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Eastern Busway

11 August 2022

Auckland Council
135 Albert Street
Auckland

Attention: Warwick Pascoe

Dear Warwick

Re. Summary of Specialist Pre-Lodgement Feedback for EB2 and EB3C

Thanks for providing, on a without prejudice basis, AC feedback on the draft technical assessments prepared for EB2 and EB3R.

This has been very insightful as we work towards finalising the technical assessments in advance of lodging the applications with Council.

Please find **attached** for your reference, a spreadsheet that outlines the EBA specialist responses to the feedback received from Auckland Council's specialists to date.

EB3R NOTIFICATION QUERY

Following our meeting on 20 July 2022, our view remains that mitigation measures proposed by EBA to address the effects of the proposal (and as addressed in the proposed conditions) are inherent in the application and should be considered at the notification stage. This approach is consistent with case law as detailed further below.

We consider, the Court of Appeal decision *Auckland Regional Council v Rodney District Council* offers greater assistance than the High Court decision of *Kawau Island Action Incorporated Society v Auckland Council*.

In that decision the question before the Court was "in making its decisions on notification can a consent authority take into account prospective conditions of consent as mitigating the effects of the activity?". The Court of Appeal held that the answer was "yes, in respect of conditions that are inherent in the application, and no, in respect of those that are not". The Court of Appeal then referred to the decision in *Montessori Pre-School Charitable Trust v Waikato District Council*, in which it was held:

It would defy common sense if when making the s 93 decision the consent authority could not have regard to the practical reality of what adverse effects on the environment would be. To determine that self-evidently requires consideration of conditions that would affect such reality.

Similarly, in the High Court decision of *Trilane Industries Ltd v QLDC* (which was subsequent to *Kawau Island* and considered it), the High Court held that: "Similarly, when relying on mitigation, it is correct to say that **conditions which directly mitigate adverse effects of an activity can be taken into account** when assessing adverse effects, for notification purposes".

Relying on the *ARC, Montessori* and *Trilane* decisions, we remain comfortable with our position and consider it is the correct legal approach to base our notification analysis on an assessment of effects that takes into account the proposed mitigation required by the conditions.

We are happy to discuss any of the above further.

Ngā mihi

Sonja Lister

EBA Consent Planning Lead