

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHĪ**

Decision No. [2023] NZEnvC 223

IN THE MATTER

of the Public Works Act 1981

AND

an objection under s23 of the Act

BETWEEN

MACFARLANE INVESTMENTS
LIMITED

(ENV-2022-CHC-10)

Objector

AND

QUEENSTOWN LAKES DISTRICT
COUNCIL

Respondent

Court: Environment Judge P A Steven
Environment Commissioner I Buchanan

Hearing: at Queenstown on 6 and 7 September 2023

Appearances: M Casey KC, M Baker-Galloway and L McLaughlan
for the objector
N Whittington for the respondent

Date of Report: 25 October 2023

Date of Issue: 25 October 2023

REPORT OF THE ENVIRONMENT COURT



A: Report issued.

B: Costs are reserved.

Contents

Introduction	2
Overview of acquisition under PWA	3
Relevant facts	3
The Fast-track Act	7
Notice of requirement for a designation.....	8
Comments on NOR	9
Decision on the NOR and associated consents	12
Environment Court process under s24 PWA.....	14
Guiding legal principles.....	15
Legal submissions for MacFarlane – overview of its case	18
Evidence for MacFarlane	21
Evidence for the Council	27
Council’s legal submissions.....	36
Our evaluation	39
Our consideration	41
Costs.....	47

REASONS

Introduction

[1] MacFarlane Investments Ltd has filed an objection with the court under s23(3) of the Public Works Act 1981 (PWA) in respect of a notice of intention to take land served on them by the Queenstown Lakes District Council under s23(1)(c) of the PWA.

[2] This report sets out our findings following our enquiry into that objection.

Overview of acquisition under PWA

[3] By s16(2) a local authority is empowered to acquire any land required for a local work for which it has financial responsibility. Such acquisitions may be by agreement, or as the result of a compulsory acquisition.

[4] Where land is required for a public work, s18(1)(a) provides that the Minister for local authority must first serve a notice of desire to acquire the land on every person having an interest in it. The local authority concerned is required 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 – see s18(1)(d).

[5] If there is no response to the invitation to sell, or the owner refuses to negotiate, or an agreement for the sale and purchase of the land at does not result from those negotiations, after a period of three months the local authority is authorised by s18 to proceed with compulsory acquisition.

[6] Principal provisions of the PWA dealing with compulsory acquisition are ss 23 and 24:

- (a) s23 sets out the process to be followed if the council issues a notice of intention to take the land, including where the person served with the notice wishes to object to the taking of the land; and
- (b) s24(7) sets out the powers and responsibilities of the Environment Court when an objection is made.

Relevant facts

The land

[7] The land to be taken comprises 39 m² of a site at 15 Man Street extending along part of both Man and Brecon Street frontages. The site is situated in central Queenstown. MacFarlane Investments Ltd (the objector) is the owner of the land

which is currently operated as a Wilson carpark. Mr John Thompson is a director of MacFarlane Investments Ltd.

Notices of desire

[8] The Council states that it requires the land for its major arterial project. In pursuit of that project, the Council issued two notices of desire to acquire land under s18:

- (a) the first on 21 December 2020 which identified the land subject to the notice comprises 54.3 m²; and
- (b) the second on 8 September 2021 defining the area required as being 39 m².

Notice of intention to take

[9] On 15 February 2022, the Council issued a notice of intention to take (take notice) 0.0039 ha of the objector's land under s23. The reasons for taking the land are stated in the take notice as being to:

provide for construction of the Queenstown town centre arterial road;
increase road width of four intersection improvements which will increase safety.

[10] The first and second notices of desire were attached to the notice of objection, together with the take notice.

[11] For a period commencing before the first s18 notice of desire was served on the objector, various communications (or attempts to communicate) occurred between the objector, and/or its lawyers Anderson Lloyd, and the Council or its consultants and/or agents. The Council's objective was to secure an agreement to purchase land from the objector.

Notice of objection

[12] On 15 March 2022 the objector filed a notice of objection (the objection) raising the following grounds (which we summarise):

- (a) a failure to comply with s18; the information provided in the notice of desire was inadequate to enable meaningful discussions between the parties, and that the Council had failed to make every endeavour to negotiate in good faith with the objector;
- (b) the works referred to in the take notice, being the intersection upgrade, is not reasonably necessary for the public work and nor has there been any or sufficient consideration of alternatives that would not require acquisition of the objector's land;
- (c) the works involving the objector's land would not be required until stage 2 of the overall project and although stage 1 had commenced construction, considerable additional design and other works are required before stage 2 could be advanced;
- (d) the Council has not given sufficient consideration of alternative sites, routes and other methods of achieving the Council's objectives;
- (e) the taking would not be fair, sound and reasonably necessary for achieving the Council's objectives; and
- (f) the Council should use publicly owned land to achieve its objectives in preference to private land.

[13] Although the objection challenged the validity and sufficiency of the take notice, that ground was not pursued.

The Council's reply

[14] As required under the PWA, the Council filed a notice of reply (the reply) that sets out background to the taking, and the statutory authority to take the land. The taking is stated as relating to the Council's Arterial Road and Wakatipu Active Transport Network projects.

[15] The Arterial Road project is explained:

...the Arterial Road Project involves creation of a new arterial road that delivers an alternative route around Queenstown's commercial area commencing at the Frankton Road\Suburb Street intersection and running along the perimeter of the town centre along Melbourne Street, Henry Street, Gorge Road, Memorial Street, Man Street, Thompson Street, and down to a new One Mile roundabout at the Fernhill\Lake Esplanade\Glenorchy Road intersection.

[16] The Active Transport Network project is also explained:

The Wakatipu Active Transport Network project is focused on improving opportunities for active transport throughout the Wakatipu Basin and an element of that wider project is implementing the Queenstown Town Centre Masterplan, which includes public realm improvements intended to enhance the visitor and local experience in the Queenstown town centre through enhancing streets and lanes, improving connections between attractions and celebrating Queenstown's heritage and culture.

[17] Works associated with the Wakatipu Active Transport Network project are described as involving road and intersection improvements, including a signalised intersection at Man Street and Brecon Street for safer pedestrian crossing, widening pedestrian paths and new street furniture and planting.

[18] As to these works, the reply states that:

MacFarlane's land sits adjacent to the intersection of the arterial route (Man Street) with Brecon Street, on which public realm upgrades are to occur.

[19] The reply notes that the Arterial Road project was listed in Schedule 2 of the Covid-19 Recovery (Fast-track Consenting) Act 2020 (the Fast-track Act); noting that a designation was obtained along with associated resource consents pursuant to the Fast-track process.

[20] The reply further states:

The Council has considered alternatives both in considering the Arterial Road Project (as was addressed by the Expert Consenting Panel) and, in respect of the particular intersection, in the Beca Limited Land Requirements Assessment dated 19 November 2020 ...

The Fast-track Act

[21] The purpose of the (now repealed) Fast-track Act was to urgently promote employment to support New Zealand's recovery from economic and social impacts of Covid-19 and to support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.

[22] Section 12 explains the relationship with the Resource Management Act 1991 (RMA). Relevantly, when a notice of requirement (NOR) is lodged under the Act the process for confirming or modifying the designation is governed by Schedule 6 of the Fast-track Act and not the RMA.

[23] However, a designation confirmed or modified under the Fast-track Act has the same force and effect for its duration as if it were confirmed or modified under the RMA.

[24] Clause 33 of the Fast-track Act sets out the matters for consideration when a NOR is received. This provision overlaps with the provisions of s171 RMA as it requires that the decision-maker have particular regard to:

- (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—
 - (i) the requiring authority does not have an interest in the land sufficient to undertake the work; or
 - (ii) it is likely that the work will have a significant adverse effect on the environment; and

- (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority seeking the designation; and

Notice of requirement for a designation

[25] On 17 December 2020, the Council lodged a NOR for a designation and associated resource consents for the Arterial Road project following enactment of the Fast-track Act. An expert consenting panel (the panel) was established under the Act.

[26] The NOR contained a statement of the objectives for the Arterial Road project being:

To provide an improved urban arterial route that:

- (A) improves town centre access and reduces congestion; and
- (B) supports integrated initiatives around travel demand management, parking management, public realm upgrades, public passenger transport and active transport modes.

[27] The new arterial route commences at the Frankton Road/Suburb Street intersection then circuits the town centre along Melbourne Street, Henry Street, Gorge Road, Memorial Street, Man Street, Thompson Street, and down to a new One Mile roundabout at the Fernhill Road/Lake Esplanade/Glenorchy Road intersection. The NOR contained a map depicting the proposed route for the Arterial Road project which identifies three stages of the route.

[28] In accordance with the requirements of clauses 13(1)(c) and 3(1) of Schedule 6 of the Act, the NOR states that it relates solely to the proposal to:

construct, maintain and operate a new Queenstown Town Centre urban arterial road (including associated infrastructure, structures, walkways, shared path, and landscaping.

[29] All stages of the works were captured by the NOR and the application for associated resource consents. A description of each stage, section by section is set out in section 4 of the NOR. Works in the vicinity of the objector's land were then proposed to be undertaken in stage 3.

[30] The NOR attached a number of appendices including a document referred to as the Alternatives Report.¹ The document is titled Queenstown Arterials Options Assessment Report dated 21 October 2020 and was authored by Beca. This report is a lengthy document that is focussed on a consideration of options for the new arterial route. The report includes the statement that:

The alternatives assessments that have been carried out in relation to the Project have focused on specific design options including route, alignment and intersection layouts, as well as determining appropriate elements to ensure the greatest level of efficiency and safety.

[31] Of the 17 options considered, 12 of them were different designated route permutations.² The remaining five were other options which did not involve designating an arterial route.

[32] Man Street is described as being within an "Inner Link" following Melbourne Street, Henry Street, Man Street and Thompson Street to bypass the CBD and ease congestion on Stanley Street and Shotover Street. Increased priority for pedestrians was one of the stated priorities for the Inner Links.

Comments on NOR

[33] Following the statutory process for consideration of the NOR, a number of parties were invited to and did provide comment to the panel on the NOR. The objector provided a comprehensive comment through its lawyers, Anderson Lloyd. That attached a review of the works from a traffic engineer, Mr Andy Carr,

¹ Which was attached as Appendix 8.

² NOR Section 9.2.6 p 27; NOE at p 76.

of Carriageway Consulting.

[34] The objector's comments addressed a number of concerns including in relation to (in summary):

- (a) the process of consultation followed by the Council which was described as inadequate as there had been inadequate opportunity to explore alternatives that minimised or avoided the need to use the objector's land;
- (b) the reduced frontage of the property to Man Street which would inevitably reduce the available footprint on the property and optimum\efficient use of the same;
- (c) the Council's failure to give adequate consideration to alternate sites, routes or methods for undertaking the works in accordance with s171(1)(b) RMA and Schedule 6 clause 33(2)(b) of the Fast-track Act, given that the Council did not have an interest in the property at 15 Man Street, but required it for the proposal; and
- (d) the Council's failure in considering these alternatives, to balance the desire for a 5 m wide footpath with the implications for the objector's future use of this land.

[35] The objector's comments identified at least two alternative options for the layout of the Brecon/Man Streets intersection that had not been considered by Beca that require little or no use of 15 Man Street land.

[36] In his report, Mr Carr commented on the proposed width of the footpath. He concluded that there is significant uncertainty as to whether the area of land required from the objector is appropriate while noting that under a scenario with the revised intersection layout and/or a reduced width for the footpath, the area proposed to be taken would either be too large or it would not be needed at all.

[37] Based upon Mr Carr's analysis, the objector observed that the Council's objective for the proposal could be achieved with a narrower footpath combined

with a setback within the west-bound lane on Man Street that would not require the taking of any of the objector's land.

[38] The objector commented that the proposal's objective as stated in the NOR applies to the whole of the project, not being focused on the intersection or streetscape works in the location of its land, commenting that the objective would not be impacted negatively by avoiding the imposition of the designation on the objector's land.

[39] As relief, the objector sought that the NOR be modified such that:

- a It does not impinge on 15 Man Street; and
- b There is a condition requiring that the shared pathway on Brecon Street and Man Street be reduced from 5m to a width based on a further assessment of pedestrian volumes and relevant design standards.

The Council's response

[40] The Council's response to comments addressed the range of concerns raised by the objector as to the justification for the taking of a 54 m² area of its land. The response attached a Transport Report. Based upon that report, the author of the Council's response states that "...this land take is necessary to provide a safe intersection at the corner of Man and Brecon Streets".

[41] The Transport Report is titled "draft [15] Man Street Land Requirements Assessment" dated 27 October 2020 (the Man Street Assessment) prepared by Beca Limited (Beca).³ The Man Street Assessment explains the options first considered for the intersection of Man Street/Brecon Street which was to be upgraded to a signalised intersection as part of the Queenstown Streetscape design.

[42] The selected option (of the three then considered) identified 35.5 m² of

³ CB Vol 202 Tab 50 p 1798.

land to be taken from 15 Man Street, although the Man Street Assessment also includes the following statement commenting on shortfalls with that design:

The Arterial preliminary design was undertaken as part of the Queenstown Transport Business Case 2020 with the intersection of Man Street/Brecon Street forming part of Stage 2 of the Arterial project. The recommended layout from the Streetscape design formed the basis for the design of the intersection.

The Arterial preliminary design for Man Street has assumed a 5 m wide Active Travel path on the northern side and 3.25m wide land as part of the wider design assumption to support the proposed 40 km/h posted speed limit. Based on the Streetscape design of Brecon Street and the Arterial Preliminary Design of Man Street kerb alignment, tour coaches left turning out from Brecon Street will encroach into the right turn land ... This will result in an unsafe intersection layout that would also result in poor operational outcomes. As such, options were investigated to address the safety and operational deficiencies.

[43] A further two options were later considered. Option 5 was identified as the preferred option of the additional two, requiring a take of 54 m². The design for this option was based upon a 5 m wide footpath provided through the intersection, with a right-turn limit line on Man Street set as close to behind the pedestrian cross walk as design standards permits "... enabling greater right turn capacity and improved intersection efficiency".

Decision on the NOR and associated consents

[44] The panel made a decision to confirm the NOR and granted the associated resource consents (the panel's Decision). The requirement for an outline plan was waived, other than for certain works, none of which relate to the works involving the Man Street/Brecon Street intersection. Having referred to the purpose of the project relevant to the NOR, the panel set out the legal framework for deliberations noting the relationship between the Act and the RMA.

[45] In considering the NOR, the panel concluded that having reviewed the application documents, adequate consideration had been given to alternative sites,

routes and methods of undertaking the work, referring to the Council's consideration of those matters set out in Appendix 8 Alternatives Report and section 9 of the AEE.

Panel's consideration of alternatives

[46] The panel's Decision comments that the alternatives considered by the Council included a "doing nothing" option and undertaking non-physical responses relating to operational road management techniques such as congestion charging, being a reference to the options referred to in the Alternatives Report.

[47] The panel's Decision then refers to the project objective and concludes that:

The proposed works are clearly necessary to achieve that Objective and the inclusion of a designation in the QLDC District Plan (a designation overrides the rules that would normally apply to an activity) is an efficient means of authorising an improved urban Arterial route. We observe that designations are routinely used to authorise linear public good network infrastructure including roads.

Panel's consideration of objector comments

[48] When considering comments received in response to an invitation given under clause 17(2) a panel must:⁴

...subject to Part 2 of the Resource Management Act 1991 and the purpose of this Act, consider the effects on the environment of allowing the requirement, having particular regard to –

- (a) any relevant provisions of the documents listed in subclause (3); and
- (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if –
 - (i) the requiring authority does not have an interest in the land sufficient to undertake the work; or

⁴ Clauses 33(2) and 33(7) of Schedule 6 state.

- (ii) it is likely that the work will have a significant adverse effect on the environment; and
 - (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority seeking the designation; and
 - (d) any other matter the panel considers reasonably necessary in order to make a decision on the requirement.
- (7) If a panel confirms a requirement, –
- (a) it may waive the requirement for an outline plan as required by section 176A of the Resource Management Act 1991; but
 - (b) if it does not waive the requirement under that section, the outline plan must be submitted to the territorial authority in accordance with that section.

[49] The panel’s Decision refers to comments responding to invitations to comment which were considered along with the Council’s response. The panel also considered the further comments on conditions to be recommended for the NOR and imposed on the associated resource consents, including a further comment from the objector.

Environment Court process under s24 PWA

The hearing

[50] By s24(3), the Environment Court must enquire into the objection and the intended taking and is to conduct a hearing having followed the procedural steps set out in ss 24(3)-(6). These steps were duly followed.

[51] A hearing on the matter was initially delayed pending a response to a request for information made by the objector to the Council under the Local Government Official Information and Meetings Act 1987. That request was then pursued as an application for discovery made under s278(2) RMA.

[52] The information sought by the objector was duly provided although a

three-day hearing initially scheduled for early December 2022 had to be vacated to allow for full disclosure to be made. A new hearing was scheduled for three days commencing on 7 February. Sadly, that hearing was also vacated due to the sudden passing of one of the Council's key witnesses, Mr Hansby.

[53] On 4 April 2023, the court was advised in a Joint Memorandum of counsel that a new witness for the Council had been identified. The Council's (then) stated intention was that this witness would adopt the evidence of Mr Hansby. The court was also advised that streetscape works in the vicinity of the site had started.

[54] A telephone conference with counsel was convened, at which the objector expressed concerns as to the Council intentions in undertaking these works. Counsel questioned how they related to the works for which its land was sought to be acquired. For the Council, Mr Whittington undertook to obtain further instructions and to communicate with the objector on that matter and a further period of time to work through outstanding issues was given to the parties.

[55] A statement from Mr Pickard was later filed for the Council and served on the objector. Mr Pickard had prepared a new statement of evidence. That evidence was both useful and relevant in that it provided a summary of the progress on the works being undertaken as part of the street upgrade project referred to in the Joint Memorandum of counsel of 4 April 2023.

[56] The hearing eventually took place on 6 and 7 September 2023. The submissions and evidence presented at the hearing will be considered within the framework of the matters we are required to consider, together with the principles that are to guide our consideration, which we now set out.

Guiding legal principles

[57] When considering the objection, s24(7) PWA prescribes the scope of the Environment Court's role; the 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:
 - (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.
- (8) *[Repealed]*
- (9) At the same time as the Environment Court submits its report and findings to the Minister or local authority, it shall send a copy of the report and findings to the objector, and make copies of them available to the public.
- (10) The report and findings of the Environment Court shall be binding on the Minister or, as the case may be, the local authority.

Principles of general application

[58] The role of the Environment Court under s24 is one of factual review of the appropriateness of the Council's decision as a means of giving effect to the Council's objectives, which it should ascertain.⁵

[59] The requirement to ascertain the objectives of the local authority is a reference to the nature of the work to be constructed or the purpose for which the land is required.

⁵ In *Waitakere City Council v Brunel* [2007] NZRMA 235 (HC).

[60] The Environment Court has no function of substituting objectives when examining the methodology adopted by the Council, including the adequacy of consideration given to alternative sites.⁶

[61] A similar direction to inquire into the extent to which consideration has been given to alternative sites, is contained in s171(1)(b) RMA. Such consideration is required where the requiring authority does not have an interest in the land sufficient for undertaking the work or it is likely the work will have a significant adverse effect on the environment, similar to the provisions of the Fast-track Act earlier referred to.

[62] The court may decide whether in its opinion it would be fair, sound and reasonably necessary for achieving the objectives of the local authority for the land of the objector to be taken.⁷ However, the court is not entitled to examine the objectives themselves.

[63] Once the site, route and method has been determined after adequate consideration of the alternatives, the court must consider whether the proposal is fair, sound, and reasonably necessary for achieving the objectives of the acquiring authority.⁸

[64] The court does not have the power to make a declaration as to the good faith endeavours of the acquiring authority under s18(1)(d). However, the court has power to state that the taking is not fair in the s24(7)(d) context, if it finds that the requirements of s18 have not been complied with and the compulsory taking was being effectively conducted in bad faith.⁹

⁶ *Oliver Trustees Ltd and St Heliers Capital Ltd v Minister for Land Information* [2015] NZEnvC 55 at [24].

⁷ Under s24(7)(d).

⁸ *Davis v Wanganui City Council* (1986) 11 NZTPA 240.

⁹ *Ravji v Wellington Hospital Board* PT Wellington W39/89. This was affirmed on appeal by the High Court on other grounds: *Ravji v Wellington Hospital Board* HC Wellington, AP 75/89, 14 February 1990.

Legal submissions for MacFarlane – overview of its case

[65] The objector was represented by Mr Matthew Casey KC and Ms Maree Baker-Galloway.

[66] Issues for the court’s determination, as framed in the Notice of objection were stated as being:

- (a) whether the Queenstown Lakes District Council failed in its obligation to make every endeavour to negotiate in good faith prior to issuing a notice of intention;
- (b) whether the Council gave adequate consideration to alternatives that would not require the taking of the objector’s land; and
- (c) whether the taking is fair, sound and reasonably necessary for achieving the Council’s objectives.

Council’s negotiations

[67] We address the objector’s ground of objection relating to the negotiation process in considering the requirements of s24(7)(d).

Confusion over reason for the taking

[68] In his submissions, Mr Casey referred to the confusion and inconsistency in the Council’s articulation of its intentions for the objector’s land, noting that the objective as stated in the NOR was to provide for construction of the Arterial roads project including road width and intersections improvements, whereas the Council is also said to require the land for the Streetscapes project as well.

Inadequate consideration of alternatives

[69] Mr Casey referred to the “robust testing of alternatives” required to be undertaken during the process of securing a designation under the RMA. Counsel

drew contrast with the Council's consideration of alternatives under the process followed under the Fast-track Act where the only participation was by way of written comment. That excluded the opportunity for any iterative dialogue between the panel and the objector. Standard steps in the usual RMA process that would otherwise have ensured a robust consideration of the adequacy of the alternatives assessment did not occur.

[70] Mr Casey contended that no consideration was given by the panel to any alternatives for the intersection as part of the NOR. The alternatives considered had been confined to route alternatives. Mr Casey referred to an absence in the panel's Decision to show that it had considered the adequacy of any alternatives assessment in respect of the objector's land, stating:

..in fact, for the entirety of the very substantive arterial designation the Panel made only one statement that indicates it turned its mind to the adequacy of assessment of alternatives under s171(1)(b) of the RMA (the equivalent to s24(7)(b) PWA).

[71] The only mention of alternatives considered by the Council in relation to the works in the vicinity of the objector's land is contained in reports from Beca dated 30 September 2019 and 19 November 2020. The three options initially considered in the Beca Reports were identified as part of the Queenstown Streetscape Design, including:

- (a) do nothing which would not require any of the land;
- (b) a design option requiring 35.5 m²; and
- (c) an intermediate option requiring 8 m².¹⁰

[72] However, as we have earlier noted, the 19 November 2020 Beca report identified two additional options as part of the arterial preliminary design:

- (a) option 4, being an amended version of the 35.5 m² take proposed as

¹⁰ These are the options discussed in the Man Street Assessment provided to the panel which had also been authored by Beca.

part of the Streetscape Design works; and

- (b) option 5, this being selected as the preferred option which involves the taking of 54 m². That was the option that had formed the basis of the NOR application and the first s18 notice of desire served on the objector.

[73] Mr Casey submitted that the focus of Beca’s assessment had been on the “claimed need” for a dedicated right-turn from Man Street into Brecon Street, with a turning circle required for tour buses turning left out of Brecon Street into Man Street. The 5 m footpath width was regarded as a given in that design. No alternative design options were considered in relation to the width of the footpath design. Mr Casey then referred to three alternative design options for the footpath that were addressed in the evidence of Mr Carr.

[74] Mr Casey also drew the court’s attention to the consideration given by the elected members of the Council with reference to an agenda item prepared for the Council meeting on 10 December 2020 at which the decision was made to proceed with acquisition of the objector’s land. The report contained many redactions. However, Mr Casey was able to point to the recommendation made to the Council (which he assumed was accepted)¹¹ to acquire the objector’s land.

[75] Mr Casey referred to the options analysis set out in the agenda report which describes the options as:

Option 1 Not approve the compulsory acquisition of the land

Option 2 Approve the compulsory acquisition of the land

Option 3 Proceed to acquire only stage I land i.e. not the objector’s.

[76] The report was jointly authored by Mr Cruickshank and Mr Hansby and

¹¹ The objector did receive Minutes of that public excluded meeting.

contains an overview of the infrastructure projects. The property at 15 Man Street is said to sit in stage 2 while also forming part of the Brecon Street/Man Street intersection upgrade as part of the Street Upgrade project planned for construction in early 2021. For that reason, the authors' recommendation was to acquire the land for each of these projects at the same time.

[77] The authors attach and refer to the Beca Land Requirement Assessment which outlines the options and rationale for the Man Street land requirement. However, Mr Casey notes that the options analysis did not address the s24(7)(b) PWA matters beyond attaching the Beca Report.

Evidence for MacFarlane

Christopher Brown

[78] Evidence was given by Christopher Brown who is a civil engineer and project manager with a local firm Rubiks Ltd. Mr Brown was engaged to consider the different scenarios of land take from 15 Man Street based on what had been constructed.

[79] In preparing his evidence Mr Brown had been provided with a copy of the "For construction" Streetscapes plan, dated 1 July 2022 for Brecon Street (the as-built plans), together with the Beca Report of 19 November 2020 which was contained in the "15 Man Street Land Requirements Assessment". These all depicted option 5, being the Council's preferred option for the intersection design.

[80] The Beca Report included two plans showing a land take area of 54.3 m² based upon a design with no setback within the right turn bay on Man Street. However, that land area was subsequently reduced to 39 m² following a survey of the land.

[81] In preparing his evidence, Mr Brown was assisted by Aurum Survey Consultants (Aurum) who were engaged by the objector. Aurum had undertaken

a survey of the as-built works. Mr Brown prepared and produced a bundle of plans that were for the purpose of illustrating differences between the as-built works with the design for option 5, noting that option 5 accounted for the requirements for both the Streetscape and Arterial Road projects. Mr Brown's plans depicted differences in kerb alignments (particularly on Brecon Street) between the option 5 alignment and the as-built works.

[82] Mr Brown was further assisted by Mr Carr in producing various scenarios of bus/coach movements involving a left-turn from Brecon Street onto Man Street with differing setbacks within the right-turn bay on Man Street. These scenarios were overlaid on the as-built plans, depicting differing land take options based on each right-turn bay setback scenario. This ranged from no land take to a take of 29 m² of land.

[83] These plans were described in Mr Brown's evidence as follows:

- 7 Following the plans produced under item 6, I was subsequently instructed by Macfarlane to brief Aurum Survey Consultants to prepare the following plans for the corner of Man Street and Brecon Street, (attached as CB 9)
 - (a) Plan 1 – As built plans overlaid with the BECA NZTA F2Q Business Cases Queenstown Town Centre Proposed Man Street Plan but with kerbs aligned. Based on locations of kerb and channel currently constructed on Brecon Street being 1.4m further away from 15 Man Street as compared to Beca Drawing (4(bi)), the land take required off Man Street is 7m² less;
 - (b) Plan 2 – As built plans incorporating Andy Carr drawing (CB 7) showing no land take along Man Street except off 15 Man Street (4m footpath remains). This shows a 29m² land take based on no setback of Traffic lanes on Man Street;
 - (c) Plan 3 – As built plans incorporating Andy Carr drawing (CB 8) showing no land take along Man Street except off 15 Man Street (4m footpath remains). This shows a 23m² land take based on a 6.03m

setback of Traffic lanes on Man Street;

- (d) Plan 4 – As built plans incorporating Andy Carr drawing (CB 6) showing no land take along Man Street (4m footpath remains). This shows no land take is required off 15 Man Street, but with a 5.05m setback of the straight through lane on Man Street and a 10.48m setback of the right turn lane on Man Street.

[84] Surveyed differences identified in the Aurum survey were conveniently described in the rebuttal evidence of Mr Thompson (which we are about to refer to) as follows:

- (a) the Brecon Street kerb line is now 1.4 m further west as compared to the preceding Beca Plans for either the Arterial or the Streetscape upgrade works;
- (b) the as-built footpath up Brecon Street and adjacent to 15 Man Street and 19 Brecon Street ranges in width from 3.2 m to 4.78 m;
- (c) the width from the Brecon Street kerb to the boundary of 15 Man Street, immediately before the corner is 6.15 m;
- (d) at the corner between Man Street and Brecon Street the width of the footpath as constructed varies from 4.14 m to 3.68 to 3.99;
- (e) the width of the footpath going east along Man Street from the intersection is 4 m; and
- (f) if the Council's preferred option was aligned with the as-built kerblines, less of 15 Man Street would be required.

John Thompson

[85] Mr Thompson gave evidence as to the history of his attempts to engage in meaningful negotiations with the Council. He was critical of the consultation that had occurred after then being approached by the Council around August 2019. The Council and Beca had then been considering a design for the upgrade of Brecon Street, including the Man Street\Brecon Street intersection, although the

works then excluded consideration of Man Street, preferring an arterial road function. The preferred option then being considered was option 3 identified by Beca. Mr Thompson had made it clear that the objector did not wish to sell any part of the land to the Council.

[86] Mr Thompson referred to delays in the Streetscape project while the Council considered how it could resolve how the Arterial Road project might affect design of the intersection. Consultation recommenced mid-2020, at which time the Council had determined that they would need more of the objector's land for the Arterial Road project.

[87] Mr Thompson gave evidence of a series of emails from Mr Cruickshank of APL, a property and valuation management company, wanting to discuss acquisition on behalf of the Council. However, by then Mr Thompson had travelled to Sydney. This was approximately one week before international borders were closed due to the Covid-19 pandemic. Mr Thompson states that he was effectively stranded in Sydney two years until borders re-opened.

[88] Mr Thompson was critical of the Council's failure to acknowledge his preference to meet with the Council officers in person upon his return to New Zealand. That was his preferred method of engagement rather than by a remote means of communication such as a phone call, or video conference. Mr Thompson explained that he was not particularly technologically advanced and had made it quite clear to Mr Cruickshank that he preferred to engage in a face-to-face meeting.

[89] Mr Thompson explained how he failed to understand the Council's urgency of resolving this matter given the timing of works associated with stage 2 of the Arterial project. He had conveyed that to Mr Cruickshank.

[90] Mr Thompson spoke to his involvement in the application lodged for the NOR stating that he had not been consulted prior to the application being lodged, beyond the attempts by Mr Cruickshank in respect of Council's wish to acquire his

land. Shortly after this process, he notes that the Council issued the first Notice of Desire on 21 December 2020.

[91] He responded to the evidence from Mr Hansby noting the contradictions with Mr Hewett's as to the extent of the land required for the Arterial project as against the Streetscape project. On the basis of Mr Hansby's evidence, the greater part of the land is required for the Arterial Road project although the opposite is stated by Mr Hewett.

[92] Mr Thompson referred to the amended design reflected in the as-built works which resulted from the relocation of the kerb to the west. This resulted in the works associated with the Streetscape Upgrade having been completed without any of his land being needed. On that basis he understood that Mr Hewett's evidence, as it related to the Streetscape Upgrade, had been overtaken by the recently completed works in accordance with the revised design.

[93] In his rebuttal evidence at paragraph 23, Mr Thompson refers to the Aurum Survey and states:

As explained in my introduction, I instructed Aurum to provide a survey drawing which overlays the Beca Arterial Design on the current constructed design which is attached to Mr Brown's evidence. The drawing identifies an area of 7sqm less land is required as a consequence of the streetscape design being shifted 1.4m to the west if the Beca Arterial preferred design was simply aligned with the newly constructed Brecon Street kerb line.

[94] Mr Thompson also refers to the error in Mr Pickard's evidence (at paragraph 16) as to the width of the temporary footpath (which was said to be 2.4 m). That part of the footpath adjacent to the boundaries of 19 Brecon Street and 15 Man Street was surveyed by Aurum and was measured at 3.2 m in that location.

[95] On the basis of the surveyed measurements, Mr Thompson considers that a maximum 5 m wide footpath could easily be constructed by the Council without

the need for any of his land. He then referred to the alternative design options in the plans produced by Mr Brown depicting a 4 m width for the footpath with varying right-turn lane setbacks. He considers that these designs would accommodate the area required for buses turning left onto Man Street based upon Mr Carr's assessment.

[96] Mr Thompson was critical that the Council did not undertake the level of analysis of alternatives undertaken by his experts or of the design amendment that resulted in the as-built works.

Andrew Carr

[97] Mr Carr had been engaged to review and provide comments on the transportation related information prepared for the Council in support of the Arterial project commencing with comments on the NOR.

[98] Reflecting his comments to the panel, Mr Carr's evidence queried the width of the 5 m walking/cycling shared pathway proposed for the northern side of Man Street. He noted that this greater width could lead to higher speeds for cyclists and e-bikes. He referred to the Austroads Guide to Road Design Part 6A ("Paths for Walking and Cycling") noting that a 5 m width is greater than the "typical maximum" width of 4 m.

[99] He also queried the Council's modelling of the likely volumes of vehicles, cyclists and pedestrians together with the desire lines assumed to be followed by users of the walking/cycling shared pathway.

[100] Mr Carr provided an assessment of an intersection/carriageway design with various setbacks within the right-turn bay to enable safe left hand turns out by buses or coaches from Brecon Street into Man Street noting that the setback was incorporated into the design of option 1 identified by Beca. In part, that was due to the length of the setback, although in Mr Carr's observation the setback was little different to others that already accommodate high traffic volumes and larger

vehicles.

[101] Mr Carr disagreed with Beca's conclusion that the length of the setback in the design of that option would affect intersection efficiency. Option 1 involved no requirement for the objector's land. Options 1 and 2 each provided for a 16 m setback within the right turn traffic lane with no setback included within the design of option 3.

[102] He noted that no assessment was provided of any interim options. He acknowledged that it is the interplay between the width of the shared pathway and the existence or not of a right-turn lane setback (on Man Street) that determines the extent of land requirement from the objector.

[103] Mr Carr was surprised that the Council had carried out works incorporating a setback. He understood the setback to have been surveyed at 14.3 m in circumstances where, on the Council's evidence before the court, that is inherently unsafe and inefficient. He was unable to understand how the Council would proceed with construction if the amended design had been subject to a safety audit that identified that as comprising a fundamental safety issue.

Evidence for the Council

[104] Statements of evidence were filed in support of the Council's position.

Peter Hansby

[105] Mr Hansby was formerly engaged as General Manager of Property and Infrastructure at the Council. Mr Hansby's evidence was read by the court, despite being replaced by Mr Pickard. Mr Hansby's evidence provided the overarching context and need for the acquisition of 39 m² of the objector's land, including summarising the Streetscape and Arterial Road projects.

[106] His evidence referred to the need of the Council to ensure that the district's

infrastructure was adequate for the population size noting that the district had experienced significant growth in recent times and was projected to grow significantly larger.

[107] Mr Hansby had written about the congestion on the district roads, noting that this underpins the Council's objectives for the arterial projects to divert traffic around the town centre and reduce congestion, along with other projects to address congestion with the aim of increasing mode shift from vehicles onto public transport and active transport such as cycling and walking.

[108] Mr Hansby's evidence referred to several Council-led and private developments that were all being progressed in parallel noting critical points around the network where the projects intersect. One such location was at the intersection at Man Street and Brecon Street where the design was required to accommodate:

- (a) pedestrian traffic heading up the Brecon Street stairs from the town centre up to the Skyline gondola;
- (b) pedestrians and cyclists travelling in both directions along Man Street using the shared active travel pathway which runs alongside the arterial road;
- (c) tour buses and coaches taking tourists from the arterial road to the Skyline gondola, making a right-turn up Brecon Street, and those coaches returning down Brecon Street being able to safely turn into the arterial; and
- (d) general through traffic, vehicles using the arterial to get from one side of the town centre to the other, or accessing Brecon Street to use the 420 park parking facility next to the gondola.

[109] Mr Hansby's evidence referred to Beca's engagement to undertake the design of the Man Street/Brecon Street intersection, noting that the preferred design required land to be acquired from the objector believed at that time to be

35.5 m², but was later discovered to be smaller.

[110] However, knowing that this was going to be an important intersection for the arterial road, Beca had been requested to bring forward design work with the intersection requirements which resulted in additional land requirement-initially believed to be 54 m² but after the surveying issue was resolved, confirmed to be 39 m².

[111] Relevantly, Mr Hansby's evidence explains that stage 2 is not able to be pursued until funding and a program for construction of new facilities to replace the Queenstown Memorial Centre and associated buildings have been worked through. The Queenstown Memorial Centre would need to be demolished before stage 2 works associated with the arterial could proceed.

[112] Funding for stage 2 is provided for in the Council's 2021-31 10-year plan and at this point is programmed to commence in 2027. The Council has budgeted funds for stage 2 in 2027-2031 of approximately \$34.7 million in total. However, funding for stages 2 and 3 is yet to be secured.

[113] His evidence refers to the consultation first commenced with the objector in 2019. However, discussions were discontinued when the Council decided that it needed to resolve how the arterial road would affect the intersection. Consultation re-commenced after the Council had worked through that issue and come to the view that additional land was required for the arterial road. At that point the Council engaged Mr Cruickshank to commence engagement with MacFarlane.

Tony Pickard

[114] Mr Pickard is the Council's transport strategy manager. In his evidence, Mr Pickard summarised the recent construction of what he described as interim works associated with the Town Centre Streetscape's upgrade. Works including at the intersection of Man Street and Brecon Street are expected to reach practical

completion in December 2023.

[115] Of relevance to our consideration, Mr Pickard explains that in the course of undertaking those works, changes had to be made to the design of the intended works at the corner immediately adjacent to 15 Man Street and to the footpath on Brecon Street immediately adjacent to that land.

[116] Mr Pickard explained that the original Beca design did not consider excavations in the Wilson car park adjacent to the boundary with Brecon Street which had occurred after the original survey, based on which the design was completed. Given the topography of the land at that time, the original design specified low-level timber retaining walls.

[117] The extent of excavation required to be undertaken in the car park together with the various retaining wall options were not considered feasible and were not pursued. Without a retaining wall, the only safe option was to provide a footpath design that had an angle of influence equivalent to a maximum of 2:1 (horizontal:vertical) slope from the edge of the footpath to the base of the existing carpark which would have resulted in a footpath width of less than 1.5 m.

[118] This resulted in the design change; Mr Pickard stated that the road (kerbline) on Brecon Street was moved to the west by 1 m. This made it possible to remove the requirement for additional services relocations, and provide a minimum footpath width adjacent to 15 Man Street of 2.4 m at the relevant section, extending to a wider footpath at either end. He further stated that the design change also allowed for a minimum footpath width of 4 m on the west side of Brecon Street.

[119] Mr Pickard described the as-built design as “a sub optimal solution” to be reconsidered “if or when the Council acquires the land from 15 Man Street, or when that property is developed”. The intention is that the footpath would then be extended to be consistent with the wider width of the rest of the street. He stated that the design work for stage 2 of the Arterial project has not been

advanced beyond the position produced to the panel when the designation was confirmed.

[120] Mr Pickard was not involved in the decision to change the design. Mr Hansby's role had been filled by Mr Tony Avery who had been directly involved. However, Mr Pickard had reviewed the background correspondence and construction diagrams to provide the summary contained in his written statement. Main changes intended to be made to Brecon Street as part of the project include:

- (a) a continuous 4-5 m wide footpath along the northern side of the street;
- (b) a 4 m wide footpath on the southern side to interface with new hotel developments and Lakeview;
- (c) new street lighting and furniture to encourage social gathering; and
- (d) signalling the intersection at Brecon and Man Streets.

[121] We note that Mr Pickard was not able to dispute the correctness of the Aurum survey. He was also questioned about the changes that might be made to the as-built works:¹²

- Q. The work that's currently going on at the Brecon/Man Street intersection, that's been going on for what, about a year, do you know?
- A. I'm afraid I don't know.
- Q. Do you know what the cost of that work is at the Man Street/Brecon Street intersection and the footpaths and so on?
- A. Again I don't know. This is all within the auspices of the delivery alliance.
- Q. When the Arterial Stage 2 is underway what works are you aware of that will need to be done to that intersection, compared to what's about to be finished there now?
- A. I think that depends on progressing through a layer, several layers of detail design and that will inform us of specifically what is required at that intersection.

¹² NOE p 141.

- Q. And is that the extent of your understanding of the changes that might be required is you actually don't know what scale they might be?
- A. Not at this stage. The, as we've seen with other projects such as the, Stage 1 of the Arterial, as you progress into various different layers of detailed designed, the 30%, 50%, 90% complete that's when you identify in detail exactly what needs to be completed or constructed.

Stephen Hewett

[122] Mr Hewett is employed by Beca Ltd as a Senior Technical Director. Mr Hewett explained that he was involved in the development of the Queenstown Town Centre Masterplan and associated business cases and the Wakatipu Active Travel Network project. That project investigated and developed an active travel network across the basin including Queenstown and surrounding suburbs. The objective is to provide a sustainable, integrated transport system that results in an enhanced user experience and an increase in the use of active modes of transport, such as cycling and walking of 40% by 2028 and increasing to 60% by 2048.

[123] His evidence explains the technical need for the acquisition of 39 m² of the objector's land, essentially explaining the consideration reflected in the various Beca Reports referred to. He summarised the alternatives that were considered, firstly in the context of the Streetscape Upgrade project and later, when the Arterial project was included.

[124] Mr Hewett spoke to the inadequacies in the initial concept which contained a 5 m wide shared active travel path on the northern side of Man Street and a 3.25 m wide lane as part of the wider design assumption to support the proposed 40 km/h posted speed limit. That design did not allow for coaches turning out of Brecon Street (into Man Street) without encroaching into the right-turn lane. This was considered to be an unsafe layout with poor operational outcomes. That led to further options being investigated with varying land requirements.

[125] Options involving realignment of the southern curve of Man Street were

precluded because of potential high cost and significant disruption. He referred to additional options beyond the first three already considered, one of which would require no additional land from the objector. However, that option involved a reduction in the width of the shared pathway to 4.2 m at the corner of the intersection. The design of the road also meant that tour coaches would need to oversteer to perform the left manoeuvre from Brecon Street to Man Street. Mr Hewett was not able to support any design that would require coaches to oversteer to perform left-turn movements.

[126] Mr Hewett addressed key issues underpinning the objection, being the need for a 5 m wide shared pathway and a design for the carriageway with no setbacks within the right-hand turning lanes to avoid any oversteer by a turning tour coach from Brecon Street into Man Street.

[127] He responded to the evidence of Mr Carr as to the options discussed in his evidence, including the option of shifting the entire shared cycleway/pedestrian path away from the new arterial route into the lower traffic environment on Shotover Street below Man Street which provides better access to the central business district.

[128] He also responded to Mr Carr's query as to the justification for the 5 m width shared pathway on the northern side of Man Street. Mr Carr stated that a 5 m width is greater than the typical maximum width set out in the Austroads Guide to Road Design Part 6A ("Paths for Walking and Cycling") of 4 m.

[129] Mr Hewett referred to other clauses in Austroads, noting that Mr Carr's discussion of these recommended buffers from both the kerb and from the property boundary in an urban arterial road setting. These buffers are intended to ensure adequate sight distance is achieved for vehicles and pedestrians leaving driveways and gateways. A 4 m wide shared path including those buffers would require a total width of 6.5 m.

[130] Mr Hewett also referred to the Auckland Transport TDM Engineering

Design Code-Cycling Infrastructure which specified a preferred width of a shared path of 4 m plus a kerbside buffer of 0.6 m. Including a further buffer to accommodate street lighting, these recommendations accounted for the preferred width of 5 m for the shared path.

[131] Mr Hewett explained that when he wrote his evidence (which was filed with the court in December 2022) he was not aware that changes had been made to the design. The construction plans reflecting the as-built works were dated July 2022. Mr Hewett was aware that construction was occurring when preparing his evidence, although he assumed that the road was being built according to the original design concept.

[132] He acknowledged that the as-built design had not been considered as an option in the analysis contained in the Beca 19 November 2020 report. Nor were any designs involving a 4 m wide pathway considered. All options identified by Beca had been based upon meeting the Council's preferred design standard of 5 m width for a shared pathway.

[133] Mr Hewett was asked whether the as-built design had been the subject of a safety audit. Mr Hewett understood that it had been. He explained that the safety audit is part of the design process and is for the purpose of identifying any issues from a safety perspective. However, he explained that it is for the client to decide in light of the comments resulting from that audit, whether changes will be made to the design or whether the client accepts a level of risk with the design identified in that audit.

[134] We understood this to be his explanation of the theory of a safety audit. Mr Hewett had no knowledge of the safety audit undertaken of the design change reflected in the July 2022 construction plans. Mr Hewett had been asked if he knew whether any risks were identified in that audit in the following exchange:¹³

¹³ NOE p 183.

- Q. So that design that is being built has gone through a safety audit?
- A. Yes and the risk has been identified as an issue from my understanding.
- Q. And the risk has been identified and apparently it's an acceptable risk?
- A. So the client QRVC is accepting the risk at this moment in time and as I outlined before in my statement, well my replies –
- Q. When you say this moment in time are you telling us that tomorrow it will change its' mind?
- A. Could do, depends on how it operates, they may, and as I said in my statement in answering the questions, they – the QRVC may have to take actions to mitigate the risks associated with it. At the moment it's not operating.

[135] We understood the relevance of this exchange as going to the question of whether the as-built works would need to be redesigned as part of works associated with stage 2 of the Arterial Road project in the future. However, whether any alterations are made to the existing intersection is a decision for the Council to make.

Daniel Cruickshank

[136] We heard from Mr Daniel Cruickshank, director of APL. Mr Cruickshank was engaged by the Council to assist with the negotiations and acquisitions of land required for the arterial's project. Mr Thompson had spoken of his engagement with Mr Cruickshank.

[137] APL had been separately engaged to support elements of the Streetscape project, although the focus was on acquisition of properties required for the Arterial roads, including the objector's land. Although that was the focus of his engagement, Mr Cruickshank explained that the negotiation process triggered by a notice given under s18 provides the opportunity for design professionals or other key persons of the Council to be involved.

[138] Mr Cruickshank summarised the attempted negotiations with Mr Thompson. This occurred over "double if not triple" the time set aside under the

PWA to try and resolve matters by agreement. He confirmed that he would have considered other options (including an easement) had that been suggested to him, provided it would still achieve the end outcome sought by the Council. He considered that there would be a number of benefits in considering something like an easement if it could work in with what the Council is trying to achieve through the public work.¹⁴

Andrew Collins

[139] We received a statement of evidence from Mr Andrew Collins from Harrison Grierson Consultants Ltd. His evidence highlights the relevant district plan provisions that apply to the land as well as the key arterial designation conditions. Mr Collins was not called to give his evidence in court as his evidence was not ultimately relevant to the issues raised by the objector. Accordingly, the evidence of Mr Collins is not referred to any further in this report.

Council's legal submissions

On alternatives considered

[140] For the Council, Mr Whittington addressed the s24(7) PWA provisions required to be considered. Mr Whittington acknowledged that the panel Decision addressed alternatives for the arterial routes but not alternatives at the specific intersection design level. However, alternatives for the design of the Brecon Street and Man Street intersection had been considered and those are set out in the Beca Land Requirements Assessment dated 19 November 2020. Mr Whittington explained that option 5 came out as the preferred option because it:

- (a) maximised the right turn capacity and intersection efficiency and safety;
- (b) reduces construction complexity and retaining wall requirements;

¹⁴ NOE p 134.

- (c) reduces construction effects with a simple extension of the kerb and footpath between the construction of the streets upgrade project and arterial project; and
- (d) defers the need to upgrade the Brecon Street stairs by keeping the current southern Man Street kerb.

[141] Mr Whittington rejected the suggestion that the Beca Land Requirements Assessment was not considered by the Councillors at the December 2020 meeting where they resolved to proceed with the acquisition of the objector's land. The Beca document was attached as an appendix to the report presented to the Council.

[142] Mr Whittington also emphasised that the report to the Council was not and did not purport to be an assessment of alternatives for the purpose of s24(7) PWA. Mr Whittington stopped short of contending that there is no such requirement where acquisition under the PWA is being considered for the Council to revisit the question of alternatives considered by the panel. However, that proposition appeared implicit in his submissions.

As-built works an interim measure

[143] Mr Whittington emphasised that the constructed works in the vicinity of the objector's land do not implement the design for the arterial route. He stated that the Council's position is clear: "... [t]hat what is being put in place as an interim solution and not an arterial route."

[144] Mr Whittington further stated that the current intersection design forms part of the Streetscape works undertaken throughout the entire Town Centre although at some point in the future "the Council will come along and implement the arterial..." at which time, "the works that have been undertaken will be overtaken and superseded".

Objector's response to the Council's legal submissions

[145] Mr Casey expressed concern at hearing submissions as to the interim nature of the constructed works. He noted that the objector had always expressed his confusion to the Council as to whether his land was being sought for the Streetscape project or for the Arterial project, noting that based on Mr Hewett's evidence the land had been required for both.

[146] Mr Casey also commented on the general concept of what is the Council's objective. He referred to the high-level objective stated in the NOR observing that this was addressed at the Arterial Road project, in comparison to the take notice served on the objector which states the reasons for the intended taking of the land as being to

... provide for construction of the arterial road, increase road width for intersection improvements which will increase safety.

[147] The fact that the Council had proceeded with the Streetscape works without any of the objector's land was said to be a very significant issue for this proceeding, including the fact that it had not been made clear to Mr Hewett before preparation of his evidence for filing in court. Mr Casey emphasised that the amended design reflected in the as-built works had not been considered by Beca as an alternative when considering the intersection works.

[148] Having canvassed the relevant authorities, Mr Casey stated that despite Mr Hewett's preference that the works be carried out according to design standards, a "less than optimal design solution" not involving any of the 15 Man Street land ought to have been considered. He referred to the alternatives addressed in Mr Carr's evidence requiring less or none of the objector's land involving:

- (a) a width of less than 5 m for the path along the north side of Man Street;
- (b) moving the shared path to the lower traffic environment along

Shotover Street;

- (c) setting back the right-turn lane from Man Street into Brecon Street one or two car lengths; and
- (d) use of an additional width on the south side of Man Street for path and/or road carriageway.

[149] He noted uncertainty as to the final design for this part of stage 2, including as to what if any improvements would be made to the as-built design.

Our evaluation

The Council's objectives (s24(7)(a))

[150] We proceed on the basis that reference to the objectives of the Council in this context is a reference to the purpose for which the land is to be taken. This objective is required to be set out in the notice gazetted under s23(1)(b)(ii). Details of the project and land requirements were described in the take notice. In broad terms the requirement was related to the Queenstown Centre Arterial Road project, although the project description incorporated elements of the streetscape works in describing the land take being required for:

...road width and intersection improvements, including a signalised intersection for safe pedestrian crossing, widening pedestrian footpaths and new street furniture and planting. To construct and maintain the land for this purpose, the Council has determined that it will be necessary to acquire a small portion of your land road for use in connection with a road.

Consideration of alternatives

[151] We are to inquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving the Council's objective as it relates to the intersection and footpath design approximate to the objector's land. Our role under s24(7)(b) is to examine the methodology adopted by or on behalf of the Council in considering the alternatives. We must be satisfied that the proper

process has been followed by the Council.¹⁵

[152] We note that the onus lay with the Council to identify alternatives in this context. The Council was obliged to address this statutory test in the NOR process decided by the panel and in the hearing of this objection, we are entitled to consider (and have done so) consideration given to alternatives in that NOR process.

[153] The Council's obligation in this regard does not extend to an identification of all possible alternatives to achieving its objective. It is conceivable that in the iterative negotiation process with an affected landowner which is required under the PWA, other options not identified by the Council may be revealed as has occurred at the hearing of this objection.

[154] The extent of the duty was also considered in *Queenstown Airport Corporation Limited v Queenstown Lakes District Council (Queenstown Airport)*.¹⁶ A designation was sought (under the RMA) that would encompass a large area of private land comprising 19 ha, although that was reduced to 8 ha. However, because of that imposition, the HC held that

[p]rovided there is some evidence that the alternative is not merely suppositious or hypothetical, then the Court must have particular regard to whether it was adequately considered.

[155] We first note that the Council was not required to undertake the analysis of alternatives required in the s24(7)(b) context when it made the decision to proceed with the acquisition at the 10 December 2020 meeting (in the s23 context).

[156] We have relied on the decision in *Minister for Land Information v Dromgool*¹⁷ (*Dromgool*) in forming that view. *Dromgool* considered the role and obligations of the Minister for Land Information under s186(1) of the RMA. However, the CA

¹⁵ *Seaton v Minister for Land Information* 3 NZLR 157.

¹⁶ *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZHC 2347.

¹⁷ *Minister for Land Information v Dromgool* [2021] NZCA 44 [2021] NZRMA 382.

had to consider a similar question; whether before the exercise of a power under s186(1) RMA, the Minister had to be satisfied that the proposed taking is capable of meeting the statutory test in s24(7)(b).

[157] The CA observed that the s186(1) decision comes prior to an objection being made or considered by the Environment Court, observing that these are the tests that must be considered by the court. In holding that the Minister did not need to be satisfied of those requirements the CA said :

If the legislative intent was that both the Minister and the Environment Court were required to be satisfied of the same matters it would be surprising if the statutory regime specified the criteria to be applied at the subsequent stage, but not the former.

[158] The CA further observed that when the Minister is acting under s186(1) RMA, the PWA procedures will not have commenced meaning that it would not be possible to ascertain whether a particular proposal would be accepted by the affected landowners or whether objections will be made to the court.

[159] The CA made a further observation as to the possibility of modifications to a proposal, by the time the matter reaches the Environment Court, that being “inherent in the concepts of prior negotiation”, stating that:

... the statutory procedures must leave room for the ongoing consideration of alternatives after a notice of intention to take land has been given under s 23. It would be artificial and inconsistent with the obligation to negotiate in good faith if the serving of the notice of intention to take this is necessarily bringing negotiations to an end. Similarly, negotiations might result in the withdrawal of a notice of intention to take under s 23(8) on the basis that it was no longer considered necessary to take the land.

Our consideration

[160] Based on *Dromgool*, we are not prepared to hold that when considering the exercise of a power of acquisition in the s23 context, the Council was required to

be satisfied of the matters contained in s24(7)(b).

[161] However, turning to the panel's consideration of those matters in the NOR process, the consideration of alternative routes and methods was focussed on alternative arterial routes and not to the intersection design or to any aspect of the Streetscape Upgrade project in the vicinity of the objector's land. This was accepted by Mr Whittington for the Council.

[162] As to the Council's prior consideration of alternatives, these are explained the Beca Reports, particularly that 19 November 2020. Based on this consideration, we are unable to make a finding that this demonstrates that adequate consideration was given to alternatives for the design of the intersection and shared pathway in the vicinity of the objector's land.

[163] Mr Casey submitted that there is nothing suppositious or hypothetical about an option that reduces the shared pathway to 4 m in front of the Man Street property and for that matter options that consider other turning lane setbacks. These were not considered by the Council. We agree with these submissions.

[164] We acknowledge that a decision as to whether, based on safety and/or for operational reasons the constructed works will need to be redesigned and rebuilt once this road forms part of an arterial route is ultimately a decision to be made by the Council. It would be wrong to express any view as to the outcome of that reconsideration.

[165] However, we had scant evidence as to whether any such redesign and rebuild is likely to occur, beyond Mr Whittington's assertions (from the bar).

[166] We note that the design change reflected in these works was made after the Council's decision under s23 of the PWA. The constructed works did not require any of the objector's land. The as-built design was not reflected in any of the options identified in the Beca Report attached to the report to the Council for the meeting at which the s23 decision was made.

Would the taking of land be fair, sound and reasonably necessary for achieving the Council's objective?

[167] We now consider whether the taking is fair, sound and reasonably necessary for achieving the Council's objectives, acknowledging that the compulsory acquisition of land involves significant interference with an individual's property rights. As Mr Casey notes, the requirements under s24(7)(d) operate as a check on the exercise of the Council's powers under the PWA.

[168] Referring to relevant authorities on these issues and in particular, the explanation of these requirements in *Waitakere City Council v Brunel*, Mr Casey stated that:

- (a) the requirement to be 'fair' must be judged by an unformed observer to be fit and right in the circumstances;¹⁸
- (b) 'sound' connotes solid and substantial;¹⁹ and
- (c) 'reasonably necessary' has been interpreted as falls between expedient or desirable on the one hand and essential on the other, and that the epithet 'reasonably' qualifies it to allow some tolerance.²⁰

[169] All criteria must be satisfied although there is a degree of overlap between the three.

[170] In *Queenstown Airport*²¹ the threshold of "reasonably necessary" was explained by the HC in the following way:

- [93] The language of "requirement" and "reasonably necessary" in ss 168(2) and 171(1)(c) (and in s 24(7) of the PWA) are standards used in everyday language. They should require no undue elaboration. **But in the present context,**

¹⁸ *Re an Objection by Pompallier Lodge Development Co Limited* (1975) 5 NZTPA 214.

¹⁹ *Brunel v Waitakere City Council* Env Ct A82/2006 at [49].

²⁰ *Bungalow Holdings Limited v North Shore City Council* (Env Ct A52/2001 at [69].

²¹ [2013] NZHC 2347.

involving the coercive powers of public authorities for public purposes, the words “requirement” and “reasonably necessary” are statutory indicia that any proposed works must be clearly justified by reference to the objective of the NOR. This aligns with the threshold identified by the Court of Appeal in *Seaton* when dealing with the concept of “required” and given the prospect of compulsory acquisition. Whether the scope of the NOR is clearly justified, in context, is of course a question for the Environment Court.

...

[96] I acknowledge that in *Seaton* the Court of Appeal used the concepts reasonably necessary and essential interchangeably. **I also accept that a NOR that will derogate from private property rights calls for closer scrutiny.** Further, I think that the Environment Court was mistaken when distancing the PWA from the designation powers under the RMA. Both statutes deal with the coercive powers of public authorities to derogate from private property rights. They should be interpreted in a consistent way.

[171] Those statements were made in the context of s171(1)(c) RMA, although this provision mirrors the requirement in s24(7)(d), which as Mr Casey notes, is a requirement applied consistently in both the PWA and the RMA.

[172] The relevant time for our consideration of s24(7)(d) matters is when the objection is heard; we cannot ignore relevant events, or issues that have arisen since the take notice was served on the objector on 15 February 2022.²²

Our findings

[173] We start by noting that there is no obligation for an affected person to engage with the Council following receipt of a s18 notice, or a notice issued under s23 for that matter. It is for the Council to attempt to reach an agreement that the land can be acquired without resort to the PWA powers of compulsory acquisition.

²² See *Shaw v Hamilton City Council* [2021] NZEnvC 175, *Grace v Minister for Land Information* [2014] NZEnvC 82 at [5] and *Remarkables Park Limited v Queenstown Airport Corporation Limited* [2019] NZEnvC 34 at [35].

The Council's attempts to reach that agreement must be exercised in good faith.

[174] While we are unable to make any declaration as to whether the Council complied with its good faith requirements under s18, we are entitled to account for any unfairness in the Council's treatment of the objector following service of a notice under s18 in this s24(7)(d) consideration.

[175] There is no evidential basis upon which to make a finding that there was any unfairness in the efforts made by the Council in its dealings with Mr Thompson through its agents, APL.

[176] We have considered the evidence as to the Council's attempts to communicate with Mr Thompson since the first notice of desire was served on the objector, as explained by Mr Cruickshank. We have also considered the evidence from Mr Thompson about that. We are satisfied that at all times the Council conducted its consultation and negotiations with Mr Thompson, on behalf of the objector, in good faith.

[177] We consider that Mr Thompson's unwillingness to meet with Council representatives virtually while he was residing in Sydney during the Covid-19 pandemic was unreasonable in the circumstances and is regrettable as some productive dialogue could have occurred by video-conference, email, or by way of conversations over the phone.

[178] We agree with Mr Whittington that during the Covid-19 pandemic, business throughout the country was conducted virtually by much of the population by necessity. This included the courts' business.

[179] We are satisfied that the Council was constrained in its ability to progress discussions in part due to Mr Thompson's attitude towards the mode of those discussions, although we note that at all times there was an underlying opposition by the objector to any taking of land. We were left with the impression that this may have influenced his approach towards discussions with the Council.

[180] Fairness has a substantive component; the Council must show clear justification for resort to a taking of the objector's land. We are able to account for that in our evaluative judgment in the context of s24(7)(d), accounting for the circumstances prevailing after the Council made its decision under s23.

[181] We find that the objective stated in the take notice has now effectively been taken off the table by the Council as a consequence of the design change. We are unsure whether that design, as reflected in the as-built works, will be reconsidered in the future and if so, in what way.

[182] That leaves the objective for the Arterial Road project insofar as that might justify the taking. We have earlier found that the Council has not given adequate consideration to alternative designs for that intersection operating as an arterial and on the Council's own evidence, the design process for the road to operate as an arterial has not yet been carried out.

[183] Nor is there a time frame within which that is to occur. We acknowledge that it is permissible for a Council to be forward-thinking when it decides to take land for a project, even where relevant planning permissions has not yet been obtained. That does not overcome counter-veiling factors justifying our finding that the requirements in s24(7)(d) are not met.

[184] If the objection is upheld, the Council will need to consider alternatives for any re-design of the as-built works. That may or may not result in a further process being commenced under the PWA. Taking all matters into account, on the state of the evidence in these proceedings we are not able to be satisfied that the taking would be fair, sound or reasonably necessary in achieving the Council's objectives.

[185] Although we have not found any unfairness with the Council's s18 negotiations, we consider that there would be substantive unfairness to the objector if we were to uphold the taking at this time.

[186] We uphold the objection.

Costs

[187] Costs are reserved. Any application for costs is to be made within three weeks of the date of this report, and any response is to be filed and served within a further two weeks.



I Buchanan
Environment Commissioner



P A Steven
Environment Judge

