IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision No. [2024] NZEnvC 101

IN THE MATTER	of an objection under s 23 of the Public Works Act 1981
BETWEEN	TONY and DEBBIE PASCOE (ENV-2021-AKL-116) Objectors
AND	MINISTER FOR LAND INFORMATION Respondent

Court:	Environment Judge B P Dwyer Environment Commissioner K A Edmonds Environment Commissioner D J Bunting
Hearing:	at New Plymouth on 29 November 2023 – 1 December 2023
Last case event:	1 February 2024
Appearances:	A Webb for the Objectors R Roff, J Prebble and K Bell for the Respondent
Date of Decision:	10 May 2024
Date of Issue:	10 May 2024

DECISION OF THE ENVIRONMENT COURT

A: Taking of the Objectors' land found to be fair, sound and reasonably necessary for achieving the objectives of the Minister. No directions made.

B: Costs reserved.

REASONS

Introduction

[1] Tony James Sofus Pascoe and Debbie Ann Pascoe (the Pascoes) have filed an objection to a notice of intention to take land (the Notice) served on them by the Minister for Land Information (the Minister) pursuant to s 23(1)(c) Public Works Act 1981 (PWA) on 4 August 2021. The Notice sought:

- The compulsory acquisition of 11.1715 ha of Pascoes' land for construction and permanent occupation by a new road; and
- A leasehold estate in 12.7489 ha of Pascoes' land for temporary occupation during construction of the road.

We will refer to the two areas collectively as the Land.

[2] The Minister opposes the objection and contends that taking of the Land should proceed.

Background

[3] The purpose of the taking is to enable a roading improvement project (the Project) known as the Mount Messenger Bypass to proceed at SH3 in the Taranaki region. New Zealand Transport Agency (NZTA - the Government Agency responsible for the Project) obtained approval of resource consents and a notice of requirement under the Resource Management Act 1991 (RMA) allowing the Project from the Environment Court on appeals by way of an interim decision dated 18 December 2019 (the interim decision), a final assessment dated 10 March 2021 and a final decision dated 1 April 2021 (the final decision).[1]

[4] This decision addresses the Pascoes' objection to the proposed taking of their

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[1] *Director-General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203; [2021] NZEnvC 27, (2021) 22 ELRNZ 557; [2021] NZEnvC 40.

land under the PWA by the Minister who, in this instance, is acting on advice given by NZTA. This decision is not a re-run or re-litigation of the RMA proceedings concerning the notice of requirement and resource consents sought by NZTA for the Project. Section 171(1)(b) RMA required the Court to consider "whether adequate consideration [had] been given to alternative sites, routes, or methods of undertaking the work" and s 24(7)(b) PWA requires the Court in this case to "enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving [the Minister's] objectives". While they are similarly worded, those are different legal questions. Section 24(6A) PWA allows the Court to accept evidence that was presented at the RMA hearing and while there is considerable overlap, the parties have lodged evidence specifically for this proceeding. We will, on occasion, mention relevant evidence given in the RMA proceedings, but the focus of this decision is the evidence and arguments relevant to the PWA tests.

[5] In paras [4] and [5] of its interim decision the Court explained the rationale for the Project in these terms:

> [4] As part of its improvement programme the Agency has identified that the existing 7.4km long Mount Messenger section of the state highway located some 58km north-east of New Plymouth has:
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> - Steep grades, a tortuous alignment and restricted forward visibility;
> - Significant lengths with no or only limited shoulders;
> - A narrow tunnel at the summit;
> - Vulnerability to interruption of service by breakdowns, crashes, landslips and rockfalls;
> - Limited alternative route options when service is interrupted, with alternative route options being limited and involving significantly longer travel times (especially for freight).
>
> [5] These constraints translate to problems with safety, route resilience (including road closures with no suitable alternatives), poor road geometry and low speeds which, when combined, mean the road is no longer fit for purpose.
>
> [footnotes omitted]

[6] The Project will bypass Mount Messenger with a new (approx) 6 km section of

highway through the floor of the Mangapepeke valley (the valley) east of the Mount. Pascoes farm a 256 ha property at 3072 Mokau Road, Urenui. The farm's home block containing 155 ha is situated at the northern end of the valley where the proposed new section of highway will connect with the existing highway. Construction of the highway will split the valley and Pascoes' farm in two.

[7] The obviously severe adverse effects of the Project on Pascoes' way of life and the Land was a matter discussed in some detail by the Court in the interim decision. During the course of the RMA hearing the Court had directed NZTA to specify in detail various remedial, mitigatory and compensatory measures which it had proposed in the course of discussion with Pascoes and/or which emerged during the hearing process. These led to the drafting of a proposed condition 5A requiring these measures as a term of resource consents should they be granted (with a corresponding condition 19(b) in the notice of requirement).

[8] The interim decision briefly summarised the Court's findings as to the effects of the Project on Pascoes in these terms:

> [468] There is no doubt that the Project will have significant adverse effects on the Pascoes and their land. The adverse social impact of the Project on the Pascoes is severe. We consider, however, that proposed condition 5A will mitigate those effects to the extent possible if the Project is approved and proceeds and the Pascoes accept the Agency's offer to buy their house, the land on which it sits, and the other land that is required for the Project.

Notwithstanding those effects, the Court ultimately approved the resource consents and notice of requirement sought by NZTA. The Notice commences the formal process for taking the Land by the Minister which, the Minister contends, is reasonably necessary for the approved Project to proceed. Two members of the Court who heard the RMA appeals (Judge Dwyer and Commissioner Bunting) sat on the panel for this hearing.

Issues

[9] Pascoes' objection identified 26 grounds. These grounds were distilled down to

the following issues in both their opening and closing submissions: [2]

> (1) The objectors case remains as set out in the opening submissions that:
>
> (a) There was no adequate consideration of alternative routes site or methods for achieving the objectives – s 24(7)(b) of the Public Works Act 1981 (**PWA**); and
>
> (b) There have not been any good faith negotiations with the objectors so far as required by s 18 PWA; and
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> (c) For both reasons, it is not fair, sound or reasonably necessary to take the Land to achieve the Objectives.[3]

In considering these issues we will engage with the provisions of ss 18(1)(d), 24(7)(a), (b) and (d) PWA. We will commence by considering s 24(7)(a) then s 24(7)(b) and then ss 18(1)(d) and 24(7)(d) together. We first set out the relevant underlying provisions of PWA.

[10] Section 18 PWA sets out a process for the giving of notice of a desire to acquire land by the Minister or a local authority. Section 18(1) provides:

> **18 Prior negotiations required for acquisition of land for essential works**
>
> (1) Where any land is required for any public work the Minister or local authority, as the case may be, shall, before proceeding to take the land under this Act—
>
> (a) serve notice of his or its desire to acquire the land on every person having a registered interest in the land; and
>
> (b) lodge a notice of desire to acquire the land with the Registrar-General of Land who shall register it, without fee, against the record of title affected; and
>
> (c) invite the owner to sell the land to him or it, and, following a

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2 Closing submissions for the Pascoes came into the Court in an unusual format. Three documents were electronically filed by Mr Webb on 1 February 2024: an unsigned document dated 22 December 2023 titled "closing submissions on behalf of the objectors", which the covering email describes as "draft closing submissions"; a marked up version of the closing submissions with extensive additional comments; and a document entitled "memorandum on behalf of D & T Pascoe" dated 1 February 2024. Notwithstanding the description as draft and the fact that it is unsigned we have regarded the first document as closing submissions made by counsel on Pascoes' behalf. When we refer to the Pascoes' closing submissions in our decision, this is the document to which we are referring.

3 Closing submissions at [1].

> valuation carried out by a registered valuer, advise the owner of the estimated amount of compensation to which he would be entitled under this Act or the betterment that he may be liable to pay; and
>
> (d) make every endeavour to negotiate in good faith with the owner in an attempt to reach an agreement for the acquisition of the land.

Section 18(2) requires the Minister "… to make every endeavour to negotiate in good faith…" with a landowner for three months after the giving of a notice under s 18(1). The landowner is not obliged to participate in the negotiation process. Section 23 PWA sets out a process to be followed for the giving of a notice to take land when purchase negotiations pursuant to s 18(2) are unsuccessful. Section 23(3) enables persons with an estate or interest in land intended to be taken to object to this Court against the taking. These proceedings relate to such an objection which is considered by the Court pursuant to s 24 PWA.

[11] The enquiry to be undertaken by the Court when hearing an objection is described in s 24(7) PWA which provides:

> (7) The Environment Court shall—
>
> (a) ascertain the objectives of the Minister or local authority, as the case may require:
>
> (b) enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving those objectives:
>
> (c) in its discretion, send the matter back to the Minister or local authority for further consideration in the light of any directions given by the court:
>
> (d) decide whether, in its opinion, it would be fair, sound, and reasonably necessary for achieving the objectives of the Minister or local authority, as the case may require, for the land of the objector to be taken:
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> (e) prepare a written report on the objection and on the court's findings:
>
> (f) submit its report and findings to the Minister or local authority, as the case may require.

Section 24(10) PWA provides that the Court's findings are binding on the Minister.

Objectives - Section 24(7)(a) PWA

[12] NZTA's objectives in advancing the Project were identified in the evidence of Mr C J Nally (Principal Project Manager for NZTA for the Project since 1 June 2019) as follows:[4]

> 32. As the requiring authority in respect of the Notice of Requirement for the Project, Waka Kotahi developed the following Project objectives, (while they address section 171(1) of the RMA – they have remained consistent throughout the life of the Project, both in terms of RMA process and PWA processes now being undertaken):
>
> 32.1 to enhance the safety of travel on SH3;
>
> 32.2 to enhance the resilience and journey time reliability of the state highway network;
>
> 32.3 to contribute to enhanced local and regional economic growth and productivity for people and freight by improving connectivity and reducing journey times between the Taranaki and Waikato Regions; and
>
> 32.4 to manage the immediate and long term cultural, social, land use, and other environmental impacts of the Project by so far as practicable avoiding, remedying, or mitigating any such effects through route and alignment selection, highway design and conditions.

It is the fourth objective which was the focus of Pascoes' case before us. They contend (in summary) that the Project as advanced does not adequately manage environmental effects through route and alignment selection or highway design.[5] That contention substantially revolves around the matter of consideration of alternatives and the determination to proceed with the route through the Land with its severe effects on them as opposed to an alternative route described in these proceedings as Option Z or revised Option Z. We will address these contentions in due course. Both the Minister and the Pascoes advanced their cases before us on the basis that the RMA and PWA objectives were one and the same and for the sake of completeness we will

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4 Nally evidence dated 9 December 2022 at [32].

5 C.f Pascoes' opening submissions at [7].

address that wider aspect.[6]

Alternatives - Section 24(7)(b) PWA

[13] Section 24(7)(b) requires us to enquire into the adequacy of consideration of alternative sites, routes or methods of achieving the objectives. In making that enquiry we address the following issues:

- The alternatives consideration process undertaken for the Project;
- The Court's function in alternatives consideration;
- The alternatives issue in this case;
- Conclusions as to consideration of alternatives.

Alternatives considerations for the Project

[14] NZTA has been undertaking studies of potential roading improvements at Mt Messenger since 2014. In 2016 it carried out a desktop assessment of possible options for bypassing the Mount. In March 2017 it appointed an alliance (the Alliance) including NZTA, Downer Construction, HEB Construction, Opus International Consultants and Tonkin and Taylor to progress the Project managed by an Alliance Management Team (AMT) which reported regularly to a Project Alliance Board (PAB) which in turn reported to NZTA. Amongst the functions undertaken by the Alliance was an options assessment carried out using a Multi Criteria Analysis (MCA) process, described in the evidence of Mr P A Roan (Director of Planning at Tonkin and Taylor and a member of the AMT). This assessment was undertaken by a design team including geologists, environmental experts, engineering and landscape designers, construction experts and construction cost estimators.

[15] The process involved initial identification of a longlist of 24 road corridor options and their assessment (MCA1) against nine criteria. The longlist options were

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6 It appears to us that the Minister's objective as described in the s 18 Notice is somewhat more limited than NZTA's objectives. The Minister's objective appears to be to acquire the Land" … for the functioning indirectly of a road for the State Highway 3 Mt Messenger Bypass Project (Project)".

two corridors largely on the existing Mount Messenger route (the online options) with the remaining potential corridors (the offline options) situated east and west of the existing corridor, including the route proposed through the valley which is the subject of these proceedings. Mr B Symmans (Alliance Design Manager since February 2018) described the longlist options as "…representative of the range of technically feasible route alignments for this section of highway".[7]

[16] The longlist options were narrowed down to a shortlist of five for further assessment (MCA2) using the same nine criteria but with some refinements. The five options under shortlist consideration were identified as Options A, E, F, P and Z. Options A, F and P were offline options situated west of the existing road. Option E was an offline route through the valley, east of the existing road. Option Z was an online route on or near the existing road over the Mount. Detailed consideration of these options, including further design work and workshopping, was undertaken by Alliance staff in July 2017.

[17] The ultimate outcome of this process was the recommendation made by the PAB (relying on advice from the AMT) to NZTA that the Project be undertaken by way of Option E. That was the route for which resource consents and notice of requirement have been approved by the Court and where the Minister now seeks to acquire the Land.

[18] In its interim decision the Court made the following findings about consideration of alternatives which was required under s 171(1)(b) RMA:

> [100] In our view, the Agency as the requiring authority undertook a thorough and detailed evaluation of route options before deciding on its preferred route along the Mangapepeke valley.
>
> …
>
> [102] We find that the Agency has given adequate consideration to alternative sites, routes or methods for undertaking the work and has met its obligation under s171 (1) (b) of the Act.

We reconsider alternatives (options) issues in light of the specific matters raised by

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7 Symmans' evidence dated 9 December 2022 at [12].

the Pascoes under PWA in this hearing.

The Court's function in alternatives consideration under PWA

[19] Section 24(7)(b) PWA requires the Court to enquire into the adequacy of consideration given to alternatives by the acquiring authority, not the outcome of that consideration. The Court's function in considering whether or not there has been adequate consideration of alternative sites, routes or methods was described in these terms in the *Olliver Trustee Ltd* decision:[8]

> [24] Section 24(7)(b) PWA requires us to enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving the Minister's objectives… There is no jurisdiction under s24(7)(b) for the Court to compare alternatives and say that an alternative is preferable to the solution (Option 1) proposed by the Transport Agency on the Minister's behalf. Our role under s24(7)(b) is to examine the methodology adopted by (or on behalf of) the Minister in considering alternatives.

[20] In *Waitakere City Council v Brunel*, the High Court described the Environment Court's inquiry into the adequacy of consideration of alternatives in this way:[9]

> The role of the Environment Court under s 24(3) and (7) is one of factual review of the appropriateness of the [Minister's] decision as a means of giving effect to the [Minister's] objectives which, under subclause (a) it must ascertain. … It must then under para (b) examine the methodology adopted by the [Minister] …

The High Court also found that "it is not the Environment Court's duty to eliminate speculative alternatives and suppositious options".[10]

[21] In *Seaton v Minister for Land Information*, the Supreme Court said:[11]

> But the consideration to be given is against the objectives of the Minister, not in respect of the project or work proposed by the network utility operator, but of the Minister in respect of the Government work of road construction. What is more, the assessment of "alternative sites, routes, or other methods of achieving those objectives" is concerned with the "adequacy of the

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8 *Olliver Trustee Ltd v Minister for Land Information* [2015] NZEnvC 55.

9 *Waitakere City Council v Brunel* [2007] NZRMA 235 (HC) at [30].

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

11 *Seaton v Minister for Land Information* [2013] NZSC 42, [2013] 3 NZLR 157, (2013) ELRNZ 168, at [16].

> consideration" that has been given to such alternatives. In other words, it is a check on proper process …

[22] We accept and adopt those principles in this decision.

The alternatives issue in this case

[23] The contest in these proceedings as to alternatives revolves around a reconsideration of the shortlist alternatives undertaken by Project participants in July/August 2017 following the initial MCA1 and MCA2 processes undertaken in May and June.[12]

[24] On 1 July 2017 the Alliance Manager prepared a report to the PAB summarising the MCA2 process and containing cost estimates of the five options on the shortlist. Option E (expected cost $199.6M)[13] was the lowest and Option Z (expected cost $382.5M) was the highest.[14] All of the estimates exceeded NZTA's affordability threshold for the Project. These matters were considered at a meeting of the PAB on 5 July where the Project was referred back to the Alliance team to investigate further and (inter alia) scope an option which could be constructed for $150M.

[25] Further work by Alliance staff on the five options identified that the only option which could potentially provide significant cost savings from the original estimates was online Option Z. That could be achieved by restricting road improvements to the southern section of the existing road which would tie in to the road at the northern tunnel portal at the summit of the Mount. Proposed works north of the tunnel under original Option Z were largely removed from the option including a 1.5 km long retaining wall designed to stabilize the road on a landslide feature known as the Washer landslide which the road currently traverses. Mr Symmans testified that stabilization works on the landslide made up over half of the originally expected cost of $382.5M for Option Z.[15] Removing much of the works on the northern side from Option Z (still allowing for some lesser stabilisation works on that side) gave an

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12 Roan evidence dated 9 December 2022 at [55] and [69].

13 M will be used for "million" in the remainder of this decision.

14 Roan evidence dated 9 December 2022 at Appendix 4.

15 Symmans evidence dated 9 December 2022 at [79].

expected costing for a revised Option Z of $206M,[16] not too far away from the expected cost for Option E of $199.6M. We will return to the detail of the proposed stabilisation works further in due course.

[26] Option E also underwent changes as part of this investigation. These had some cost reduction benefits but not of the significance of the Option Z changes. Most of the northern section of the proposed road on the Pascoe property was moved from the western to the eastern side of the valley taking it further away from the Pascoes' house.[17] By sidling around the flanks at the eastern edge of the valley floor this route avoided poorer soil conditions on the valley floor, reduced the number of valley crossings and bridges required for the road, avoided the need for box cuts and meant a 40% reduction in the volume of cuts and 30% reduction in the volume of fill required with consequent environmental and costs benefits identified by Mr Symmans.[18] There was some debate between the parties as to whether or not these changes constituted revisions of or refinements to Option E but we do not think that anything turns on the label that might be attached to them. We will continue to refer to the changed Option E as Option E as that is the term that NZTA witnesses used. We accept that the changes had the benefits to the Project that Mr Symmans identified.

[27] Following this process, on 24 July 2017 Alliance staff made a presentation to Mr T Parker (NZTA General Manager System Design and Delivery) and then on 3 August to Mr F Gammie (NZTA CEO) recommending Option E as the preferred option to proceed with the Project. It is apparent that a fundamental conclusion as to options had emerged through this process, namely that of the potential offline routes an eastern route was to be preferred to a western route (although Option P remained under consideration as a potential third choice option). Mr Roan testified as follows:

> 94. Following this presentation to Mr Parker a presentation was then prepared for and given to Mr Fergus Gammie, the Chief Executive at

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16 $151M for improvements to the south and $55M for works (including some stabilisation) to the north.

17 C.f plan of Option E appended to report to Mr T Parker dated 24 July 2017. MTM.028.0110.

18 NoE at 83 and 84.

> Waka Kotahi on 3 August. Again, I note for clarity, that I did not attend the presentation. The presentation recommended an eastern route (Option E) whereas public expectation (noting the above public consultation on the shortlisted options), and Ministerial expectations, were for a western route. However, the presentation notes it was clear that new and significant geotechnical, ecological, landscape and cultural information had influenced the PAB decision making process – derived from the MCA as set out above. This included having to address:
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> 94.1 The large scale and active landslides on the proposed western corridors.
>
> 94.2 Very weak alluvial plains in other options.
>
> 94.3 A wide range of nationally significant habitats and species. This included the unbroken sequence of high quality, predator controlled forest from marine to mountain (White Cliffs through to Mt Messenger), which would be severed by a western route.
>
> 94.4 Regionally significant Landscape areas (Waipingao) in the New Plymouth District Plan.
>
> 94.5 Significant implications for Treaty settlement land and associated cultural values.
>
> [footnote omitted]

[28] On 9 August 2017 the PAB resolved that Option E was the preferred option to proceed and recommended accordingly. On 25 August 2017 NZTA's board determined that Option E would be taken forward as the Project option. That is the option consented by the Environment Court. None of the four remaining shortlist options (including revised Option Z) were advanced as a recommended option in any of the presentations or documents/reports provided to PAB or NZTA by Alliance staff or AMT members although costs expectations of original options were included in briefing information.

[29] The Pascoes challenge the adequacy of the process described in summary above. Their reasons were expressed in these terms in counsel's closing submissions:

> 2. The consideration of alternatives was not adequate because:
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> (a) There was no consideration of the effect of greenhouse gas emissions (**GGE**) between the alternative route options; and/or
>
> (b) There was not adequate consideration given to the effects and costs of the alternative *revised* route options; and/or

> (c) The NZTA Board was not given all the relevant information about the different revised route options for its meeting on 25 August 2017 so that it was not able to give adequate consideration to which revised route option it should choose.

We consider those issues in a different order to that in which they have been presented by counsel, addressing firstly the matter of the alternative or different revised route options under sub paras (b) and (c). In these proceedings that consideration comes down to a comparison between a revised online Option Z and the offline (eastern) Option E.

[30] In para [24] of his closing submissions Mr Webb cites extensively from the Court of Appeal decision in the *Air Nelson* case[19] as to the need for officials advising ultimate decision makers to provide fair, accurate and adequate reports enabling the decision makers to have regard to all relevant matters when making decisions under advice. We do not repeat those citations here but record that we respectfully concur with them. We are also conscious of the proposition stated by the High Court in the *Queenstown Airport Corporation*[20] case that … "The greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will need to be". Although that statement was made with reference to considerations under s 171 RMA we assume that it is equally applicable to the enquiry undertaken under PWA by advisers, decision makers and the Court.

[31] Mr Webb went on to submit:

> 25. The objectors maintain their position that the NZTA Board itself was required to give adequate consideration to alternatives for achieving the Objectives and that it was prevented from doing so because information was withheld about revised route options, and the NZTA Board did not receive a fair, accurate and adequate report from the Alliance to base its decision on.
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> 26. As at 25 August 2017 revised Option Z had not been discounted. It was estimated that the safety improvements and the Washer slip would all be addressed within the ROC of $206m. There was no basis as at 25 August 2017 for that information not to be given to the NZTA Board to at least consider and, if necessary have the opportunity to explore further.

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19 *Air Nelson Ltd v The Minister of Transport* [2008] NZCA 26.

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

> 27. This compounded the deficiencies for not having compared the effects (including GGE) between revised Option Z and revised Option E.

We will address the specifics of these contentions shortly. Before doing so we identify a matter which we think is fundamental to the process of considering alternatives.

[32] As noted above, the High Court in *Waitakere City Council v Brunel* also found that "it is not the Environment Court's duty to eliminate speculative alternatives and suppositious options".[21] We would go further and add after the words "… suppositious options" the words "…nor options that are not viable or feasible". In this context by viable or feasible we mean practically constructable within a project's financial constraints while meeting project objectives.

[33] In para [25] (above) we have given a brief description of revised Option Z and what was proposed under it. In order to determine the issues before us regarding sub paras (b) and (c) of the submission it is first necessary to provide a more detailed description of the Washer landslide and how it impacts on the Project. These matters were discussed in the evidence of Mr Symmans, an engineer at Tonkin and Taylor with 28 years' professional experience. He was either Design Manager or Project Manager from February 2018 to March 2022. He had a part time involvement in the Project since March 2017. Mr Symmans was not directly involved in the MCA2 assessment itself but had a role in geotechnical aspects of that process. He concurs with the conclusions reached by the MCA2 assessment. Mr Symmans' evidence as to engineering and geotechnical matters was not contradicted by any other expert evidence.

[34] The existing Mt Messenger road alignment on the northern side of the Mount traverses the headscarp zone of the Washer landslide, described by Mr Symmans as a "…very large active feature…".[22] He testified as follows:

> ***Option Z landslide***
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> 61. The landslide feature is identified on the New Zealand Landslide Database and illustrated on the GNS Science geological map of Waikato

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

22 Symmans' evidence dated 9 December 2022 at [59].

(Edbrooke, 2005). Feasibility and resilience studies completed by Beca (2002) and Opus (2016), respectively, identified this landslide as a significant feature likely to affect any future upgrades to SH3 at Mt Messenger.

62. The Project team referred to this landslide as the "Washer Landslide" as it is located on the Washer property.

63. While I only had a periphery [sic] role in the assessment of this landslide feature at the time of the MCA assessments, I have completed a review of the engineering and design information relating to this feature since becoming Design Manager. I have also walked over this feature, completed my own independent analysis, and sought confirmation of ongoing displacement by commissioning a further round of displacement monitoring in May 2018.

64. The landslide is structurally controlled by the local sedimentary bedding. This means that the shear surface is occurring on a weak layer or defect parallel to, and deep within, the rock bedding.

65. The landslide is deep seated. For example, along the MCA2 Option Z alignment, the depth below ground to the shear surface was identified to be at 14.4m and 23m in two boreholes drilled along the alignment.

66. An active region in the southern third of the feature is still moving, this is observable by fresh tension cracks (likely to be less than 2 or 3 months old observed in May 2018) located along the edge of the valley at the toe of the landslide. Ongoing displacement is also confirmed by instrumentation installed within the feature. Two instruments sheared off due to displacements of several hundred millimetres, or more, in less than nine months.

67. The landslide is in the order of 1500m across (parallel to SH3) and up to 700m from headscarp to toe. Above the 500m wide active section of landslide, the existing SH3 carriageway lies within a less active zone of the greater landslide.

68. It is not possible within any corridor Z (online) alignment to avoid the Washer Landslide. This is because the landslide extends all the way from the stream in the valley floor, almost to the ridge line. It is impractical for the route to traverse around the top edge of the landslide as the route would be too high (approximately 50m height) on the spur (ridge to west of the Pascoe dwelling), at the northern extent of the landslide. This would create an insurmountable vertical disparity between the route above the landslide headscarp and the existing route on the Mangapepeke valley floor. Put another way, the gradients are too steep to connect the route on the valley floor to a route that traverses above the Washer Landslide.

…

70. Stability analysis completed under my direction since I became Design Manager, indicates the stability of the landslide is likely to be sensitive to

> very modest rises in groundwater levels and moderate earthquake shaking.
>
> 71. Analysis my team did suggested that horizontal displacements of up to 6m could occur in the design level earthquake.[23] Predicting this order of displacement is inherently uncertain. Effectively, this magnitude of predicted seismic displacement confirms the route would be prone to significant displacement, and it would likely be impractical to re-establish the route post a moderate to large earthquake.
>
> …
>
> 73. The minimum design standards for new highways relating to resilience (retaining walls, and slope stability) are set out in NZTA Bridge Manual SP/M/022, Third Edition ("**Bridge Manual**"). The Bridge Manual provides design guidance for bridges, retaining walls and slopes. All route options developed for comparative analysis as part of the consideration of alternatives were developed to achieve these minimum standards.

[35] Mr Symmans testified further:[24]

> 80. Without significant works to stabilise this landslide feature, any route options crossing the feature would be subject to ongoing deformation and potentially large displacements if subjected to raised groundwater levels or earthquake shaking and would not meet Waka Kotahi's design requirements for new highways or the Project's resilience objective.

[36] The solution to the problems of the landslide proposed by the Project designers when initially considering Option Z was construction of the 1.5 km long retaining wall described in para [25] (above). Mr Symmans testified that the proposed retaining wall was a fair representation of what was required to provide a resilient route and meet the minimum design guidance for bridges, retaining walls and structures set out in the NZTA Bridge Manual.

[37] As we have noted in para [25] (above) the retaining wall was removed from revised Option Z to reduce costs. Landslide stabilisation works on the northern side of the Mount under revised Option Z were restricted to a fill buttress at the bottom of the landslide which involved filling the valley (including a stream) beneath the

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23 The design level earthquake, taken from the NZ Bridge Manual V3.2 for an importance Level 2 Route, Table 2.2, is an earthquake with an average return period of 1000 years. The Bridge Manual Table 6.1 recommends that rigid soil structures (retaining walls) supporting carriageways should displace less than 100mm in the design level earthquake. https://www.nzta.govt.nz/resources/bridge-manual/bridge-manual.html.

24 Symmans evidence dated 9 December 2022 at [80].

landslide to stop the landslide moving into that space.[25]

[38] The stabilisation works to be undertaken under revised Option Z and their effectiveness and cost were described in paras [83] – [93] of Mr Symmans' initial brief and summarized in paras [10] – [22] of his reply brief in these terms:

> **The 151M costing**
>
> 10. As outlined in my brief of evidence dated 9 December (**BOE**) the 151M costing improved only the length of the existing route south of Mt Messenger, did not address crash sports [sic] north of the tie in and out of context curves to north and south of the route and there was significant resilience risk from the active *Washer* landslide.
>
> 11. By not addressing the road north of Mt Messenger, significant safety and resilience issues remained which meant that this costing was unlikely to meet the project objectives:
>
> 11.1 The crash history north of the tie in would not be addressed which includes six serious crashes that occurred between 2012 and 2016.
>
> 11.2 The Washer Landslide has been discussed in my BOE. If this feature was not addressed the existing state highway would be at significant risk of displacement and instability. The topography in this area means that even a temporary deviation is impractical. Even minor displacement would result in the existing state highway not being able to be used until repairs could be affected. A significant displacement would likely disrupt the state highway for three to five years, until an alternative route could be constructed.
>
> 11.3 Closure of SH3 at Mt Messenger would result in vehicles needing to detour via SH43 (an additional 91km or 1 hour 43 minutes) and heavy trucks needing to detour via SH4 (an additional 240km or 3 hours 12 minutes), both routes are particularly susceptible to weather related closures.
>
> **The 206M costing**
>
> 12. As outlined in my BOE in order to provide for additional features (safety work on the curves north of Mt Messenger tunnel and supporting resilience work to mitigate the risk of landslide displacement in an earthquake), the cost of Revised Option Z would need to be increased from $151.8m to a ROC of $206M.
>
> 13. This ROC included:
>
> 13.1 $32M for out of context curve improvement;

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25 NoE at 70 – 74.

13.2 $15M for (a 1,000,000 m3) buttress fill to improve resilience; and

13.3 $7M if climbing lanes required.

14. The primary issue with this ROC is the 15M allocated to improve resilience which relates to mitigating the effects of the Washer Landslide.

Resilience and the Washer Landslide

15. Resilience is described as the ability to recover from an adverse event, and is influenced by design that mitigates the effects of adverse events. This is particularly important in respect of the Washer Landslide and topography of the area.

16. As part of achieving an acceptable level of resilience, all options developed for analysis through the MCA process were developed to comply with the minimum design standards for new highways. In terms of resilience, minimum standards are informed by the Bridge Manual.

17. The Bridge Manual essentially requires this type of infrastructure (a road on an embankment) to withstand a 1 in 1000 year return period earthquake and without earthquake the slopes should have 50% more resistance to slope movement than required to achieve stability (a factor of safety of 1.5).

18. The 1,000,000 m3 ($15M) buttress option was just not feasible to achieve this required level of resilience.

19. The fill buttress was not expected to and would never have been able to "stabilise" the landslip, as is often referenced in the evidence of Marie Gibbs.

20. As noted in my BOE this buttress fill was only designed to reduce the quantum of displacement in earthquake events and only in the more active zones of the Washer Landslide (as best as they were known at the time). The proposal was not designed to stabilise or improve the resilience issues resulting from the Washer Landslide to the same level as the retaining wall option for MCA2 Option Z had been (which was developed in accordance with the resilience requirements in the Bridge Manual). Essentially this 1 million m3 buttress option would only reduce the displacement of the landslide in a 1 in 1000 year return period earthquake to somewhere in the order of 3m.

21. As also noted in my BOE, a full-length buttress of 3.3million m^3 was previously considered (prior to MCA2) as an alternative to the MCA2 Option Z retaining wall to address the resilience issues arising from the Washer Landslide to the level of the Bridge Manual. However, this was considered to be more expensive than the retaining wall solution proposed for MCA2 and would also not achieve the same resilience measures as the retaining wall solution developed. It is therefore impossible that anything less than that by way of buttress fill would provide anywhere near the resilience that the retaining wall in MCA2 Option Z would provide.

> 22. In my opinion this 1 million m3 buttress option would not meet the resilience standards in the Bridge Manual, nor the Project's resilience objective. As noted in my BOE if this option was to be scored in an MCA assessment, I would expect this would have been such a negative factor as to potentially discount the option from further consideration.
>
> [footnotes omitted]

[39] A number of things emerged from Mr Symmans' written briefs and responses to questions from counsel and the Court:

- The first is that there was pressure on the Alliance design team from the PAB to make Option Z work.[26] Nothing we heard suggests other than that genuine attention was given by the design team as to what could be done to achieve this end;
- Third party feasibility and resilience studies in 2002 and 2016 had identified the likelihood of the landslide affecting future upgrades to SH3;[27]
- The landslide is vulnerable to movement caused by earthquake, groundwater and/or ongoing displacement of adjacent sections of the landslide;[28]
- There was a high degree of uncertainty as to the stability of the landslide which was recognised as requiring more investigations in 2017.[29] On the basis of 2017 knowledge, displacement of the landslide could be anywhere from 0.3m to 3m in a design earthquake. The significance of this uncertainty has been highlighted by the fact that subsequent site investigations have shown the stability predictions made in 2017 were overly optimistic, that the landslide is more active than understood at that time and would require significant engineering work akin to the retaining wall proposal to meet Bridge Manual requirements;[30]
- The allowance of $15 million for the buttress was a "very rough order of costs" based on a buttress of only one million cubic metres compared

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26 NoE at 69.

27 Symmans evidence dated 9 December 2022 at [61].

28 Symmans evidence dated 9 December 2022 at [71] and [72].

29 Symmans evidence dated 9 December 2022 at [88.3].

30 Symmans evidence dated 9 December 2022 at [92].

with the 3.5 million cubic metres which would be required to provide the level of resilience to meet the design standard contained in the Bridge Manual;[31]

- The statements contained in para [26] of the Pascoes' closing submissions that revised Option Z had not been discounted on 25 August 2017 and that safety concerns and the Washer landslide would all be addressed by revised Option Z were factually incorrect as were the contentions contained in para [97] of their opening submissions that Mr Symmans' primary evidence was that the Washer slip could be addressed within the $206m ROC and that revised Option Z could meet the Bridge Manual requirements. Mr Symmans' evidence was directly contradictory to all of those propositions.
- In response to questions from the Court Mr Symmans testified that revised Option Z "… just wasn't the feasible option for so many reasons…" and accordingly "…wasn't developed".[32]

[40] Further to Mr Symmans' evidence, direct evidence on the advice to PAB and NZTA in July/August 2017 was given by Mr R C Napier (Project Manager between March 2016 and June 2018):

> **Waka Kotahi briefings**
>
> 11. On 24 July 2017 I gave a presentation to Tommy Parker (General Manager System Design and Delivery at Waka Kotahi) on the MCA process and revision of options following the MCA process (this presentation is at appendix A of the report to the PAB, dated 1 August 2017). That presentation relevantly states:
>
> 12. On the summary slide:
>
> 12.1.1 "on-line improvement on south approach to the north portal of a new tunnel falls short of Project objectives".
>
> 12.1.2 Modified option E is recommended as it meets all the Project objectives and stakeholder responses.
>
> 12.2 On the affordable range slide:

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31 NoE at 69.

32 NoE at 95.

12.2.1 Revised option Z sub-optimal on Project objectives (speed, resilience), but lowest RMA consenting risk compared to other options.

12.3 On the Summary of costs slide:

12.3.1 Explains that revised option Z only improves length of existing route south of Mt Messenger, and that it does not address "crash spots north of tie-in and out of context curves to the north and south of route. Significant resilience risk from major landslide.

12.3.2 A rough order of cost to address the issues that revised option Z does not address was **$206M.**

12.4 Cost savings – Option Z: gives break down of what revisions to Option Z occurred following the MCA process and what made up the $206M figure which was said to address issues of revised option Z only doing half of route.

13. In the lead up to this presentation I recall being involved in discussions with Ken Boam (the Alliance Design Manager for the Project at the time), and others in the Design Team that supported him with the work requested by the PAB at the 5 July 2017 meeting. From those discussions it was my understanding that the revised online option was not a robust solution:

13.1 I understood uncertainty remained about degree to which the landslide feature was active.

13.2 I recall there was uncertainty about the robustness of the revised online option. I understood it was not likely to meet Waka Kotahi's own Bridge Standard requirements and would need significant ongoing remedial work in the event of a significant rainfall event or earthquake.

13.3 It was not designed to the same standard as those options that had been assessed through the MCA process. While some mitigation was proposed north of the tunnel, this was not to the same design standard.

13.4 My view at the time was revised Option Z did not need ongoing investigation as it had been shown through this additional work to be inferior to option E (and for that matter the more robust online option with the full retaining wall). Option E had none of the resilience issues that plagued modified Option Z and was similar in cost (if not slightly cheaper).

13.5 With the benefit of hindsight perhaps the briefing paper to Tommy Parker could have made this point more clearly (that is it was not considered to be a viable option) and certainly not when compared with the far more durable and considered revised Option E, which was a full upgrade, was not over the same alignment which would

have been incredibly difficult to construct, and which did not have any geotechnical issues associated with instable underlying slopes.

14. Whilst the revised costings for Option Z were not advanced beyond this point, the modified version of Option Z was still used for comparison purposes as the modified version was a direct response to the PAB request for an option within the $150M threshold. The intention behind using this as a comparison was to see if a viable benefit option existed at this revised costing.

15. On 3 August 2017, I provided further talking points to Tommy Parker for his briefing with Waka Kotahi CEO Fergus Gammie. This briefing, in preparation for Waka Kotahi Board meeting, focused on why we would be proposing the eastern route (option E) as opposed to the western route (option Z) and why the costings had increased from the original 2015 assessment. Since reporting to the Board, an executive team, typically focuses on viable options which meet Project Objectives, any additional focus and reporting on discarded options was not an expectation nor a requirement.

The Waka Kotahi decision in 2017 on route selection

16. I prepared the Waka Kotahi Board paper dated 25 August 2017, which was then recommended by Tommy Parker. I understand Tommy Parker spoke to this paper at the Board meeting on 25 August 2017.

17. I noted in the 25 August paper that a modified, shorter Option Z option, tying back into the existing road at the northern tunnel portal, was developed for comparison purposes. It was clear to me that from a comparison point of view, the shortened Option Z, even with mitigation, was an inferior option which confirmed the MCA process and in particular revised Option E. The comparison served to confirm it was simply not a viable option to put forward to the Board.

18. The paper went on to outline the numerous other factors that were going into the decision at the time, including the fact that Option E represented the best return on investment (as noted on pages 13-14).

19. On 25 August 2017 the Waka Kotahi Board chose revised Option E as preferred route for the Project (see presentation to board recommending revised Option E be chosen).

20. The main point I want to reiterate, given the concerns as expressed by Mr and Mrs Pascoe (Tony and Debbie), is that at this time Waka Kotahi was aware that a lot of work had been undertaken by the Alliance on testing options. The Board was confident in relying on the work of the appointed Alliance, including myself, to ensure that the most beneficial, resilient, and viable options were before it. This is common for such large projects and decisions made on such projects, where not all details on all options considered are put to the Board. Rather, the Board relies on the professional experience/judgment, knowledge and work of Waka Kotahi subject matter experts and professional suppliers to ensure that a robust and fulsome process has been undertaken. In my view that is not only reasonable but necessary.

> 21. For the above reasons, it remains my view that a robust decision was reached and which, given later testing (noted below), was further confirmed as the correct decision.
>
> [footnotes omitted]

Conclusions as to Consideration of Alternatives

[41] We conclude from all of the foregoing that the Alliance design team undertook a sufficient investigation of the options available to meet Project objectives. Nothing we heard remotely suggested that they acted arbitrarily or gave only cursory consideration to alternatives. The evidence was to the contrary. We find that the design team comprised persons with a wide range of applicable skills and that their considerations of the various options were detailed and systematic.

[42] No challenge was launched in these proceedings as to the conclusions which the design team had reached discarding the western offline options A, F and P from further consideration for geotechnical, ecological, landscape and cultural reasons. These options could not adequately manage immediate and long term environmental effects (being a Project objective) in an area containing nationally significant habitats and the Waipingao valley. We find that these options were not viable or feasible for reasons which were within the scope of the design team's expertise to determine. Talking point summaries and plans identifying these discarded options were provided to Messrs Parker and Gammie. We find that the design team had undertaken a sufficient investigation of the alternatives which enabled it to reach the conclusions it did regarding these options.

[43] The options' contest in this case came down to a comparison of Option E and revised Option Z. It is understandable why the Pascoes should promote the latter option which avoids the severe disruption to their home and way of life which construction of Option E will bring about. We agree that if revised Option Z did adequately address landslide and resilience issues at an expected cost of $206M (as compared to the expected cost of $199.6M for Option E) and avoided the adverse effects on the Pascoes, that is a matter which should have been drawn to NZTA's attention to enable it to make an informed decision on which option to pursue.

[44] Talking point summaries and plans detailing what was proposed under Options E and Z (as revised with some allowance for northern works) was contained in the PAB report of 1 August 2017 and the presentation papers to Messrs Parker and Gammie. Included in those documents were the following statements:

- Firstly document MTM.028.0099 which is a summary of Option costs which identifies the need to address crash spots north of the tie in and resilience risk. The summary states … "RoC to address all the above $206M"; (our emphasis);
- Secondly document MTM.028.0108 which identifies costs savings for Option Z and again refers to the $15M "… to improve resilience" and a "…total RoC of $206M".

[45] We understand these statements to be the source of the Pascoes' contention that revised Option Z with buttress and other improvements included at $206M would address all safety concerns and the resilience issue of the Washer landslide. Their view in that regard is understandable and para [13.5] of Mr Napier's brief acknowledged a failure in clarity on that issue. However the evidence which we heard was that the $206M version of revised Option Z would in fact not adequately address all the landslide and resilience issues and that was the conclusion which the Alliance team exercising their professional judgement had reached before the presentations to Messrs Parker and Gammie in July/August 2017.

[46] We accept Mr Symmans' uncontradicted evidence that revised Option Z at $206M:

- Would not adequately stabilise the Washer landslide;
- Would provide a lesser level of stabilisation to the landslide and road than the originally proposed retaining wall;
- Would not meet the resilience requirements of the Bridge Manual;
- Would not meet the Project objectives;
- Was not a feasible alternative and accordingly was not developed further following considerations in July 2017.

[47] There is one further matter which we address for the sake of completeness. In both their opening and closing submissions the Pascoes contend that at the time of shortlist consideration there should have been a "new" MCA process undertaken comparing revised Option Z and Option E. That proposition was put in these terms in Pascoes' opening submissions:

> 94. But the point is that once these revised options were produced, a new MCA process was required. The benefits/costs of each revised option had to be balanced in the normal way before any recommendations could be made. But this did not occur. There is no evidence for example that any consideration at all was given to landscape, historic heritage, community, property, terrestrial ecology, water environment in assessing the revised options before recommending revised Option E. There is no evidence that there was any consequent "RMA weighting" or "environmental sensitivity" or "transport sensitivity" analysis applied to the revised route options that were also applied for the MCA2.
>
> 95. Clearly, Objective 4 was not considered at all in the final consideration of which revised route should be recommended to NZTA, and NZTA was not told this had not occurred.
>
> 96. The Alliance/NZTA cannot have it both ways – either the MCA process is required, or it is not. It is accepted a "minor" route change may not have required a further MCA process. But that is not the case here. Such an analysis for the revised options (with a focus on Objective 4) would have shown for example, what environmental benefits/costs were caused by reducing the cost of Option E from $241m to $199m, or from reducing the cost of Option Z from $382.5m to $206m. Or how did the adverse environmental effects of revised Option Z compare with revised Option E?
>
> 97. The Minister's reply evidence seems generally to suggest the focus at that late stage was on generally on issues about resilience/travel time/safety. Yet on resilience, Mr Symmans primary evidence is that the Washer slip could be addressed within the $206m ROC or by the $220m ROC. It is also the case the revised Option Z could meet the NZTA *Bridge Manual* requirements. It certainly did not get a "fatal" score. As to safety/travel time, these issues were considered within the MCA2 process which gave Option Z the highest overall score. If anything, surely the effect on/from these issues would be reduced as the works being only on one side, would only take half as long.
>
> 98. This all suggests that undue weight is being given retrospectively to those issues now in the Crown evidence, and it should be treated accordingly.
>
> [footnote omitted]

[48] In support of these propositions, Mr Webb put to Mr Roan a document called NZTA Multi Criteria Analysis User Guidance August 2020 (Exhibit 1) which

contained the following statement in the section headed "New Options/ Change Circumstances":

> If a viable and substantive new option arises after an MCA has been completed, specialists should be asked to complete a review of the new option using the same methodology used for the prior MCA, and fully document the outcomes.

[49] Mr Roan disputed the need for any further MCA and had this to say when questioned on that subject by Mr Webb:[33]

> Q. So when you reported – so at that point when you had your revised options done based on as I understand it design construction matters, there's no prohibition on you undertaking a further MCA analysis at that point.
>
> A. Sir, I think there is absolutely no prohibition if that's the question that's been put to me. Would there have been any benefit that have come from that, that's quite a different question and I don't believe that the answer to that question would've been yes. The challenge workshop and the MCA process and the information from the MCA process enabled us to ascertain that the two options to the west that crossed the … Valley did not perform any better. The revised Option Z in fact performed worst and as I outlined yesterday the revised Option E possibly performed better. And on that basis there was no substantive change, there was no reason based on my experience to subject the process to a further MCA when really what the transport agency Waka Kotahi was doing at this stage coming out of the back of a detailed consideration of options was testing cost and ensuring in that process that they had the benefit of the MCA process and the understandings that had come out of it. So no I don't – there was no prohibition. I don't believe there would've been any benefit in subjecting the revised options to further MCA consideration.

Mr Symmans testified to like effect.[34]

[50] We accept the witnesses' evidence in that regard but, more significantly, note that the User Guidance appears consistent with our earlier findings. It requires a revisitation of the MCA process… "If a viable and substantive new option arises after an MCA has been completed…". Revised Option Z was not a viable or substantive new option for the reasons we have identified. It follows that even on the basis of the User Guidance, no new MCA process would be required.

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33 NoE at 62, line 30 – 63, line 17.

34 NoE at 80, line 5 – 81, line 3.

[51] The consequence of our findings that Options A, F and P were discarded from consideration for geotechnical, ecological, landscape and cultural reasons and that revised Option Z was not developed further for the reasons set out in the preceding paragraphs mean that these options were not viable or feasible options that required to be measured against Option E which the Project team considered to be the most viable or feasible route out of the five shortlisted options in terms of the Project's objectives. Although it is not our function to determine if the best option was chosen, the decision made by the Project team and confirmed by the PAB to recommend Option E to NZTA was unsurprising in light of the findings we have made. In any event, we are satisfied that the report recommending that outcome was fair, accurate and adequate, that all relevant options had been identified and properly considered and a reasoned determination had been made as to which route would be recommended.

[52] In terms of the issues contained in paras [2(b)] and [2(c)] of the Pascoes' closing submissions we find that:

- In making the recommendation which it did that Option E was the preferred route option, adequate consideration was given by the Project design team to the effects and costs of all shortlisted route options including the alternative revised route options (para [2(b)]);
- The NZTA Board was given all relevant information regarding route options including the revised route options so that it was able to give adequate consideration to which revised route option it should choose . By relevant information we mean information pertaining to viable or feasible route options. We do not consider that PAB was required to give further information than it did regarding Options A, F, P and revised Option Z which it had determined were not viable or feasible options for the Project for the reasons we have identified (para [2(c)]).

[53] Those findings bring us to the contention contained in para [2(a)] of the submission that there was no consideration of the greenhouse gas emissions (GGE) between the alternative route options. With respect to the detailed arguments

advanced by the parties on this topic, it seems to us that the findings we have made above as to the process for considering the viability or feasibility of the various options similarly addresses that issue as it has done in respect of issues 2(b) and (c).

[54] For the sake of completeness we note that Mr R J MacGibbon who has an honours degree in zoology and ecology responded on behalf of the Minister to Mr Pascoe's suggestion that up to 110,000 tonnes of carbon dioxide could be released into the atmosphere from deforestation associated with NZTA's chosen alignment.[35]

[55] Mr MacGibbon's evidence was that if it was assumed that all felled vegetation was removed from the site, then at most 11,000 tonnes of carbon would be removed which equates to 41,000 tonnes of CO_2. He said that in reality most of the woody vegetation which is to be felled is to be retained on site and as well, some 32 ha of riparian, wetland and terrestrial replacement planting is proposed as part of the Project Restoration Package. This means that for the chosen Option E there should be a significant improvement in net carbon storage and annual carbon sequestration rates compared with pre-construction conditions.

[56] With regard to the comparison of Option E with revised Option Z, Mr Pascoe suggested that revised Option Z would have less impact on carbon storage as the loss of wetlands with revised Option Z would be considerably less than for Option E. Mr MacGibbon responded that the wetlands of the Mangapepeke and Mimi Valleys are low in retained organic matter with low carbon storage capacity compared with peat wetland and mature native forest. His evidence was that with the proposed Project Restoration Package in place the net carbon storage for revised Option Z would be no better than Option E.

[57] In any case, we do not consider that the Alliance design team undertaking the MCA was required to consider a comparison of GGE between the alternative route options in light of the determination which it had reached that the most viable or feasible route option for the Project after completion of the shortlist process was Option E and the other options were discarded or not further developed (in the case

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35 MacGibbon evidence dated 8 November 2023 at [42] – [49].

of revised option Z) for the reasons we have identified.

Good faith/Fairness Issues – ss 18(1)(d) and 24(7)(d) PWA

[58] We deal with these matters jointly. We have previously cited s 18(1)(d) PWA which requires the Minister to … "make every endeavour to negotiate in good faith with the owner in an attempt to reach an agreement for the acquisition of the land" and we noted that s 18(2) PWA provides for a three month period following the service of a notice for that to happen.

[59] Section 24(7)(d) PWA (previously cited) provides:

> **24 Objection to be heard by Environment Court**
>
> (7) The Environment Court shall—
>
> …
>
> (d) decide whether, in its opinion, it would be fair, sound, and reasonably necessary for achieving the objectives of the Minister or local authority, as the case may require, for the land of the objector to be taken:

[60] In opening the Minister submitted as follows regarding the provisions of ss 18 and 24(7)(d):

> 72. The fair, sound and reasonably necessary limb under s 24(7)(d) is the Environment Court's overarching and most substantive enquiry under s 24(7). The Court can form and act on its own opinion as to whether the intended taking is fair, sound and reasonably necessary for achieving the objectives of the Minister.[36] In *Waitakere City Council v Brunel* the High Court considered the meaning of the terms used in s 24(7)(d):[37]
>
> 72.1 the term "fair" may be limited to a "sense of equitable" or "free from irregularities";
>
> 72.2 "sound" was said to connote "solid and substantial"; and
>
> 72.3 a taking could be reasonably necessary despite alternative land being available.

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36 *Waitakare City Council v Brunel* [2007] NZRMA 235 (HC) at [48].

37 *Waitakare City Council v Brunel* [2007] NZRMA 235 (HC) at [48] to [49].

> 73. The three criteria overlap, and this was reflected the High Court's overall assessment that the rubric of "fair, sound and reasonable" required a proportionate approach on the part of the Environment Court.[38] However, all three criteria must be satisfied.[39]
>
> 74. The statutory duty to be fair must be exercised in good faith, acting reasonably in the public interest but with due regard to the interests of the landowner.[40] The Court of Appeal in *Wellington City Council v Body Corporate 51702 (Wellington)* considered what "an obligation to negotiate in good faith" means:[41]
>
> > … **An obligation to negotiate in good faith essentially means that the parties must honestly try to reach agreement**. They remain able to pursue their own interests within what is subjectively honest, rather than what is objectively reasonable. [Emphasis added]
>
> 75. As confirmed by the Environment Court in *Shaw v Hamilton City Council,* compliance with s 18 of the PWA and the good faith requirements required by that section are encapsulated by the s 24(7)(d) test and whether it is fair.[42]
>
> 76. Ultimately the powers of compulsory acquisition must be strictly construed, exercised in good faith, and even-handedly, supported by a clear justification.[43]

We concur with those submissions.

[61] In their closing submissions the Pascoes relevantly submitted as follows:

> 66. The objectors' position is that it cannot be fair or sound to take the land if:
>
> …
>
> (b) There was not a 3-month period after the service of the s 18 PWA notice where the Minister made every endeavour to negotiate in good faith to reach agreement for the purchase of the land by agreement before issuing the s 23 PWA notice.

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38 Brief of evidence of Christopher Nally dated 9 December 2022 at [32].

39 *Shaw v Hamilton City Council* [2021] NZEnvC 175 at [126].

40 *Deane v Attorney-General* [1997] 2 NZLR 181, 191 and *Shaw v Hamilton City Council* [2021] NZEnvC 175 at [127].

41 *Wellington City Council v Body Corporate 51702* (Wellington) [2002] 3 NZLR 486 at [17].

42 *Shaw v Hamilton City Council* [2021] NZEnvC 175 at [128] to [129].

43 *Dromgool v Minister for Land Information* [2022] NZSC 157, [2022] 1 NZLR 716 at [52] – [54] citing *Deane v Attorney-General* [1997] 2 NZLR 180 (HC) and *Simpsons Motor Sales (London) Ltd v Hendon Corp* [1963] Ch 57 (CA).

[62] It appears to us that there are two aspects of the proposed taking which come into consideration under the fair, sound and reasonably necessary head in this case. The first relates to the taking itself and whether that is fair, sound and reasonably necessary. The second aspect is whether the process enabling that taking has been carried out fairly in accordance with the good faith requirement raised in para [66(b)] of the Pascoes' closing submissions.

The Taking

[63] We deal with the first aspect only briefly. We are satisfied that:

- The taking is fair in that the Minister seeks to take the minimum area of the Pascoes' farm which is required to practically construct and operate the Project; [44]
- The taking is sound in that it enables the replacement of a section of state highway which is no longer fit for purpose with a new section of road for which resource consents and a notice of requirement have been approved;
- The taking is reasonably necessary in that the Land to be taken was found by NZTA's and the Minister's advisors to be the most viable or feasible route for the proposed road.

On that basis we conclude that the s 24(7)(d) test is satisfied insofar as the actual taking itself is concerned. The remaining issue is whether the "good faith" negotiation requirement which the Minister conceded is encapsulated in the s 24(7)(d) test has been met.

The Process

[64] Before considering the specific issues raised by the Pascoes under this head we firstly address a general issue arising out of interactions since 2016 between Pascoes and NZTA and Alliance staff and contractors undertaking route development

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44 Symanns' evidence dated 9 December 2022 at [117]-[123].

investigations together with accredited supplier personnel involved in purchase discussions.

[65] The Pascoe farm was purchased by Mr Pascoe's parents in the 1950s and he has lived there all of his life. Mrs Pascoe has lived on the farm since they were married over 30 years ago. In the interim decision the Court stated that "…it is clear to us that both Mr and Mrs Pascoe care deeply about their land and its natural values and that they have been greatly affected by the designation and the resulting process".[45] That statement remains true nearly four and a half years later and the effects of the process on the Pascoes have continued as a result of uncertainty and drawn out RMA and PWA processes.

[66] The uncertainty arose because the southern portion of the Option E road runs through land which had only recently been returned by the Crown to Ngāti Tama iwi as cultural redress in its Treaty of Waitangi settlement. NZTA proceeded with Project planning and RMA approvals on the basis that it would be wrong to use the Crown's coercive powers to reacquire land which had just been returned to Ngāti Tama. The Project would only go ahead if a settlement could be reached with the iwi as to acquisition of land required for the road, something which was the subject of internal controversy within Ngāti Tama.

[67] The Court's intention to grant approval was signalled in the interim decision but on the basis that the Court could not be satisfied that effects of the consents had been appropriately addressed until the terms of acquisition and further mitigation had been agreed with Ngāti Tama. Settlement was eventually reached in mid 2020 with the Court's final decision issuing on 1 April 2021. Until agreement was reached there was uncertainty as to whether the Project would proceed at all. One of the criticisms made by Pascoes as to process was that the Minister initially issued a notice under s 18 on 5 March 2018, well before resolution had been reached with Ngāti Tama. We do not think that anything turns on that in this instance as the good faith negotiation issue revolves around a further s 18 notice (the Second s 18 Notice) served on 31 August

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45 Interim decision at [269].

2020 and we will return to that matter in due course.

[68] In addition to this uncertainty, details of the Project itself were in flux as Alliance staff worked through design issues and acquired more information (often from the Pascoes) as to ground and water conditions and the like in the valley. Figure 18 of Mr Symmans' evidence shows that there were 11 changes to the Project's main Land Requirement Plan between October 2017 (when 31.49 ha of land for permanent occupation were proposed to be taken) and May 2021 when the area required permanently was reduced to 11.1715 ha.[46]

[69] Engagement between the Pascoes and personnel involved in the Project appears to have begun in about April 2016 when investigations got underway for the Project. There were two streams of participants from the Project, firstly persons involved in route development, investigation, design and RMA matters and secondly persons involved in PWA discussions and processes. As we understand it the former primarily involved NZTA and the Alliance staff and contractors with the latter involving personnel from The Property Group (TPG) which provides (inter alia) PWA land access and acquisition services to Land Information New Zealand (LINZ).

[70] The evidence we heard from a number of witnesses for both parties established that from mid 2016 there was an intense process of engagement between the Pascoes and representatives of NZTA, the Alliance and TPG. It is not necessary for us to detail all of those. By way of example we refer to the summary of engagement appended to Mr Napier's brief which identified 33 such engagements involving negotiations, land entry agreements, information exchange, plans and other documents between 27 July 2016 and 24 May 2018.

[71] This process put Mr and Mrs Pascoe under severe stress which Mr Pascoe believes led to him being hospitalised in June 2018.

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46 Mr Symmans' evidence covers iterations of various alternatives that did not result in the Second s 18 notice and s 23 notice and the accompanying plan of the land and the lease land. Many of these iterations were being progressed informally alongside advancing the design.

[72] Uncertainties regarding Ngāti Tama agreement were apparently resolved when iwi members voted in favour of the Project on 14 July 2020. An acquisition agreement for the land needed for the road was entered into between Ngāti Tama and the Crown on 26 August 2020.

[73] On 31 August 2020 Mr K M Billing (a Senior Property Consultant at TPG and the person then responsible for acquisition negotiations with the Pascoes) served the Second s 18 Notice on the Pascoes. In addition to the Second s 18 Notice Mr Billing also served a notice under s 110 PWA (the s 110 Notice) advising of the Minister's intention to enter the land to undertake a survey. Where appropriate we will refer to the two notices jointly as "the Notices" in this section of the decision.

[74] The Pascoes contend that there were two failures on the part of the Minister (or the Minister's agents/representatives) which mean that the negotiation process was not carried out in good faith, namely that:

- Simultaneous issue of the Notices created an impression that the Minister was just going through the motions and that negotiations were not being undertaken in good faith;
- Insufficient information had been provided by NZTA to the Pascoes to enable them to participate effectively in purchase negotiations.

[75] The contention as to simultaneous issue of the Notices arises out of the evidence of Mr R S Gordon a valuer of nearly fifty years' experience (including in PWA matters) who gave evidence for the Pascoes. Mr Gordon had this to say about the Notices being issued at the same time:

> **Cadastral Survey**
>
> 51. When Tony and Debbie were served with the s 18 PWA notice on 1 September 2020 this was accompanied with the service of the s 110 PWA notice also dated 15 July 2020. Yet the s 110 PWA notice authorised entry onto land for a cadastral survey which is not required at the time the s 18 PWA notice is served. I accept that a cadastral survey is required under s 23(1)(a) PWA **<u>if</u>** the Minister makes a decision to issue a s 23 PWA notice but serving the s 110 notice with the s 18 PWA notice sends a clear message that whatever happens, NZTA/LINZ are simply getting

ready to serve the s 23 PWA notice.

52. As a landowner for our lease farm if I was concurrently served with notices under s 110 and s 18 PWA, that would give rise to concerns and reservations that the requirement for Crown endeavours re good faith negotiation to be satisfied were not going to be complied with: i.e. that the proposed acquisition was not up for negotiation.

53. In my view the concurrent service of both notices was not an example of good faith negotiation

[76] Mr Gordon's contentions were responded to by Mr Billing in a reply brief. He testified that:

Issuing section 110 land entry notice at the same time as section 18 notice

14. Issuing a section 110 land entry notice at the same time as a section 18 notice is standard practice. Arranging and undertaking a survey (especially if access is contested), and then waiting for the survey plan to be approved by LINZ before it is lodged can take time. The survey plan must be lodged prior to any section 23 notice being issued. It is therefore standard practice to serve a section 110 notice at the same time as the section 18 notice to minimise delay in the event that a voluntary agreement cannot be reached within the statutory three-month good faith negotiation period.

15. My serving the section 110 notice at the same time as the (second) section 18 notice was not a sign that I had given up trying to negotiate a voluntary agreement with Tony and Debbie or my further attempts to negotiate that followed were not done in good faith. As made clear in my service letter to Tony and Debbie dated 28 August 2020, the service of the section 18 notice was a preliminary step only to give formal notice that the Crown wished to acquire their land and my primary focus was good faith negotiations.

[footnote omitted]

[77] The fact that something might be standard practice does not make it "legal", however nothing in the provisions of either ss 18 or 110 PWA preclude the Notices being issued simultaneously and the reasons advanced by Mr Billing for the practice seem practical and reasonable. We agree with the proposition advanced by Mr Gordon that simultaneous issue of the Notices raises concerns as to the inevitability of taking but the fact is that when a s 18 notice is issued the Minister has already determined that the land identified in the notice is "required" for a public work and the Minister desires to acquire it for that purpose. In addition to notice to the landowner a notice is put on the title to the property signalling the Minister's

intentions, so issue of a s 18 notice is a step of serious consequence reflecting a determination which has been made that the land identified in the notice is required. The process which follows seeks to enable acquisition by agreement if possible or compulsorily if not.

[78] Mr Billing included a letter with the Second s 18 Notice which (inter alia) provided as follows:

> The first stage of the process is to serve you as landowner with a Notice of Desire under section 18 of the PWA. Please note this is a preliminary step only. It serves to give formal notice that the Crown wishes to acquire your land, and provides a starting date for calculating the time taken for negotiations.
>
> The Crown must negotiate for at least three months before continuing any further with the compulsory acquisition process. This is a minimum time period and the Crown, acting through The Property Group Limited as its accredited supplier, is required to take all reasonable steps to negotiate an agreement for sale and purchase of the land.
>
> A notice is also registered against the title to the land and will be served on any other parties with a registered interest in the land. The notice is attached to this letter by way of service.
>
> The primary focus however is good faith negotiation and I will be in contact shortly to advance matters with you. If you have any queries about the negotiations or the acquisition process, please feel free to discuss them with me.
>
> Also attached by way of service, is a notice under section 110 of the PWA. This authorises entry onto the property for the purposes of completing a survey of the land for the Project. The surveying firm will contact you prior to entering the property.

[79] The combination of the Notices and Mr Billing's letter spell out in quite stark terms what stage the PWA process has reached, however they do not in our view constitute evidence that those negotiating on behalf of the Minister were not acting in good faith when undertaking purchase negotiations. The notices are in accordance with the requirements of ss 18 and 110 giving formal notice of the Minister's desire to purchase and enabling access for survey purposes should that become necessary. Mr Billing's letter spells out the obligation on the Minister and TPG to take reasonable steps to act in good faith in negotiating an agreement and invites the Pascoes to discuss these issues with him. We are unable to conclude from the documents that we have seen that the simultaneous service of the Notices meant that the Minister was

acting other than in good faith.

[80] That finding brings us to the second leg of the good faith argument that insufficient information was provided by NZTA to the Pascoes to enable them to participate effectively in purchase negotiations. That was put in these terms by Mr Pascoe:

> 29. I also see from evidence from Mr Billing and Mr Nally filed in this case that they explain to the Court how various letters and/or emails and/or requests for meetings went unanswered in the period from July 2019 – March 2021 period. Yet, as above we had no idea about what decision had been made by Ngāti Tama until mid-2020, and no final decision had been made by the Environment Court until April 2021.
>
> 30. One thing really bothered us was that despite numerous requests, we never seemed to be able to obtain accurate information that told us precisely what land was required. In respect of the haul road for example, we asked for the area to be marked out on the land, but for some reason the Alliance group refused to do so. I recall first asking Andrew Hopkirk for this on 12 July 2018. We thought this was a basic requirement for us to understand how the temporary occupation would work and then we could make further decisions based on that information.
>
> 31. Once the second s 18 notice was served in September 2020 our immediate concern was about the survey that was requested under the s 110 PWA notice and why that was occurring because it seemed to us that it was a survey required for s 23 purposes and not required for negotiations under s 18 PWA. There was a series of correspondence between us, NZTA, TPG, LINZ and the Minister about this. We kept asking for the proposed temporary occupation, the balance land and the project features and footprint to be marked out on the ground to inform negotiations. For some reason, NZTA and/or LINZ refused to do so.
>
> 32. The other thing that really bothered us was the area of land required always seemed to be changing. As Mr Billing says in his evidence, even as late as May 2021 he was receiving instructions to alter the area of land required from Debbie and I and by that stage the survey plan was up to revision "L". There was also an updated valuation prepared around this time as well. Yet as above, the first s 18 PWA notice was served on us and registered on our title over 3 years earlier in back March 2018.
>
> 33. However, before we really had time to take any material steps in response to this latest information provided in May 2021, a s 23 PWA notice was served on us on 17 July 2021. At that stage we had had enough, and our focus shifted onto filing the objection to the compulsory acquisition. We very strongly felt we were not being dealt with in good faith especially in the period after the final Environment Court decision was issued on 1 April 2021.

[81] This issue was also canvassed in some detail in paragraphs [30] – [50] of Mr Gordon's evidence and summarised by him in these terms:

> 54. NZTA and LINZ failed to:
>
> - clearly identify and define project activities, footprint and constraints and ground mark the boundaries and dimensions of those activities, especially within the temporary occupation zones to inform negotiations.
>
> - complete and provide benchmarking assessments to establish and agree on the start condition of the temporary occupation corridor zone, permanent occupation, and the balance land, including ground marking to once the construction footprint was known and understood to inform negotiations.
>
> - provide an injurious affection and anticipated disturbance assessment in relation to the desired temporary occupation corridor/zone, permanent occupation, and the balance land once the construction footprint was known and understood to inform negotiations. Any information provided by NZTA would be insufficient on its own to enable good faith negotiations to be commenced in the absence of pre-approval for support and advice, and up to date information including benchmarking, ground marking and injurious affection/disturbance assessments, on the Pascoe Whānau home, especially given NZTA and Alliance instructions to Ken Billing to not discuss the effects of the project on the Pascoe's property with the Pascoes.

[82] Mr Billing responded to the Pascoes' contentions in his reply brief as follows:

> **Changes to the land requirement area and marking out the land**
>
> 16. In response to Tony and Debbie's comment at [32] of their brief of evidence that they were bothered that the area of land required always seemed to be changing, in my experience it is common for land requirement areas to change as the design of a project progresses.
>
> 17. I accept it is important to keep affected landowners up to date as land requirement areas change, and that is what occurred in this case. By the time Tony and Debbie stopped engaging with me, after July 2019, there were no significant changes made to the land requirement areas, only small changes made as the design of the Project got more refined. I kept Tony and Debbie up to date with any land area changes as and when they occurred. The changes made in May 2021 (referred to in Tony and Debbie's brief of evidence at paragraph [32]) reduced the temporary occupation area. This was done for their benefit, to lessen the impact on their land.
>
> 18. At paragraph [31] of Tony and Debbie's brief of evidence they say after the second section 18 notice was served on them (on 31 August 2020),

> they made repeated requests for the proposed temporary occupation, balance land, Project features and footprint to be marked out on the ground but that Waka Kotahi and/or LINZ refused to do so. I did not receive any direct requests of this nature from Tony and Debbie, but as mentioned in my BOE at paragraph [69], when I emailed Tony and Debbie (and Russell Gibbs) on 16 October 2020 to seek entry for the purpose of conducting a survey, I enquired at that time whether they required the potentially affected areas of their land to be pegged and/or staked. I did this because I was aware that Russell Gibbs on their behalf had emailed the Minister and said Tony and Debbie were unclear which parts of their land would be potentially affected by the Project. Given this communication, it seemed to me, notwithstanding the dispensation that had been granted by the Officer of the Surveyor-General, the survey team would need to enter Tony and Debbie's property in order to peg and stake the land as appropriate. In my email of 16 October 2020, I asked that Tony and Debbie come back to me and told them that I would, once confirmation was received from them, propose a time during which the survey would take place. They never came back to me, nor did they respond to my follow up email on 24 November 2020, and on 17 December 2020. When the survey team attempted to enter Tony and Debbie's property on 11 and 12 January 2021, they were turned away and served with trespass notices by Tony and Debbie's supporters (as was I).
>
> [footnotes omitted]

[83] Mr Billing also responded to the matters raised in Mr Gordon's evidence as follows:

> 20. In response to comments made by Ranald Gordon in his brief of evidence at paragraphs [30] to [50] I respond as follows:
>
> 20.1 *Offering Professional Advice and Support*: I confirm Andrew and I encouraged Tony and Debbie to seek independent legal advice and advised them they had the right to be reimbursed under section 66 of the PWA for the cost of that legal advice, as well as for valuation advice and compensation for any disturbance suffered. Tony and Debbie were aware that they were entitled to expert advice and support. They were legally represented between 2017 and 2019 and they have claimed and been reimbursed for professional costs associated with legal advice, valuation advice, specialist farming advice and have claimed and been compensated for various disturbance costs. Andrew Hopkirk and Trevor Knowles address these issues in their briefs of evidence. Tony and Debbie have also been encouraged to submit any further disturbance claims for consideration (e.g. for loss of grazing revenue) but have failed to do so. I advised Tony and Debbie in 2019 that if Poutama (Russell Gibbs) was working as a professional advisor then, in accordance with LINZ guidelines, Russell Gibbs would need to submit his resume to me outlining his experience so I could seek pre-approval from LINZ for reimbursement of his fees under section 66. This was never done.

Counselling was offered to Tony and Debbie, but not taken up. I am also aware that as part of the Environment Court confirming the designation and resource consents for the Project, conditions were imposed to address the effects of the Project on Tony and Debbie (Designation Condition 5A and Designation 19b). These conditions, which include a number of supports and the provision of alternative accommodation during construction, are explained in the evidence of Christopher Nally.

20.2 *Ground marking*: Rob Napier in his brief of evidence confirms that the set out of the proposed alignment and all permanent and temporary areas were pegged in March 2018, and Andrew in his evidence in reply confirms that a wall plotter (a large wall chart) showing the proposed alignment was provided to Tony and Debbie on 9 November 2018. As explained above, a survey team could have pegged or staked the land in January 2021 but they were denied access and served with trespass notices. At paragraph [47] of Ranald Gordon's brief he states that various reasons have been given (to Tony and Debbie) for not marking the land, including cost, and/or other difficulties. I am not aware of any response made to Tony and Debbie citing costs and/or other difficulties.

20.3 *The completion and agreement of a property benchmarking assessment*: Ranald Gordon states that a property benchmarking assessment/report should have been completed and agreed. It is not standard practice for us to prepare a property benchmarking report. But I would expect that the matters referred to by Ranald Gordon, such as, e.g., the start condition and reinstatement of the temporary occupation zones, would be discussed, agreed and included in any sale and purchase/lease agreement entered into with a landowner. In this case, a benchmarking assessment was never requested, and all my attempts to meet and discuss PWA matters with Tony and Debbie, which would have included matters such as these, were either ignored or turned down after July 2019. Because Tony and Debbie refused to engage with me from this point, there was no opportunity to progress these types of issues and matters with them.

20.4 *Injurious affection and anticipated disturbance assessment:* Ranald Gordon states that injurious affection and anticipated disturbance assessments should have been provided to Tony and Debbie. However, Andrew and I arranged for and presented to Tony and Debbie various valuation assessments, which included a range of compensation payments depending on the acquisition option and included assessments for injurious affection payments. These are referred to in my and Andrew's briefs of evidence. Ranald Gordon at paragraph [54] of his brief of evidence also states that I was instructed by Waka Kotahi and the Alliance to not to discuss the effects of Project on the Pascoe's property with Tony and Debbie. This is incorrect. I did not receive any instructions on this basis. I was advised to confine my discussions with Tony and Debbie on PWA issues, and PWA issues involve the consideration and effect of the Project on the Pascoe property. I made every effort and

> attempt to discuss the effects of the Project on their property with them but was unable to complete my discussions with them after July 2019 when they stopped engaging with me.

[84] We note that Mr Nally had advised the Pascoes by letter of 17 July 2020 that Mr Billing was the Crown-accredited independent property consultant retained to work with the Pascoes in respect of land acquisition. We did not understand the Pascoes to dispute Mr Billing's evidence as to the attempts which he made to engage with them following issue of the Second s 18 Notice nor that the Pascoes did not respond to him when he endeavoured to contact them.

[85] We do not disagree in principle with much of the evidence given by Mr Gordon as to the sort of information which the Pascoes might have required to enable them to negotiate a contract. To the extent that Mr Gordon's evidence contains contentions of opinion or fact as to what information was or was not provided to the Pascoes and the circumstances surrounding that[47] we note that he was not involved in interactions between the parties prior to or following service of the Notices and is relying on advice given to him by the Pascoes, much of which is disputed by Mr Billing and other witnesses.

[86] At the time of service of the Notices the centre line of the proposed road had previously been marked (in 2018) by survey pegs to fill height for the purposes of the RMA processes. We were told that the position of fill areas, access roads and haul roads had also been set out.[48] The route had been walked by NZTA staff and the Pascoes so they would have had a general idea of what was proposed. The Second s 18 Notice included both a Land Requirement Plan and a Survey Office Plan showing where each of the areas sought to be acquired were on the Pascoes' farm. It is correct that ground marking to survey standard had not been undertaken prior to 31 August 2020 for the obvious reason that until agreement was reached with Ngāti Tama there was no need to do so. Certainty in that regard having been achieved, the s 110 notice authorised the undertaking of such survey work as might be required to advance the proposed public work. That seems to us to be a sensible outcome supporting issue of

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47 E.g, Gordon evidence dated 11 October 2023 at [46] and [47].

48 NoE at 149, lines 14 – 17.

a s 110 notice at the same time as a s 18 notice.

[87] We agree with the contention implicit in Mr Gordon's evidence that the Pascoes would be entitled to request information of the sort he has identified to inform the negotiation process, but we do not consider that TPG or the Minister can be criticised for not providing further information that the Pascoes might require until they actually knew what that information was. Issue of the Notices was the trigger for good faith negotiations to resolve such issues. We did not understand there to be any dispute to Mr Billing's contentions that the Pascoes declined to communicate directly with him over the three month period which expired on 1 December 2020 following issue of the Second s 18 Notice.

[88] On 23 July 2020 (prior to issue of the Notices but after resolution of Ngāti Tama issues) Mr Billing wrote to the Pascoes presenting three potential options for land purchase which might be discussed. He testified as follows in his primary brief:[49]

> 69. On 16 October 2020 I emailed Tony and Debbie, and Russell Gibbs,[50] to seek entry on to Tony and Debbie's land for the purpose of the survey and to arrange a meeting for the purpose of re-engaging on land purchase matters. I explained that if Tony and Debbie were unclear about what areas of land were potentially affected by the Project, then those areas would need to be precisely defined to inform negotiations and that to address these points the survey team would need to enter the land and peg and/or stake the relevant areas. I did not receive a response to my email and my follow up email to them of 24 November 2020 went unanswered.
>
> [footnotes omitted]

Mr Billing testified similarly in his reply evidence.

[89] There was extensive questioning of Ms Gibbs by counsel for both parties and the Court as to why the Pascoes did not take up Mr Billing's offer to have such survey work done as might be necessary to inform the parties in their negotiations. We think

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49 Billing evidence dated 9 December 2022.

50 Mr Russell Gibbs and Ms Marie Gibbs had become advisors to/ advocates for the Pascoes, replacing the solicitor whom NZTA had previously funded for PWA negotiations. Ms Gibbs gave evidence in this proceeding.

that the answer emerged in this exchange between Ms Gibbs and Judge Dwyer:[51]

> Q. All right, well let's get back to the simple… the reasons, the reason why Mr Billing's offer of the 16th of October to do the things that the Pascoes were seeking and you were seeking was because you didn't think that they could be done in conjunction with the cadastral survey work or they shouldn't be done in conjunction with the cadastral survey?
>
> A. That's correct, your Honour, we thought it shouldn't be, that that would make it kind of fait accompli, but as you can see it was clearly set out by the, you know, on the 10th and 4th of January what Mr and Mrs Pascoe were wanting, and…

In short it appeared that the Pascoes would not agree to a survey being carried out as suggested by Mr Billing because that meant that the taking would be a fait accompli.

[90] Mr Billing testified that he made numerous attempts between July and November 2020 to contact the Pascoes by phone and email to discuss the purchase options as well as to make arrangements to enter the Land to peg and stake out relevant areas but without success. His evidence in that regard was not challenged.

[91] The apparent answer to that question lay in the evidence of Mr T Knowles (Manager of Clearances in the Regulatory Practise and Delivery Group at LINZ) who testified that:[52]

> It was clear to me that prior to the issuing of the Second Section 18 Notice in 2020 Mr and Mrs Pascoe had arrived at the view that the section 18(1)(d) negotiations could only be done by the Minister himself, or by LINZ itself under delegation.
>
> [footnote omitted]

This issue was not argued in front of us and has been the subject of determination in the High Court (now under appeal, we understand). In any event, it is clear that following issue of the Notices the Pascoes would not engage with the person whom LINZ had advised was the Crown-accredited independent property consultant retained to work with them on acquisition matters.

[92] The failure to engage with Mr Billing was unfortunate in light of the offer made

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51 NoE at 186.

52 Knowles evidence dated 9 December 2022 at [126].

in his email of 16 October 2020 (and repeated on 24 November and 17 December 2020) to arrange a survey to peg and stake the boundaries of the Land. This would have gone some considerable distance to addressing the matters identified in Mr Gordon's evidence and enabled negotiations to advance. Pascoes were apparently agreeable to having the areas of interest to them marked but would not agree to any other survey work being done simultaneously.

[93] The s 110 notice authorised the undertaking of a survey for the proposed public work being the Project and appears to comply with the requirements of s 4(6) PWA. The rights of entry pursuant to s 110 are not limited to mandatory surveys pursuant to s 23(1)(a) as we understood Ms Gibbs to contend but would allow surveyors to undertake the cadastral survey which the Crown sought and any further marking out which Pascoes sought and consented to.

[94] We are satisfied that Mr Billing honestly tried to discuss purchase options with Pascoes and to arrange for a survey to be carried out at which time any specific requirements which Mr and Mrs Pascoe might have as to marking out areas significant to them might be resolved. His efforts were not responded to by the Pascoes, notwithstanding the notice which they had received that Mr Billing was authorised to negotiate acquisition matters. Whatever the rights and wrongs of the legalities of surveying and negotiating might be, the fact of the matter is that agreement as to purchase of the Land had not been reached by 1 December 2020 when the three month negotiation period expired.

[95] As counsel for the Minister noted in opening, compliance with s 18 and the good faith negotiations required by that provision are encompassed in these proceedings by the provisions of s 24(7)(d) and whether the acquisition process has been "fair". We find in that regard that the acquisition process:

- Was undertaken by the Minister in accordance with the relevant statutory powers;
- Was undertaken in good faith and even handedly by the Minister's accredited independent property consultant;
- Was supported by a clear justification, namely the acquisition of the

Land which was found by NZTA's and the Minister's advisors to be the most viable and feasible route for the Project.

For these reasons we find that the process adopted by or on behalf of the Minister meets the requirements of s 24(7)(d) PWA.

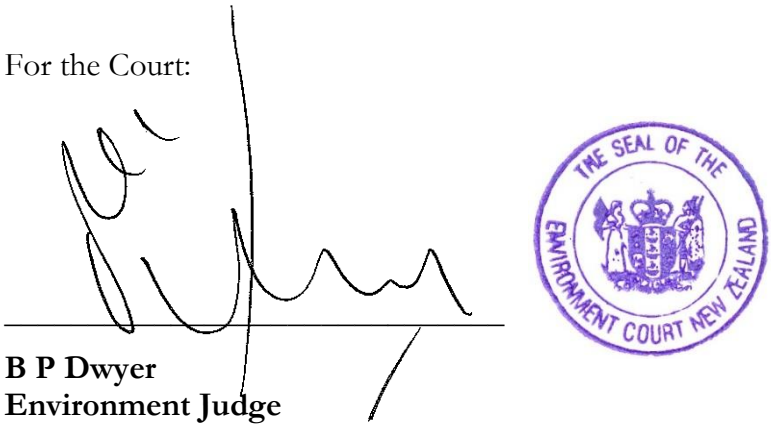
Outcome

[96] For all of these reasons we determine that it would be fair, sound and reasonably necessary for achieving the objectives of the Minister for the Land to be taken. We make no directions pursuant to s 24(7)(c) PWA.

Costs

[97] Costs are reserved in favour of the Minister. Any costs application to be made and responded to in accordance with para 10.7 of the Environment Court Practice Note 2023.

For the Court:



B P Dwyer
Environment Judge