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23 April 2012

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Dear Brigid

UNITARY PLAN - PROPOSED TRANSPORT ZONE

We refer to your instructions of 10 April 2012 seeking our advice on the NZ Transport Agency's ("**NZTA**") proposal that a transport zoning be included in the Unitary Plan.

Your Questions

1. You have asked us to respond to three questions arising from the NZTA's proposed transport zoning, posed by Katherine Dorofaeff in an email to you dated 5 April 2012. They relate to the relationship between the NZTA's proposed transport zoning and its designations (some of which – as Ms Dorofaeff notes – provide for specific projects and contain many detailed conditions, and some of which are very general with few, if any, conditions).

2. We quote Ms Dorofaeff's questions below and provide a brief response to each (more detail is provided in the attached **Analysis**).

Our Opinion

Question 1

> What are the implications if a transport zoning is permissive, and a designation is more limited with specific conditions? Can the zoning be used to avoid meeting all designation conditions?

3. If a requiring authority implements a designation, the conditions then 'bite' or take effect. If an act or omission by a requiring authority clearly relates to (i.e. is within the scope of) a designated work or project, and that act or omission is contrary to a condition, then the requiring authority will be in breach even if the underlying zoning is more permissive. If the requiring authority wishes to undertake works that are within the scope of the designation, but in conflict with a condition, it can lodge an application for a resource consent for the works (which will not alter or remove the condition, but will authorise the works on a one-off basis), or it can lodge a notice of requirement to alter the designation to alter or remove the condition under section 181 of the Resource Management Act 1991 ("**RMA**").

4. If, on the other hand, works are proposed by a requiring authority which are outside the scope of its designation, then the District Plan provisions for the underlying zone will apply. A requiring authority can undertake an activity not associated with the designation, provided that it is permitted by the rules of the District Plan, or a resource consent is obtained.

5. We acknowledge the potential for uncertainty to arise as to whether works fall within the scope of an existing designation and are bound by any conditions, or constitute an entirely new project, which may be able to benefit from the more permissive transport zone provisions. Grey areas are particularly likely to exist where a new project is proposed to be undertaken within the area covered by an existing designation.

6. Please note our comments in the attached **Analysis** on the important distinction between section 138 of the RMA, applying to the surrender of resource consents, and section 182 of the RMA, applying to the removal of designations. In theory, at least, a requiring authority could – in the event of a more permissive zoning being introduced – elect to remove its entire designation under section 182 so as to take advantage of the more permissive provisions. We cannot rule out the possibility of a requiring authority seeking to advance an argument – even where the works appear to otherwise fall within the scope of the designation – that it need not comply with the designation conditions because the activity is authorised by the underlying zoning. The requiring authority may point to its ability to remove the designation from the District Plan as supporting its right to rely on more permissive underlying zoning provisions. All of this highlights for us the need for particular care in drafting provisions for the proposed transport zone.

Question 2

> What are the implications if the transport zoning is permissive, and the designation is general (eg motorway purposes) with no conditions? Can the zoning be used to avoid providing council with an outline plan?

7. Where construction falling within the scope of the description "motorway purposes" is proposed, it is arguable that an outline plan of works should be submitted providing detail of the proposal.

8. However, section 176A(2) of the RMA identifies a number of situations where an outline plan of works need not be submitted to the Council, one of which is where the "proposed public work, project, or work has been otherwise approved under this Act": section 176A(2)(a). A requiring authority may potentially seek to rely on section 176A(2)(a) in the scenario described in the question above, to avoid the obligation to submit an outline plan, and take advantage of the permissive zoning. It is also worth reiterating the point that, in reality, a requiring authority could – in such circumstances – simply remove the designation, in order to take advantage of the permissive District Plan zoning, and thereby avoid the need to submit an outline plan of works.

9. Again, these sorts of possibilities underline the need for any provisions applying to a new transport zone to be very carefully devised.

Question 3

> How can we ensure that the relationship between the transport zoning and designation is made clear in the unitary plan so that it is understood by both NZTA, and council planners?

10. We suggest that the Council may wish to explore with the NZTA a slightly less permissive zoning regime, which allows the Council to retain an adequate degree of control, in the event that the NZTA decides to rely on the transport zoning rather than the designation process (including the outline plan process) to pursue its projects.

11. Therefore by way of example, rather than permitted activity status, the Council may wish to apply (at least) controlled activity status to development proposals within the transport zone, together with clear thresholds above and beyond which restricted or full discretionary activity status will apply. This will enable the Council to retain a degree of control over development and may, for instance, provide an answer to the concern that the NZTA may seek to avoid the obligation to submit an outline plan of works. The Council could for instance reserve control over the section 176A matters, among others.

12. On the assumption that the Unitary Plan will employ explanatory text to describe its zoning and planning controls generally, some text will obviously be required to explain the proposed transport zone. This explanatory text would, we envisage, touch upon the relationship between the zoning and existing (and future) designations within the transport corridor, and provide the sort of general guidance this third question appears to be directed at.

Please note that this opinion is based on the facts and background set out in the attached **Analysis**, which also provides a fuller explanation of our views. We would be happy to discuss these matters further at your convenience, or to answer any queries you may have.

Yours sincerely

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Partner/Senior Associate

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ANALYSIS

UNITARY PLAN - PROPOSED TRANSPORT ZONE

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Background/Your Questions

1. The NZ Transport Agency ("NZTA") wrote to the Council's Unitary Plan Team on 27 March 2012 suggesting *inter alia* that a new transport zone be provided in the Unitary Plan applying to areas used or proposed to be used by the NZTA for transport purposes, including "ancillary activities compatible with the use".

2. You have asked us to respond to three questions arising from the NZTA's proposal, posed by Katherine Dorofaeff in an email to you dated 5 April 2012:

    - What are the implications if a transport zoning is permissive, and a designation is more limited with specific conditions? Can the zoning be used to avoid meeting all designation conditions?
    - What are the implications if the transport zoning is permissive, and the designation is general (eg motorway purposes) with no conditions? Can the zoning be used to avoid providing council with an outline plan?
    - How can we ensure that the relationship between the transport zoning and designation is made clear in the unitary plan so that it is understood by both NZTA, and council planners?

3. We answer each question below in turn.

4. We have seen and had regard to the following in providing this advice:

   (a) Ms Dorofaeff's email dated 5 April;

   (b) The NZTA's letter dated 27 March, the draft provisions attached to that letter, and Lorraine Houston's covering email; and

   (c) An email from Ms Dorofaeff to Janine Bell at Boffa Miskell dated 5 April 2012, attaching a Simpson Grierson opinion to Auckland City Council dated 13 August 2002.

5. General comment on the NZTA's proposal (and accompanying draft provisions) is beyond the scope of this letter, however we do note that the idea of a transport zoning applying to a corridor which is, or is largely already subject to transport designations, is not a new one. Ms Dorofaeff's email refers to the Isthmus Plan's Special Purpose 3 zone. Similar provisions can be found in the Christchurch City District Plan, relating to its Special Purpose (Road) Zone. The Manukau Operative Plan also applies a road zoning to all roads (including a Primary Road Zone for national, regional and district arterial routes, including state highways), together with a "Manukau Rapid Transit Link Overlying Zone", the area of which is largely designated for motorway purposes, to facilitate the implementation of a rapid transit link from the Main Trunk Railway Line in the vicinity of Wiri Station to Manukau City Centre[1]. While not a road transport zoning, we note that the Auckland International Airport benefits both from designations and an underlying Airport Zone.

6. As a general observation, the NZTA's proposed approach is extremely permissive in relation to "transport activity", which is broadly defined at present as including rail. There do not appear to be any development controls or standards proposed to be applied to "transport activity". In addition, the relationship between some of the NZTA's provisions and the use of definitions is likely to require further thought. There is a lack of clarity in some of the existing provisions (e.g. whether "Transport Buildings" includes "Rail Depots/Bus Depots"[2]).

Question 1

7. The first question comprises two separate questions:

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1 Refer Chapter 8 relating to Transport generally, and 8.14.2 relating to the Manukau Rapid Transit Link Overlying Zone.

2 "Transport Buildings" is broadly defined and treated as permitted subject to compliance with the "Rule A" development controls. The Rule A development controls also apply to "Rail Depots/Bus Deports", however "Rail Depots/Bus Deports" are separately provided for as a discretionary activity.

> What are the implications if a transport zoning is permissive, and a designation is more limited with specific conditions? Can the zoning be used to avoid meeting all designation conditions?

8. The general issue raised by the questions quoted above has arisen in a resource consent context previously. In **Ngati Rahiri Hapu O Te Atiawa (Taranaki) Society Inc v New Plymouth District Council**[3], an issue arose as to the construction of a condition in a resource consent requiring an Iwi representative to monitor all earthworks and excavation at all times as was reasonably practicable during construction. The developer sought to qualify the effect of the condition, by limiting the monitoring entitled to earthworks or excavations beyond a certain extent, or to virgin soil. It was noted in argument that the district plan did not require resource consent for minor excavations.

9. Judge Sheppard declined to read any further qualifications into the condition, stating at paragraph 17:

> The district plan provisions by which similar activity might otherwise be permitted do not entitle the consent-holder unilaterally to avoid the full compliance with the agreed conditions. Any justification the consent holder may have for amendment of the condition should be tested by appropriate proceedings on notice to all affected.

10. The consent had been implemented, meaning that any conditions took effect, despite the fact that district plan provisions might have authorised similar activity.

11. In our opinion, the position is similar for projects/works authorised by designation.

12. The scope of the designation obviously defines what activities the requiring authority may undertake on the designated land (refer section 176(1)(a)).

13. If a requiring authority implements a designation, the conditions then 'bite' or take effect. If an act or omission by a requiring authority clearly relates to (i.e. is within the scope of) a designated work or project, and that act or omission is contrary to a condition, then the requiring authority will be in breach even if the underlying zoning is more permissive. If the requiring authority wishes to undertake works that are within the scope of the designation, but in conflict with a condition, it can lodge an application for a resource consent for the works (which will not alter or remove the condition, but will authorise the works on a one-off basis), or it can lodge a notice of requirement to alter the designation to alter or remove the condition under section 181 of the RMA.

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3 Decision W13/06.

14. The following comments by Judge Newhook in **Manu Waiata Restoration and Protection Society v Auckland Regional Council** are pertinent (our emphasis in bold)[4]:

> Manu Waiata made the rather wild assertion in their memorandum that that decision of this Court was "flawed". They asserted this because they were unhappy with one aspect of the decision concerning "fish passage". No challenge to that decision was ever made by way of appeal; the fish passage aspect became the subject of an application to this Court for review under s 294, which application was declined. I hold that there is absolutely no basis for the allegation that Decision A100/2002 was "flawed". Likewise, the reference by Manu Waiata to s 104(1)(h) is misconceived. **There is no basis in law for holding a requiring authority to the terms of a designation if it wishes to apply for resource consent for something else.** Here, TNZ has applied for a set of resource consents concerning water and soil matters from the ARC. **They are to be tested in their own right, and are not to be limited by conditions imposed on some earlier permission.** When considered in their own right, the present applications may attract terms that are more stringent, equally stringent, or less stringent as the case may require, or may be declined if that is the decision of the Court.

15. If, on the other hand, works are proposed by a requiring authority which are outside the scope of its designation, then the district plan provisions for the underlying zone will apply. A requiring authority can undertake an activity not associated with the designation, provided it is permitted by the rules of the District Plan, or the requiring authority obtains a resource consent.

16. We acknowledge the potential for uncertainty to arise as to whether works fall within the scope of an existing designation and are bound by any conditions, or constitute an entirely new project, which may be able to benefit from the more permissive transport zone provisions. Grey areas are particularly likely to exist where a new project is proposed to be undertaken within the area covered by an existing designation.

17. While our comments above liken the position to that applying to resource consents, it is worth noting one point of distinction between section 138 of the RMA, applying to the surrender of resource consents, and section 182 of the RMA, applying to the removal of designations.

18. A consent holder who surrenders a consent remains liable under the RMA for any breach of conditions which occurred before the surrender of the consent, and to complete any work to give effect to the consent: section 138(3) and **Auckland City Council v Easton**[5]. Designations, however, must simply be removed from the District Plan by the Council without formality upon receipt of the prescribed notice, the only

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4 Decision A9/2003.
5 Decision A75/09.

exception being where part removal of a designation is proposed, and the Council considers the effect of the removal of that part on the remaining designation is more than minor: section 182(5). In theory, at least, a requiring authority could – in the event of a more permissive zoning being introduced – elect to remove its entire designation so as to take advantage of the more permissive provisions. We cannot rule out the possibility of a requiring authority seeking to advance an argument – even where the works appear to otherwise fall within the scope of the designation – that it need not comply with the designation conditions because the activity is authorised by the underlying zoning. The requiring authority may point to its ability to remove the designation from the District Plan as supporting its right to rely on more permissive underlying zoning provisions. All of this highlights for us the need for particular care in drafting provisions for the proposed transport zone.

Question 2

19. The second question again comprises two separate questions:

> What are the implications if the transport zoning is permissive, and the designation is general (eg motorway purposes) with no conditions? Can the zoning be used to avoid providing council with an outline plan?

20. In such a scenario, where construction falling within the scope of the description "motorway purposes" is proposed, it is arguable that an outline plan of works should be submitted providing detail of the proposal.

21. However, section 176A(2) of the RMA identifies a number of situations where an outline plan of works need not be submitted to the Council, one of which is where the "proposed public work, project, or work has been otherwise approved under this Act": section 176A(2)(a). A requiring authority may potentially seek to rely on section 176A(2)(a) in the scenario described in the question above, to avoid the obligation to submit an outline plan, and take advantage of the permissive zoning. It is also worth reiterating the point that, in reality, a requiring authority could – in such circumstances – simply remove the designation, in order to take advantage of the permissive District Plan zoning, and thereby avoid the need to submit an outline plan of works.

22. Those possibilities – together with the confirmation from the NZTA that it is working on a "full review with regard to the designation boundaries and conditions and also reviewing our requirement for existing (and potentially new) designations"[6] – underline the need for any provisions applying to a new transport zone to be very carefully devised. While the NZTA states that it proposes to "largely" retain its existing designations, the Council should assume, as a possible scenario, that the NZTA may decide to remove any one of its designations at some stage in the future, and may decide instead to rely on the

6 Letter dated 27 March 2012.

underlying zoning. The Council therefore needs to be satisfied that the provisions applying to the proposed transport zone provide sufficient control (whether through appropriate development controls/standards, appropriate activity status for activities, or otherwise).

Question 3

23. Your third question is as follows:

> How can we ensure that the relationship between the transport zoning and designation is made clear in the unitary plan so that it is understood by both NZTA, and council planners?

24. For reasons already canvassed above, we suggest that the Council may wish to explore with the NZTA a slightly less permissive zoning regime, which allows the Council to retain an adequate degree of control, in the event that the NZTA decides to rely on the transport zoning rather than the designation process (including the outline plan process) to pursue its projects.

25. Therefore by way of example, rather than permitted activity status, the Council may wish to apply (at least) controlled activity status to development proposals within the transport zone, together with clear thresholds above and beyond which restricted or full discretionary activity status will apply. This will enable the Council to retain a degree of control over development and may, for instance, provide an answer to the concern that the NZTA may seek to avoid the obligation to submit an outline plan of works. The Council could for instance reserve control over the section 176A matters, among others.

26. On the assumption that the Unitary Plan will employ explanatory text to describe its zoning and planning controls generally, some text will obviously be required to explain the proposed transport zone. This explanatory text would, we envisage, touch upon the relationship between the zoning and existing (and future) designations within the transport corridor, and provide the sort of general guidance this third question appears to be directed at.

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