IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2014-485-11253

UNDER	The Resource Management Act 1991
IN THE MATTER OF	Appeal of the decision of the Board of Inquiry on the Basin Bridge Proposal
BETWEEN	**NEW ZEALAND TRANSPORT AGENCY** **Appellant**
A N D	**SAVE THE BASIN CAMPAIGN INC** **Respondent**

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Submissions of Save the Basin Campaign Inc and the Mt Victoria Residents' Association Inc

9 June 2015

Next event: Hearing from 20 July 2015 (Brown J)

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A N D	**WELLINGTON CITY COUNCIL** **Respondent**

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1 INTRODUCTION AND SUMMARY

1.1 The New Zealand Transport Authority (**NZTA**) proposed a requirement for a flyover around the Basin Reserve in Wellington (**proposed flyover requirement**) and four associated resource consents. The Minister for the Environment decided the proposal was a matter of national importance, partly because of its heritage and amenity effects. She decided it should therefore be decided by a specially constituted Board of Inquiry (**the Board**) rather than by NZTA.

1.2 The Board decided to cancel the proposed flyover requirement and, consequently, to decline the consent applications. After an intensive consideration of the facts the Board considered that the adverse effects of the proposed flyover requirement, particularly on amenity and heritage values, outweighed the neutral or small positive effects on traffic flows.

1.3 The essence of NZTA's appeal of the decision is its disagreement with the weight placed by the Board on various evidential matters. NZTA attempts to shoehorn that into as many grounds of appeal dressed up as issues "of law" as possible.

1.4 For the convenience of the Court these submissions, of the Save the Basin Campaign Inc (**STBC**) and Mt Victoria Residents Association Inc (**MVRA**), follow the structure of the submissions for NZTA.

1.5 In summary, the STBC & MVRA submit:

Relevant Law

(a) *The RMA and the Board's Role:* The Minister for the Environment decided that the proposed flyover requirement is a matter of national significance and referred it to the Board partly because of the proposal's heritage and amenity effects. In its decision the Board is required, by s 149P, to have regard to the Minister's reasons for referring the proposal to the Board and, by s 171, to have particular regard to provisions of planning instruments, to whether adequate

consideration has been given to alternatives and to any other matter it considers reasonably necessary.

(b) *Appeal on a Question of Law:* Parliament, in passing the Resource Management (Streamlining and Simplifying Amendment) Act 2009, deliberately limited appeals to questions of law. In such cases the Courts consistently reject appeals questioning the weight given by a decision-maker under the guise of a question of law, which is what most of NZTA's grounds of appeal are here.

(c) *Withdrawal of Concessions:* NZTA should not be permitted to withdraw concessions it made before the Board - in order to be consistent with authority and to avoid perverse incentives in future such cases.

Issue 1: Consideration of Alternatives

(d) *Issue 1A "Adequate" consideration of alternatives:* What is "adequate" is determined by the circumstances and the significance of the effects, as accepted by NZTA at the Board of Inquiry. NZTA's submission that its consideration of alternatives was "adequate" is not a matter of law. The Board's conclusions were not in error; there was clearly an evidential basis on which they were founded.

(e) *Issue 1B Consideration of non-suppositious options:* The Board was required to have particular regard to whether alternatives were adequately considered. It correctly concluded that NZTA failed adequately to consider two options with reduced environmental effects and failed to consider a third. (See also Annex A.) Disagreeing with the conclusion that NZTA's consideration was not adequate relates to the Board's assessment of the facts and is not a question of law.

(f) *Issue 1C What sort of consideration?:* Transparency and replicability of NZTA's consideration of alternatives are relevant to

enabling the Board to exercise its statutory function of determining whether NZTA's consideration of alternatives was adequate. It was reasonable for the Board to find the absence of these characteristics was relevant to its task. The weight it put on this factor is a matter of fact, not law.

(g) *Issue 1D Role of Part 2:* It was correct for the Board to keep the relevance of Part 2 of the Resource Management Act 1991 (**RMA**) in mind as it examined the adequacy of NZTA's consideration of alternatives.

(h) *Issue 1E Alleged Conflation of ss 171(1)(b) and 171(1)(c):* The Board did not say what NZTA says it did.

(i) *Issue 1F Effect of Government Decision:* The Board did not find what NZTA says it did, and if it did that would be a matter of fact.

(j) *Issue 1G Adequacy of Consideration and Adjournment:* NZTA's argument that the Board should have found the consideration was more than adequate seeks to relitigate a factual conclusion and is wrong (as further demonstrated in Annex C). There is no basis for the suggestion the Board should have adjourned its consideration to allow NZTA to fix its proposed flyover requirement.

Issue 2: McGuire *and Considering Alternatives*

(k) NZTA misunderstands *McGuire* which reflects orthodox public law. The Board did not purport to determine the best of alternatives as NZTA suggests.

Issue 3: Section 171(1)

(l) *"having particular regard to":* NZTA's understanding of the Board's approach is not accurate; the approach it urges is not materially different from the Board's approach, and the different outcome NZTA favours depends explicitly on the weight the Board should give to evidence.

(m) *"subject to Part 2":* The authorities do not support NZTA's proposed application of *EDS v NZKS* to s 171, with which the Board's approach was consistent. In any case, the Board's findings of fact justify its decision on either application.

Issues 4-5: Transport Issues

(n) *Issue 4 Enabling Effects:* Contrary to NZTA's assumption, the Board did treat the enabling effects of the proposed Flyover requirement as relevant. NZTA's real objection is that the Board didn't given them sufficient weight.

(o) *Issue 5B Treatment of Immediate Effects:* NZTA's submission that the Board took a "reductive" approach to transportation benefits is another disagreement about weight. And it is wrong.

(p) *Issue 5C Project Objectives:* The Board was required, as well as entitled, to assess the effects of the project. This is what it did. NZTA doesn't like the weight attributed to some factors.

(q) *Issue 5A Onus and Standard of Proof:* There is no basis for NZTA's claim that the Board "effectively" required demonstration of transport benefits beyond reasonable doubt.

Issues 6-8: Heritage and Amenity

(r) *Assessing Effects "through the lens" of plans and documents:* NZTA's reliance on *EDS v NZKS* reverses the point it actually stands for. The Board found that there were majorly adverse effects on historic heritage and significantly adverse effects on landscape, townscape and urban design. It considered that these findings, supported by the hierarchy of planning instruments and part 2 of the Act, justified the Board in cancelling the requirement. It was not limited to assessing effects only on the basis of what heritage is specifically protected in planning instruments.

(s) *"Historic heritage" in s 2:* The Board's conclusions were consistent with the breadth of the definition. NZTA's objection is to the weight the Board gave the evidence.

(t) *"Inappropriate" in s 6(f):* This argument does not appear to be within NZTA's Amended Notice of Appeal and it is wrong as to what the Board did.

(u) *Options within the Scope of the Application:* Contrary to NZTA's submission the Board did consider options within the scope of the application.

Outcome Sought

(v) If any of NZTA's appeal have weight they are not material to the Board's decision and the appeal should be denied.

(w) If the Court upholds the appeal the orthodox relief would be to remit the assessment back to the Board to consider again, as s 149J(2) of the RMA explicitly contemplates.

(x) However, there is no merit in the appeal which is largely about the weight the Board attributed to evidence.

(y) The Court should decline the appeal, award costs to the respondents and reserve leave for submissions about the amount of costs.

2 FACTUAL BACKGROUND

2.1 STBC and MVRA rely on the facts as found by the Board, following its 72 days of hearings over 16 weeks, with the benefit of 74 submitters at the hearing, 69 witnesses and 212 written submissions and site visits.

2.2 There is no need to refer to the extensive evidence before the Board that NZTA has sought to put before the Court.

3 RELEVANT LAW

A The RMA and the Board's Role

3.1 The Supreme Court comprehensively reviewed the purpose of the RMA in *Environmental Defence Society v New Zealand King Salmon* (***EDS v NZKS***). The Court stated:[1]

> 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management

and

> Section 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA. It is given further elaboration by the remaining sections in pt 2, ss 6, 7, and 8:

3.2 The Court rejected taking an "overall judgment" approach to considering plan changes and determined that the cascading hierarchy of planning instruments, through which the purpose of the RMA is manifested with increasing particularity, could include environmental bottom lines.[2]

3.3 In addition to the cascade of planning instruments, certain "requiring authorities" are empowered under the RMA to make requirements for public works that cut across existing plans. A requiring authority is a Minister, local authority or approved network utility operator (s 166). Here, NZTA is the requiring authority.

3.4 Under s 168 a requiring authority has the power to issue a notice of its requirement for a designation for a public work. The usual role of the territorial authority under s 171(2) is to decide whether to recommend to the requiring authority that it confirm, modify, impose conditions on, or

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1 *Environmental Defence Society v New Zealand King Salmon ("EDS v NZKS")* [2014] NZSC 38, [2014] 1 NZLR 593 at [24d] and [25] and see generally [21]-[30].

2 At [106]-[154].

withdraw the requirement. The requiring authority then decides, under s 172, whether to accept the recommendation. NZTA is therefore used to making its own ultimate decisions on its own requirements. If a requirement is confirmed the territorial authority is required by s 175 to include it, as a designation, in the district plan. Under s 176 the work becomes a permitted activity and no person may do anything that would prevent or hinder it.

3.5 Here, however, the Minister for the Enviroment decided that the proposed flyover requirement was of national significance and referred it to the Board of Inquiry under s 147 that she appointed under s 149J. The Minister's reasons were:

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

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

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

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

- The proposal relates to a network utility operation (road) that, although physically contained within the boundaries of Wellington City, as a

section of the Wellington Northern Corridor Road of National Significance will affect and extend to more than one district and region in its entirety.

3.6 Under s 149P(4) the Board itself cancels, confirms, modifies or imposes conditions on the requirement. Section 149P(1)(a) requires the Board to have regard to the Minister's reasons for so referring it – which here centred directly on the heritage and amenity effects. Section 149P(4)(a) requires the Board to "have regard to the matters set out in section 171(1) . . as if it were a territorial authority".

3.7 In part 12 of its submissions NZTA seeks to suggest that the Board's function in considering a requirement under s 171(1)(b) of the RMA should really be centred on process rather than substance. It effectively seeks deference to the requiring authority (NZTA) on the substantive decision, as if the requiring authority still had the power to make the decision and the RMA did not set environmental bottom lines, or as if the Board's decision was more in the nature of a judicial review.

3.8 NZTA cites some interlocking Board of Inquiry and Environment Court and Planning Tribunal decisions, and a passage from two High Court judgments, as authority for its argument. This approach illustrates a certain distance in perspective between an "RMA world" approach and a conventional legal approach of purposive interpretation. Ironically, the former is not sustainable.

3.9 Section 171(1) states:

> When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to:
>
> (a) any relevant provisions of—
>
> (i) a national policy statement;
>
> (ii) a New Zealand coastal policy statement;
>
> (iii) a regional policy statement or proposed regional policy statement;
>
> (iv) a plan or proposed plan; and

(b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—

(i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(ii) it is likely that the work will have a significant adverse effect on the environment;

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

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

3.10 The explicit invocation of part 2, the purpose and principles part of the RMA, directs the decision-maker, among other things, to:

(a) the Act's purpose of sustainable management explicated in s 5;

(b) the requirement on it to recognise and provide for "the protection of historic heritage from inappropriate subdivision, use, and development" as a matter of national importance in s 6(f);

(c) the requirement on it to have particular regard to "the maintenance and enhancement of amenity values" in s 7(c), which are widely defined in s 2.

3.11 In *EDS v NZKS* the Supreme Court determined that "inappropriate" in s 6(f) should be interpreted "against the backdrop of what is sought to be protected or preserved".[3] Section 6 "simply means that provision must be made for preservation and protection as part of the concept of sustainable management".[4]

3.12 So the Board's function in considering the requirement under s 171(1) is not engaging in a judicial review of process while deferring to the substance of the requiring authority's decision. It is considering the effects on the environment of allowing the requirement, in the context of

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3 At [105].
4 At [149].

sustainable management as the purpose of the Act, protecting historic heritage as a matter of national importance, and the requirement to have regard to amenity values. It includes examining whether the consideration given to alternative sites has been "adequate" in that context.

3.13 This statutory context also demonstrates why, contrary to part 13 of NZTA's submissions, the Public Works Act 1981 regime is an entirely inappropriate analogy. That Act is not animated by the scheme and purpose of the RMA explicated by the Supreme Court.

3.14 The statutory context is also the answer to NZTA's attempt to privilege a designation in part 14 of its submissions. NZTA suggests the consideration of alternatives, in the context of a designation that will not have the effect of restricting private property rights, should not be subjected to the "increased" level of scrutiny in *Queenstown Airport*.[5] However, the power of designation, and the statutory responsibility placed on the decision-maker by s 171(1)(b) makes it *more* important that consideration of the alternatives must have been "adequate".

B Appeal on a Question of Law

3.15 NZTA's appeal is required, by s 149V(1) of the RMA to be on a question of law. This provision was deliberately inserted by Parliament in the Resource Management (Simplifying and Streamlining) Amendment Act 2009 as part of its simplified and streamlined process for dealing with proposals of national significance (Part 6AA of the Act).

3.16 NZTA's opponents, four small community organisations with limited resources (**the respondents**), are parties by virtue of s 302 of the RMA. The respondents requested that NZTA replead its first Notice of Appeal since its "kitchen sink" approach appeared aimed at overturning the

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[5] Para 14.2 of NZTA's Submissions.

substantive decision on its merits rather than raising questions of law. In repleading, NZTA's Amended Notice of Appeal of 27 November 2014 was 27 pages long, broken into eight issues, two of which are broken into 10 sub-issues and alleged 38 errors of law.

3.17 NZTA's 96 pages of submissions have further "refined" four of the eight issues (3, 6, 7, and 8) into seven new issues with a variety of previous grounds of appeal not now being pursued. NZTA also attaches 26 additional pages of four "annexes" which outline (repetitively) NZTA's consideration of alternatives to the proposed flyover.

3.18 The Notice of Appeal, Amended Notice of Appeal and NZTA's written submissions demonstrate that NZTA's real problem with the Board of Inquiry's Report is its belief that its proposed flyover requirement should have proceeded. In essence, NZTA disagrees with the Board's decision on the merits of the proposal. It appears to be particularly embarrassed at the suggestion that its consideration of alternatives was not adequate.

3.19 As a result, a surprising number – most – of the alleged errors of law simply concern matters of the weight given by the Board to the evidence. This is illustrated, for example, by the various grounds of appeal that suggest what the Board "ought to have found" or "should have" concluded.[6]

3.20 As the Supreme Court noted in *Mars New Zealand*, the failure to accord sufficient weight to particular factors in reaching a decision is not a question of law.[7] They are disputes over matters of fact dressed up as errors of law.

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6 Notice of Appeal paras 5(c), 8(d), 11(e), 14(d), 17(f), 20(c), 29(b), 29(d) and 33(a); and Outline of Submissions paras 22.4, 24, 24.2, 25.2, 28.24, 31.14, 31.35, 32.9, 32.15, 34.19, 38.8, 38.10.

7 *Mars New Zealand Ltd v Roby Trustees Ltd* [2012] NZSC 118, at [3].

3.21 This is not an uncommon problem for the High Court to face, in such appeals. Successive judgments have been very clear. In *Ayrburn Farm Estates Ltd* French J neatly stated the Court's jurisdiction as follows:[8]

> [34] Appellate intervention is therefore only justified if the Environment Court can be shown to have:
>
> i) applied a wrong legal test; or,
>
> ii) come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or,
>
> iii) taken into account matters which it should not have taken into account; or,
>
> iv) failed to take into account matters which it should have taken into account.
>
> [35] The question of the weight to be given relevant considerations is for the Environment Court alone and is not for reconsideration by the High Court as a point of law.
>
> [36] Further, not only must there have been an error of law, the error must have been a "material" error, in the sense it materially affected the result of the Environment Court's decision.

3.22 In *Young v Queenstown Lakes District Council* Mander J, after quoting this passage, added:[9]

> [19] The Court will not engage in a re-examination of the merits of the case under the guise of a question of law, nor will it delve into questions of planning and resource management policy. The weight to be attached to policy questions and evidence before it is for the Tribunal to determine, and is not able to be reconsidered as a point of law.
>
> [20] Wylie J in *Guardians of Paku Bay Association Inc v Waikato Regional Council* summarised the deference to be shown to the specialist jurisdiction of the Environment Court and its expertise in determining planning questions:
>
>> [33] The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the

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8 *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [34]-[36] (internal citations omitted).

9 *Young v Queenstown Lakes District Council* [2-14] NZHC 414, (2014) 18 ELRNZ 1. And see Andrews J in April 2015, quoting all the above passages, in *Man O'War Station Ltd v Auckland Council* [2015] NZHC 767 at [25]-[27].

> factual circumstances of the case. No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.

3.23 This jurisprudence accords with the Supreme Court's more generic test in *Bryson* of what is an error of law:[10]

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

3.24 In particular, NZTA's reliance on *Edwards v Bairstow*[11] (where a decision-maker could not reasonably have come to the decision on the evidence before it) is a rather desperate approach.

3.25 NZTA's response to the Court's question, at the teleconference of 29 May 2015, about the authority for its submission that it is an error of law for the Board to make a finding "where there is no reliable, probative evidence to support the determination" is telling. In its memorandum of counsel of 3 June 2015, the only authority NZTA is able to cite is one sentence of a 52 page judgment, *Chorus Ltd v Commerce Commission,* of which the Court said "[m]ore time may have altered the expression of my reasons".[12]

3.26 The relevant statement by Kós J in *Chorus* (at [154]) quickly disposed of a secondary argument about the "benchmarks" which were the primary evidence the Act directed the Commission to consider. But this was in the context of a useful formulation of the scope of a Court's ability to

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10 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25].

11 Notice of Appeal at paragraphs 5(d), 7(d), 8(c)(iii), 20(b), 20(f), 22–23(a), 29(f)(ii), 29(f)(iv), 36(b), 40(i), 46(b), 46(k) and 52(d).

12 *Chorus Ltd v Commerce Commission* [2014] NZHC 690 at [7]. The appellant cited paragraphs [154] and [177].

interfere with a tribunal's decision on a question of law – only if it considers the tribunal has:[13]

(a) applied the wrong legal test; or

(b) took into account matters which it should not have taken into account; or

(c) failed to take into account matters which it should have taken into account; or

(d) came to a view without evidence, or reached a view which, on the evidence, it could not reasonably have come to.

3.27 Kós J in *Chorus* characterised (at [14]) the last three of these grounds as "where what the tribunal has done in its fact-finding is so misconceived that it constitutes an unlawful decision" and found that, per *Bryson,* that was a "very high hurdle". He also accepted as applicable in that appeal on a question of law (at [20]), the Supreme Court's acknowledgment in *Unison Networks:*[14]

> Often, as in this case, a public body, with expertise in the subject matter, is given a broadly expressed power that is designed to achieve economic objectives which are themselves expansively expressed. In such instances Parliament generally contemplates that wide policy considerations will be taken into account in the exercise of the expert body's powers. The courts in those circumstances are unlikely to intervene unless the body exercising the power has acted in bad faith, has materially misapplied the law, or has exercised the power in a way which cannot rationally be regarded as coming within the statutory purpose.

3.28 STBC and MVRA submit that this approach is also required here.

3.29 The respondents did not have the resources to mount an interlocutory strike out application of the various grounds of appeal which are really about matters of fact; rather the trouble to which NZTA has put the respondents will go to the quantum of costs if the appeal fails. In these submissions STBC and MVRA meet the oppressive length of NZTA's submissions with succinct responses.

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13 At [13], but see [10] – [21].

14 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [55].

C Withdrawal of Concessions

3.30 NZTA candidly acknowledges that two of its arguments on appeal reverse concessions it made in argument on legal issues before the Board of Inquiry and that formed the basis for the Board's reasoning:

(a) At part 15 it withdraws its concession that the measure of adequacy of consideration of alternative sites will depend on the significance of the adverse effects.[15]

(b) At part 16 it withdraws from accepting the High Court's judgment in *Queenstown Airport* that the Court must have particular regard to whether a non-suppositious alternative was adequately considered.[16]

3.31 NZTA has also reversed its position regarding the effect of *EDS v NZKS* and the role of an "overall judgment" approach. It now argues an overall judgment should not be adopted, but it did not argue that before the Board.

3.32 Not only is withdrawing such concessions unattractive but Courts will often not allow it. The problem is that, especially in a first instance hearing, if the concession had not been made then the other parties may well have proceeded on a different basis – both in terms of arguing the law but also in adducing evidence and cross-examining witnesses. That is particularly so in a context so factually based as a Board of Inquiry from which appeal lies only on matters of law.

3.33 This practice was deprecated in a RMA context by the High Court in, for example, *Wymondley*.[17] The Court there ultimately considered the point, in order to avoid procedural omissions trumping merit, but took into account the appellant's failure in assessing the merits of the point.

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15 Para 15.3 of NZTA's submissions.
16 Para 16.5 of NZTA's submissions.
17 *Wymondley against the Motorway Action Group Inc v Transit New Zealand* [2004] NZRMA 162 at [9]-[14].

3.34 In *Patcroft Properties Ltd v Ingram* the Court of Appeal refused to allow a new counsel to withdraw a concession below on that basis.[18] The House of Lords has said that it would allow counsel to withdraw from concessions below "only rarely and with extreme caution".[19] The Privy Council has split 3 to 2 as to whether withdrawal of a concession should be allowed.[20] Chambers J in the High Court stated that a litigant "cannot reopen something which was conceded before the [decision-maker below]".[21]

3.35 Such an approach is well established in New Zealand. In 1891 Denniston J in the Court of Appeal said "[w]hen parties deliberately come before a certain tribunal, and together ask for a decision in a certain way, it is not open to one of them afterwards to seek to upset the decision so given on the ground he mistook his rights at the time".[22]

3.36 NZTA should not be allowed to withdraw its concessions here. To do so would create quite perverse incentives effects on parties before a Board of Inquiry, viz.: to advise a Board of the law it should follow only to use it doing so as a ground of appeal.

4 ISSUE 1: CONSIDERATION OF ALTERNATIVES

4.1 A raft of NZTA's appeal points turn on various aspects of whether the Board was correct to conclude that NZTA had not given adequate consideration to alternatives to the proposed flyover requirement in accordance with s 171(1)(b) of the RMA.

4.2 The Board's conclusion rested on its view of the facts and the weight to be accorded to different factual considerations. Most of NZTA's points

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18 *Patcroft Properties Ltd v Ingram* [2010] NZCA 275, [2010] 3 NZLR 681 at [14].

19 *Grobbelaar v News Group Newspapers* [2002] 1 WLR 3024 (HL) at [21].

20 *New Zealand Meat Board v Paramount Export Ltd (in liq)* [2005] 2 NZLR 447 (PC) at [65]. The Council also allowed such a withdrawal in *Foodstuffs (Auckland) Ltd v Commerce Commission* [2004] 1 NZLR 145 (PC) at [8]-[9] because there was no material prejudice and the issue was important.

21 *TV3 Network Services Ltd v ECPAT New Zealand Inc* [2003] NZAR 501 (HC) at [25].

22 *Ihaka Te Rou v Love* (1891) 10 NZLR 529 (CA) at 533.

are dressed up in the legal language of "tests" and "thresholds" but are, in effect, challenges to the Board's view of the facts, as noted generically above and specifically below.

A Issue 1A: "Adequate" Consideration of Alternatives

4.3 If NZTA is allowed to withdraw its concession before the Board, they propose to argue, in part 15 of their submissions, that the Board was wrong to rely (at [1088] and [198] and [1275]) on the High Court in *Queenstown Airport* saying that the more significant the adverse effects, the more careful the assessment of alternatives must be.[23]

4.4 STBC and MVRA submit that Whata J's statement in *Queenstown Airport* must be correct. It does no more than read the word "adequate" in s 171(1)(b) in light of the purpose of the RMA in part 2, as is implied by the Board (at [189], [198c], [199]). That purpose admits of the possibility that activity might be prohibited as noted above.

4.5 The effect of s 171(1)(b) is inter-related with the effect of the consideration in s 171(1)(c) of whether the work is "reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought". The more significant the adverse environmental effects, the more careful an "adequate" assessment of alternatives must be.

4.6 This is entirely consistent with the Supreme Court's comments about when consideration of alternatives is required in a plan change context despite not being explicitly mandated by the RMA. In *EDS v NZKS* the Supreme Court found that the context of the application would determine whether consideration of alternatives is required, saying:[24]

> if the applicant claims that a particular site has features that make it uniquely, or even especially, suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternatives sites, *particularly where the decision-maker considers that the activity will*

23 *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [121].

24 *EDS v NZKS* at [170] and see [155]-[173].

have significant adverse effects on the natural attributes of the proposed site. (emphasis added).

4.7 By extension, here, the context determines the degree to which consideration of alternatives is “adequate”. There is no suggestion that a “sliding scale”, “hard look”, “meticulous” or “exhaustive” approach is required as NZTA suggests. The Courts in New Zealand avoid such artificial tests.[25] It is simply a question of what is “adequate” and that is, inevitably, determined by the circumstances including the significance of adverse effects.

4.8 And that question also, inevitably and contrary to NZTA’s submissions, applies to both limbs of s 171(1)(b), since the word “adequate” occurs in the chapeau to subparagraphs (i) and (ii).

4.9 If, apart from arguing over the legal meaning of “adequate”, NZTA persists in submitting (para 15.12) that the consideration of alternatives here was in fact more than adequate, then its submission must be rejected on appeal since it does not concern a question of law.

4.10 However NZTA seeks to characterise it, what the Board actually did here was to assess whether alternatives had been considered adequately. That’s what it was required to do by law. NZTA cannot get round its disagreement over facts by dressing it up as a matter of law.

B Issue 1B: Consideration of non-suppositious options

4.11 If it is allowed to withdraw its concession before the Board, NZTA also argues (paras 16.1 and 16.8) that it is unreasonable to expect a requiring authority to give detailed consideration to every permutation of a non-suppositious option and that it needn’t have good reason to discard a non-suppositious option.

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[25] E.g. regarding judicial review in a RMA context, see *Westfield (NZ) Ltd v North Shore* [2005] 2 NZLR 597, (2005) 11 ELRNZ 346 (SC) at [5] (Elias CJ).

4.12 This suggestion must be assessed on the basis of the text of s 171(1)(b), which requires that the requiring authority's consideration of alternatives must be "adequate", and its purpose, which supports the purpose of sustainable management that underlies the RMA.

4.13 Obviously all the details of an infinite number of permutations of options needn't be examined, as the authorities cited by NZTA in its submissions (at 16.7) affirm. But that was not suggested by the Board.

4.14 At para [1183] the Board noted that witnesses before the Board put options before it to establish that the options were not suppositious, would potentially have reduced environmental effects, and should have been explored. The witnesses were able to identify several such options (e.g. an at grade option such as BRREO, grade separation on the west side as with Option X or variants, and the long tunnel option). NZTA needed to consider such alternatives adequately. The Board was required by s 171 to have particular regard to whether it had done so. It was entitled to find that NZTA had not (as Annex A explains in more detail).

4.15 NZTA appears to be arguing that non-suppositious options with reduced environmental effects should not have been explored. That is not sustainable (in several senses). First, it would be contrary to the purpose of the RMA. Second, it bears no relation to what the Board found. Indeed as the Board states, in one of the paragraphs strangely given by NZTA as a ground for appeal:[26]

> Subsection 1(b) requires a judgment on whether an adequate process has been followed, including an assessment of what consideration has been adopted. The enquiry is not into whether the best alternative has been chosen. It is not incumbent on a requiring authority to demonstrate that it has considered all possible alternatives or that it has selected the best of all available alternatives. Rather, it is for the requiring authority to establish an appropriate range of alternatives and properly consider them.

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[26] Para [1090] at para 8(a) of the Notice of Appeal. And see [1182] and, re BRREO, [1164], [1187], [1216b].

4.16 NZTA appears to wish to elide the point that witnesses identified non-suppositious options with reduced environmental effects with the point that NZTA's consideration of alternatives was not adequate, to create a straw man that the Board required NZTA to examine every possible alternative. It certainly did not.

4.17 The argument in part 17 of NZTA's submissions, that NZTA did adequately consider the options, is not a question of law. It is, blatantly, a disagreement with the Board about its assessment of the facts. Hence NZTA relies on arguments such as "the Minority's finding[s] [of fact] must stand".[27] This is not a valid ground of appeal. (And, for the avoidance of doubt, it is wrong, as part A of the Annex to these submissions demonstrates).

C Issue 1C: What sort of consideration?

4.18 NZTA appears to suggest that the Board's reference (at [1172]) to the lack of transparency and replicability of NZTA's consideration of alternatives is too detailed an approach for it to take and that that is somehow an error of law.

4.19 In fact, at that paragraph, the Board reports the opinion of witnesses and is ambiguous as to whether the Board adopts that view. In later comments:

(a) The Board considers transparency is relevant to whether the consideration given to alternatives is adequate (at [1178]). This must be a relevant consideration in the performance of the Board's statutory function under s 171(1)(b). Otherwise the Board is unable to perform its statutory function. There is no error of law.

(b) The Board comments adversely on the inability of a witness to replicate the selection process used to arrive at the preferred options in the Feasibility Report (at [1174]). This demonstrates that the

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27 Outline of Submissions at 17.13 and 17.35.

selection from alternatives was arbitrary, which demonstrates that consideration of the alternatives was not "adequate". It is an assessment of fact; it is not a question of law. It is reasonable and correct.

4.20 Again, NZTA is disagreeing about a matter of factual inference and assessment, as is illustrated by its explicit submission (at para 18.9) that the Board "placed too much weight on the opinion evidence of Mr Durdin . .". And it again suggests what the Board "ought to have found" (at para 11(e) of the Notice of Appeal).

D Issue 1D: Role of Part 2

4.21 It's not clear what this issue or argument is. NZTA appears to object to the Board referring to "considerations under Part 2 of the Act" in the process of considering alternatives.

4.22 Part 2, of course, underlies the whole RMA. It is not used in itself to "test" alternatives. The Board's decision did not do so; indeed the Board emphasised that that would be wrong (at [1092]-[1094]) in another paragraph that NZTA strangely gives as a ground of appeal.[28] It would obviously also be wrong to argue that the purpose of the RMA is irrelevant to its application – the purpose of the RMA as expressed in part 2 is obviously central to the meaning of the RMA, purposively interpreted.

4.23 At [1180] the Board simply noted that NZTA failed to explain its weightings of different evaluation criteria applied to different alternatives which made it difficult to assess. Again, this is an assessment of fact. It is not a ground of appeal on a question of law. And again NZTA suggests that what the Board "ought to have found" is a ground of appeal.[29]

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[28] Amended Notice of Appeal para 14(a).
[29] Amended Notice of Appeal para 14(d).

E Issue 1E: Alleged Conflation of ss 171(1)(b) and 171(1)(c)

4.24 NZTA's concern here (at 20.2) seems to be that the Board criticised NZTA's belief that grade separation (separation of lanes by height) was required. The argument is put (at 20.6 and 20.8) in terms of ss 171(1)(b) and (c) being "conflated" by the Board (at [1180]).

4.25 There is no point of law here. The relevant paragraphs of the Board's Report do not say what NZTA suggests they did:

(a) Paragraph [961], read in the context of [959] and the other paragraphs ([959]-[962]) under the heading "Conflict of Evidence", is simply designed to explain why there might have been a conflict of evidence between the parties and witnesses.

(b) Paragraph [1180] does nothing more than indicate that part 2 considerations should be reflected in the weight given to particular evaluation criteria. The reference at the end of the paragraph to meeting project objectives (the subject of s 171(1)(c)) is attributed to NZTA's own Feasible Options Report.

4.26 There is nothing to suggest that the Board "conflated" the two paragraphs of s 171(1). There is no basis for again alleging in the Amended Notice of Appeal (at 17(f)) that, but for these paragraphs, "the Board ought to have found that the consideration given was adequate".

F Issue 1F: Effect of Government Decision

4.27 NZTA says (at 21.2(a)) the Board erred in law by finding (at [1196]) that NZTA's review of alternatives in July 2012 was "cursory". This is a finding of fact; not law. And there were reasonable grounds for the Board to so find, as outlined in Annex B.

4.28 NZTA also says (at 21.2(b)) that the Board erred in law by finding (at [1201]) that NZTA was required to carry out a "feasible option type assessment" after the government's decision to contribute $50 million to the undergrounding of Buckle Street. If that were true, NZTA would be again contesting what the Board found as a matter of fact to be an aspect

of how NZTA's consideration was inadequate; it would not be a question of law. However, that is not what the Board found. At [1201] the Board noted that no reason was given for the failure to carry out such a report. The inference is simply that, if NZTA had not so failed, the Board could have assessed that.

4.29 In addition, in part 22, NZTA says (at 22.2-22.3) that the Board found the consideration of alternatives in March 2013 was too late and that the Board gave little or no weight to NZTA's consideration of alternatives. The reference to weight is a telling signal that this point is about weight; and is not a question of law. But, in addition, the relevant passage of the Board's report (at [1200]) does not support the inference NZTA draws. The Board suggested that NZTA had "become entrenched" well before November 2012, making its decision that Option A was its preferred option on 17 August 2012.

G Issue 1G: Adequacy of Consideration and Adjournment

4.30 Part 24 of NZTA's submissions appears out of order and is not marked as "Issue 1G" as it was in the Notice of Appeal. That is understandable since it is another blatant relitigation of a factual conclusion. Neither does it appear to add anything to the previous submissions. Part 24 seeks to argue, as the heading in NZTA's subs says, that "The Majority should have found that the consideration given was more than adequate".

4.31 Annex C to these submissions outlines how the Board concluded that NZTA did not give adequate consideration to alternatives and why such a conclusion was not unreasonable.

4.32 Part 25 of NZTA's submissions is also out of place. It argues that the Board should have adjourned and referred the matter back to the NZTA when it determined the consideration of alternatives was inadequate. This is a ground of appeal that cannot be found in the Amended Notice of Appeal and consequently cannot be pursued.

4.33 Even if this argument was able to be considered, it would be ill-founded. Parliament envisaged that the Board should be under strict statutory deadlines to deliver its decision on this decision. It was required by s 171(1)(b) to have regard to whether the consideration of alternatives was adequate. It came to a clear view, expressed it and thereby discharged its statutory duty.

5 ISSUE 2: *MCGUIRE* AND CONSIDERING ALTERNATIVES

5.1 NZTA objects (in part 23) to the Board citing (at [1324]) the Privy Council in *McGuire* that an alternative that accords with the spirit of the legislation should be preferred. NZTA says (at 23.3) the relevant legislation "can only be read as referring particularly to their Lordships [sic] discussion of Treaty jurisprudence and its place in the RMA" and should not have been extended more generally. It also says (at 23.5) the Board crossed the line into adjudicating on the merits of the options.

5.2 Unfortunately for NZTA the relevant passage, in Lord Cooke's opinion in *McGuire* for the Privy Council, appears under the heading "The Resource Management Act" and is clearly referring to what may be done under the RMA given the "strong directions" in that Act which concern the Treaty. The Board of Inquiry (at [1324]) says that it bears that in mind when considering the "strong directions" of ss 6 and 7 of the RMA.

5.3 In any case, their Lordships' statement is no more than a specific endorsement of the common-place public law principle that, in the words of the Supreme Court in *Unison Networks* "even a broadly framed discretion should always be exercised to promote the policy and objects of the Act".[30]

5.4 The Board did compare the relative effects of various aspects of the proposed Flyover with those of alternatives. That is a natural corollary

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30 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

of examining the alternatives and considering whether NZTA had adequately assessed them. That is what the Board is required to examine by s 171(1)(b).

5.5 But this does not constitute an "assessment of merits" in the sense contemplated by the Environment Court in *Quay Property Management Ltd v Transit New Zealand*. The Court there considered it would have been unreasonable for Transit NZ to seek an alternative alignment.[31] It was concerned that the Court not determine whether the chosen route was "reasonable" by means of determining the best of alternatives.

5.6 The Board here did not purport to determine the best of alternatives. It determined that NZTA had not adequately considered the alternatives. It was required by s 171(1)(b) to consider that question. That conclusion was reasonably open to it.

6 ISSUE 3: SECTION 171(1)

6.1 NZTA's written submissions deal with issue 3 in part 26 by saying that it has "further refined" the questions of law from the Amended Notice of Appeal into two questions.

A "Having particular regard to"

6.2 In part 28 of its submissions NZTA makes a series of fine legal distinctions between different ways of approaching the exercise of the s 171(1) discretion. STBC and MVRA responds as follows:

(a) NZTA does not accurately characterise the Board's approach.

(b) The approach NZTA urges is not materially different in law from the approach adopted by the Board.

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[31] *Quay Property Management Ltd v Transit New Zealand* EnvC Wellington W28/00, 29 May 2000 at [152].

(c) The different outcome that NZTA favours depends explicitly on NZTA's real objection (in the summary at 28.28-28.29), which is the weight the Board gave to particular evidence.

6.3 The essence of NZTA's objection to legal technique appears (at 28.1 and 28.7) to be to the Board presenting its decision by considering the assessment of the requirement's effects "and" having particular regard to the matters in s 171(1). In fact, that summary of its task exactly reflects the Board's understanding (at [190]) of NZTA's own summary in its opening submissions of what was required.

6.4 Nevertheless, NZTA now says (at 28.8) that the correct approach is to consider the effects of the proposal having regard to the matters in s 171(1) and then come to a decision on the basis of that assessment (and, seemingly, then have recourse to part 2 of the Act if necessary). (Whether that is the same as the Board's report (at [191]-[192]) of NZTA's position in its closing submissions is not clear.)

6.5 The first problem is that NZTA's characterisation of the Board's approach is not supported by the Board's report – not even by the paragraphs ([194]-[196]) NZTA quotes (at 28.3). Contrary to NZTA's latest characterisation, the Board explicitly says (at [194a]), adopting the approach of another Board of Inquiry, that the statute's injunction to "*consider the effects . . . having particular regard to . . .* expresses a duty to do both together, without necessarily giving one primacy over, or making one subordinate to, the other." This, and the rest of the explanation of that approach, is an entirely unobjectionable summary of an orthodox purposive approach to the meaning of s 171(1).

6.6 The second problem is that NZTA's proposed approach is not materially different in law from the approach used by the Board. Both approaches examine the factors to which the decision-maker must have particular regard. Both approaches consider the effects of the requirement. NZTA has not demonstrated that there is any material difference between its

preferred approach and the approaches it has characterised the Board taking, let alone the approach actually taken by the Board.

6.7 NZTA attempts to make something of the difference in wording between s 104 and 171. Clearly there is a difference, and that was noted by the Board (at [193]). However, the difference in wording does not support the existence of the kind of substantive difference that NZTA suggests (at 28.14), viz., that "an inconsistency with one or more of [(a) to (d)] cannot be decisive, whereas it can be with resource consents". That is not correct. An inconsistency with one or more of the factors to which the Board must have "particular regard" may be so significant as to justify a negative decision. Otherwise there's no point in Parliament requiring the Board to have particular regard to those factors. Whether or not it does, of course, is a matter of the weight the Board gives to the different factors. And that is, of course, NZTA's real objection.

6.8 The third problem with NZTA's analysis is that its real objection is to the weight the Board gives to various factors. This is made crystal clear at the denouement of its submissions in the last two paragraphs of its summary, which triumphantly announce that:[32]

> 28.28 To summarise, by correctly having particular regard to the (a) – (d) matters, the Minority found that the Project would have more positive effects (enabling transportation effects in particular) and less adverse effects (heritage and amenity).
>
> 28.29 In contrast, the Majority explicitly gave less weight to the evidence from the Appellant that assumed grade separation was necessary (see [670] in relation to heritage and [960] – [961]) in relation to amenity. The Majority also gave little, if any, weight to enabling effects.

6.9 STBC and MVRA agrees that is a crucial difference. It is a crucial difference that does not depend on legal technique. It is a crucial difference that would not change the outcome of the majority's and minority's decisions if they applied different techniques. But it is not a question of law that can be the subject of appeal.

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[32] This summary also reflects the Amended Notice of Appeal at 29(d) and (f).

B "Subject to Part 2"

6.10 NZTA argues in part 29 that, in interpreting and applying the phrase "subject to part 2" in s 171, the Board has not correctly followed the Supreme Court's decision in *EDS v NZKS*.[33] It submits that this justifies overturning the Board's decision.

6.11 STBC & MVRA say that:

(a) the authorities do not support NZTA's proposed application of *EDS v NZKS* to s 171;

(b) the Board's decision was consistent with *EDS v NZKS;*

(c) in any case, the Board's findings of fact justify its decision on either interpretation.

6.12 In *EDS v NZKS* the Supreme Court made a series of trenchant, but carefully worded, observations about the "overall judgment" approach of the Environment Court (and RMA bar) to the plan change provisions of the RMA.[34] This was related to the Court's reasoning that "environmental protection by way of avoiding the adverse effects of use or development falls within the concept of sustainable management and is a response legitimately available to those performing functions under the RMA in terms of pt 2".[35] That is, the Supreme Court found that the RMA may (but does not have to) contain "environmental bottom lines".[36] It is ironic, and telling, that NZTA is seeking to overturn a decision that heeds an environmental bottom line in relation to heritage and amenity by reference to this decision.

6.13 The first point is that the authorities do not support the applicability of Supreme Court's reasoning regarding plan changes to other decisions under the RMA. NZTA acknowledges this (at 29.35), referring to *KPF*

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33 *EDS v NZKS* [2014] NZSC 38, [2014] 1 NZLR 593.

34 At [106]-[149] in particular.

35 At [150].

36 At [38], [107]-[108], [132], [136]-[140], [148]-149], [150]-[151].

Investments where the Environment Court considered that the direct reference to part 2 of the RMA in s 104 and the nature of the inquiry in s 104 distinguishes resource consent decisions from plan change decisions.[37] The case NZTA cites in support of its argument, *Saddle Views Estate Ltd*, simply raises the question (unargued before it) as to "whether" that needs further qualification.[38] This is not sufficient authority to argue that the Board here erred in law here in referring to part 2. In s 171(1), Parliament has been explicit in directing that decisions must be "subject to part 2".

6.14 The second point is that, despite its use of the "overall judgment" label, the Board's approach was consistent with *EDS v NZKS.* NZTA suggests (at 29.22) that, according to the Supreme Court in *EDS v NZKS,* "Part 2 will be relevant if .. there is a conflict in the exercise of the statutory duty under s 171(1)(a) to (d)". Then it says that, because the proposed project was contemplated in the planning framework, "there is no conflict so as to bring part 2 into play".

6.15 But the Supreme Court did not put part 2 of the RMA "in play" only in such limited circumstances (29.22 & 29.40); rather it emphasised the importance of part 2 and saw it as flowing through the cascading hierarchy of planning instruments that support the RMA. Again, this is consistent with the orthodox importance, voiced by the Supreme Court in *Unison Networks,* of the purpose of a statute animating discretionary decisions made under it. That is so whether they are decisions to make subsidiary legislative instruments or discretionary administrative decisions. This is reflected explicitly in s 171's requirement that a decision-maker must have particular regard to both: the hierarchy of planning instruments (in s 171(1)(a)); and adequate consideration to alternatives (in s 171(1)(b)).

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37 *KPF Investments v Marlborough District Council* [2014] NZEnvC 152 at [196]-[200].

38 *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243 at [13].

6.16 Here, the Board considered (at [1236]-[1239]) that the project was consistent with some aspects of the planning instruments (regarding transportation) but not consistent with others (landscape, visual amenity, open space, amenity and heritage). It found reference back to part 2, particularly s 6(f) (at [1260]), assisted it to conclude that the development would be an "inappropriate" development. This reasoning directly reflects the Supreme Court's reasoning in *EDS v NZKS* which:

(a) clarifies that the importance and meaning of "inappropriate" (at [98]-[105]) is to be assessed by reference to what it is that is sought to be protected including in s 6(f) (at [105]); and

(b) acknowledges the possible need to refer back directly to part 2 as a "guiding principle which is intended to be applied by those performing functions under the RMA",[39] when the planning instruments do not determine the answer to a particular decision (e.g because they do not cover the field or are uncertain – caveats which NZTA acknowledge (at 29.23)).[40]

6.17 Third the foundation of the Board's decision is dictated by its factual findings – such as the inadequacy of NZTA's consideration of alternatives treated so extensively above. Even if NZTA were correct about its interpretation of s 171 in the basis of *EDS*, and correct that the Board is inconsistent with that, NZTA would still need to demonstrate that that would make a difference to the result. It has not done so. All NZTA can point to (at 29.44) is that the minority comes to a different conclusion.

6.18 STBC and MVRA submit that the Board's factual findings mean that its conclusion would be justified anyway. This is the conclusion the Supreme Court came to in *Sustain Our Sounds v New Zealand King Salmon ("SOS v NZKS"),* the companion Supreme Court judgment to

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39 At [24a].
40 At [88].

EDS v NZKS.[41] Even though the Board there applied a defective overall judgment approach the Court determined that its decision on water quality was justified on the basis of its factual findings (at [59], [70], [74]).

7 ISSUE 4-5: TRANSPORT ISSUES

A Issue 4: Enabling Effects

7.1 At part 31 NZTA submits that the potential effect of the proposed flyover requirement in enabling future works should be relevant to the Board's decision under s 171(1). It characterises this as an error in seven different ways (at 31.7) but they all suffer from the same problems:

(a) the Board did treat the enabling effects as relevant; and

(b) NZTA's real objection is that the Board did not given the enabling effects sufficient weight.

7.2 The Board did treat the potential effects of the proposal in enabling future works as relevant to its decision. This is particularly clear from a fair reading of its report from paragraphs [506] to [519]:

(a) at paragraph [509] the Board identified the possibility that it should treat the enabling element as a separate and identifiable benefit, as NZTA argues, but goes on to consider that whether to do so is a moot point "because, in our view, any such benefit can be given little (if any) weight, primarily for the reasons set out below".

(b) At [513] the Board confirms "Put simply, and using the wording from *Elderslie*, we cannot place any significant weight on a supposed (but not quantified) Project benefit which is not real – in that we have no certainty or assurance it would actually materialise."

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41 *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673.

(c) At [517] the Board relates the uncertainty of the benefit back to the concept of sustainable management.

7.3 This reasoning is further reiterated in the Board's overall decision-making, particularly at [1297] and [1318].

7.4 NZTA's real objection here is that the Board didn't give *enough* weight to this consideration. This is revealed in the relevant phrasing of its Amended Notice of Appeal at paragraph 30(a) (as "failing to treat and/or give weight to the enabling benefits . . .") and the repeated references to weight in this part its submissions, at:

(a) 31.6 ("then appears to give this little, if any, weight");

(b) 31.7g ("this effect has been given little, if any, weight");

(c) 31.8 ("the Board wrongly attributed little, if any, weight to this highly relevant positive effect of the Project");

(d) 31.14 ("ought to have been considered and given significant weight");

(e) 31.21 ("By failing to consider or give weight to this effect");

(f) 31.27 ("the enabling effect . . should be given significant weight");

(g) 31.36 ("it did [not (sic)] attribute any weight to the enabling benefits").

7.5 NZTA disagrees with the Board's assessment of weight. This is a dispute of fact, not a question of law.

7.6 And, again, even if there was a problem here, all NZTA can do to demonstrate that it had a material effect on the decision is to point to the minority's view. That view was different from the majority's in many ways and is irrelevant to an appeal of the Board's decision.

B Issue 5B: Treatment of Immediate Effects

7.7 In part 32 NZTA argues (at 32.3) that the Board took a "reductive" approach to transportation benefits in finding that the proposal did not offer "any significant or worthwhile benefit". This is yet another disagreement about weight. And, again, NZTA's assertions about what the Board found are incorrect.

7.8 First, NZTA says (at 32.7) the Board gave no weight to the relief of congestion from Paterson St to Tory St but "analysed the time travel savings only". But the Board was explicit (at [329]) that it considered congestion in terms of indicators that the consensus of experts agreed on, including "difficulties getting through controlled intersections in a single phase and major variability in travel times". It considered these benefits extensively, in particular at [305]-[316] and [359]-[381] and in its overall summary at [1242], [1244]-[1247] (noting the time savings were substantially less than originally put forward when the third lane at Buckle Street and the effect of the Mt Victoria tunnel duplication are accounted for). It noted that the proposed flyover requirement would provide a time saving for the west-bound journey of 90 seconds in 2021 (at [330], [365], [1244]).

7.9 Second, NZTA says (at 32.15) the Board failed to have regard to the immediate benefit of providing for bus priority. But one of the paragraphs NZTA cites (at 32.12) in the Board's report ([405]) demonstrates the opposite:[42]

> We are satisfied the improved journey times discussed earlier would improve journey times for buses passing through the Basin Reserve area. The Transport Agency's modelling shows that the partial bus lanes proposed as part of the Project would not prevent other vehicular traffic also gaining similar time savings. We can accept that the increased priority for public transport provided by the Project could be viewed as a precursor to BRT promoted by the Regional Council, but we have no evidence about the effect of what is proposed here on mode share, which is an objective of the planning documents.

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[42] Similar implications are also noted at [387], [389], [398].

7.10 This paragraph, and the wording used by NZTA in its submissions at 32.15, makes clear that its objection is only to the weight the Board gave to the evidence.

7.11 Finally NZTA says (at 32.16, 32.19) that the Board failed to reference the quantification of economic benefits. The Board did (at [536], [539], [543], [545]-[550] and [552]), noting (at [543]) that "[a] number of Benefit-Cost Ratio figures were presented to us in the application documents and in the evidence". If the Board hadn't referenced specific evidence that would not justify NZTA's complaint. But it did even that, citing (at [542]) the evidence of NZTA's expert, Mr Copeland, whose economic assessment of the project relied upon the BCRs developed by Mr Dunlop upon which NZTA now seeks to rely. The Board's conclusion (at [550]) is reached after seeing how contested were the BCR assumptions. Again the objection is to weight.

C Issue 5C: Project Objectives

7.12 NZTA says (at 33.8) the Board went behind the project objectives because the objective was only to "facilitate" mode shift and the Board assessed whether the project would "achieve" mode shift.

7.13 But the Board explained (at [125]-[127] and [275]-[280]) that it considered a number of instruments as part of the wider planning framework including the Regional Policy Statement. It found that a modal shift to public transport was a consistent objective of transportation strategy documents and could significantly affect the need for the Project and the projected transportation benefits (at [424]). It also notes at various points (e.g. at [418] and [466]) that the proposal was put forward by NZTA at the hearings as a "multi-modal" solution and the Board found on the facts (at [441]) that "[w]e do not see this package of proposals as a truly multi-modal, integrated, long term solution for cycling and walking in the project area".

7.14 The Board is not only entitled but required by s 171 to assess the effects of the project. This is what it did. NZTA doesn't like the weight the

Board attributed to some factors but that is no ground for appeal on a point of law.

D Issue 5A: Onus and Standard of Proof

7.15 NZTA submits that the Board "effectively" required demonstration of transport benefits beyond reasonable doubt.

7.16 There is no basis for this claim. The paragraph NZTA points to (at 34.10), and the preceding paragraph, say:

> [484] We have no doubt that the assumptions fed into the traffic models are the best estimates of competent and experienced people. The point rightly made by critics however is that these assumptions largely determine the outcomes of the complex modelling exercise. Any errors in the assumptions compound when they are used to project traffic flows beyond the immediate future.
>
> [485] The issue would not be important if we were considering infrastructure improvements with minimal adverse environmental effects. In that situation it would not be important from an RMA perspective if the works proved to be premature or not needed at all. The situation here is that, as discussed later in this decision, the Basin Bridge would have significant adverse effects, **so the level of confidence we can have in the modelled need and benefits, which depend on the underlying assumptions, is important.** (emphasis added)

7.17 The Board simply said the level of confidence it could have in the assumptions of the model is important. So it focussed on them. Witnesses cast doubt on the assumptions (e.g. at [497]) and NZTA kept revising them (e.g. [386]) and the Board commissioned its own review by Abley. The Board simply made its own fair assessment of the assumptions and modelling outcomes. This was an important element of discharging its obligation to consider the effects of the proposed flyover requirement.

7.18 NZTA raises other questions, about the evidence the Board relied upon, that are also matters of weight. As noted in part 2A of these submissions, the approach of the Court in *Chorus* is directly against, rather than authority for, NZTA's contentions here:

(a) There is nothing in the Board's report that justifies NZTA's characterisation (at 34.12) of a list of transportation-related matters

as being subject to a higher “standard of proof”; the Board was simply assessing the evidence.

(b) NZTA’s suggestion (at 34.13-24.17) that the Board relied too much on the evidence of three submitters about transportation matters is a classic example of a disagreement as to the weight the Board accorded the evidence. It is not a matter of law.

(c) NZTA provides (at 32.22) what it says is “the only correct conclusion” which indicates its disagreement is really only as to the merits, not a question of law.

(d) Similarly, NZTA’s ironic assertion that “he who asserts must prove” (at 34.27) is incapable of undermining the Board’s findings about heritage and amenity matters that NZTA contends is not based on sufficiently reliable and probative evidence. The Board has not taken an approach “to minimise the Project’s positive effects and instead accentuate its adverse effects” (NZTA at 34.32). Rather, the Board has, reasonably, arrived at its own assessment of the evidence The fact that NZTA doesn’t like the Board’s assessment does not mean it a question of law that may be appealed.

8 ISSUES 6-8: HERITAGE AND AMENITY

8.1 NZTA says (at 35.2) that it has “refined” the questions of law under this heading that were in issues 6, 7 and 8 of the Amended Notice of Appeal into five issues.

8.2 It is difficult to see a basis for at least two of these “refined” issues anywhere in the Amended Notice of Appeal (assessment against s 6(f) and 7(c), and “inappropriateness” in s 6(f)).

8.3 Perhaps that is why NZTA does not appear to pursue the first of those (assessment against ss 6(f) and 7(c)). However, NZTA will need to explain why the Court is able to consider the second (considered below in part 8C).

A Assessing Effects "through the lens" of plans and documents

8.4 In part 36 of its submissions NZTA says the Board was required to reconcile apparent conflicts between plans and should have assessed heritage and amenity effects "through the lens" of s 171 and not with reference to part 2 of the RMA.

8.5 NZTA also suggests that the Board "rewrote" the planning documents and should not have had regard to heritage effects that were not recognised in the planning documents.

The Planning Instruments

8.6 NZTA's argument that the Board was required to reconcile planning instruments here is based on its understanding of *EDS v NZKS*. However, that understanding reverses the point it actually stands for. NZTA attempts to rely on *EDS* to say that the Board should have interpreted the planning documents to produce a meaning that favoured the proposed requirement and then approve it. That is not consistent with the statutory role of the Board under s 171.

8.7 In *EDS* the Supreme Court was at pains to explain that, in order to establish the meaning of the RMA, courts need to interpret not only the broadly worded provisions of part 2 but also the text and purpose of the "cascade of planning documents" which "form an integral part of the legislative framework", "giving substance to its purpose" with "increasing particularity both as to substantive content and locality".[43]

8.8 The point of this was to reject the version of the "overall judgment" approach to plan changes which seemed to involve a decision-maker simply noting a variety of different factors and finding a conclusion ungrounded in those instruments. The Supreme Court emphasised that the wording of particular instruments could well establish "environmental bottom lines" and that the possibility of such bottom

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[43] *EDS v NZKS* at [30].

lines was envisaged in part 2.[44] Consistent with the rule of law, the wording of these legal instruments is to be interpreted as law, not just relevant considerations. So environmental bottom lines in the New Zealand Coastal Policy Statement ("NZCPS"), interpreted by reconciling the meaning of apparently conflicting provisions if possible, directly affected the ability to make a change to the Regional Plan. This was because the Regional Plan was required by s 67(3)(b) of the RMA to "give effect" to the NZCPS.

8.9 Here, the Board's primary task under s 171 was not whether the proposed flyover requirement was consistent with the planning documents. NZTA's requirement, if accepted, would cut across some of the District Plan – a requirement that is confirmed becomes a "designation" in a district plan that gives effect to a requirement (ss 166, 175 and 176).

8.10 Rather, the Board is required by s 171, "subject to Part 2, to consider the effects on the environment of allowing the requirement", "having particular regard" to various factors including the adequacy of alternatives and the relevant provisions of the planning documents. So consideration of the effects, subject to Part 2, having particular regard to the stated matters is (as the Board said, at [170]) the "focal point of the assessment". Planning documents do not determine the outcome of a s 171 decision, unlike the NZCPS which can determine a plan change decision under s 67.

8.11 Importantly, the provision which empowers the Board to make the decision on the requirement itself (rather than making a recommendation to NZTA, as a territorial authority would) requires the Board to have regard to the Minister's reasons for referring this matter of national importance to the Board.

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[44] At [106]-[108], [126]-[132].

8.12 Here, the Minister's reasons emphasised the "recreational, memorial, and heritage values associated with this area of national significance (including associated structures, features and places) which contribute to New Zealand's national identity" as well as the "widespread public interest regarding its actual or likely effects on the environment, including on heritage values and experiential values associated with the Basin Reserve".

8.13 However the legal reasoning is presented, it is very clear that the crucial element of the Board's reasoning for cancelling the requirement were its findings about the major adverse effects on historic heritage and the significantly adverse effects on landscape, townscape and urban design:

(a) The effects on the environment of the proposal were found (at [1259]) to be adverse to a "major" degree (e.g. [766]) in relation to historic heritage – especially "the risk to the status of the Basin Reserve as a venue for test cricket" and the "cumulative adverse effects of dominance and severance cause by the proposed Basin Bridge and exacerbated by the Northern Gateway Building".

(b) The effects on the environment were found (at [1261]) to be significantly adverse for residents and users of the northeast quadrant, visual amenity of the southern part of Kent/Cambridge Terraces and lower Paterson St, the loss of streetscape and open space of the Basin Reserve, and experiential appreciation of the Basin Reserve and its area.

8.14 These effects were directly relevant to its inquiry both because there were environmental effects under s 171 but also (under s 149P) because concerns about them were an important part of the Minister's decision to refer the proposal to the Board in the first place.

8.15 NZTA criticises the Board for not "reconciling" the various planning documents. Even in the plan change context the authority NZTA relies on, *EDS v NZKS,* recognises explicitly (at [130]) that if there was

conflict between particular policies, after trying to reconcile them, then a determination may be reached that one policy prevails over another, informed by s 5.

8.16 But what the Board was required to do here, in a requirement context, and what it did do, was to have particular regard to the planning instruments under s 171(1)(a), in assessing the effects of the proposed requirement. So:

(a) The Board reported (at [559]) the identification by the planning witnesses it heard from of a single theme in the statutory instruments regarding historic heritage: "to protect heritage from inappropriate use and development". It traced this (at [560]-[561]) to Objective 15 and Policy 46 of the RPS and Objective 20.2.1 and Policies 12.2.6.3 and 20.2.1.4 of the District Plan as well as to the various provisions in part 2.

(b) The Board identified (at [792]-[799]) Objective 22 and Policies 54, 57 and 67 of the RPS, and too many objectives and policies of the District Plan to list, as relevant to urban form, design and amenity.

8.17 The Board also confirmed that part 2 of the RMA, which its consideration was required to be "subject to", was consistent with its assessment of these effects:

(a) Its concern about the adverse effects on historic heritage is consistent with s 6(f) of the RMA which requires decision-makers to "recognise and provide" for "protection of historic heritage from inappropriate development" as a matter of national importance ([1260]).

(b) Its concern about the significantly adverse effects on landscape, townscape and urban design was consistent with ss 7(c) and 7(f) which require decision-makers to "have particular regard to" "the maintenance and enhancement" of "amenity values" and "the quality of the environment" ([1263]).

Heritage is not limited to what's said in the Planning Instruments

8.18 NZTA says (at 36.16) the Board rewrote the District Plan which did not have a heritage precinct or landscape in it.

8.19 The Board did not rewrite any plan. Rather, it was NZTA which was attempting, literally, to rewrite the District Plan by having the proposed requirement included in it as a designation.

8.20 The Board was required by s 171 to assess the effects of the proposed requirement. There is nothing in the RMA that limits the effects that are considered to the values protected in a plan. Indeed "effect" is defined in its own interpretation section, s 3, broadly, as the Supreme Court has noted:[45]

> **3 Meaning of effect**
> In this Act, unless the context otherwise requires, the term **effect** includes—
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

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45 *EDS v NZKS* at [23] and [145].

8.21 This definition is consistent with the purpose of the RMA of ensuring that a holistic view of environmental effects is taken by decision-makers, as demonstrated by the equivalent breadth of s 5.

8.22 Not only the text and purpose but also the scheme of the RMA drives a broad assessment of the effects of a requirement. The hierarchy of part 2 of the Act, and the planning instruments that sit under it, work from general principles to specific applications. As the Supreme Court recognised in *EDS v NZKS* the planning instruments increase in particularity "both as to substantive content and locality".[46] The lowest level of planning instrument, the District Plan, has the most specific rules in it that govern activities, quintessentially through the allocation of activities into different classes (e.g. prohibited, restricted discretionary, discretionary, controlled, permitted) (s 87A). All levels of plan are required to be formulated through a process that allows significant public participation through submissions and hearings.

8.23 Yet, except at either end of that spectrum (prohibited and permitted) the Act still requires people to apply for resource consents to undertake particular activities. A very important part of the process of considering granting a resource consent that has more than minor adverse environmental effects is notification of the public and a submission and hearing process (s 95A). The point of having a public participatory process in relation to a particular resource consent is that a Plan is still necessarily written at a level of general abstraction. The environmental effects of a specific example of an activity can only be assessed by assessing the evidence about that specific activity.

8.24 The assessment of a proposed requirement is similar, but even more important. The requirement, if confirmed, will cut across the District Plan. It is vital that all its effects are assessed, with the benefit of public participation. That is even more true where the Minister for the

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[46] *EDS v NZKS* at [30].

Environment has decided that a proposed requirement is a matter of national importance and must be considered, and decided, not by the requiring authority but by an independent Board of Inquiry.

8.25 A Board of Inquiry to whom that task has been entrusted is expected to examine all the effects of a proposed requirement. The suggestion that it can only consider effects that are recognised in pre-existing planning instruments would make a nonsense of having a participatory process to assist the Board assess the effects of this specific proposed requirement.

8.26 Similarly, the Court of Appeal in *Auckland Regional Council v Rodney District Council* determined that, although they cannot be ignored, planning instruments cannot determine environmental effects for the purposes of notification decisions:[47]

> [t]he environment', as defined by s 2, has a reality that is independent of what is said about it in planning instruments. So it is perfectly possible to assess, or form views about, the environment without referring to such instruments. An effects assessment requires in the first instance a consideration of externalities associated with the proposed activity on the environment as it exists. District planning instruments are, however, relevant to the assessment of the significance of such effects (for example, whether they are likely to be major, minor and so on) because these instruments prescribe what activities can occur within the relevant environment.

8.27 Here, rather than rewriting the District Plan itself, the Board has prevented NZTA from rewriting the District Plan. It has examined, as it was required to do by s 149P, precisely those environmental effects that were the reason why the Minister established the Board in the first place.

8.28 An example of the implications of NZTA's argument is that it acknowledges (at 36.23) that the Kent/Cambridge viewshaft "has both some heritage and amenity value". Yet it criticises the Board for "elevating" the effect on the viewshaft. This illustrates that NZTA's argument here, as elsewhere, reduces to a dispute about the weight that the Board placed on environmental effects that NZTA didn't value as

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[47] *Auckland Regional Council v Rodney District Council* [2009] NZCA 99, (2009) 15 ELRNZ 100 at [67].

highly as did the Board. Indeed, that is explicit in the next objection in NZTA's submissions (at 36.24): "the Majority gave undue weight to the effect of the Northern Gateway Building on views both to and from the Basin Reserve".

8.29 The same point applies to the objections about the processional route and the wider heritage area/precinct. These matters are all considered by the Board as environmental effects of the proposed requirement. It was not only entitled, but required, to do so.

8.30 NZTA notes (at 36.28) that the Basin Reserve is registered as a historic heritage area under the Heritage New Zealand Pouhere Taonga Act 2014. NZTA objects that that Act does not provide statutory protection under the RMA. This illustrates the artificiality of NZTA's approach. The purpose of the 2014 Act, according to its s 3, is "to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand".

8.31 NZTA's first sentence in its last point in this section of its submissions (at 36.31(d)) is that "The key issue applicable to heritage values ultimately relates to visual/landscape effects arising from the presence and dominance of the Bridge structure." That is correct. But NZTA's objection is simply to the weight that the Board placed on that, as the last sentence reveals: "Given this, the effects on heritage are not so significant that the overall heritage values currently experienced would be lost."

B "Historic heritage" in s 2

8.32 In part 37 of its submissions NZTA says (at 37.3) the Board misapplied the definition of "historic heritage" in s 2 of the RMA. It says the definition "does not specifically provide for heritage precincts or landscapes" and so it is not open to the Board "as a matter of law" to "conclude that the wider Project area is a heritage precinct/landscape".

8.33 The definition of historic heritage in the RMA is broad. It is explicitly defined (at (b)(i)) to "include" "historic sites, structures, places and areas" as well as "surroundings associated with the physical resources" (i.e. resources that, per paragraph (a) of the definition "contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities" which include "architectural", "cultural" and "historical").

8.34 NZTA is wrong if it is suggesting that the Board concluded that there was, or that it created, some formal heritage precinct or landscape. It examined whether there was an area of historic heritage, just as the definition permits it to do. The problems in terms of historic heritage effects were found to be major adverse effects on particular heritage sites and the cumulative heritage effects in the area (at [709], [743], [757]), not in any formal "precinct" concept.

8.35 NZTA urges on the Court an unduly narrow interpretation of "historic heritage" that is at odds with both the text and the purpose of the RMA.

8.36 A fair reading of the Board's report demonstrates that it was examining the environmental effects of the proposed requirement, including those effects about which the Minister was so concerned that she referred this matter to the Board rather than leaving it with NZTA.

8.37 Indeed the Minister, in her reasons, referred to the proposal as being "adjacent to and partially within the Basin Reserve Historic Area and international test cricket ground; in the vicinity of other historic places" and "adjuacent to the National War Memorial Park (Pukeahu)". She then said "The proposal is likely to affect recreational, memorial, and heritage values associated *with this area of national significance (including associated structures, features and places)* which contribute to New Zealand's national identity." It is difficult to see how the Board could have complied with its obligation to have regard to the reasons of the Minister in referring the proposal to it, without taking the approach it did to the "area" of historic heritage.

8.38 NZTA disagrees with the Board. But it is, again, a disagreement as to the weight accorded by the Board to the evidence. This is revealed by the alternative argument by NZTA (at 37.12) that the Board should not have held that a landscape qualifies as a cultural heritage landscape without "adequate expert evidence of a probative nature". The Board's report is clear that its findings of fact were based on the evidence before it. The section of its report on the overall evaluation of heritage effects notes (at [765]-[782]) a degree of consensus amongst the five heritage experts as to the overall effect on heritage values. All except Mr Salmond (NZTA's expert) agreed that the degree of adverse effect was "*major*" (emphasis in the original at [766]-[767]):

(a) four experts regarded the dominance of the Flyover in terms of elevation, bulk and location as "major adverse" whereas Mr Salmond regarded it as "significantly adverse");

(b) four experts regarded the juxtaposition of (visible) vehicular movement next to the recreational ground as "major adverse" whereas Mr Salmond regarded it as "adverse";

(c) four experts regarded the interruption and changing of views to and from the Basin as "major adverse" whereas Mr Salmond regarded it as "significantly adverse".

8.39 The Board also notes (at [768]) that Mr Salmond explicitly qualified his evaluation with the preferatory words "if the need for the Bridge (as a transport management solution) is accepted". Under cross-examination he accepted that "if one sets aside all other issues then in a heritage context it's not difficult to agree that **the bridge is inappropriate**, left solely to that issue" (emphasis in the original). On this basis the Board concluded (at [772]) that "there would, in fact, be a very high degree of consensus amongst all six heritage experts regarding the magnitude of the overall adverse effect of the Project on historic heritage values if they had been carried out with equivalent assumptions".

8.40 NZTA is not entitled, in an appeal supposed to be on a question of law, to question the weight the Board ascribed to that evidence.

C “Inappropriate” in s 6(f)

8.41 In part 38 of its submissions NZTA says that the Board did not correctly apply the test of “inappropriateness” required by s 6(f) of the RMA because it failed to have particular regard to the relevant planning documents.

8.42 The first point about this argument is that it does not seem to appear in NZTA’s voluminous Amended Notice of Appeal, which it took the opportunity to amend. So NZTA needs to establish that it is entitled to argue this point.

8.43 Furthermore, as explained above in relation to issue 8A, and in the Board’s report, the Board clearly did have particular regard to the relevant planning documents.

8.44 NZTA also mischaracterises (at 38.10) the Board’s explanation of Mr Salmond’s qualification to his evaluation noted in relation to issue 8B above.

D Options within the scope of the application?

8.45 In part 39 of its submissions NZTA says the Board failed to consider options within the scope of the application that would have balanced the needs of cricket with any other heritage or amenity effects of a longer Northern Gateway building. In particular, NZTA points (at 39.1) to the options of having a 45m or 55m Northern Gateway building and to the option of having a 65m Northern Gateway building together with conditions that would retain “a sense of openness” between 45m and 65m.

8.46 The Board did consider those options but it found that the 65m option would have less significant adverse effects:

(a) The Board heard evidence from cricket witnesses on Day 52 of the hearing (Neely, Anderson and Snedden) about the deficiencies of the 45m and 55m options.[48] The Board considered (at [758]) that loss of the test-cricket status of the Basin Reserve "would constitute the loss of a major element of historic heritage of this place" but accepted that "if the Northern Gateway Building is constructed to a length of 65m and designed in accordance with the requirements as set out in the evidence, the potential adverse effects on the playability of cricket, from the players' perspective, is insignificant and therefore so is the consequent risk of losing test-cricket status". The reference to the evidence presumably includes the evidence the Board heard on the requirements for openness other than on match days, as discussed by Mr McIndoe (at [903]) and Mr Snedden.[49]

(b) The Board examined the 65m Building which was, according to the City Council's Urban Design expert (at [903]), "essential to maintain the ambience and integrity of the ground from within" and, according to the cricketing experts (at [965]) was "necessary to mitigate the effects on cricket". The Board accepted the evidence of the cricket experts over that of the NZTA's ophthalmological expert, Dr Sanderson.[50] NZTA's heritage expert, Mr Salmond also apparently accepted (at [646]) the need for a screening bridge for international cricket purposes although he was concerned about its environmental effects on viewshafts.

(c) The Board's assessment and findings on the proposed conditions regarding the design of the Northern Gateway Building at [160] demonstrates that conditions for design were indeed considered.[51]

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48 Transcript: 5996, 23-25 (Neely); 5999, 30-34 (Anderson), 6001, 12-22 (Snedden).

49 Transcript, 6001, 12-17 (Snedden).

50 Transcript, 6091, 3-24. And see the alternate view by the minority that accepted the same point at [1383].

51 Paragraph [160] refers to paragraph [177] of the Board's Draft Decision, specifically DC.11(c)(ix), DC.12 and DC.31.

8.47 NZTA appears to be complaining that the Board didn't consider options which would have had an even greater impact on historic heritage than the options it did focus on.

9 OUTCOME SOUGHT

9.1 If the Court considers any of NZTA's points do have weight, STBC and MVRA submit they are not material to the Board's decision and the appeal should be denied. The Board's decision was determined crucially on the basis of its factual findings about the effects of the proposed flyover requirement. None of NZTA's alleged legal defects would make a difference to that conclusion; even if they were genuine defects, which they aren't.

9.2 If the Court upholds the appeal, the orthodox relief would be to remit the assessment back to the Board to consider again. Section 149J(2) of the RMA is explicit that the Board has jurisdiction to complete the performance of its functions in such circumstances.

9.3 But the STBC and MVRA submit that there is no merit in the appeal. It is largely concerned with questions of weight about facts which do not constitute grounds of appeal on questions of law. The questions of law that are raised are ill founded.

9.4 The STBC and MVRA submit that the Court should decline the appeal, award costs to the respondents and reserve leave for submissions about the amount of costs to be awarded.

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& Mt Victoria Residents Association Inc

ANNEXES: THE BOARD COULD REASONABLY HAVE COME TO THE CONCLUSIONS IT DID

The Board's conclusion that NZTA failed to satisfy the requirement for the "adequate consideration of alternatives" was a reasonable conclusion to reach given the meaning of adequate consideration and the extensive evidence from 2001 to 2014 that was put to the Board over the four-month hearing.

The Board examined the case law on s 171 and what "adequate consideration" entails. It established at [1094] that the words are intentionally broad to avoid mandatory tests and to avoid restricting how they may apply to a potentially wide range of projects. The Board also found, however, that there are certain guiding principles discernible from the case law:[52]

1) At [1091(a)–(d)]: "adequate consideration" is about the process, not the outcome. That is, the question is not whether the best or most appropriate route, site or method has been chosen, as the authority maintains responsibility for selecting the site.

2) At [1090]: the requiring authority must establish an appropriate range of alternatives and properly consider them.

3) At [1087] and [1215]: the measure of adequacy will depend on the impact on the environment of adverse effects. Therefore, when a project involves significant adverse effects as this one does, adequate consideration is more relevant.

4) At [1091(a)]: a requiring authority must avoid acting arbitrarily or giving only cursory consideration of alternatives.

5) At [1091(e)]: a requiring authority is not required to eliminate speculative or suppositious options.

Because of the Board's finding that the measure of adequacy will depend on the impact of adverse effects, the following findings of fact were material to their examination of "adequate consideration":

1) At [782]: the Project constituted an inappropriate development in terms of effects on historic heritage;

2) At [1010]: the Project would have a number of significant adverse effects on landscape, townscape and urban design;

3) At [1079]–[1081]: there was insufficient evidence to conclude on social impacts and public health effects, which were some of the reasons for the Minister referring the application to the Board of Inquiry;

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[52] Referring to *Queenstown Airport Corporation Limited v Queenstown Lakes Distrct Council* [2013] NZHC 2347 (12 September 2013); Upper North Island Grid Upgrade Project Board of Inquiry (2009); and MacKays to Peka Peka Board of Inquiry (2013).

4) At [505]: the Project could not be credited with being a long term transportation solution; and, at [1247]: the transportation benefits would be "substantially less" than NZTA anticipated, with savings on time travelled would be 90 seconds, not seven and a half minutes as the NZTA had anticipated, as noted at [364]–[365].

The importance of these factual findings was reinforced by the fact that the Ministerial direction referring the proposal to the Board referred directly to these topics.[53] The Board was required under s 149P(1)(a) to have regard to the Minister's reasons for referring the proposal and they included the potential effects on the Basin Reserve Historic Area, a place that contributes to New Zealand's national identity, the intention to make improvements for a range of transport matters, and the potential benefits to the Crown's public health, welfare, security and safety functions.

These contextual factors lay the foundation for the Board's reasonable findings that the NZTA did not adequately consider alternatives.

A 1B(17): NZTA did not adequately consider non-suppositious options

The Board found at [1182] that it was incumbent on NZTA to consider, adequately, non-suppositious options with reduced environmental effects because of the Project's significant adverse effects. On the evidence, Option F and Option X (see [1187]) and the BRREO (see [1164]) met the threshold of being non-suppositious and therefore required consideration.

However, NZTA's assessments of those and other options, including the preferred Option A, were so lacking in transparency that the Board concluded at [1181] that "it was difficult, if not impossible, to determine if adequate consideration was given to alternative options".

The Board also concluded that the consideration of alternatives was not adequate when options were treated differently. The Board found at [1150] that the weighting assigned to the economic efficiency factor differed at different stages of comparison. When Options A and B were compared to Options C and D, a difference in the benefit cost ratio (BCR) of 0.5 was considered to be insignificant for a project of this scale. Later, however, when Option A was compared to Option F, a similar BCR was not considered to be insignificant. Although the Board does not say this explicitly, the consequence of that differential treatment was that Option F was cast in a negative light that was not cast on to other options. This was an example used by the Board to show that the lack of transparency about the weighting given to options meant that it could not reasonably conclude that consideration had been adequate.

A further reason for the Board concluding that NZTA did not give alternatives adequate consideration was the Board’s finding on the evidence at [1200] that

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53 Hon Amy Adams, Ministerial direction referring the Basin Bridge proposal to a board of inquiry (3 July 2013).

NZTA was entrenched with Option A. This conclusion was reached because of the purpose of the Comparison of Options produced in March 2013, which states in its introduction that "[t]he evaluation was undertaken to confirm the decision previously made by the NZTA that Option A is the preferred option".[54] The Board also cited a letter from the CEO of NZTA, Mr Geoff Dangerfield, to the Wellington City Council dated 19 December 2012 (set out in part at [1141]). In that letter, Mr Dangerfield stated, "We [the NZTA] are particularly concerned about the council taking a position to oppose the construction of the bridge at the Basin Reserve". The Board concluded from that letter that "the Transport Agency had become entrenched with Option A". Thus, it was reasonable for the Board to conclude from the evidence that NZTA failed to adequately consider the options which the Board found to be non-suppositious.

B 1F (21): NZTA did not adequately <u>re</u>consider alternatives

In mid-2012, the circumstances for the Project changed when the government began exploring whether it would fund the undergrounding of Buckle Street, which later came to be known as the Arras Tunnel. The Board identified the importance of this change: although tunnel options for the Basin Reserve area had previously been explored and ruled out (see [1134]), it had been explicitly stated on two identified occasions that Options F and X should be reconsidered if the government funded the Arras Tunnel (see [1123] and [1137]). For these reasons, the Board said at [1196] that "the playing field changed … [and] should have resulted in re-evaluation of the options, including Option F, against the Project objectives".

After the government's indications about the Arras Tunnel, NZTA's consultant Opus wrote a letter to NZTA (dated 3 July 2012). Again indicating that NZTA's position was already entrenched, the letter stated that "[t]he purpose of this document is to consider whether this [the government's indications with respect to the Arras Tunnel] changes the preferred solution at the Basin Reserve".[55] The Board considered at [1196] whether the contents of this letter constituted "adequate consideration" and concluded on the evidence that "[t]he five-page letter was essentially a brief summary or overview of Option F and Option X. … It was not a careful evaluation of options in light of the decision by the government to underground Buckle Street. … At most it could be called nothing but a cursory review of the situation". Moving at pace, NZTA announced on 17 August 2012 that Option A was its preferred option.

In light of this evidence, it was reasonable for the Board to conclude that NZTA failed to give adequate consideration to these non-suppositious options.

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54 Opus, "Basin Bridge Technical Report 19: Alternative Options Omnibus: A description of the alternatives that were considered for the Basin Reserve Project", June 2013, Appendix B.

55 Gareth McKay, "Transport Improvements Around the Basin Reserve: Undergrounding Buckle Street – Alternatives Review" (letter to NZTA, 3 July 2012).

C 1G (24): NZTA did not adequately consider alternatives

In reaching its conclusion that NZTA failed to adequately consider alternatives, the Board was not focused on the many options that were floated. The Board was focused on the process of consideration and its adequacy, as stipulated in s 171(1)(b) and defined in *Queenstown Airport Corporation Limited v Queenstown Lakes Distrct Council*.[56] It noted at [1165] that the evidence before it included "many criticisms levelled at the process and its underlying methodology" and that is the crux of whether NZTA adequately considered alternatives. To that end, the Board found in the evidence a number of critical failings, which it boiled down at [1171] into two themes: (a) the transparency and replicability of the option evaluation; and (b) the consideration given to non-suppositious options with potentially reduced environmental effects.

In terms of adequate consideration, transparency and replicability were found at [1172]–[1181] to be relevant to the process because the results of evaluation could vary widely depending on the methodologies employed. Of particular importance was the lack of transparency about the weight given to various criteria and measures. As noted at [1176], all experts agreed that, if a different process was used, then different recommendations could have resulted.

In terms of consideration to non-suppositious options, the Board had found that the Project would have significant adverse effects and concluded at [1182] that it was therefore necessary for NZTA to give adequate consideration to alternatives, particularly those with reduced environmental effects. As described in sections A and B above, the Board found on the evidence that the consideration of non-suppositious options was inadequate.

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[56] *Queenstown Airport Corporation Limited v Queenstown Lakes Distrct Council* [2013] NZHC 2347 (12 September 2013) citing Upper North Island Grid Upgrade Project Board of Inquiry (2009); and MacKays to Peka Peka Board of Inquiry (2013).