrapolate from that to say it's not necessarily required to address an adverse effect or to achieve the objective of the applicant. It may be sufficiently related, or logically connected, to warrant a condition if that was to address an effect or create a benefit.

And his Honour Justice Priestley in Morgan said that the:

30 "... power to impose conditions conferred by s 108 must be 'logically connected' with the development."

Turning now to the Newbury test as a starting point, and turning to the first and the third limbs because they're easier to deal with.

35 In terms of the first limb counsel assisting submit that the upgrade of the Alexandra Underpass requested by the Council would address issues relating to a resource management or planning purpose, namely: The amenity and fitness for purpose of the underpass, and arguably the efficient

use of resources given the evidence that an upgrade will be more difficult later.

Counsel for the Agency may be tempted to argue that the AC condition is not for a resource management purpose because it does not address an adverse effect. However, in our respectful submission that is not the issue as our consideration of the second limb demonstrates.

The relevance or weight to be accorded to these issues is obviously for the Board to assess and determine.

The third limb is not unreasonable. In terms of the third limb we consider that such a condition would not be considered so unreasonable that a reasonable planning authority, or Board, duly appreciating its statutory duties, could not have imposed it in a *Wednesbury* sense, particularly in light of concerns expressed by submitters and the acknowledgement by the Agency that the underpass requires an upgrade, irrespective of the Project.

The one issue that the Board may wish to reflect on in that regard is whether it is reasonable to require NZTA to bear the entire cost of the upgrade. We've raised that with my friend Mr Bangma who advises that there haven't been any discussions in relation to cost sharing or that issue at all.

However, the primary factor I think we need to consider here is the second limb under *Newbury*, whether it's fairly and reasonably related.

And in terms of that limb, the fact that the upgrade is not required to address the adverse effects of the Proposal (if the Board accepts the Agency's evidence) does not in and of itself lead to the conclusion that the Board cannot impose a condition requiring the upgrade on the basis of the *Waitakere* and *Morgan* cases. That the condition need not be essential for the purpose of the project. However, the condition must be logically connected to the project, not unrelated, and not related to external or ulterior concerns. So, the underlying portion there is simply extrapolating the main two points for those two cases.

We have reviewed the case law relating to the second limb of *Newbury* to ascertain whether any provide useful guidance as to whether the underpass may be considered to fairly and reasonably relate to the Proposal. That is, that it's logically connected and not unrelated or relating to exterior concerns.

In Retail Projects Limited and Papakura concerned an appeal against conditions of consent for earthworks required for the construction of a commercial development. The conditions included a requirement to improve the stormwater network to cater for stormwater flows from the land upstream of the application site. The Court found that this was not fairly and reasonably connected noting that any condition, et cetera, et cetera.

"We heard no justification arising from the effects of the development, the plan provisions and Part II [of the] RMA, for a condition requiring RPL to provide for stormwater works for the wider upstream catchment beyond the demands of its site. Such a condition therefore does not fairly and reasonably relate to the development. "

So, we can obviously see when we have a development and the Council says you've got to do work upstream, the water only flows down, it doesn't really follow.

In the Upper Clutha Tracks Trust case, the Environment Court considered the grant of a resource consent for the construction of a golf course. An interim decision indicated that on the basis of the available evidence the Court was not satisfied that the proposal would achieve the purpose of the RMA. However, it allowed the applicant additional time to lodge further evidence and a new proposal for mitigation or compensation.

The Applicant proposed additional compensation with respect to weed management and so forth, but this was challenged by appellants who argued that the Applicant was buying a consent or doing almost anything to secure the desired outcome. The Court rejected that view and said that:

"... the test for environmental compensation is whether it is reasonably related to the natural and physical resources being used in the application. Whether the test is satisfied is a mixed matter of fact, opinion, and degree we should assess on an issue by issue basis."

Which probably doesn't help you that much, however, but they did find that the -- in these proceedings the environmental compensation is all logically connected to the development.

It is of course highly relevant that it was the Applicant proactively volunteering compensatory measures on the basis that it would accept conditions. So, that sets that case apart from this one.

So, the key issue is whether the upgrade of the underpass is logically connected or related to the proposed new motorway and/or the SUP in terms of this limb.

5 If the Board accepts the evidence that there will be increased usage of the underpass as a result of this project, that could be seen as justifying a finding that there is a clear and logical connection between the two and that the upgrade may be required to address potential adverse effects, bearing in mind of course that there is limited evidence as to the extent to which the usage will increase.

10 Even in the absence of sufficient evidence that the usage of the underpass will increase, the Board may consider that the upgrade is logically connected to the Proposal, particularly in light of the minor upgrade proposed by the Agency to improve the alignment of the southern pathway and include lighting and CCTV inside the underpass. In our view, these circumstances are similar to those in the Waitakere case where the Applicant had proposed
15 the inclusion of a road which was not required to mitigate adverse effects of its own Project.

As addressed in Mr Bangma's closing submissions for the Council, the Supreme Court held that the road did not need to be required for the purpose
20 of the subdivision. It was sufficient that it was logically connected to the Proposal and including the road in the Proposal was sufficient to demonstrate that connection.

So, we've thought about this a lot and we consider that the issues are finely balanced, which again, probably doesn't help you that much because
25 I'm going to throw back to you.

The factors weighing in favour of the Council's position are that the existence of the SUP may generate increased demand for the underpass; Upgrading the underpass in accordance with Option 3 would increase safety of the underpass and be more compliant with CPTED principles, the ULGF
30 and better give effect to the objectives of the Project; it would be more efficient to undertake the upgrade now to the tune of \$1.5 million, and if the upgrade is not undertaken now, it may never be undertaken given the cost of undertaking the upgrade separately, the extensive works required, and the disruption to traffic which would result.

35 And I think that's a fairly important point, because I think we know the answer to that question.

The factors weighing in favour of the Agency's position are the extent to which there will be an increase in demands to use the Alexandra Underpass is uncertain and bearing the upgrade now will force the Agency to bear the full cost of the upgrade, to the tune of \$5 million.

5 As regards to the Agency's position, and as I've said, we do not consider in light of the legal authorities that it is determinative that the upgrade is not required to address adverse effects and the objectives of the project are not required to be fulfilled. Further, the suggestion that the failure to upgrade the underpass will ensure that demand does not increase seems
10 entirely at odds with the purpose of including an SUP altogether.

So, where we come down to, Your Honour, if I was sitting there, we consider that if the Board is sufficiently persuaded by the evidence that upgrading the underpass would better promote the purpose of the RMA, including by reference to efficiency issues, the upgrade is sufficiently
15 connected to the Proposal for the Board to validly impose conditions in that regard.

So, ultimately we get to the place where we agree with Mr Bangma that it's logically connected. The points that are made against it are obviously valid, but not determinative.

20 So, unless you have any further questions I'll hand to Ms Vella to address the Unsworth upgrade -- Unsworth off-ramp point, other than to turn to the very final comment, because I've been here much of the time, I just want to say on behalf of both of us that we have enjoyed assisting the Board; wish it well for its deliberations. We also wish to thank members of the EPA.
25 And to acknowledge and thank fellow counsel and experts for the constructive and collegial approach that has been apparent throughout this process.

MS VELLA: So at section 5, we are addressing the Unsworth off-ramp issue, and the first couple of paragraphs really just set out an overview of what that is.

30 And so 5.1, essentially, in order to upgrade the State Highway to full motorway status the existing connections to the local roads will be closed, including two off-ramp connections from State Highway 18 to Unsworth Drive and a Z Fuel Station, which is very close by.

35 And, you will be aware from Ms Brock's supplementary evidence that during consultations with affected neighbours, the owners of businesses on Greenwich Way expressed their concern that without direct access to and

from State Highway 18, they will not be able to tenant their shops, or operate their businesses.

And Ms Brock's supplementary evidence contained a record of one of the consultation meetings with the Greenwich Way shop owners, from
5 September 2016, and that records those concerns which I've set out there at (a) to (f), but essentially, that there will be a loss in commercial trade and the shop owners won't be able to get tenants for their shops.

And as a result of the consultation the shop owners requested that the Agency investigate options to provide connectivity between State Highway 18
10 and Unsworth Drive and the Agency considered two main options, set out there at 5.4 (a) and (b), one being a connection from State Highway 18 to Unsworth Drive, and the second, a connection from Unsworth Heights to the existing State Highway 18-Albany Highway westbound off-ramp, but ultimately, due to a range of issues, NZTA determined not to provide
15 additional connection via this Project.

So, setting out our understanding of the issue at 5.6, it seems to us that the Board's concern is indicated via its questions to Ms Strogan, on day 13 [sic] of the hearing, and that that concern can be summarised as follows: Despite the lack of submissions from shop owners and tenants at
20 Greenwich Way, there is a concern that the closure of the Unsworth off-ramp will adversely affect businesses at Greenwich Way. And while NZTA has considered options to mitigate that effect, none have been proposed. Ms Strogan indicated that mitigation such as advertising and signage, distribution of flyers and the like, to communicate that the Greenwich Way
25 shops are still open could be undertaken, but there was no requirement for that in the conditions.

And the Board expressed a concern, via questions, that even if such mitigation was undertaken there is no mechanism for addressing the adverse effect of -- if that mitigation doesn't work. In other words, there is no
30 compensation to shop owners, because there is no -- this is -- it doesn't fall within the realms of the Public Works Act acquisition because there is no land being acquired.

So, in light of that, the Board has asked us to address the scope of its jurisdiction to impose those conditions, or require that the off-ramp remain
35 opened.

So, we've addressed that in two categories, I suppose, the first being, the jurisdiction to impose general sort of conditions requiring mitigation measures, such as the advertising, signage and distribution of fliers that Ms Strogan suggests could be undertaken, and we think it's fairly obvious that conditions of that type of nature can be imposed by the Board if it considers that it's appropriate and would better promote the purpose of the RMA.

And so, the absence of submissions from the Greenwich Way shop owners doesn't preclude the Board from imposing conditions to mitigate an adverse effect of the Project. And those conditions obviously need to meet the Newbury tests insofar as they are for a resource management purpose, fairly and reasonably relate to the proposal and it's not unreasonable to impose them.

The second category relates to the Board's jurisdiction to require the on-ramp to remain open and that's the trickier issue. We've addressed, just briefly, for you, the relevant evidence there at 5.10 and onwards, and Mr Clark has now provided a supplementary statement of evidence, over the weekend I think, which notes the rationale for the closure of the off-ramp in that quote there which says:

"The Project includes the permanent closure of the existing off-ramp from State Highway 18 to Unsworth Drive. This is due to the proximity of the off-ramp to the new on-ramp on the Paul Matthews Road/Caribbean Drive intersection."

And Mr Clark's evidence refers to the technical note prepared by Aurecon on 25 November 2016, and that's attached at Ms Brock's supplementary evidence at annexure D.

We understand from that note, and we've now confirmed this with counsel for NZTA, that leaving the off-ramp open would in fact -- in order to leave the off-ramp open would in fact require a new connection to be built, because State Highway 18 is going to be realigned in that area. So, I don't think it is as simple as -- and this is probably something you could address with Mr Clark, but I don't think it's as simple as simply leaving the current off-ramp open; it requires a new solution to be built.

And the technical note addresses the two options that NZTA considered were available, and the first option, I've given a brief overview at 5.12 and 5.13. The first option is a connection from the realigned

State Highway 18 to Unsworth Drive, and the note sets out the significant safety issues associated with that option, set out there in that quote, which I think is probably worth reading. It says:

5 "There is approximately 600 metres between the Paul Matthews Road on-ramp and a potential off-ramp to Unsworth Drive and State Highway 18. In this short length of motorway, vehicles will be accelerating from the Paul Matthews Road on-ramp to merge with State Highway 18, whilst vehicles wishing to use the Unsworth Drive off-ramp would be decelerating in preparation to negotiate the tight radius curve at the end of the ramp. Based
10 on a simple exit with a diverge taper, vehicles would need to undertake most of their deceleration on the State Highway 18 motorway. The speed differential between these accelerating and decelerating vehicles would result in significant safety issues, for example, introduce a significant risk of rear-end collision."

15 And so, the note goes on to say that in order to mitigate those operational and safety issues, it would be necessary to provide an additional lane which in itself presents:

20 "... significant planning and property risks to the Project, as it requires extending the project designation and acquiring additional property. The Proposal would require acquiring and demolishing all or part of an existing building in the north-east corner of Metlifecare's Greenwich Gardens retirement village, and it would also require land at 13 and 14 Wren Place and Auckland Council's Rook Reserve.

25 And the second option that was addressed in the technical note, would involve connecting Unsworth Drive to the existing Albany Highway off-ramp, but that would also require extending the Project designation, acquiring additional property, and construction through an existing densely vegetated watercourse in Bluebird Reserve.

30 And so, it's on the back of that assessment that Aurecon recommended, that due to potential significant risks to safety, traffic operations, planning, environmental and property acquisition, it's recommended that the current design is retained and no additional connections provided.

35 That note does note that access between the Greenwich shops and State Highway 18 can be gained through the proposed interchange at Paul Matthews Road/Caribbean Drive by Barbados Drive, and Mr Clark's

evidence -- supplementary evidence -- also notes that the loss of through traffic, resulting from the closure of the off-ramp, will be partly offset by a slight increase in flows on Barbados Drive.

5 So, in terms of the law relevant to this issue, that's set out at 5.17 and onwards.

To the extent that the options for replacing the current off-ramp would require the extension of the designation and would affect a new set of property owners, the law in relation to the scope of permissible modifications to NoRs applies.

10 And we referred the Board already to section 149P of the RMA which sets out the Board's powers, and the relevant aspect there is obviously that the Board is entitled to modify or impose conditions on the NoR as the Board thinks fit subject to those administrative law principles.

15 Now, the term "modify" isn't defined in the RMA, but there is a significant body of case law in respect of the correct approach to its interpretation. I could have gone into vast detail in that regard but we've tried to pick out the key points and to address those briefly, but the term "modification" is defined by the Environment Court in that Hope case which is set out there; paragraphs 40-42 in the Hope case. And the underlying parts say:

20 "A 'modification' is defined as 'an act of making changes to something without altering its essential nature or character'."

And the underlining at paragraph 41 from that decision is also worth reading:

25 "If the Court reaches the conclusion suggested by the Council that the changes are minor, there is a lessening of environmental impact, and that affected land owners remain unchanged, the court would have power to make such modifications."

30 I think that's -- I'm not going to be revealing too much -- that's probably the key issue here, in the sense that either of those two options would actually affect people that haven't already been heard.

At 5.20, we've just tried to derive the key principles from relevant case law; and summarise them as follows:

35 "To qualify as a 'modification' the proposed change must not alter the 'essential nature or character' of the proposal. In a couple of examples in applying this test, the first: The Court in Quay Property Management Ltd

found that a proposed alternative alignment which obliterated a motor camp ..." -- that was the Judge's words "... and brought the alignment close to a substantial number of residents was considered to be more than a modification."

5 So, you can see the similarities with this case here.

And the Board, in McKays Peka Peka Expressway Board of Inquiry, accepted some modifications to the designation boundary to either reduce the footprint or include land so that it could be purchased under the Public Works Act but it considered that an alternative roading layout, involving an additional bridge, and amended interchange design was beyond the scope of a permissible modification.

As I've already alluded to, the proposed change must not give rise to a greater environmental impact or new effects on land owners or the public, and the legal authority made clear that the Board's power to modify this Proposal is limited by the need to ensure procedural fairness, and modification should not be made unless the Board is satisfied that it is not plausible that any stakeholder or member of the public would have made a submission had the Proposal been notified in its modified form.

And when exercising its power to modify an NoR, the Board must bear in mind, firstly, that it is beyond the Board's jurisdiction to find that the requiring authority selected the wrong alternative, and to adopt the alternative proposal. They only have the power to modify each proposal to be acceptable formally with regard to the points above, and if the Proposal is not acceptable to the Board following permissible modifications the only option would be for the NoR to be cancelled and for NZTA to re-notify an amended Proposal if it wishes to do so.

And so, by way of summary, having regard to the relevant authorities, the Board does have jurisdiction under section 149P to modify the designation as long as it doesn't alter the essential nature or character of the proposal. And then whether adopting one of those options available for retaining a connection to Unsworth Drive is such a modification would be a question of fact for the Board to determine, if it was within its jurisdiction, but changes that take the alignment outside of the designation footprint, or require significant construction works to be undertaken outside of the designation boundary as proposed, have been held to exceed the Court or Board's power to modify. In this case, both of the options for retaining a

connection to Unsworth Drive will require an extension of the designation and the taking of additional land and fall into this category.

Further, the power to modify the NoR is limited by the need to ensure procedural fairness. And given the need to alter the designation boundary and take additional land, we consider it very probable that third parties might have lodged a submission if they were aware of the proposed alterations.

And so, taking all of that into account, the options available to the Board to impose conditions to mitigate adverse effects on the Greenwich Way shop owners really are limited to the type of condition discussed by Ms Strogan, such as signage and flyers and that sort of thing for the purpose of advising the public that the Greenwich Way shops are still open.

~Comments from the Board (10.02 am)

JUDGE HARLAND: Or perhaps providing the owners with some money towards a re-marketing programme or something like that? We've heard nothing creative about what is proposed really, and I guess the concern is if we're left with an all or nothing, we're also left with an unmitigated effect and some economic wellbeing of some people being the sacrificial lamb really.

MS VELLA: That is the case in this type of situation, Your Honour; it's not unnecessarily common.

JUDGE HARLAND: Doesn't mean it's right, and doesn't mean it's in accordance with the Act either. What I'm suppose I'm surprised about -- and I'm not giving you a hard time because you're helping us -- is that there's actually been nothing concrete put together. It's very vague, and not particularly sophisticated or helpful I would have thought. Do you want to make a comment about that or not? You don't have to.

MS VELLA: I don't, beyond saying that I don't disagree with you. I mean, there are obviously various options in this type of situation that could be offered by the Applicant in order to address that effect, and so, in the absence of any of those, and this is really what the rest of our submissions say, is that in the absence of any of those, unfortunately it's left to the Board to determine whether or not that level of effect is in the category of unacceptable in the context of the proposal as a whole and the task that you are now -- have to undertake in terms of assessing -- you know, the benefits of the Proposal, in light of any of those residual adverse effects that haven't been avoided,

remedied, or mitigated, but, I guess, that's also a conversation that I presume you will probably want to have with counsel for NZTA, as well.

JUDGE HARLAND: But there would be nothing wrong with us imposing a requirement that was more specific as a condition to address potentially
5 adverse economic effects on the Greenwich shops. Our difficulty is we don't have much evidence on the point, but I suppose the risk of that is that we then come up with something.

MS VELLA: This is true, and potentially, similar to the issue that Mr Berry addressed you on earlier this morning, in terms of any you know, construction, traffic,
10 monitoring conditions it may be that you could give NZTA a signal that you'd be interested in seeing a condition of that type, but they may be able to offer some specific wording based on the expertise that they have.

JUDGE HARLAND: Well, the other thing we could do I suppose is adjourn the hearing, get our own marketing expert to tell us how much would be, and
15 how long would be a reasonable period of time for a programme to be put in place?

MS VELLA: I think that's an option available to you.

JUDGE HARLAND: Thank you. Sorry to interrupt.

MS VELLA: Well, I think we've pretty much covered the last paragraphs in any
20 event. All I was really saying at 5.23 was exactly the concern that you've just addressed, or related to the concern that you've just addressed, that even if you were to impose a condition requiring some signage and that kind of thing, if it doesn't work there is no -- there's essentially no recourse then, unless you did have a condition that, you know, it might specify -- and I've
25 seen this before too -- that the NZTA might assist the shop owners to develop a marketing plan or, you know, something along those lines. I've certainly been involved in projects where the Applicant has offered, along with a financial sort of component, to develop a marketing plan for a potentially affected business.

30 JUDGE HARLAND: Well, I mean there is force, and you are welcome to comment on this, there's force in the argument that business owners have to adjust all the time to economic changes. You can't just sit on your laurels and expect things to continue. But, in the face of uncertainty caused by a potential Proposal such as this, there might be a middle ground.

35 What other conditions have you dealt with where? Can you recall? Was the McKay to Peka Peka one where there was a package to that effect?

MS VELLA: I have to admit I'm not sure about that; I haven't had a look that closely at the McKays to Peka Peka or even any of the roads of national significant conditions with a view to looking at that particular issue.

JUDGE HARLAND: Well, I don't think we probably need to investigate that, I think
5 that's probably -- the issue's very clear, what we're talking about here.
So -- all right. Well thank you for that.

MS VELLA: You're welcome. Thank you.

JUDGE HARLAND: So do you have any questions?

MR STEWART: No, it's really just that -- I mean, I was involved at one stage, many
10 years ago, with the Pokeno Bypass and I know in that case the NZTA -- I
think it was Transit in those days, gave -- or there was an agreement -- there
was a lot of financial assistance given to the local owners, business owners.
So, I know -- well, in those days it could be done.

MS VELLA: We'd be more than happy though to have a look at some of those
15 examples, if you like, and provide with you some examples of wording, or
even construct something in conjunction with NZTA?

JUDGE HARLAND: We'd be helped by that, thank you. Yes, that would be very
helpful.

Because I think, again, that the degree of certainty to well, let's leave it
20 for another day, possibly might not provide that kind of public confidence,
again.

All right, well, no doubt the Agency will address that in their closing.

So, Mr Berry and Ms Vella, on our behalf, thank you very much for the
effort that you put in. You have been very helpful, and for the careful way
25 that you've addressed the matters before us.

MR BERRY: It's been our pleasure, thank you very much.

JUDGE HARLAND: Yes. So, in terms of how quickly you can get back to us on
that, obviously the sooner the better for everybody, and we'd reserve the
right of the agency to respond to that as well, in fairness.

30 MS MCINDOE: Thank you, Your Honour.

JUDGE HARLAND: And the Council. Do you want to be heard on that point at all
Mr Bangma?

MR BANGMA: Perhaps we could reserve right too, Your Honour?

JUDGE HARLAND: What I had in mind was perhaps -- without wanting to put too
35 much pressure on everybody, but bearing in mind that we don't want this

dragging on and on, something that allowed for responses by the end of this week?

MS MCINDOE: Your Honour, if it's helpful to counsel assisting the Board, our closing legal submissions do suggest a condition on this matter, and I appreciate that they were one of the later parts to go into the submissions, and I expect that Ms Vella wouldn't have had a chance to look at it yet, but it might be if she is able to stay today, or is able to look at that during the course of the next few days, that might well assist.

JUDGE HARLAND: Yes, well that's very helpful, and can I acknowledge also the constructive way you've all worked together. It's actually a pleasure to have that, and I don't only say that in relation to counsel, but also the experts and all of the people involved. This has been very pleasant hearing that -- where we've raised issues people have been very willing to address them. There has been a high degree of goodwill and I think that reflects very well on everybody.

So, we'll leave open the idea of Friday, but if I can also say that we will be here this afternoon for a period of time anyway. So, if you thought it was something that could be sorted today, so much the better.

But let's see where we get to.

Now, I see that Mr Clark has arrived. Would you like a moment to talk to him? We could take an early break, or are you -- do you wish to just start your opening and -- what would you like to do?

MS MCINDOE: If the Court is willing to take an early morning break I think that would be useful. We can briefly check in with Mr Clark and then call him and then present the closing.

JUDGE HARLAND: Yes, and the other thing is if you want slightly more of a morning break to have your discussions and look at things that's fine too.

MS MCINDOE: Perhaps half an hour, might be useful?

JUDGE HARLAND: That's fine. Let's come back then at quarter to.

30

~(Adjourned 10.11 am - 10.46 am)

~Comments from Ms McIndoe (10.46 am)

MS MCINDOE: Thank you Your Honour, we have Mr Clark. Now, Mr Clark has prepared a second supplementary statement of evidence, but he hasn't actually yet appeared to present his first supplementary, which perhaps the Board was

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content to enter on to the record, but if it made sense for him to confirm that while he's on the stand, then happy to do that.

JUDGE HARLAND: Yes, I just assumed it had gone in by consent, but why don't you just to tidy it up let's do that.

5

~ IAN DAVID CLARK (Affirmed) (10.47 am)

~Examination in Chief by Ms McIndoe (10.47 am)

MS MCINDOE: Can you please confirm for the Board that your full name is Ian David Clark?

10 MR CLARK: That's correct.

MS MCINDOE: And that in addition to your statements Evidence in Chief and rebuttal which you have already presented to this Board, you have also prepared a supplementary statement of evidence dated 25 July 2017?

MR CLARK: Yes, I have.

15 MS MCINDOE: And you have prepared a second supplementary statement of evidence dated 12 August 2017?

MR CLARK: Yes, I have.

MS MCINDOE: Do you have any corrections to make to those statements?

MR CLARK: There's one I will explain as I read the second supplementary, a small
20 typographical. Shall I do it now?

MS MCINDOE: Shall we do it now, it means there's no risk of forgetting it.

MR CLARK: Sure. Paragraph 3.7 very minor, one line up from the bottom defines ATOC as being the Auckland Transport Operating, it should be the Operations
Centre.

25 MS MCINDOE: Thank you. So, with that correction, can you please confirm for the Board that these two statements of evidence are true and correct to the best of your knowledge?

MR CLARK: Yes.

MS MCINDOE: If we turn to the second supplementary statement of evidence, could
30 you please read this statement for the Board?

MR CLARK: So, maybe if I start at Section 2, because the supplementary evidence addresses two issues.

35 First, is the suggestion by counsel assisting the Board that a traffic monitoring condition is required, and secondly, the effects of closing the Unsworth Drive off-ramp from State Highway 18.

So, firstly the monitoring. The latest version of proposed conditions is appended to the Supplementary Statement of Evidence of Mr McGahan...(Reads 3.1- 4.2 of Second Supplementary Statement)... Caribbean Drive.

5 At this point I might just read through this paragraph and then go through it again and reference to the plan on the screen there.

So, through traffic currently using the Unsworth Drive off-ramp having reassigned to Caribbean Drive may continue up that road. So, don't forget this is page 8 or 9, look at page 8. Firstly, this one's upside down, north point is facing down the screen.

10 JUDGE HARLAND: Yes, I've already commented, thank you Mr Clark, because it took me quite honestly a long time to figure that out. Yes, never mind.

MR CLARK: So vehicles starting on the far left of the screen on State Highway 18, they will approach this intersection (indicates). If they can't get off Unsworth Drive they'll turn left and go into Caribbean Drive. So, through traffic
15 will go up that screen to the top, through the roundabout and they may keep going up Caribbean Drive.

Then the next clause, for traffic heading for more local destinations is likely to turn into Barbados Drive in order to reach destinations such as Unsworth Drive or Bluebird Crescent.

20 So, these people again will turn left into Caribbean Drive but then right at that roundabout, that road is Barbados Drive.

So, that continues to the right of that page, and we go to page 9, and so at that point Barbados Drive, just to the north of this screen, and then in the middle of the screen you can see a road coming back down which is
25 Unsworth Drive.

So, if you're going to let's say the retirement village you will have to come back down that part of Unsworth Drive to turn right at the roundabout by the shops, back into the retirement village.

30 So, the flow goes to zero at the off-ramp itself, but it doesn't go to zero for the length of Unsworth Drive because people have to approach local destinations from the other direction, such as the retirement village to turn right and into their carparks or to turn left into that section of Bluebird Crescent.

35 So, back into paragraph 4.2. So, as a result the model indicates that traffic flows on Barbados Drive, approaching the roundabout with Unsworth Drive will increase marginally due to the Project.

Therefore, in terms of traffic in the vicinity of the shops ... (Reads 4.3 - 4.5)... Therefore, in my view, there will be safety benefits associated with closing the Unsworth Drive off-ramp.

5 MS MCINDOE: Thank you Mr Clark, I just have two further questions. The first one is at the end of paragraph 4.2 you state that the model indicates that traffic flows on Barbados Drive approaching the roundabout with Unsworth Drive will increase marginally due to the project. Are you able to help the Board with what was taken into account in the model, if you like, in terms of the particular destinations within this location, what did the model consider?

10 MR CLARK: The model is a large area model and it's very adequate in terms of the overall effects. Looking at this very local effect, it's a bit coarse. For example, there are two legs of Bluebird Crescent. In the model traffic has a choice of taking either of those. So, it's a bit coarse in it. And with the closure of the off-ramp it sends them all straight across from Barbados Drive into
15 Bluebird Crescent. If you were living in the lower leg you would probably go down Unsworth Drive to get into that lower leg.

Also, while it generally includes the growth anticipated by Auckland Council or Auckland Transport, it doesn't go into detail, for example, we haven't individually loaded the retirement village into the model.

20 So, it's a bit coarse in looking at local issues in detail as this, in terms of giving very detailed traffic forecasts.

MS MCINDOE: Now, the other question was just to ask whether you have had an opportunity to read the closing statement by counsel assisting the Board?

MR CLARK: Yes, I've looked at the section relating to this Unsworth Drive issue.

25 MS MCINDOE: Is there anything which you consider might be useful to add given your knowledge on traffic issues and after having considered that statement?

MR CLARK: Well, I did wonder whether the Panel hasn't quite heard sufficient evidence from myself on this weaving issue and the safety of weaving. There was one witness who did suggest that weaving's not a problem, particularly
30 looking at Gillies Ave to Khyber Pass where there is closely spaced motorway ramps. Now, I did look at the accident stats through there, and while you heard there's not a problem there, in fact, there's been 343 crashes in the one direction in five years. I know that's busy, so you can't imply there'll be 343 between Paul Matthews and Unsworth Drive. But that supplementary evidence
35 did just refer to what was in the assessment of transport effects and I did look in detail at what those accident crashes are telling us locally, and there is an

instance already of accidents of vehicles changing lanes, there's two crashes of vehicles turning left into Unsworth Drive. So, although they have had a decent deceleration lane, some drivers, and one was alcohol impaired, so you don't necessarily dismiss that, but we are trying to design a road system that reduces the likelihood of people falling off the roads. There was two people in the last five years, even though the flows are fairly low, who have failed to take that left turn bend. And it is very tight. So, I believe there is an issue around the weaving which maybe hadn't quite come enough out to the Panel.

5
MS MCINDOE: Thank you, please answer any questions which the Board might
10 have.

~Questions from the Board (11.06 am)

MR MARK-BROWN: Mr Clark, I have a couple of questioners, one I guess is to do with monitoring of, or control of, congestion due to the construction works. I understand what you're saying about difficulty to monitor that.

15 My question is, do you expect that the NZTA to have quite a strong feedback loop with the Alliance in terms of effects on traffic? I mean, we've got the management plans associated with what we're looking at, but presumably there will be quite a link, so that the contractors are going to be aware of the need to minimise disruption due to closure of lanes or control of lanes and that sort of thing. Would that be a reasonable assumption?

20 MR CLARK: Yes, it is. I personally haven't been involved in Alliances, but I understand that they do include NZTA personnel and an Alliance will have certain criteria, performance measures, to be met. And I expect the feedback loop between the general operations people at the Transport Agency and the Transport Agency staff within the Alliance to be very close.

25 MR MARK-BROWN: My second question relates to when you were talking about 3.7 about the Auckland Transport operating centre, so my understanding is what you're saying is that there's going to be a need to change the phasing of the lights; that will be done by ATOC in response to how the traffic actually behaves. Have you had any experience in terms of how, with large projects such as we're looking at, how that actually works in practice?

30 MR CLARK: Yes, I have. If you look at -- I've been more closely involved in Cityrail Link than I have on the Waterview Project. But certainly I am aware of the way that there has been a group there who are very aware of the next temporary phase of works that's about to happen and how they will respond to that. As an example, there's currently works in Halsey Street, they've closed that in one

direction for general traffic, allowing buses only through. And the diversions there on day 1 included different signal phasing at the Halsey/Victoria intersection. So, the effects were expected and therefore, the system was ready to go. I didn't drive through on that day, I was going through on day 2
5 and was pleasantly how the set of works that were expected to happen had happened.

MR MARK-BROWN: So, from that experience your view would be that the ATOC is set up and adequately resourced to deal with that sort of thing?

MR CLARK: They are, given the first example. Also, as I've in the industry, have
10 occasionally complained to ATOC when things have gone wrong, by the time I've got to work to make the phone call they are very aware of the problem; so they are actively monitoring what's going on. Clearly they can't solve the whole congestion of Auckland, but I think in terms of they're doing their best with what they can to manage it and minimise it.

15 MR MARK-BROWN: They might attract a bit of unfair criticism at times.

MR CLARK: I think so, they are busy people trying to do a lot of things.

MR MARK-BROWN: And resourced sufficiently to your knowledge?

MR CLARK: I know there has been a couple of departures recently, but they are actively trying to re-recruit.

20 MR STEWART: Just a couple of questions, Mr Clark, the first is a matter of information, we have been on a site visit, but I just wondered if you could tell us, the entrance to the Metlifecare Retirement Village is that the main entrance is -- one entrance is by the shops, is that the main entrance do you know?

MR CLARK: That's the route I've been in when I've been to meetings, yes, that's the
25 main entrance.

MR STEWART: Yes, I think we realise that, but I don't remember seeing other entrances.

MR CLARK: I think there may be other entrances for pedestrians, but not for vehicles.

MR STEWART: The only other question I have, is really it's just a sense I get from
30 reading your statement and you say things like it's unlikely that mitigation would be carried out and scope for mitigation is limited. And I just get the sense from reading your evidence or listening to it, that really you could have actually been a little bit more definitive. It seems to me, my sense from your evidence is that there really isn't any point in carrying out mitigation monitoring because
35 mitigation isn't possible. Is that going a bit further than you would be prepared to go?

MR CLARK: I think that's what I'm saying in paragraph 3.3. You need to know what you're going to do if you find a problem having monitored it. And here, particularly with the works along the motorway, the lane width restrictions, they are required for safe clearance against the work zone; so you're not going to
5 change it so what can you do even it's as a result of monitoring.

MR STEWART: So there's not a lot of point?

MR CLARK: That's correct.

MR STEWART: Yes, I did get that sense thank you.

JUDGE HARLAND: So, I just have a couple of questions, the first is in relation to
10 paragraph 4.2 where you have referred to the use -- the daily use of the off-ramp being 1450 vehicles per day. Have we got a comparative with the -- a comparative figure with the other exits that are used for that population base to get a feel for whether it's more or less used than the other available exits?

MR CLARK: We do. There's information on the forecast flows in the assessment of
15 transport effects which was repeated in my Evidence in Chief, I believe it was table 2.

JUDGE HARLAND: What I'm trying to figure out is whether it's the least used of the exits or the most used or where it sort of fits?

MR CLARK: That's what I was going to get to, because it is a remarkably low flow.
20 For example, Caribbean Drive, top of page 19 of my Evidence in Chief is given as being 16,000 two-way. And that isn't the section right next to the motorway, I believe it's more like 20,000.

It's interesting that of the 1450 when I looked at the what the model was predicting and it had it less than a thousand. It's because the model said it's
25 quicker for most people to turn left into Caribbean than it is to keep going through the lights and then turn into Unsworth.

So, only people with a really local destination need to use it.

JUDGE HARLAND: Right. Well that was where I was wanting to get to.

So really, the people along Bluebird, the lower end of Bluebird might be
30 ones that might be tempted to us it, or perhaps the retirement village, but otherwise most people seem to be choosing the other, Caribbean?

MR CLARK: I think that's correct, yes.

JUDGE HARLAND: Thank you for that.

The second aspect is in relation to the retirement village, have you been
35 involved in modelling expected traffic flows for retirement villages?

MR CLARK: My company actually works a lot for Metlifecare. I think they may have been involved in the planning of this one. I tend not to get into that, but I know that the trip breaks assumed for time units are a fraction of what they are for normal houses.

5 JUDGE HARLAND: Yes, what I'm trying to get at, so you understand the context to the question, is one possible inference is that the shops there at Greenwich Way might benefit from having the retirement village there, because there might be a community that might use those shops. And I was trying to get a handle on how many visitors one might expect just from traffic flows to and
10 from say a retirement village of this size? I know it would depend, and it's a very coarse -- but, what would be -- are you able to help me with that?

MR CLARK: Well the trip rate is very low for retirement villages. But having been to at least two meetings within that particular retirement village to do with this project, our meetings were often, as part of the residents' weekly or monthly
15 catch up, and they were talking about the various events that go on, and it does appear like a place where they try to encourage the families to come along. So, these are people obviously of retirement age but they are very active playing bowls, table tennis you name it, and encourage families to come along. So, in that respect, you can expect a certain number of visitors. The trip rate I was
20 referring to is the peak hour trip rate being point 1, I don't know what the interpeak trip rate is expected to be. So, you can expect a measure of visiting going on there, yes.

JUDGE HARLAND: So, there might be -- so, one of the concerns for the shop owners might have been passing traffic that may have been attracted maybe by the
25 service station or could then divert to the shops. But there might also be opportunities for visitors to and from the retirement village to avail themselves of what's on offer at the shops?

MR CLARK: That's correct. I haven't done the sums to know whether the minuses equal the pluses, but certainly the main vehicle entrance is right through the
30 Greenwich Way shops.

JUDGE HARLAND: Thank you that's helpful.

Are there any questions arising?

MS MCINDOE: No, thank you Your Honour.

JUDGE HARLAND: Thank you very much Mr Clark for working hard over the weekend to provide us with this, and particularly within the circumstances that you found yourself this morning. We're grateful.

5 ~-(The witness withdrew 11.16 am)

~Closing submissions on behalf of the Applicant (11.16 am)

MS MCINDOE: Just as documents are being handed around; if you're looking for somewhere to store these documents, this large one, volume 4, UDLF, this is the revision 3, which is referred to in the new version of the conditions, but I wasn't intending to take you to any particular page, so if you wanted to put that on the shelves behind you that might save you some space.

JUDGE HARLAND: Thank you.

MS MCINDOE: The other documents, I think you might have received two of the same thing there?

JUDGE HARLAND: We've got one that's in a nice folder and the other one that's spiral bound and is the same?

MS MCINDOE: They are the same.

JUDGE HARLAND: Which one do you want us to have?

20 MS MCINDOE: The ones in the nice folders were designed for the Board so perhaps the spiral bound ones could come back and there might be other people in the room who would like a copy of those.

And then the other documents are contained in a folder which has closing legal submissions at the front and those legal submissions have three appendices A, B and C. And then under D, that's where the bundle of authorities start. And for those in the room who haven't received a bundle of authorities with their closing submissions, I don't think they have the A, B, C but they do have all the appendices and it's all bull dog clipped together, so just if they're wondering why their version doesn't look like yours.

30 And while remember, I would like to make one correction to Appendix C which is the table of SUP extensions and connections. And that is on page 29, it's simply a formatting matter, when the table spread over the page, the top right-hand box looks empty, but that should be "side agreement with AT", it's simply the note from the previous page applies to the empty box at the top of page 29.

35 JUDGE HARLAND: I don't have an empty box. Oh, I see "method of delivery"?

MS MCINDOE: Yes, that's right.

JUDGE HARLAND: I see, thank you.

MS MCINDOE: Just while I remembered that.

5 My intention with the closing is to hopefully get through about ten pages myself, but if my voice doesn't last that long then I will hand over to Ms Sheard and I think probably from about page 10 or 11 she is the best person to finish the remainder of the submissions anyway.

10 So, the opening legal submissions for the Transport Agency outline the statutory framework and summarise the evidence to be presented for the Transport Agency in support of the Project.

These closing legal submissions do not repeat or replace the opening legal submissions, but instead respond to specific matters which have arisen during the hearing, and also comment on evidence as it was presented to the Board.

15 There are very few unresolved matters. With reference to paragraph 1.13 of the opening legal submissions which set out the matters outstanding at the opening.

20 The only witnesses who still consider Alexandra Stream Underpass must be upgraded or replaced as part of the project are Mr Tindall, Mr Brown and the Bike Auckland representatives who appeared.

25 The only witnesses asking the Board to alter the designations so that the shared used path is on the south side of State Highway are Mr Fogarty and Mr Brown, but I note that Auckland Council closing legal submissions do not seek relocation of the is shared used path to the south side of State Highway 18.

Mr Willmott and Mr Fogarty were the only witnesses who suggested the south facing ramps should be added to the Project.

Impacts on the Kiwi Self Storage site do remain in dispute.

30 No witness suggests that conditions are required to futureproof for future works in the area.

There was suggestions about that in the evidence for, particularly, Auckland Transport and then Auckland Council, but those conditions are no longer being sought by those parties.

35 Auckland Council and Auckland Transport witnesses agree the additional SUP connections sought are not required to mitigate effects and are appropriately provided by way of side agreement.

And the expert planning witnesses now agree on both the detail of the conditions and whether particular conditions should attach to the designations or resource consents.

5 And if I could just note at this point there have been some amendments to conditions since the set which was attached to Mr McGahan's supplementary evidence. And I'll take you to those changes.

The new set of conditions was circulated to the planning witnesses and counsel on Saturday night, I think it was, so I appreciate that that's not a lot of time for them to respond, but I haven't had any concerns expressed; indeed,
10 Mr Bangma for the Council and Auckland Transport indicated no opposition to the changes that were suggested, which are generally minor.

JUDGE HARLAND: Has Mr McGarr looked at them and got back to you about them or not?

MS MCINDOE: Counsel assisting were copied in to that email, but Mr McGarr didn't
15 respond, so I'm not -- I understand he might be overseas.

JUDGE HARLAND: That's why I asked, because I think he might be.

All right, that's helpful thank you.

MS MCINDOE: So, against that background, and mindful of questions raised by the Board during the hearing, these closing submissions address, firstly, the
20 additional SUP connections which the Transport Agency has agreed to provide; why the Transport Agency should not be required to upgrade the Alexandra Stream Underpass as part of the Project; Kiwi's proposed changes to the busway and shared used path; effects on Greenwich Way shops; the section 104D gateway test for objectives and policies; whether resource
25 consent is needed for the stream reclamation; whether work authorised by the existing designations can be considered as a section 171 (1) (d) other matter; contingent benefits in relation to the North Harbour Hockey Stadium; and various matters relating to conditions, including whether a condition requiring monitoring of construction traffic management is required and whether
30 conditions are required for other aspects of the Project which counsel assisting the Board suggests are not, in his words, "pinned down".

So, Appendix A to these submissions is a revised set of conditions and perhaps if I just briefly take you to Appendix A, not to run through them in detail but to give you a flavour of what's there. We have inserted a table of contents
35 and then the Notice of Requirement conditions are shown; the most recent changes being the changes since Mr McGahan's evidence was produced are

those shown in pink. The resource consent conditions begin on page 32. Again, the most recent changes are shown using pink. And on page 74 there's a table, I think this table was also included with Mr McGahan's supplementary evidence. The only difference this time is that a new column has been added in the middle so that the duration is indicated. The table appended to Mr McGahan's supplementary showed the lapse period, but not the duration. So that's been added. And then finally, the very last page of Appendix A is a revised Project management structure. So, this is a new version of the diagram, diagram 50 in the AEE; so this shows the revised structure of the management plans.

The diagram 50 diagram had a management plan which is not here and that was the Operational Noise Management Plan but those conditions of course have been extensively altered, so that there is in fact no operational noise and management plan and so that has been removed. Other than that, it's mostly a case of changing management plans from the designations to the resource consents or vice versa, and the adding of the public transport management plan.

JUDGE HARLAND: So, the white ones are stand-alone plans, correct?

MS MCINDOE: Yes. So, the white plans are submitted to the Council, but not for certification and not as part of the outlined plan.

And the pale blue plans are submitted for certification.

And then the dark blue plans are those which are part of the Outline Plan.

The only other matter indicated in the key is that the Stormwater Operation and Maintenance Plan is a plan which regulates operational aspects of the Proposal.

And all other matters relate to the construction or immediately following construction of the Project.

JUDGE HARLAND: Sorry, can you just help me again, the white ones are submitted to Council but not for certification, and what were they in relation to the outline plan, not part of the Outline Plan?

MS MCINDOE: They're not part of the outline plan, no.

JUDGE HARLAND: Thank you.

MS MCINDOE: Then the other, I guess, final element which might look a little bit odd but has arisen during the last part of last week, was that the Site Specific Construction Noise Management Plans and Vibration Management Plans, they

are submitted for certification and not part of the Outline Plan despite them being subsidiary plans of the Construction Noise and Vibration Plan and the reason for that was that the witnesses identified that the timing wouldn't work. That those plans would be prepared, because they're site specific, it could be two years into construction. And so, it wouldn't make sense for them to be submitted as part of the Outline Plan for that part of the work. So that's why they're instead submitted for certification.

So, I was just at the bottom of page 2.

If I take you to appendix B, I will just cover that off while we're here. This is a schedule which has been prepared by Mr Bray and it explains the differences. So, this schedule explains the differences to the UDLF revision 3 as compared to revision 2, which was appended to his rebuttal evidence.

There was nothing in particular that I needed to draw your attention to, just simply to help you understand the difference between the two versions.

JUDGE HARLAND: Right, so these are minor edits, are they?

MS MCINDOE: Some of them have arisen out of conferencing. So, for example, the -- if I take you to the top of the second page, there's been a note added: "Install solid 2 metres wall on the edge of the SUP to eliminate views into Wastecare Management site at the request of Wastecare management".

And I think there was another one added. Some of these include the provision of connections for the shared use path.

So, in Appendix C where it says that some of these connections are going to be implemented via the UDLF, so, for example, Appendix C, if I take you to the second page, Appendix C, the Auckland Transport and the Transport Agency have agreed that the design will not preclude a connection off the shared use path into the Rosedale Closed Landfill and that's to be achieved by the Urban Design and Landscape Framework. And so that change is identified in the schedule in Appendix B, just to help you connect those dots. If I go back to page 3 of the submissions. On the first day of the hearing the Board asked for a list of the shared use path connections which the Transport Agency has agreed to provide. Appendix C to these submissions sets out those connections which the Transport Agency has agreed to provide (or not preclude) and whether the connection is contained in the side agreement with Auckland Transport or addressed in conditions. As I've said, it's conditions by way of reference to the Urban Design Landscape Framework.

Mr Lovell's Summary Statement confirms that these connections are not required to mitigate any effects of the Project. Rather, Mr Lovell adopts the evidence of Ms King, which is that the connections are relevant to achieving one of the Project's objectives, and for maximising the benefits of the Project.

5 Section 2 of the closing statement for Auckland Transport discusses the appropriateness of addressing these matters through a side agreement. And the Transport Agency respectfully agrees with and adopts those submissions. When Bike Auckland presented its submission, it too expressed support for additional shared used path connections. Many of the connections sought are

10 covered by the matters addressed in the side agreement with Auckland Transport. As a result, and following further discussions with Bike Auckland, two new provisions have been added to the side agreement with Auckland Transport, and Auckland Transport supports those amendments.

JUDGE HARLAND: Which ones are they?

15 MS MCINDOE: So, if I take you to the table, so these are the final two on the bottom of page 28. So, you might recall Bike Auckland was seeking a Greenway path through to Centorian Reserve, so on the south side of Pond 2, and the Transport Agency has agreed to construct a connection within its part of its designation if Auckland Transport constructs that Greenway path in the future.

20 And the next one down Oteha Valley Road crossing at eastern extent of the shared use pat and there the Transport Agency has agreed to investigate the feasibility of such a crossing and if it is feasible has agreed to construct it. Turning then to the Alexandra Stream Underpass - sorry, I've missed a paragraph, 2.5, further, Bike Auckland's interest in the detailed design of

25 improvements to the Alexandra Stream Underpass and the Paul Matthews Road overbridge has been recognised through amendments to condition UDL.14 and the inclusion of a new UDL.15.

So, maybe just for completeness I can take you to those.

30 They are on page 26 of the conditions. So UDL.14 requires that the matters relating to pathway alignment, lighting and CCTV to be designed and implemented in consultation with Council Parks, Bike Auckland and Auckland Transport.

35 And then UDL.15 requires the Transport Agency to consult Bike Auckland on the layout and detailed design of the shared used path on the overbridge, which was one of the other matters which Bike Auckland presented on.

If I go back to section 3 in the legal submissions on page 3.

5 So, the one remaining issue in dispute between the Council and the Transport Agency relates to the potential upgrade of the Alexandra Stream Underpass. The planning witnesses for Auckland Council have not suggested a condition which require the underpass to be upgraded, but counsel understand that Auckland Council nonetheless still seeks the upgrade. The Transport Agency's position has not changed from that set out in opening legal submissions. Fundamentally the Agency does not agree to this add-on because firstly it's not required to mitigate an effect of the project, as I'll discuss further below, including with reference to the legal issues which Mr Berry addressed in his closing statement.

10 And secondly, it's not reasonably necessary to achieve the Project objectives. And, in any event, the Transport Agency is not required to demonstrate that the work it proposes will completely or perfectly fulfill those objectives.

15 If we look at the evidence on this issue, Mr Tindall for Auckland Council all but accepted that the underpass upgrade was not required to mitigate an effect of the Project. Mr Tindall accepted that as a result of the Project the existing Albany Highway Interchange pedestrian and cycling crossings will continue in place; the Alexandra Stream Underpass will remain; there will be a new crossing over State Highway 18 on the new Paul Matthews Road bridge and the ability for pedestrians to cross at Constellation Interchange will remain.

20 As for the physical nature of the underpass itself, Mr Tindall accepted the difficulties with the underpass were an existing issue, noting, for example, that "the underpass is not getting any narrower...in terms of the scheme."

25 As recorded in opening legal submissions, the Recreation and Reserves experts agreed there was no "loss in connectivity as a result of the Project ". While Mr Tindall accepted this was their view, his opinion nonetheless was that there would be a loss in connectivity associated with the State Highway becoming a motorway, such that cyclists would not be legally allowed on it.

30 He considered there were presently "some cyclists and pedestrians who would cross who would not be permitted to, and therefore, from a traffic and transport perspective, there is an element of loss of connectivity: However, he had never actually seen a cyclist undertaking the manoeuvre of travelling from Paul Matthews Road to Unsworth Drive, for example.

35

In terms of the scale of this effect, Mr Tindall's view was that "loss of connectivity is from a level of a relatively hostile or a hostile environment to nothing at all", which I think is the same quotation that Mr Berry referred to in his closing statement.

5 In comparison, Mr Bray considered the Project improved connectivity, and I'm going to read this because it relates to a point Mr Berry made about Mr Bray's opinion and the Project as a whole, as opposed to the landscape architecture elements of it. So, if I read the passage and then I can briefly comment on Mr Berry's submissions on the issue. So, Mr Bray said:

10 "No, I think we're saying that the shared used path provides greater connectivity overall. We're not saying that it provides direct connectivity or improvement for a small community in Unsworth Heights. We're looking at a bigger picture which is correcting, you know, creating a spine, I guess, of a shared use path that others can connect to, and in the future that would be
15 extended. So, my view is that connectivity is improved, generally, for a wide area, not necessarily for a specific catchment."

Now, I checked and that's not the passage which Mr Berry references in his closing submissions and I haven't been able to, I guess, double check to see whether the passage he refers to is different in its tone, but certainly my
20 reading of that passage is that Mr Bray is commenting, when he talks about the Project as a whole, on the physical extent of the project, rather than offering a comment on its other effects or benefits which he may not be qualified or come within his area of expertise.

25 ~Comments from the Board (11.39 am)

JUDGE HARLAND: Yes well, I thought Mr Berry was commenting on or suggesting that connectivity was not a matter that Mr Bray could comment on, because of his -- the nature of his expertise. Or perhaps, probably putting it a little less harshly, that Mr Brown's was to be preferred because he had the additional
30 planning qualification.

MS MCINDOE: Mmm. And, with respect, I don't agree. Mr Bray's evidence, although it is brief, explains his -- gives a brief explanation of his experience in designing shared used paths, so certainly his experience is relevant. And he also, in his evidence, I think also in answer to questions where I read through that
35 section of the transcript, referred to Mr Clark's survey on this matter to help establish his views on the design and likely usage of the underpass.

In my mind, I guess I'm not entirely convinced that connectivity isn't something that landscape architects could comment on. It seems to me that it is, but I'm not aware of any case law to support my gut feeling on that matter, it's simply a matter that it's often that landscape architects and architects, I guess, in relation to the built environment do comment on.

JUDGE HARLAND: Well it could, in fairness, be an overlap kind of issue because it's a transport, planning, maybe urban design.

MS MCINDOE: Yes.

~Closing submissions on behalf of the Applicant continues (11.41 am)

Later, in responses from the Board as to whether the underpass needed to be replaced to mitigate effects on cyclists, Mr Tindall explained his view was that the underpass presently does not deliver desirable levels of safety and amenity for a connection across State Highway; that the replacement of the underpass as a standalone scheme would give rise to disruption and additional costs, to a greater extent than if it was completed as part of the project, or, as later summarised by Mr Tindall:

"My view of the adverse effects relate to the difficulty in providing a wider, straighter underpass in this location in the future and the significant costs that would arise resulting from that."

Now, of course the Project does include minor improvements to Alexandra Stream Underpass being the installation of CCTV, new lighting and realignment of the southern approach. These matters were described in Mr Moore's evidence and now captured in the conditions which I've referred to there.

In addition, the UDLF and the urban design landscape conditions do contain references to CPTED, but they are not specific as to any particular location.

Mr Bray's evidence regarding the ability of the Project to meet the Project objectives without upgrading the underpass was, as I've set out there:

"... to look at this as a Project perspective. We are providing safe connections across State Highway 18. It's not at the underpass, admittedly, but it is at Paul Matthews Road Overbridge where there are no current safe connections. So, in terms of -- I think meeting the Transport Agency's objectives in terms of connectivity, we are meeting those objectives and improving the situation that is there currently."

Looking at efficiency, Mr Tindall's views of this "effect" is essentially the same as the Council's argument, I'd submit, that it would be more efficient to undertake the work now. The Transport Agency does not dispute that it would be more efficient and cheaper for the underpass to be ungraded in conjunction with the Project. And if Auckland Council wishes to capitalise on the efficiencies associated with upgrading of the underpass while construction of the Project is underway, it should press ahead and plan the upgrade.

The Board asked Auckland Council and Auckland Transport witnesses whether there was any structural planning reason why the Council could not adjust its funding in response to the project, and no witness identified any issues with this. The Transport Agency has confirmed and is confirming through me, that it would be happy to discussion co-ordination of Auckland Council's upgrade of the underpass with the Project.

However, efficiency is not a sufficient reason to require the Transport Agency to carry out the upgrade at its cost. As stated in opening submissions, simply because it's convenient to upgrade the underpass now, does not mean it should be required.

And if I could just interpolate there, I was thinking to myself what would be another example of this in another context and to me the argument appears to be that if my neighbour is building a house then they should also build mine, because there would be efficiencies in having the construction team in the neighbourhood. And simply, I just cannot see how the logic of that can be true. That just because one construction project is going on, that it would be efficient to add another one to it, that it should then be required. And I'll come to the discussion of the law on logically connected and so on.

Auckland Council also characterised the underpass upgrade as a lost opportunity. I'm not aware of any case law considering this kind of feature or characteristic of a Project as an effect, or something which should be achieved by the imposition of conditions. However, it's potentially comparable to, but the opposite of, the concept of an enabling benefit as considered in the Basin Bridge decision. So, if you like, it could be a disabling benefit.

Enabling benefits, as discussed by the High Court, relate to the fact that the Project under consideration would enable, facilitate or provide for other future projects to be implemented (as distinct from the benefits that would flow from the actual implementation of those future projects).

So, for example, one of the benefits of this Project is that it facilitates the later provision of a new bus station at Rosedale which would not proceed if there was no busway to connect to it. Now, I'm saying -- this was not something that's we've stressed, but I'm simply giving it as an example of what an enabling benefit could be.

The High Court considered that whether such factors should be treated as a positive effect or were better considered under section 171(1)(d), should turn on the particular circumstances. In the present case, Mr Tindall appears to be suggesting that not upgrading the underpass now represents a foregone gain, rather than a loss or an adverse effect of the Project.

Regardless of whether you treat this matter as an adverse effect on the environment or a consideration under 171(1)(d) or other matter, the Transport Agency submits that it should be given no weight because the additional costs associated with upgrading the underpass in the future will only arise if in fact the underpass is upgraded, and there's no evidence that the underpass will in fact be upgraded in the future. Neither Auckland Transport or the Council identified any funding or programme of works to achieve this.

And, therefore, the efficiency loss which Mr Tindall points to may never arise.

Turning then to whether a requirement to upgrade can be imposed despite not being required for mitigation.

~Comments from the Board (11.47 am)

JUDGE HARLAND: Wasn't he more talking about an efficiency benefit? Wasn't he saying that there would be more benefit obtained if this occurred? I thought that was the thrust of his argument?

MS MCINDOE: Perhaps I was seeing it from the other side, which was that if this was to be undertaken into the future there would be additional costs, and therefore there's efficiencies, perhaps two sides of the same coin?

JUDGE HARLAND: All right.

MS MCINDOE: And it's possible he may have expressed it both ways.

~Closing submissions on behalf of the Applicant continues (11.47 am)

Section 108 which I am referring to here, but of course your power is under 149P, but there's no dispute that the 108 case law is relevant.

Section 108 confers a decision maker with a discretion (in relation to resource consents) to grant any condition that the consent authority considers

appropriate. And section 171 (2) allows Council's to recommend the imposition of conditions on designations, and there is no dispute that you're empowered to impose conditions on the designations in this case.

5 Now, I've referred there to the well-established principles in the Newbury decision which I'm sure you've heard before, so I won't read out, paragraph 3.20.

And in 3.20 I refer to Estate Homes where the Supreme Court modified Newbury's second limb introducing the logically connected element.

10 The Court went on to clarify that this limit on section 108 of the Act is "simply that the Council must ensure that the conditions it imposes are not unrelated" to the proposed development. Conditions must not relate to external or ulterior concerns.

15 The Transport Agency agrees with the summary of the law regarding the Estate Homes test provided in Auckland Council's closing statement and indeed Mr Berry's summary on the law today. To be valid a condition must be: "Logically connected..." not relate to "external or ulterior concerns..." (b) for a "planning purpose..." and "overall ... must be reasonable."

So, perhaps the task is easier for the Board because we do not disagree on the law, it's simply application where there's a dispute.

20 So, we do not agree with the Council that any condition which required the underpass could be upgraded would be valid because:

The underpass is located in close vicinity to the Project works, but that does not mean its upgrade is logically connected to the Project.

25 The underpass sits inside the Transport Agency's designation footprint, but is not affected by it. And if I can explain this with reference to the general arrangement plans? It is sheet 9.

30 So, you will see there that the underpass is indicated using yellow print and it runs along the northern side. Of course, the north point is around the wrong way, or the bottom of the page, the northern side of State Highway 18, and you will see that in the middle of the screen there has to be an extension created in the designation is extended in that area to allow the underpass to be connected down to the existing path which goes under the underpass, through the underpass.

35 So, the designation, if you like, the Transport Agency's connected to an existing network, and has ensured that the designation is big enough to construct that connection, but actually the underpass could have just as easily

have just continued along the street, but wouldn't have -- along State Highway 18, but wouldn't have had as many connectivity benefits as it will have by dropping down to that path, which already goes through from the bottom part of the page through the underpass and up through the top of the page.

5 So, the designation footprint also covers elements of the local road network, but that does not oblige, of course, the Transport Agency to upgrade all of those elements.

 Second, the underpass is not owned or operated by the Transport Agency. I think we established that it was an Auckland Transport
10 asset.

 ~Comments from the Board (11.52 am)

JUDGE HARLAND: Auckland Council you mean?

MS MCINDOE: Sorry, Mr Bangma can you correct me on that? Maybe we didn't
15 establish?

JUDGE HARLAND: Who owns it?

MR BANGMA: Well, it has been the subject of discussion between the offices. I think my learned friend is right though, one view is that because it forms part of the existing Albany cycle way network it would be regarded as an Auckland
20 Transport asset, and it's only on the other side of the underpass when you get to Rook Reserve that the infrastructure would become Council parks infrastructure.

JUDGE HARLAND: Maybe that complicates the who pays business, does it?

MR BANGMA: Potentially, Your Honour.
25

 ~Closing submissions on behalf of the Applicant continues (11.52 am)

MS MCINDOE: 3.24 a iii: The underpass is not the only connection between Unsworth Heights and the proposed shared use path on the northern side of State Highway 18 and as I've already said the Transport Agency is adding a
30 connection over the Paul Matthews Road Bridge.

 The Transport Agency is proposing to carry out minor improvements to the underpass, but it's submitted that it does not logically flow that a full upgrade should be required.

 Mr Clark's evidence is that any increase in demand for the existing
35 Alexandra Stream Underpass as a result of the new shared used path along the northern side of State Highway 18 will be offset by the reassignment of some walking and cycling trips to the new connection on the Paul Matthews Road

overbridge. And the closing statement for Auckland Council suggests that Mr Bray considers usage of the underpass will increase, however with respect this is incorrect, the reference provided to the transcript is to the transcript evidence of Mr Brown.

5 The existing path on either side of the underpass is not being altered, as I explained by reference to the general arrangement plans. That part of the path was constructed by the North Shore City Council as part of the Albany cycle path and that was in the appendices to Ms Barrett's summary statement.

10 Even if the Board was to find the underpass upgrade to be logically connected to the project, the Transport Agency submits that it would not be for a planning purpose, nor would it be reasonable, to require its upgrade as part of this Project. And this is because the cost to upgrade the underpass is significant, approximately \$5 million.

15 The Project already provides substantial benefits for pedestrians and cyclists, include a new safe shared used path connection across State Highway 18 on Paul Matthews Road Bridge.

 The Council upgraded the underpass as recently as 2010, and the reports prepared in relation to the 2010 underpass upgrade did not suggest that further upgrades would be required within the next ten years.

20 And lastly, the Transport Agency did assess a range of options to upgrade the underpass, before deciding not to upgrade it.

 However, even if you were to reach the view that conditions requiring an upgrade of the underpass could be imposed, that is they would not be legally invalid, that does not mean, I submit, that they should be imposed.

25 Estate Homes was an appeal on points of law and concerned with the legal jurisdiction to impose conditions. It's not the case that all potential conditions that might pass the test of being legally valid are conditions which you might consider appropriate under section 108.

30 As a matter of practice, conditions are generally considered appropriate where they're necessary to mitigate or manage an adverse effect of the Proposal and do not place a disproportionate burden on the consent holder. And it's submitted that any condition requiring upgrade of the underpass is not necessary to mitigate or manage an adverse effect of the Project and would be disproportionate.

35 Now, when Mr Berry was presenting his statement I made a note of an interpolation that he offered where he said that you could have a condition to

create a benefit, it's not in the written part of his statement, but an oral interpolation. And in terms of whether you could have a condition to create a benefit, I would submit that any such condition would need to be carefully assessed as to its reasonableness to ensure that it wasn't inconsistent with the Augier line of cases which establish, of course, that conditions which are offered by the Applicant and create a benefit are enforceable. But in this instance there is no condition being offered by the Transport Agency. And so, the submission is that this would be a matter as to the reasonableness of the condition and whether a condition that required a benefit would be reasonable, particularly in light of the case law relating to Augier conditions which also require benefits.

And it was at that point that I was going to sit down and let Ms Sheard take over.

MS SHEARD: Turning now to Kiwi's case in section 4. As you will no doubt be well aware by this point, Kiwi suggests that the Project should be redesigned to protect views of its site from State Highway 1. Kiwi's argument that the Project will have significant adverse effects on its site is simply not supported by the evidence for the reasons outlined below.

Firstly, Mr Land's assessment is based on an inaccurate representation of the existing view of the Kiwi site, as he has not factored in the significant screening effect of existing vegetation;

b: As a result Mr Land's conclusion that the effect of the Project on views from the motorway to Kiwi's site are "significant" cannot be relied on;

c: Mr Doyle's projected 10% reduction in occupancy is based on the loss of visibility (presumably relying on Mr Land's flawed assessment based on Solution 2) and adverse effects on circulation areas within the site (an issue which Kiwi is no longer pursuing);

Mr Bray's evidence is that the most prominent view of the site as vehicles and buses come across the causeway will in fact be enhanced by the Project and he was not challenged on that point.

Mr Bray's evidence is also that the projected increase of bus patronage on the busway will provide new regular and passive travellers who are able to see the Kiwi site (and again, Mr Bray was not challenged on that point).

And finally, Kiwi's suggestion that the blocking effect of the motorway will have flow-on impacts for customers obtained through other channels and for its other facilities in New Zealand is not supported by any evidence.

Mr Bray sums up the position as follows:

"I therefore conclude that there will remain significant numbers of viewers, both in vehicles and in buses, who will remain having good (or even better) visibility of the Kiwi site when travelling southbound. Regular travellers will remain able to build up images of the Kiwi building the more frequently they travel past it, and I consider that the loss of visibility to the site at locations adjacent will have a negligible effect on viewers awareness of the facility."

Whilst there's no evidence that there is an effect that needs to be avoided, remedied or mitigated in this case, it is submitted that, in any event, Kiwi has no reasonable expectation that its visibility will be maintained. Nor should there be any expectation that State Highway 1 will never change or be upgraded over time. To argue otherwise would seriously hamstring the Transport Agency's ability to upgrade State Highways within urban areas. It will also hamper AT's work in that regard as well.

~Comments from the Board (12.01 pm)

JUDGE HARLAND: Well, that's sort of like the flood gates' argument, isn't it? Isn't the reality that there haven't been that many significant motorway projects really that have started to impact in this particular way, we're really starting with it now. So, this area is evolving.

MS SHEARD: I guess you could probably could say that, but I think you only need to drive up and down State Highway 1 to realise there are a lot of premises which have capitalised on the views from the motorway in terms of signage. So, it is a potentially large flood gate.

JUDGE HARLAND: Well, flood gates arguments are a bit difficult, aren't they? Anyway, I take your point.

~Closing submissions on behalf of the Applicant continues (12.01 pm)

MS SHEARD: If the visibility of commercial sites signage is a relevant consideration under the RMA, then the Transport Agency would need to visually assess the impact of the changes to the motorway on every commercial property within site line of the carriageway. Similarly, other resource consent applicants would also need to consider the effect of their developments on the visibility of the sites near them, and whether those sites value their visibility (as opposed to preferring privacy, which maybe the case in many instances). This would create an impossible burden.

To require substantial transport infrastructure to be redesigned in accordance to preserve the views of commercial interests would set a precedent which would impact upon roading projects throughout New Zealand and would hinder the role controlling authority's placement of signs, landscaping and route choice.

In considering whether Kiwi has a right to visibility that should be protected, it's also highly relevant that Kiwi's resource consent application for its site relied on vegetation to screen views of the site, and showed no signage on the buildings. The conditions of consent require landscaping to be implemented along the site boundaries that provide the view into the site from the motorway.

Kiwi has, like many other businesses fronting State Highways throughout New Zealand, opportunistically benefitted from its visibility from the motorway. Mr Land and Mr Fraser accepted that the Transport Agency could carry out planting or construct other screening within the existing designation that would completely screen the Kiwi site from view.

At a practical level, the Transport Agency also remains opposed to both the 'solutions' sought by Kiwi and its related proposed conditions for the following reasons:

Improving visibility of the Kiwi site requires the busway and shared used path to be constructed in a way which is less able to achieve the greatest benefits for the public using those facilities. Kiwi is asking the Board to favour its private commercial interests at the expense of the public interest>

Detailed design of the Project has not been completed. In these circumstances, imposing conditions which set the maximum RL outside the Kiwi site (down to three decimal places) and a similar specific level at the Constellation Road Bridge will prevent any future attempt to find an even better solution for the walking, cycling and bus travelling public through a further reduced gradient.

Similarly, the Transport Agency is constrained by clearance of the Constellation Road Bridge and the heavy vehicle users' wish that maximum clearances are provided.

Both Auckland Transport and Bike Auckland have emphasised the importance of ensuring that the shared used path gradient is as flat as possible to maximise functionality and ensure safety.

Mr Maule confirmed that buses suffer a performance reduction on the hill up to the ridge at Sunset Road when they are full.

And finally, even if the economic impacts claimed by Kiwi are correct, they are not substantial enough to justify the dis- benefits to users of the shared used path and busway.

Contrary to the comment in the closing submissions for Kiwi that "no issues have been identified that should prevent Kiwi's alternative design solutions from being implemented", the matters outline above provide very compelling reasons why the Transport Agency opposes the solutions put forward by Kiwi.

The statement in Kiwi's closing submissions that the Transport Agency's opening statement indicates that its concern about Kiwi Solution 2 is "primarily one of safety" is also incorrect.

As stated in the Transport Agency's opening:

"These suggestions, [ie the Kiwi solutions], are discussed in the evidence of Mr Moore, and are either impractical or would have substantial downsides, such as affecting the performance of buses using the busway, steeper gradients for cyclists on the shared used path, or requiring a further bridge across State Highway 1".

The suggestion in Kiwi's closing submissions that the Transport Agency has not adequately considered Kiwi's concerns is disappointing and incorrect. The Transport Agency has actively engaged with Kiwi over a period a period of many months, including numerous meetings and considerable effort drawing up Kiwi's proposed "solutions". Mr Moore's evidence discusses the Kiwi suggestions, and Aurecon prepared the drawing appended to Mr Hall's evidence, which showed how the Kiwi options compared with the lodged design.

In closing submissions, Kiwi also alleged that the Transport Agency has not fulfilled the requirements under section 171 to undertake an alternatives assessment on the basis that it considered its "solutions" are "routes" or "methods". Mr Schofield's uncontested evidence remains that the alternative assessment for the Project has been undertaken in accordance with best practice and is robust. Mr Schofield's evidence was that consideration of options to the level of detail sought by Kiwi was not necessary at this point in the Project development and would be highly unusual. The types of changes being requested by Kiwi simply seek to lock down the detailed design.

JUDGE HARLAND: Well, aspects of the detailed design between two chainages.

MS SHEARD: That's correct.

In closing submissions, Kiwi argued that the Project will also "detract from the high levels of investment in the Facility." The effects of the Transport Agency's acquisition of part of Kiwi's site will be considered under the Public Works Act. Section 61 (b) of the Act also allows for the payment of compensation for injurious affection suffered when the value of the remaining land is affected by the acquisition of a part. And I've outlined section 64 there for completeness.

10

~Comments from the Board (12.08 pm)

JUDGE HARLAND: You won't be aware of this, but there's a recent case that was just decided last week in the Environment Court, or not in the Environment Court, the Land Valuation Tribunal, which discusses injurious -- compensation for injurious affection's a very high threshold. So, you don't need to worry about that, but it's a very high threshold basically.

15

MS SHEARD: I look forward to seeing that when --

JUDGE HARLAND: Well, I mean are you seriously saying -- what you're really saying is that the compensation's for that little bit of land, isn't it, rather than for the bigger picture issue of -- wouldn't you have to link in the loss of the land to the injurious affection? Whereas they're saying here that it's not to do with that little bit of the loss of the land.

20

MS SHEARD: I guess you could see it that way. There is a link, though, between the taking of the land and the reduction of the views, as you move the motorway closer to the site.

25

JUDGE HARLAND: Oh of course, yes you're quite right. Thank you for that. Yes, you're quite right, and that was the point that was submitted. You're quite right. My apologies.

30

~Closing submissions on behalf of the Applicant continues (12.10 pm)

MS SHEARD: So, I think I'm at paragraph 4.15:

With regard to the effect of the retaining wall proposed as part of the Project, Mr Bray's evidence is that it will be a similar height to the Kiwi building and the neighbouring Bunnings Warehouse. He concludes that the adverse visual amenity effects of this wall being next to a commercial facility and unvegetated parking/storage area are negligible.

35

Agreement has been reached with Kiwi in relation to the construction impacts on this submitter. Effects on Kiwi's interests will be mitigated by amendments to the Outcomes Sought in Revision 3 of the UDLF, and an amendment to condition DMP.3 (f), which requires the cleaning of buildings which suffer objectionable or offensive dust deposits as a result of the Project. The side agreement also requires the Transport Agency to construct the fence along the shared use path near Kiwi's site out of visually permeable materials. It is submitted that these measures are sufficient, and no further conditions are required.

So, turning now to the Greenwich Way shops.

You've asked a number of questions during the hearing regarding the impact of the Project on the commercial viability of those shops. The Assessment of Transport Effects explains that the Unsworth off-ramp must be closed in order for State Highway 18 to become a motorway. In this case, as acknowledged in the AEE, the Unsworth Heights area adjacent to the shops is undergoing significant change. And you touched on that with Mr Clark just before. The adjacent Greenwich Gardens Metlifecare Retirement Village is being progressively developed with a final population of approximately 600 people.

Ultimately, as noted in the assessment of social effects included in the AEE:

"This is clearly a trade-off between improving safety and traffic performance by the removal of the off-ramps to the Z Petrol Station and the Greenwich shops from State Highway 18, and the risk posed to the economic viability and community function of the service station and the eight retail/food outlets. While the Project has considered the potential for an Unsworth Drive link to North Harbour East or a replacement ramp to/from Upper Harbour Highway further to the west, neither option is feasible from a road safety perspective. The PWA does not provide compensation for land owners or businesses where no land is being taken. Consequently, it is recommended that the Transport Agency continue to engage with these parties with respect to signage and advertising.

Ms Brock's supplementary evidence demonstrates that the Greenwich Way shop owners and operators have been extensively consulted with. Despite this consultation (or perhaps because of it) the shop owners and

operators have not submitted on the applications and have not provided any evidence of how they consider they will be affected by the Project (if at all). Nonetheless, the Transport Agency has considered the impact on the Greenwich Way shops. Mr Clark's supplementary evidence is that the reduction in traffic on Unsworth Drive will be offset by a slight increase in flows on Barbados Drive. He also considers there will be safety benefits for closing the Unsworth Drive off-ramp.

And you also heard his comments about the entrance to the Greenwich Metlifecare.

It's submitted that if the Greenwich Way shops experience any downturn in business as a result of the project, this will occur as soon as the Unsworth off-ramp is closed during construction. At this time, the SCP conditions, in particularly SCP.9 will require the Transport Agency to implement measures such as signage to mitigate impact on business severance and visibility. Given the 3.5 year construction period, these measures undertaken during construction may be sufficient.

But following on from your earlier comments, we have made some changes to the conditions. I spoke to Mr Berry and Ms Vella during the break and it was agreed that we will continue to work those conditions up. At the current time we have it drafted with a requirement to consult with the Greenwich Way shop owners, to put a way finding signage at the main roundabout, and also to do leaflet drops and advertising. But as I said, we will continue to work that wording up in consultation with them.

JUDGE HARLAND: Thank you.

MS SHEARD: So, turning now to section 6 of the submissions, consideration of objectives and policies.

You've queried whether the correct approach to consideration of plan provisions in section 104 and/or the section 104D(1)(b) gateway test is to consider: The objectives and policies of a relevant plan as a whole; or each objective and policy of a relevant plan.

The Transport Agency submits that the Board's consideration of the Project does not turn on this issue. The only matter of tension with the objectives and policies that has been identified by the expert planning witnesses is that Mr Turner considers that the Project is not entirely consistent with objectives and policies of the planning documents relating to the streams issues.

Nonetheless, he concludes that the Proposal is however not contrary to the objectives and policies of the relevant statutory planning documents, and hence passes the section 104D(1) (b) test for non-complying activities. When questioned Mr Turner confirmed that consistency is a lower threshold than contrariness.

Accordingly, it's submitted that there is no evidential foundation to conclude that the Project is "contrary" to the objectives and policies of the unitary plan, either in terms of the plan as a whole, or on an individual objectives and policies basis.

As such, the question posed is not something that the Board must determine in order to make a decision on the Project.

So, turning now to the resource consents needed for the stream reclamation. As we've already discussed, the Transport Agency has applied for 560 metres worth of stream reclamation and we do request that the Board determine the applications on that basis.

Based on the evidence of Ms Barnett, the existing fresh water values of the areas to be reclaimed are low, and minor adverse effects associated with the Project will be adequately mitigated to a less than minor level through the creation of stormwater wetlands.

In particular, and regardless of whether or not the watercourses in question qualify as "streams", Ms Barnett's evidence is very clearly that the loss of 130 metres of concrete lined stormwater drain and 430 metres of watercourse was considered as part of the AEE. The habitat was assessed as highly modified, extremely poor quality aquatic habitat. There will be a significant biodiversity gain from the establishment of the new stormwater wetland.

And on that basis no additional offsetting is required. In response to questions from you, Ms Barnett confirmed it was irrelevant from her perspective whether or not the watercourse was actually qualified as a stream.

Mr Turner has since confirmed that he considers the relevant watercourses are streams, and therefore consent is required. Nonetheless, he accepts Ms Barnett's view that no offset mitigation is required in this case. Mr McGahan's view, as expressed in his summary statement of evidence, is that, given the difficulty applying the definition to the facts of the case, and given that the Transport Agency has applied to reclaim the larger 560 metres,

he also supports the Board considering the resource consent applications for the larger area as applied for by the Transport Agency.

So, turning now to section, 8 work authorised by existing designations as an "other matter".

5 During the presentation of opening submissions, you asked whether there's any authority for the proposition that the existing designations and the work they authorise could be a relevant other matter under section 171(1)(d). Counsel were unable to find any cases considering this particular point. The Environment Court in Pukekohe East Community Society and Auckland
10 council recently offered the view that:

"In relation to the listing of "any other matter" in section 171(1)(d), we observe that this phrase must be read and understood in the context of the requirement for "particular regard" to be had to it, and that it must be
15 "reasonable necessary" for such regard to be had to it in in order for the Territorial Authority to make its recommendation on the NOR or, on appeal, for the Court to make its decision. Given the import of those phrases as discussed above, this means that for the purpose of subparagraph (d) any such other matter must be comparable significance to the matters set out in
20 subparagraphs (a)-(c) of section 171 to the making of a decision under section 171."

In both sections 171(1) (d) and 104 (1)(c) the decision maker effectively has a discretion whether to take into account a particular matter or not. Examination of the cases under section 104(1)(c) indicates that a wide range of matters have been considered.

25 For example, in Ammon and New Plymouth District Council, the Court took into account that the site, although in a residential zone, was already designated by hospital authorities and had been used as a hospital for accommodating psychiatrically disturbed patients (who had caused problems to neighbours), in determining that a secure rehabilitation centre for parolees
30 would have a minor effect on the neighbouring properties.

Other matters that have been considered include non-statutory documents and international obligations.

So, turning now to the hockey relocation and contingent benefits in section 9.

On the first day of the hearing you asked whether the concept of contingent benefits is considered in the Basin Bridge case might apply to the relocation of the hockey stadium.

Counsel do not consider that this concept applies. The
5 Transport Agency is not suggesting that the benefits associated with the new hockey facility are contingent benefits of the Project. Instead, the relocation of this facility is to occur by way of mitigation, or perhaps pre-emptive remediation, of the effects over the Project on the existing facility.

The conditions for the Project proposed by the Transport Agency include
10 a requirement to relocate the existing facility prior to any works commencing with any part of the North Harbour hockey lease area.

Accordingly, while there is some uncertainty and the resource consent
appeals and the separate Reserves Act process, there is nothing uncertain
about the proposed condition. Put simply, the Transport Agency will not be
15 able to proceed with the associated aspects of the Project until such time as it can provide an appropriate replacement facility for the Harbour Hockey Charitable Trust.

Matters relating to conditions.

The opening submissions by counsel assisting the Board suggested the
20 Board may wish to 'pin down' aspects of the work by way of specific conditions and also needs to understand the potential scope for design changes (and associated changes in effects) afforded by the conditions as drafted.

The Transport Agency submits that there is a very low risk of unforeseen
effects not being regulated by the conditions, given that: The application
25 documents establish the scope of the approvals. Regardless of what the conditions provide, the Transport Agency would not be able to do more than what it had applied for.

The effects of the project have been considered on a reasonable "worst
case scenario" basis as anticipated by counsel assisting and confirmed by
30 Mr McGahan when he gave evidence.

Mr McGahan's evidence was that the effects of the Project will be
comprehensively managed by the more specific later conditions and required
management plans. In this respect, the "bottom lines" in terms of the effects
expressed in conditions -- sorry I'll read that again. In this respect the "bottom
35 lines" in terms of effects are expressed in other conditions, so it's not necessary for conditions DC.1 and RC.1 to cover everything.

With respect to the designation conditions, there will be a further opportunity for the Council to consider effects of the detailed design at that Outline Plan stage, and after the detailed design process is complete. The Transport Agency is not seeking a waiver to the usual requirement to prepare an Outline Plan which, among other matters, will address matters such as the height, shape, bulk and finished contour of the work, as well as any other matters to avoid remedy or mitigate any adverse effects on the environment.

One of the matters which counsel assisting the Board has suggested in opening submissions was not 'pinned down' was the requirement to monitor construction traffic. And you've now heard Mr Clark address that matter this morning.

In summary, Mr Clark considers that no further condition is required for the following reasons: The conditions already require the effect on bus travel times to be monitored, and there are very few options to further mitigate the effects of construction on traffic, if monitoring shows that the effects are not as predicted. Therefore, the monitoring would be for no purpose.

In informal correspondence, counsel has questioned whether other aspects of the Project which the Transport Agency's witnesses have acknowledged could be accommodated by the project, should be "conditioned". These include the provision of stairs in addition to a ramp at Rosedale Road and the possible extension of an existing T2 lane.

It is submitted that these matters do not need to be the subject of conditions because they are matters of detailed design, which can be considered by the Outline Plan process.

To require these matters would reduce the flexibility of the project, and therefore hinder the possibility to achieve better outcomes.

No submitter has sought the imposition of these conditions.

And they are both matters which relate to the Transport Agency's road controlling functions.

It is submitted that resource consent and designation conditions imposed now in relation to these matters would hinder the Transport Agency's ability to operate (and change the operation of) the State Highway in the future.

Now, there is just one other matter that I wish to draw to your attention before we finish in relation to the conditions. You had some questions relating to complaints regarding construction noise and I think time periods for responding to those.

If I could ask you to turn to Appendix A again, page 6.

So, on page 6 you will see item (i), this is in relation to the construction noise and vibration requires complaints to be consistent -- procedures with dealing with complaints to be consistent with the conditions under the SCP conditions. So, if I can ask you to turn now to page 30, and under SCP.14, there is a requirement to deal with a complaint within 24 hours of receipt except where there's an immediate hazard present. And I discussed this matter during the break with the Transport Agency and they thought it would be appropriate to insert there "or where the complaint relates to construction noise."

10 JUDGE HARLAND: Whereabouts is that sorry?

MS SHEARD: This is under SCP.14.

JUDGE HARLAND: Yes whereabouts in there?

MS SHEARD: "... except where an immediate hazard is present."

JUDGE HARLAND: And the other words?

15 MS SHEARD: "... or where the complaint relates to construction noise."

JUDGE HARLAND: Or vibration?

MS SHEARD: Or vibration, yes.

MS SHEARD: So, turning back to page 25 of the closing, in conclusion, it's submitted that the evidence presented to the Board has confirmed that the Project has substantial benefits for a range of travelling modes. The Transport Agency witnesses continued to work throughout the hearing to improve the proposed conditions and reach agreement with expert witnesses for submitters. This has resulted in a large degree of alignment between the parties, including agreement on conditions. The Transport Agency thanks submitters, counsel and witnesses for their willingness to engage, and their commitment to the process. And I'd echo Mr Berry's sentiment in his closing as well, would also like to offer thanks to the EPA for their help as well during the process and keeping things running smoothly and efficiently.

20

25

So finally, the Transport Agency asks the Board to confirm the designations sought and grant the necessary resource consents subject to the agreed conditions, to enable the Project to proceed.

30

JUDGE HARLAND: Thank you. I'll just check and see if there are any questions.

~Questions from the Board (12.30 pm)

35 MR MARK-BROWN: Ms Sheard, my question relates to the Kiwi storage and you will recall I think Kiwi's, some of their witnesses had a concern that -- well one of

their points was that by NZTA not preserving their view or preserving the views of their site, it was inconsistent with the revised urban design landscape framework, do you remember that? You haven't actually addressed that, you don't seem to have addressed that in what you talked about?

5 MS SHEARD: I think Mr Land conceded under questioning that there are a lot of different tensions within the UDLF; so you're not necessarily going to achieve every single outcome. It is the matter of balancing those outcomes against each other. And also, I think he also conceded that it's important to balance functionality into that mix as well.

10 MR MARK-BROWN: Okay, thank you.

MS SHEARD: I also add that we have added a note to the UDLF requiring the landscaping to remain low in that location.

So, that's section 5 (1) of the outcomes sought in the UDLF.

15 ~Comments from the Board (12.32 pm)

JUDGE HARLAND: Thank you very Ms Sheard and Ms McIndoe for the very helpful way that you've addressed everything throughout this hearing process and before. It's always difficult when you're acting for the Applicant. We've pushed you, and you've responded in a very courteous and helpful way. Also, to
20 acknowledge your various juniors, we do remember that every good team is backed by a whole heap of people working in the background and, likewise, the way in which your witnesses and staff from the agency have constructively worked towards position that we now find ourselves in.

What's been really lucky for us is that you've made our job a lot easier
25 because of that, and we've very grateful.

So, your task is done, you will be very glad you can all have a break for a bit.

We're going to reserve open the ability for you to come back by Friday on that matter that we talked about before.

30 So, in that sense the hearing is adjourned, rather than completed at this point to enable us to receive that.

Once we've received that information I will issue a minute just saying that the hearing is formally closed. And our task begins.

35 So, it's now our turn to work very hard and to complete the report within the timeframes that we need to do.

So, thank you very much.

And with that, unless there is anything further, we'll adjourn.

~(Karakia - 12.36 pm)

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~(The hearing adjourned - 12.37 pm)