DOUBLE SIDED ORIGINAL

Decision No. A052/01

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under section 174 of the Act
BETWEEN	**BUNGALO HOLDINGS LIMITED**
	(RMA761/99)
	Appellant
AND	**THE NORTH SHORE CITY COUNCIL**
	Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge D F G Sheppard (presiding)
Environment Commissioner P A Catchpole
Environment Commissioner F Easdale

HEARING at **AUCKLAND** on 13, 14, and 15 November 2000 and on 1 March 2001.

COUNSEL

L J Newhook for the appellant
D A Kirkpatrick and A J Bull for the respondent
J Burns for the Auckland Regional Council
G C Warren for Transit New Zealand

DECISION

Introduction

[1] Bungalo Holdings Limited (the appellant) has appealed under section 174 of the Resource Management Act 1991 against a decision by the North Shore City Council. The appeal relates to the City Council's requirement that certain land at Constellation Drive be designated for a station and park-and-ride facility for a proposed busway. It was the appellant's case that only part of the subject land is required for the purpose, and that the requirement should be modified so that the rest of the land is not designated.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

[2] The Auckland Regional Council and Transit New Zealand, being public authorities having interests in the proposed busway, were heard in support of the City Council's case. Although the Bus and Coach Association of New Zealand Incorporated had given notice that it wished to be a party to the appeal, it was not separately represented at the appeal hearing. However a representative of the association was called to give evidence for the City Council.

[3] At the start of the appeal hearing, counsel for the appellant announced that the appellant's case was based on two of the considerations in section 171 of the Act, namely, that designation of the whole of the subject land is not reasonably necessary for achieving the objectives for the work, and that adequate consideration had not been given to alternative methods of achieving the work.

The meaning of section 171(1)(a)

[4] By section 174(4) of the Resource Management Act the Court is required to have regard to the matters set out in section 171 of the Act. In the course of the hearing of the appeal, a question arose about the meaning of section 171(1)(a) of the Act, a criterion whether the designation is reasonably necessary for achieving the objectives of the public work or project or work for which the designation is sought.

[5] The question related to the words: "Whether the designation is reasonably necessary ..." In short, the question was whether regard is to be had to whether the designation itself, as a planning technique, is reasonably necessary for achieving the objectives, or to whether the intended work or project the subject of the designation is reasonably necessary for achieving them, so enabling consideration of the extent of land to which the designation would apply.

The arguments

[6] It was the case for the City Council that the issue is not whether the project itself is reasonably necessary, but whether the designation is reasonably necessary to achieve the objects of the project, or whether some other planning mechanism could be used in order to achieve the same objective. Its counsel, Mr Kirkpatrick, referred to the Court's decision in *Quay Property Management v Transit New Zealand*[1] in which the effect of designations was discussed. Counsel acknowledged that an alternative to designation would have been for the Council to purchase the land required for the project and seek all the resource consents required.

[1] Environment Court Decision W28/2000.

[7] Counsel for Transit New Zealand, Ms Warren, submitted that section 171(1)(a) does not call for inquiry into the necessity for achieving the objectives of the proposal (that is, whether the proposal is needed), but rather an inquiry into the necessity of a designation for achieving the objectives. Ms Warren cited the Planning Tribunal decision in *Babington v Invercargill City Council.*[2]

[8] Counsel for the appellant, Mr Newhook, added *Estate of P A Moran v Transit New Zealand*[3] to those in which that understanding had been given to section 171(1)(a). However he submitted that the meaning given in those decisions was too narrow, and that the Court should consider whether the work or project is necessary for achieving the stated objectives.

[9] Counsel offered three reasons. First, he contended that the term "designation" implicitly includes the project or work, referring to the definition of 'designation' in section 166,[4] and to section 168(2). Secondly, Mr Newhook submitted that the approach adopted in the decisions cited fails to satisfy the presumption of statutory interpretation that the legislature used the word 'designation' deliberately. Thirdly, counsel adopted reasoning in an article by M Taylor titled *Designations: the standard for private planning regimes*[5] that to consider the necessity of the designation as a form of approval and authority against the project objective (but not the project itself) would be a pointless exercise.

[10] Pursuant to leave reserved, Mr Newhook made supplementary submissions in writing on the point. In them, he remarked that in *Babington* the Tribunal did not go further than to record that it would not pass judgment on the requiring authority's objectives. Counsel observed that this did not preclude consideration of whether the project or work was reasonably necessary for achieving the objectives, which could be done without questioning the objectives.

[11] Mr Newhook also referred to the decision in *Barron v Minister of Works and Development*[6] in which the Planning Tribunal had stated its duty (under section 118(8)(a) of the Town and Country Planning Act 1977) was to have regard to whether the proposed work was reasonably necessary for achieving the Minister's objectives. Counsel acknowledged that section 118(8)(a) of that Act[7] was more specific in its

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[2] (1993) 2 NZRMA 480, 486.
[3] Environment Court Decision W55/99.
[4] Section 166 is quoted in paragraph [28].
[5] [1999] *Brooker's Resource Management Gazette.* As this publication is not available to the Court, we are not able to give a full citation to Mr Taylor's article.
[6] Planning Tribunal Decision A161/80.
[7] S 118(8)(a) of the 1977 Act was: *Whether the proposed work is reasonably necessary for achieving the objectives of the Minister or local authority.*

reference to the need to consider the work, although the Tribunal had also referred to considering the necessity of the designation.

[12] Next in his written submissions, Mr Newhook argued that as, by the definition of 'designation' in section 166, a designation is "to give effect to a requirement ... under section 168", and section 168 (2) speaks of a "requirement for a designation for a project or work", the designation relates to a specific project or work.

[13] Further, Mr Newhook submitted that to determine whether a designation "as a form of RMA approval and authority, is reasonably necessary for achieving the project's objectives" (using the language of the Court in *Moran*[8]) can only be done by considering the physical project or work and the amount of land required for it. The objective is theoretical and unspecific, and has to be related to the project or work to assess the reasonable necessity of the designation. Counsel argued that assessing the need for a designation without looking behind it at the project of work would be inconsistent with the presumption of statutory interpretation that all the words in a statute are used correctly and exactly,[9] so that the word 'objectives' is largely read out of the statute.

[14] In addition, counsel for the appellant referred to section 24(7)(d) of the Public Works Act 1981[10] which directs the Court, in considering an objection to a proposal for taking land, to 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.*

[15] Mr Newhook acknowledged that this provision is more explicit than section 171(1)(a) of the Resource Management Act is in requiring consideration of the necessity for the land to be taken, though counsel submitted that "little turns on that". He also referred to the discussion of the meaning of the term 'reasonably necessary' in the context of section 24(7)(d) of the Public Works Act contained in the judgment of Justice McGechan in *Fugle v Cowie,*[11] and submitted that the approach to deciding the question under that provision has been to examine the works and the specific site.

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[8] *Estate of P A Moran v Transit New Zealand* Environment Court DecisionW55/99.
[9] Citing *Wilson & Horton v CIR* [1996] NZLR 26, 33.
[10] As substituted by s 8(1) of the Public Works Amendment (No 2) Act 1987, and by section 6(2)(a) of the Resource Management Amendment Act 1996.
[11] [1997] NZRMA 395, 401.

[16] In summary, Mr Newhook contended that necessity for the amount of land should be the subject of challenge, and submitted that section 171(1)(a) should be interpreted accordingly.

[17] For Transit New Zealand, Ms Warren submitted that there would be deficiencies in confining the inquiry to whether the designation, as a form of approval and authority is reasonably necessary (which she referred to as the current interpretation), and in extending the inquiry to whether the project is reasonably necessary, including whether all the land is reasonably necessary (the interpretation contended for by the appellant). Ms Warren remarked that the appellant's interpretation would include consideration of whether an alternative other than that selected by the requiring authority would better meet the objectives.

[18] Ms Warren identified deficiencies in both approaches. On the current interpretation, the Court cannot consider whether the project will achieve the requiring authority's objectives for it. Transit New Zealand accepted that the Court should consider that question, and counsel contended that it would lead to absurdity if a project may not be rejected even where it fails to meet the objectives. However on the appellant's interpretation, the Court would be obliged to inquire into whether the project is the best alternative, which (she urged) would be incompatible with subsection (1)(b) of section 171 (citing *Adamson Taipa v Mangonui County Council*[12]), and would inappropriately require the Court to consider matters of policy that ought to remain the preserve of the requiring authority (citing *Waimairi District Council v Christchurch City Council* [13]).

[19] Transit New Zealand urged a third approach, restricted so as to prevent reconsideration of the requiring authority's choice of alternatives, by asking whether the designation (both in the sense of the project and a procedure) will achieve the objectives of the requiring authority for the project. If the answer to the question is No, the designation is not reasonably necessary. If it is Yes, (ie, it will achieve the objectives), and if adequate consideration has been given to alternatives (the question to be considered under section 171(1)(b)), then the designation is reasonably necessary to achieve the objectives.

[20] Ms Warren contended that the effect of applying the third approach advanced by Transit New Zealand to the present case would be to preclude consideration of the extent of the land to which the designation should apply, because to do that would be to question the requiring authority's choices of alternatives, in not choosing a multi-level

[12] Planning Tribunal Decision A134/80.
[13] Planning Tribunal Decision C30/82.

parking structure that could occupy less land, or in assuming greater use of feeder bus services.

[21] In reply, Mr Kirkpatrick accepted that, as a matter of common-sense, section 171(1)(a) calls for consideration of the work proposed, and assessment of it against the requiring authority's objectives. However he submitted that this does not extend to consideration of the amount of land required; but the Court only needs to be satisfied that a reasonable assessment has been carried out by the requiring authority to take care that it does not require too much or too little land to achieve the objectives of the work. Beyond that the Court would be involved in matters of policy and risks, usurping the requiring authority's role in undertaking public works.

[22] Mr Kirkpatrick urged that in this case there is a significant risk to the City Council in calculating the amount of land required for the project, and that the use of the word 'reasonable' in section 171(1)(a) shows recognition of the need for a public work to cater for some risk, and enables assessment to be made with some flexibility, and a lower threshold of acceptability.

[23] Since the hearing of the appeal, the Court of Appeal gave a decision in other proceedings, *Queenstown Airport Corporation v Skipworth and Queenstown Lakes District Council*[14] about the meaning of section 185(3) of the Act—

> *(3) The Environment Court may make an order applied for under subsection (1) if it is satisfied that–*
> *(a)The owner has tried but been unable to enter into an agreement for the sale of the estate or interest in the land subject to the designation or requirement at a price not less than the market value that the land would have had if it had not been subject to the designation or requirement; and*
> *(b) Either–*
> *(i) The designation or requirement prevents reasonable use of the owner's estate or interest in the land; or*
> *(ii) The applicant was the owner, or the spouse of the owner, of the estate or interest in the land when the designation or requirement was created.*

[24] In the *Queenstown Airport* case, the Court of Appeal held it is the designation or requirement, not the public work or utility to which it relates, that is referred to in section 185(3). In case the understanding of the use of the term "designation" in section 185 given by the Court of Appeal in the *Queenstown Airport* case might be a permissible guide to the understanding to be given to the word "designation" where it appears in section 171(1)(a), the Court gave counsel the opportunity to make submissions about the relevance to this case of the reasoning in the *Queenstown Airport* case.

[14] CA77/00; 2 April 2001; Thomas J.

The Court's consideration of the meaning of section 171(1)(a)

[25] The question is one of interpretation of section 171(1)(a) of the Resource Management Act. The principles and rules for the interpretation of legislation are stated in the Interpretation Act 1999. The material principles are in section 5 of that Act—

> *5. Ascertaining meaning of legislation— (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.*
> *(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*
> *(3) Examples of those indications are preambles, examples and explanatory material, and the organisation and format of the enactment.*

[26] The purpose of the Resource Management Act is to promote the sustainable management of natural and physical resources.[15] The meaning of 'sustainable management' in that Act includes managing the use and development of physical resources in a way which enables people and communities to provide for their economic wellbeing, and for their health and safety.[16]

[27] The Resource Management Act does not contain preambles, examples, or explanatory material that might provide indications of meaning. The organisation and format of the Act is that it is divided into parts with separate subject headings; that there is an extensive collection of definitions of terms used in the Act, but it contains none that assist in ascertaining the meaning of section 171(1)(a); that provisions about restrictions on use of land generally are contained in Part II, and in district plans made under the Act; but Part VIII contains a subpart (sections 166 to 186) containing provisions relating to designations.

[28] Section 166 contains a definition of the term 'designation'[17]—

> *In this Act—*
> *"Designation" means a provision made in a district plan to give effect to a requirement made by a requiring authority under section 168 or section 168A or clause 4 of the First Schedule.*
> ...

[29] Section 167 relates to the approval of requiring authorities, and section 168 relates to notice of requirement for a designation to the territorial authority. Such a notice may be given by a Minister or local authority having financial responsibility for a public work, or by a requiring authority. It is to be notice of a requirement for a designation for a public work (where the notice is given by a Minister or local authority) or for a project or work (where it is given by a requiring authority); or for a restriction

[15] Section 5(1).
[16] Section 5(2).
[17] Definition as amended by s 83 Resource Management Amendment Act 1993.

necessary for the safe or efficient functioning or operation of a public work, or the project or work for which a requiring authority was approved, as the case may be.[18]

[30] Section 168A[19] applies where a territorial authority itself proposes a designation. Because the City Council's proposal the subject of this appeal was made under that section, we quote the material parts of its text–

> ***168A. Notice of requirement by territorial authority***– *(1) When a territorial authority proposes to issue notice of a requirement for a designation–*
>
> *(a) For a public work within its district for which it has financial responsibility; or*
>
> *(b) In respect of any land, water, subsoil, or airspace where a restriction is necessary for the safe or efficient functioning or operation of a public work–*
>
> *it shall publicly notify the requirement; and the provisions of section 168, with all necessary modifications, shall apply to such notice.*
>
> ...
>
> *(3) In considering a requirement under this section, a territorial authority shall have regard to the matters set out in section 171 and all submissions, and may decide to–*
>
> *(c) Confirm the requirement; or*
>
> *(d) Cancel the requirement; or*
>
> *(e) Modify the requirement in such manner, or impose such conditions, as the territorial authority thinks fit.*
>
> *(4) Sections 173, 174, and 175 apply, with all necessary modifications, in respect of a decision made under subsection (3).*[20]

[31] Section 169 provides for application (with modifications) of provisions of the Act for notification, submissions, hearing and decision of resource consent applications to notices of requirements for designations. Section 171(1) makes provision for matters to be considered by the territorial authority, and we quote its text[21]–

> ***171. Recommendation by territorial authority***– *(1) Subject to Part II, when considering a requirement made under section 168, a territorial authority shall have regard to the matters set out in the notice given under section 168 (together with any further information supplied under section 169), and all submissions, and shall also have particular regard to–*
>
> *(a) Whether the designation is reasonably necessary for achieving the objectives of the public work or project or work for which the designation is sought;*
>
> *and*
>
> *(b) Whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work or project or work; and*
>
> *(c) Whether the nature of the public work or project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route or method; and*
>
> *(d) All relevant provisions of any national policy statement, New Zealand coastal policy statement, regional policy statement, proposed regional policy statement, regional plan, proposed regional plan, district plan, or proposed district plan.*
>
> ...

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[18] Section 168(1) and (2).

[19] Section 168A was inserted by s 66 Resource Management Amendment Act 1993.

[20] Section 168A(4) as amended by s 35(3) Resource Management Amendment Act 1997.

[21] Section 171(1) as amended by s 87 Resource Management Amendment Act 1993 and s 36(1) Resource Management Amendment Act 1997.

[32] There follow provisions for the territorial authority to make a recommendation to the requiring authority, for the requiring authority to accept or reject the recommendation in whole or in part, or to modify a requirement, and for the territorial authority to give notice of the decision.

[33] Section 174 provides for appeals to the Environment Court, and subsection (4) contains these directions to the Court in determining an appeal–

> *In determining an appeal, the Environment Court shall have regard to the matters set out in section 171 and may–*
>
> *(a) Confirm or cancel a requirement; or*
>
> *(b) Modify a requirement in such manner, or impose such conditions, as the Court thinks fit.*

[34] Section 175 provides that in accordance with the decision of the Court, the territorial authority is to include the designation in its district plan as if it were a rule in accordance with the requirement. Section 176 describes the effect of a designation[22]–

> *176. Effect of designation– (1) Where a designation is included in a district plan then, notwithstanding anything to the contrary in the district plan or any proposed district plan and regardless of any resource consent, but subject to sections 9(3) and 11 to 15 and 176A,–*
>
> *(a) The requiring authority responsible for the designation may do anything that is in accordance with the designation; and*
>
> *(b) No person may, without the prior written consent of that requiring authority, do anything in relation to the land that is the subject of the designation including–*
>
> *(i) Undertaking any use of the land described in section 9(4); and*
>
> *(ii) Subdividing the land; and*
>
> *(iii) Changing the character, intensity, or scale of the use of the land–*
>
> *that would prevent or hinder the public work or project or work to which the designation relates.*
>
> *(2) The provisions of a district plan or proposed district plan shall apply in relation to any land that is subject to a designation only to the extent that the land is used for a purpose other than the designated purpose.*
>
> *(3) ...*

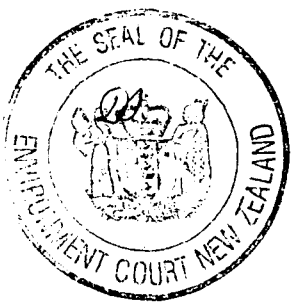
[35] Section 176A provides a procedure for approval by the territorial authority of outline plans for construction on designated land, with provision for the territorial authority to appeal to the Environment Court. Section 177 makes provision where land is the subject of more than one designation; and section 178 provides that a requirement has interim effect. Sections 179 to 186 contain further machinery provisions relating to designations. Section 186 provides that a designation lapses on the expiry of 5 years after it is included in the district plan unless it is given effect before then, or the designation specified a different period. There are provisions for extension of the period.

[22] Section 176 as amended by s 90 Resource Management Amendment Act 1993 and s 37 Resource Management Amendment Act 1997.

[36] We have, for the purpose of section 5 of the Interpretation Act, identified the purpose of the Resource Management Act, and its organisation, and set out the text of material provisions. We have now to return to the provision in question, section 171(1)(a), to identify from its text and context indications of the intended meaning.

[37] We are not aware that there is any judgment of a superior Court that is directly in point. Counsel quoted passages from the Planning Tribunal decision in *Adamson Taipa v Mangonui County Council*[23] which was affirmed by the High Court on appeal;[24] and to a passage in the Planning Tribunal decision in *Waimairi District Council v Christchurch City Council*[25] that was quoted with approval by Justice Chilwell in *STOP Action Group v Auckland Regional Authority.*[26] However those Planning Tribunal decisions related to the corresponding provision in section 118(8)(a) of the Town and Country Planning Act 1977, which directed the Planning Tribunal to have regard to "... whether the proposed **work** is reasonably necessary for achieving the objectives ...",[27] so the question in this case did not arise.[28]

[38] Concerning the *Queenstown Airport* case, counsel for Transit New Zealand submitted that the meaning of "designation" adopted by the Court of Appeal ought to be applied to determine the meaning of the term "designation" wherever it appears in the Act, observing that it is desirable that there be consistency in the interpretation of "designation" throughout. Counsel also observed that the Court of Appeal appeared to have adopted a purposive approach, and contended that the purpose of section 171(1)(a) is two-fold, so the Court can consider whether the use of the designation procedure is reasonably necessary vis-à-vis other procedures available to the requiring authority, and whether a project is reasonably necessary to achieve the requiring authority's objectives (and to avoid absurdity). Transit New Zealand acknowledged that application of the Court of Appeal's definition would not meet the second purpose, but argued that it would only be appropriate to apply a broader definition to achieve the second purpose if the Court was satisfied that the second purpose is a legitimate purpose of section 171(1)(a), and that the statutory context of section 171(1)(a) is sufficiently different from that of section 185.



[23] Planning Tribunal Decision A134/80.
[24] *Environmental Defence Society v Mangonui CountyCouncil* (High Court, Auckland; M101/81, 23 October 1981, Speight J).
[25] Planning Tribunal Decision C30/82.
[26] High Court Wellington; M514/85, 28 July 1985, Chilwell J.
[27] Emphasis added.
[28] For the same reason *Barron v Minister of Works and Development* (Planning Tribunal Decision A161/80), cited by Mr Newhook, does not assist in deciding the point.

[39] Counsel for the City Council adopted the submissions of Transit New Zealand, and submitted that the Court of Appeal's decision should be used as a guide. Mr Kirkpatrick submitted that there is some difference in context between sections 171 and 185.

[40] Mr Newhook submitted that sections 185 and 171 have purposes that are sufficiently different that the understanding of the term "designation" in section 185 would not provide a guide to the understanding to be given to it in section 171. Counsel urged that there are two subgroups of sections about designations: those up to section 174 about promulgation and confirmation, and those (sections 175 to 186) that legislate for the consequences and management of designations and requirements.

[41] Mr Newhook submitted that section 185 operates on the presence of a requirement or a designation in a district plan (or proposed district plan), and that the effect of the Court of Appeal judgment in the *Queenstown Airport* case was that no inquiry need be made into effects on the environment that might lie behind the provision. In contrast, counsel submitted that section 171 is expressly concerned with what lies behind the provision including, "whether the designation is reasonably necessary" before the provisions can be confirmed.

[42] We accept that it would be desirable that a consistent meaning be intended wherever a term is used in an Act of Parliament. However it is necessary to apply the provisions of the Interpretation Act to discover whether the same meaning is to be ascribed to the term in different provisions of the Resource Management Act.

[43] Sections 171 and 185 are in the same group of provisions about designations in Part VIII of the Act. However the purposes of the provisions are different, and the contexts are different.

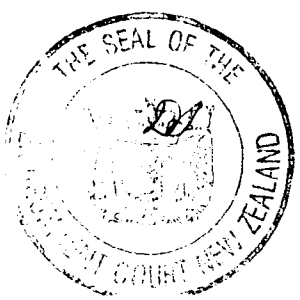
[44] The purpose of section 185 is to afford a landowner a remedy for the restrictions on the use of the land flowing from a requirement or designation in the conditions described in the section. By comparison, the purpose of section 171(1) is to provide criteria for deciding whether a designation should apply to the land at all, and if without, to what extent and on what conditions. (The first purpose advanced on behalf of Transit New Zealand, whether the designation procedure is reasonably necessary, creates a circular argument that does not assist in interpretation.) The context of section 185 is where the existence of the designation or requirement prevents reasonable use of the land and has prevented sale at market value. However the context of section 171 is the making of a decision whether or not the land should be affected by a designation at all.

[45] In our opinion, these differences allow for the possibility that different meanings were intended by the use of the term "designation" in each of those provisions. We were not referred to, and we have not found, anything in the reasoning of the Court of Appeal that would be applicable to section 171(1)(a) as well as section 185. We therefore hold that the meaning given by the Court of Appeal in the *Queenstown Airport* case to the word "designation" in section 185 does not have to be applied to the meaning of the word in section 171(1)(a), because of those differences. Accordingly, as there is no judicial authority determining the interpretation to be given, we proceed to apply the directions of the Interpretation Act to ascertain it.

[46] In considering the text of section 171(1)(a) for indications of the intended meaning, we observe that the text is: "Whether *the* designation is reasonably necessary..."[29] The use of the definite article "the", rather than the indefinite article "a", or omitting an article altogether (eg Whether designation is reasonably necessary...), is an indication that the question to be considered concerns the particular designation proposed, rather than designation as a generic class of planning technique.

[47] The rest of the text of paragraph (a) is: "...for achieving the objectives of the public work or project or work for which the designation is sought." That language calls for identifying the objectives of the particular designation. There would be little point in identifying the objectives if the question to be considered was whether designation as a planning technique was reasonably necessary to obtain the authorising and restraining effects of designation described in section 176(1). So we consider that the words of the second phrase in the paragraph are also an indication that the question concerns whether the particular designation is reasonably necessary for achieving the particular objectives.

[48] We have reviewed the context of the paragraph for indications of its meaning. The introductory words "Subject to Part II..." are a kind of code. The effect of them is that the general directions that follow do not apply where having regard to them would conflict with anything in Part II.[30] We are not able to imagine circumstances in which having regard to whether use of the planning technique of designation is reasonably necessary for achieving the objectives of the work or project could ever conflict with the contents of Part II. However if paragraph (a) was intended to call for consideration of the substance of the designation proposed, the assertion of the primacy of the contents of Part II is meaningful. Therefore we consider that the introductory words of section 171(1) are an indication that the latter meaning was intended for paragraph (a).



[29] Emphasis added.
[30] *Paihia and District Citizens Association v Northland Regional Council* Planning Tribunal Decision A77/95.

[49] Paragraphs (b) and (c) of section 171(1) are part of the context of paragraph (a). Paragraph (b) calls for particular regard to the adequacy of the consideration given to alternative sites, routes and methods of achieving the work or project. By confining the question to the adequacy of the consideration given, this paragraph implies that the territorial authority (and the Environment Court on appeal) are not expected to substitute their own judgements about which of the alternatives should be adopted, beyond the extent called for by paragraph (c).[31] Even so, paragraphs (b) and (c) call for the territorial authority (and the Court when invoked) to have regard (to the limited extents defined) to the substantive content of the proposed work or project, and alternative sites, routes and methods. The comparison of the direct use of words in those paragraphs to that effect with the words of paragraph (a) "Whether the designation is reasonably necessary..." may be an indication that paragraph (a) was intended to be focused on the designation, not on the work or project.

[50] In the wider context, the effects of a designation are twofold. First, a designation is authority for the requiring authority to act in accordance with it, even though contrary to the district plan.[32] Secondly, a designation prevents use of the land that would prevent or hinder the work or project, without the requiring authority's consent.[33] These effects could have serious impacts on the environment and on private rights. The safeguards are notice, opportunity for submissions, hearing by the territorial authority, and appeal to the Environment Court. The territorial authority, and the Environment Court on appeal, have power to confirm, cancel or modify the requirement or to impose conditions on it.

[51] Decisions on requirements for designations are likely to involve careful weighing of adverse effects against the value of the proposed work or project. Such a judgement of possibly conflicting factors would be informed by the sustainable management purpose of the Act. That could not be done convincingly if the decision-maker's consideration of reasonable necessity is confined to use of the designation technique, and does not extend to the reasonable necessity of the work or project itself. For that reason we consider that the context in which section 171(1)(a) is to operate provides a firm indication that the criterion provided by that paragraph is not restricted to designation as a technique, but extends to the work or project.

[52] Having found no authority on the point, and having identified indications in the text of section 171(1)(a) and its context and purpose, our provisional view is that the meaning is broader than consideration of designation as a technique, and extends to the

[31] *STOP Action Group v Auckland Regional Authority* (High Court, Wellington, M514/85; 28 July 1985, Chilwell J).
[32] Section 176(1)(a).
[33] Section 176(1)(b).

reasonable necessity of the work or project itself. We now consider the reasoning in the decisions to the contrary, and the arguments to the contrary presented to us.

[53] Ms Warren referred to *Babington v Invercargill City Council.*[34] In its decision in that case, the Planning Tribunal said[35]–

> *...it is not for us to pass judgment on the merits or otherwise of this objective. What we are required to do is to have particular regard to whether the proposed designation is reasonably necessary for achieving it.*

[54] We have found nothing in that decision which indicates that the Tribunal held that the consideration called for by section 171(1)(a) was confined to designation as a planning mechanism.

[55] It does not appear from the Planning Tribunal's decision in *Olsen v Minister of Social Welfare*[36] that the question about the meaning of section 171(1)(a) had been raised. After stating the effect of section 171(1)(a), the decision continued[37]–

> *That matter can be shortly disposed of because a designation or requirement is certainly reasonably necessary to achieve the objectives of the Minister –namely to create the type of institution we are discussing. It is not for us to enquire into the ministerial objective. Our concern is whether this particular designation should be on this particular site and that calls for evaluation of other matters.*

[56] The Tribunal appears to have understood paragraph (a) as calling for consideration of the reasonable necessity of the designation as a planning mechanism, but not extending to the reasonable necessity of the work or project itself. However the Tribunal did not state its reasoning for that understanding, presumably because it was not in question in that case. Therefore that decision does not assist in determining the question.

[57] The question was considered by the Environment Court in *Estate of P A Moran v Transit New Zealand.*[38] Referring to section 171(1)(a), the Court said[39]–

> *125. This provision poses the question whether the 'designation', as a form of RMA approval and authority, is reasonably necessary for achieving the project's objectives. Transit's decision expresses the objective of the work as "to provide a safe and efficient state highway route from the Terrace Tunnel to the Basin Reserve". It does not require or allow an examination as to the necessity of the project itself (see Babington v Invercargill City Council (1993) 2 NZRMA 480, 486).*
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> ...

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[34] (1993) 2 NZRMA 480.
[35] Page 486.
[36] [1995] NZRMA 385.
[37] Page 395.
[38] Environment Court Decision W55/99.
[39] Page 30.

> *132. Transit is a statutory authority given its mandate under s.5 of the Transit Act to operate "a safe and efficient state highway system". How Transit chooses to achieve this objective is not a matter for this Court to determine.*

[58] The Court then stated that it endorsed the views of the Tribunal in *Olsen*, and quoted the passage reproduced above, emphasising the sentence:

> *It is not for us to enquire into the ministerial objective.*

[59] The decision in *Moran* continued[40]–

> *133. CBC, in legal submissions, correctly identified that the issue is whether the designation as a form of approval or authority is reasonably necessary. It is not whether the work is reasonably necessary. This approach is reinforced by the wording of s.168(3)(a) which also refers to the reasons why the designation is needed –not reasons why the work is needed.*
> *134. CBC recognises that a designation is a powerful planning tool because land under a designation is given its own planning regime within the district plan. We accept a designation has significant ramifications, but its influence is limited to activities undertaken in accordance with the designation. It is also subject to the outline plan processes of s176A for matters of detail not addressed in the designation.*

[60] After observing that where a requiring authority acts outside what is reasonably contemplated by designation, enforcement proceedings are available, the Court proceeded to consider whether the particular designation the subject of those proceedings was reasonably necessary to achieve the objective of the work, and found that it was.

[61] In that the Court's understanding of the meaning of paragraph (a) was founded on *Babington's* case, we have not been able to find anything in the decision in *Babington's* case which would support that understanding. What the Tribunal said in *Babington* was that it was not for it to pass judgment on the merits or otherwise of the requiring authority's *objective*. That is different from saying that it was not to consider the necessity for the work or project itself.

[62] To the extent that the Court relied on the sentence from *Olsen* which it emphasised, we do not, with respect, find that pertinent. In that sentence the Tribunal said that it was not for it to inquire into the ministerial *objective*. That was the same point that had been made in *Babington*. We have found nothing in the Tribunal's decision in *Olsen* that supports the interpretation of section 171(1) adopted in *Moran*.

[63] We agree with the remarks in paragraph 134 of the decision in *Moran* about designation being a powerful planning tool, having significant ramifications. However the requirement of section 168(3)(a) that a notice of requirement include the reasons

[40] Page 31.

why the *designation* is needed does not, with respect, appear to bear on the question of the scope of section 171(1)(a).

[64] We now consider the arguments presented by counsel in the present case against giving section 171(1)(a) a wider meaning allowing consideration of the necessity for the work or project.

[65] We do not accept Ms Warren's objection that on the appellant's interpretation the Court would be obliged to inquire whether the project is the best alternative. As counsel pointed out, that would be incompatible with section 171(1)(b), and with the court's understanding that it should not substitute its own opinions on matters of the requiring authority's executive policy.

[66] However we consider that the territorial authority (and the Court on appeal) would be able to have particular regard to whether the proposed designation is reasonably necessary for achieving the objectives of the work or project, including whether the work or project itself is reasonably necessary for doing so, and the extent of land affected by the designation, without questioning the objectives, or questioning the requiring authority's choice of alternatives beyond the extent called for by paragraph (c).

[67] A territorial authority (or the Court) could find that a proposed designation goes further than is reasonably necessary for achieving the objectives of the project or work in respects other than the extent of land affected, and modify it accordingly. A hypothetical example might be constructed about a designation for an electricity distribution switchyard with capacity for a certain amount of current. If the evidence adduced by a requiring authority proposing a designation for the switchyard showed that capacity for half only that amount of current was reasonably necessary, the territorial authority or the Court might modify the designation, or impose conditions, to limit the designation to what the evidence justified. That would not be to replace the proponent's choice of alternative sites, routes or methods, or its executive policy. It would be a planning decision limiting the extent to which the special and powerful planning regime of the designation (having the twofold effects described in section 176(1)) is to replace the general planning regime. It would represent the safeguard against excessive use of the special powers interfering with that general planning regime.

[68] Mr Kirkpatrick urged that the Court only needs to be satisfied that a reasonable assessment has been made by the requiring authority to take care that is does not require too much or too little land to achieve the objectives of the work. Counsel emphasised

the risk for the requiring authority, and submitted that the use of the word "reasonable" enabled assessment to be made with some flexibility and a lower threshold of acceptability.

[69] We accept that this meaning has to be given to the word "reasonable". However the powers of the territorial authority and the Court to determine that a proposed designation be cancelled or modified, indicate that the territorial authority and the Court are intended to make their own findings on the matters to which they are to have particular regard. Their judgements, on the evidence, of whether a proposed designation is reasonably necessary for achieving the objectives of the project or work, are capable of giving meaning to the word "reasonable".

[70] Having considered the decisions and the arguments presented, we remain of the opinion that on the correct interpretation of section 171(1)(a) a territorial authority, and on appeal the Court, may consider the extent of land that would be affected by the designation in having particular regard to whether the designation is reasonably necessary for achieving the objectives of the work or project. To the extent that the Court adopted a different interpretation in *Moran*, we respectfully decline to follow that decision.

[71] Because the appellant confined its challenge to the designation to two grounds: the extent of the land to which the designation is to apply, and the adequacy of the consideration given to alternative methods (in particular, requiring less land), we now review the evidence on those questions, in turn.

Necessity for the extent of the designation

[72] The proposed designation would apply to an area of vacant land of approximately 2.6 hectares, on which the City Council proposes to establish a bus station and approximately 415 car-parking spaces, including 15 for cars dropping off or picking up bus passengers. The City Council maintained that all that land is reasonably necessary to achieve the objectives of the bus station.

[73] Section 171(1)(a) requires consideration of whether the designation is reasonably necessary for achieving the objectives of the project or work. For that to be given meaning, the proponent's objectives need to be cast with sufficient abstraction that the outcome of the question is not pre-empted.[41]

[41] *Percival v Waikato Hospital Board* Planning Tribunal Decision A3/85; *Lambourn v Auckland Education Board* Planning Tribunal Decision A54/85; *Whangarei City v Northland Area Health Board* Planning Tribunal Decision A120/86.

[74] We would have expected that a concise statement of the City Council's objectives for the proposed busway station and parking facility would have been contained in the notice of requirement, so that those considering whether or not to make a submission could have known them, and stated grounds of submission accordingly. Failing that, we would have expected that a statement of the City Council's objectives for the work would have been presented on its behalf at least in the evidence presented to the Court.

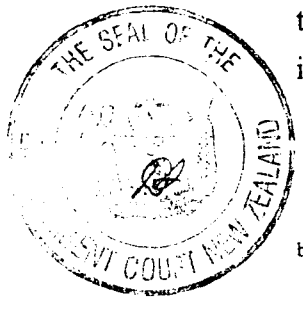
[75] To our disappointment, the City Council's objectives for the work do not appear to have been stated in the notice of requirement, nor have we been able to find any statement of them in the evidence called on its behalf at the appeal hearing. We have been left to infer the objectives as best we may by trawling through voluminous and prolix documents.

[76] Without knowing whether we have been able to capture all the elements, we infer that the City Council's objective is to provide a convenient and safe facility for passengers to transfer between feeder buses and cars, and line-haul buses on the proposed busway.

[77] The appellant did not challenge the necessity for the proposed bus station at the site. It accepted that provision for 270 car-parking spaces is reasonably necessary, and it maintained that parking for 270 cars could be accommodated on less than the total area of land the subject of the proposed designation. The appellant put in issue the application of the designation to the extra land to accommodate the remaining 145 spaces, contending that this would exceed the demand.

[78] In addition, the appellant put in issue the application of the designation to any part of the land to be used for facilities for administration of the proposed busway system, as distinct from the bus station. The appellant accepted that the City Council has authority to provide transport stations and parking places, but contended that it has no authority at law to conduct passenger transport operations, citing section 594ZR of the Local Government Act 1974.

[79] The appellant maintained that application of the designation beyond the land that is reasonably necessary for the bus station has the potential to seriously compromise intended use of that land by the appellant. The appellant sought that the Court modify the requirement so that it would not apply to an area of the land of 7511 square metres identified on a plan produced by one of its witnesses.



[80] The City Council relied on the evidence of Mr K G Gosselin, a consulting engineer having more than 28 years' experience in transportation planning and traffic engineering. Mr Gosselin is a director of a firm called McCormick Rankin International (MRI), which had been engaged by the City Council to give technical advice for the busway project.

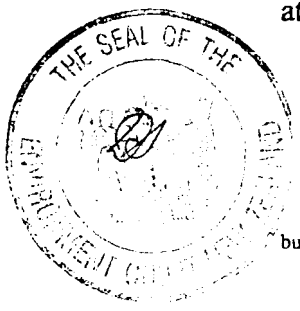
[81] On the number of car-parking spaces that should be provided at the proposed bus station, Mr Gosselin explained assumptions he had made in predicting the number of passengers using the proposed busway by the year 2011, and the mode of access to the proposed Constellation Drive bus station for those trips, based on experience in Ottawa, Adelaide and Toronto. He had assumed 15% using "park-and-ride" as the mode of access, compared with 2% using that mode in Ottawa, 15% in Adelaide, and 30-60% in Toronto. An assumption of 15% would suggest 270 peak-hour trips at that station.

[82] From that number, Mr Gosselin derived a peak demand for about 400 car-parking spaces at that station. He assumed that the peak periods would account for 90% of the daily demand for parking, that the peak hour is 60% of the peak demand, and that the average vehicle occupancy for "park-and-riders" would be about 1.25 persons.

[83] To the 400 spaces for "park-and-riders" he added 15 spaces for "kiss-and-ride" users, assuming 90 vehicles in the peak hour, and a pick-up waiting time of no more than 10 minutes. In that way he arrived at his opinion that 415 car-parking spaces would be the minimum needed for the proposed bus station, as an initial supply. Mr Gosselin gave the opinion that to reduce the long-term parking supply below that figure would seriously jeopardise the success of the proposed busway.

[84] The witness acknowledged that the demand for "park-and-ride" parking spaces is sensitive to the extent of use of feeder bus services to and from the station, but considered that the likelihood was remote of more than the assumed 75% arriving at the station by bus.

[85] Mr Gosselin commented on the opinion of Mr G D Hamilton, a witness called for the appellant, that the percentage of "park-and-ride" users of the Constellation Drive station should be assumed to be 10%, not 15%. Mr Gosselin observed that this would assume that more than 75% would use feeder buses, and he gave the opinions that attaining 75% would be a challenge, and the chance of exceeding it is very low.



[86] Mr Gosselin also commented on a figure of 270 car-parking spaces for the Constellation Drive bus station given in an earlier report by his firm. That had been based on a policy of providing a high level of service for feeder and express buses to the bus station. He explained that further studies, and access to an Auckland Regional Council traffic prediction model, had led to a better understanding of the likely patronage, and the opinion that a minimum of 415 parking spaces would be needed.

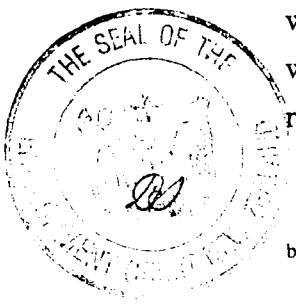
[87] In cross-examination, Mr Gosselin agreed that Adelaide busway experience had been important in his assessment of the size of the car park at Constellation Drive. He adhered to the opinion that 15% more truly represents park-and-ride demand that could be expected at Constellation Drive, and stated his belief that this percentage is lower than recent figures at Adelaide.

[88] Mr Gosselin agreed that he had assumed that one-third of bus boardings at Constellation Drive would be for other destinations on the North Shore, and explained that these would not be to travel elsewhere on the North Shore by the busway, but to use feeder or express services.

[89] Mr D Stanley, an experienced transport and resource management consultant, gave the opinion that adequacy of parking at the bus station is critical to the busway, and that risk of non-achievement by inadequate parking is not tenable. He considered that oversupply of parking would be acceptable, but inadequate parking would be intolerable.

[90] Mr F S Green, an experienced traffic engineer, gave the opinion that it would be unwise to provide for less than about 400 parking spaces at the station, and that the size of site shown in designation requirement is necessary for the effective and viable development of the facility

[91] Mr G D Hamilton is an experienced highway and traffic engineer and consulting transportation planner who had been engaged by the appellant to advise on the amount of land necessary to accommodate the proposed busway station. He provided a critique of Mr Gosselin's assessment of use of the Constellation Drive station and the extent of "park-and-ride" use. In particular, Mr Hamilton gave the opinion that to assign 15% to park-and-ride (as Mr Gosselin had) would be inappropriate, and that a reasonable figure would be 10%, resulting in peak parking demand for "park-and-ride" of 223 spaces, to which 13 spaces should be added for "kiss-and-ride", bringing the total peak parking requirement to 236.



[92] In cross-examination Mr Hamilton agreed that if the 5% in contention do not arrive at the busway station by car, they would most likely arrive by feeder bus, increasing the share of that mode to 80%; and he agreed that it would be a challenge to achieve that. He also agreed that negative initial experience could prejudice people's views about the busway, and that if a feeder bus service is not attractive to patrons, but the busway itself is, there could be higher demand for "park-and-ride" parking spaces.

[93] On his assessment of 10%, Mr Hamilton deposed that he had reviewed material put forward in MRI reports for Ottawa and Adelaide, and had applied his own research. The witness agreed that the 10% represented his own professional judgement based on the material he had been able to access and discussions with people in Adelaide. He agreed that estimate of demand is a matter of art, not science, on which reasonable experts have been known to differ. Mr Hamilton also agreed that the key difficulty in public transport is making it attractive to users.

[94] We have identified the significant evidence on which we have to consider whether the designation is reasonably necessary for achieving the objectives of the public work, being the proposed busway station. In doing so, we are assisted in understanding the words "reasonably necessary" by the judgment of Justice McGechan in *Fugle v Cowie,* even though that case concerned their meaning in section 341(2)(a) of the Resource Management Act. In short, "necessary" falls between expedient or desirable on the one hand, and essential on the other, and the epithet "reasonably" qualifies it to allow some tolerance.

[95] The heart of the difference between the two expert transportation planners about the number of car parking spaces necessary lay in the different assumptions each had made on the proportion of users of the busway station who would leave their cars parked there during the working day. The difference between Mr Gosselin's 15% and Mr Hamilton's 10% represented the 145 parking spaces that would occupy most of the 7500 square metres of land in contention.

[96] However there was no issue between them that the proportion is not capable of being predicted reliably by calculation. It is a matter on which people of skill and experience can make estimates. Their estimates may differ, and events presently unforeseen may influence the reality. At this stage there is no absolute right or wrong.

[97] Both witnesses are qualified and experienced professionals. We have no question about the independence and care with which they came to their opinions and gave their evidence. The opinion of each of them is entitled to our respect.

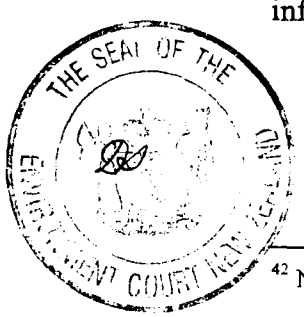
[98] The Court is not required to make a finding preferring one to the other. The question we have to consider is whether the designation is reasonably necessary for achieving the objective of the work. It is conceded that to the extent required to provide 270 parking spaces, the designation is necessary. However the essence of the question is to have sufficient parking spaces to attract people to use them without depriving the feeder bus service of the business necessary for its survival. Giving meaning to the words "reasonably necessary" according to *Fugle*, it is our judgment that applying the designation to enough land to provide for 415 parking spaces is reasonably necessary for achieving the objectives of the busway station as we understand them.

[99] That is not to say that we do not accept Mr Hamilton's opinion. We are grateful for his evidence. Rather, we are persuaded that it is reasonably necessary to assume a proportion of 15% "park-and-ride", and provide land for parking the additional cars which that assumption entails.

[100] We do not consider that the recommendation of 270 spaces in an earlier report by Mr Gosselin's firm warrants doubt about the opinion that he gave in evidence and adhered to in cross-examination. We accept that on such a question, the prospect of court proceedings may lead to careful review of up-to-date data.

[101] We consider that the questions of the use of part of the designated land for administration of the proposed busway itself, and the City Council's power to designate land for such a purpose, are red herrings. Although the explanation of elements of the busway station in the notice of requirement states that a control centre to manage the operation of the busway may be accommodated on the site,[42] administration or control of the busway are not among the purposes for which the City Council proposed that the land be designated. So unless those activities on the land are permitted by the district plan (in which case the question of the City Council's power to carry them out does not arise in these proceedings), they would need to be authorised by separate designation or resource consent.

[102] In short, we find that the application of the designation to the extent of the land that would enable provision of 415 car parking spaces is reasonably necessary for achieving the objectives of the busway station and park-and-ride facility (as we have inferred them to be).



[42] Notice of Requirement, paragraph 3.2, pg 6.

Adequate consideration of alternative methods

[103] The other issue raised by the appellant was one aspect of section 171(1)(b), namely, whether adequate consideration had been given to alternative methods of achieving the work, requiring less land of the site.

[104] It was the City Council's case that an in-depth investigation of alternative methods within the meaning of the Act had been done, so that it had not acted arbitrarily in making the requirement.

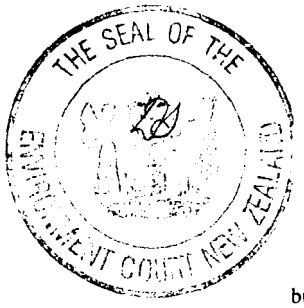
[105] It was the appellant's case that inadequate consideration had been given to alternative methods of achieving the project, requiring less land than is sought by the City Council. Two particular respects were alleged.

[106] First it was asserted that a parking structure, as an alternative to parking at grade, had been summarily dismissed as being probably 30% or 40% more expensive at current land costs, without further evidence or analysis of the cost. It was claimed that this represented arbitrary, scant and cursory consideration of that alternative method, which did not meet the standard the Act requires.

[107] Secondly, it was claimed that the City Council had failed to consider carefully designed alternatives for development of the park-and-ride facility presented to the Council by the appellant.

[108] The appellant claimed that as a result of those failures the unnecessary extent of the land to which the designation is proposed to apply would be wasteful of the excess land, creating planning blight on the excess, and failing to meet the statutory purpose of sustainable management of land and other resources.

[109] In reply Mr Kirkpatrick submitted that considering alternatives under paragraph (b) should not extend to considering commercial projects for the site, instead of or in tandem with the public work. Counsel argued that with public works there is often a more commercially attractive use for the land, and that is why the works are not usually pursued privately. He urged that if requiring authorities had to consider commercial alternatives for the site, public works might never occur.



[110] Mr Kirkpatrick also argued that the appellant's proposition invited the Court to enter matters of policy about the best use for the land, or to compel the City Council to join with the appellant in developing the land. He submitted that the Court should only have regard to whether the City Council had comprehensively considered alternatives.

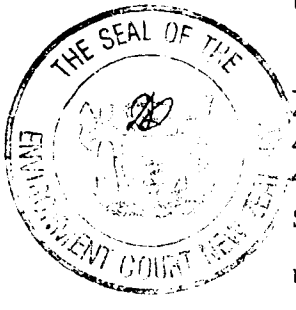
[111] We understand that section 171(1)(b) calls for a decision-maker to have particular regard to whether the proponent has made sufficient investigations of alternatives to satisfy itself of the alternative proposed,[43] rather than acting arbitrarily or giving only cursory consideration to alternatives.[44] The proponent is not required to eliminate speculative or suppositious options.[45]

[112] Therefore we have reviewed the evidence given on behalf of the City Council for descriptions of any consideration given to an alternative development of the busway station on the Constellation Drive site to provide the necessary 415 car parking spaces but not occupying all of the land to which the proposed designation would apply.

[113] Mr C F Fuhr, a Council official, deposed to a statutory declaration having been made on 13 May 1999 by the deputy mayor and city secretary that the whole of the land was required for the "park-and-ride facility". However the witness agreed in cross-examination that neither of those declarants had been involved in actually considering how much of the land was required. Neither of them, nor any of the officials whom Mr Fuhr named as having been actively involved in that question (other than himself), was called to gave evidence on this appeal. Mr Fuhr himself gave no evidence of consideration of establishing the busway station and parking occupying less of the site.

[114] In cross-examination Mr Gosselin stated that he would want to promote co-development of a bus station and park-and-ride facilities with other businesses. Asked by the Court whether he preferred an open car park, or parking combined with other activities, he replied that it would be preferable to integrate transit-oriented developments that could be dealt with by other than the transport authority. However it was not evident that Mr Gosselin had carried out consideration of alternative methods of developing the Constellation Drive station that would occupy less of the subject land.

[115] Mr Green, the traffic engineer, described in his evidence the various activities of the busway station, and produced a preliminary concept layout for it. He deposed:



[43] *Transit New Zealand v Auckland Regional Council* Environment Court Decision A100/00.
[44] *Waimairi District Council v Christchurch City Council* Planning Tribunal Decision C30/82.
[45] *Environmental Defence Society v Mangonui County Council* (High Court Auckland M101/81 23/10/81, Speight J).

While a carparking structure could be used in future to increase parking supply if necessary, this would be significantly more expensive than at-grade parking (probably 30% to 40% more expensive at current land costs) and is not currently desirable or justifiable.

[116] In cross-examination, Mr Green stated that he had made a comparative evaluation of a car-parking structure on a spreadsheet, and that he had been involved in quite a few parking structures and developments. In answer to questions by the Court, he agreed that a structure could provide parking near the busway platforms, but stated that structures are rare in park-and-ride situations, that surveillance is not so easy with parking structures, and although there is an advantage of covered parking, it comes at a cost.

[117] Mr Green's evidence did not refer to any report by him to the City Council of his comparative evaluation, or of any methodical consideration by it of alternative methods of developing the busway station and parking that would occupy less of the land to which the proposed designation would apply.

[118] Mr D R Hughes, a planning and resource management consultant, deposed that when his practice had been engaged by the City Council in October 1998 to prepare the notice of requirement, it had already been determined that–

- *The facility would not involve a major parking building, it being considered that it would be prohibitive in cost and would limit future opportunities in terms of costs.*
- *All day open car parking would be provided for people who drive to the station prior to boarding a bus. This car parking would occupy the major part of the designated area.* [46]

[119] Mr Hughes gave his opinion about the suitability of the site for the purpose. However, although the appellant had lodged a submission on the requirement seeking that some of the land be omitted, Mr Hughes's evidence did not reveal any methodical consideration by him, or by the City Council, of alternative methods of developing the busway station that would occupy less of the subject land.

[120] The evidence simply does not provide a basis for finding that adequate consideration has been given to alternative methods of achieving the busway station and park-and-ride facility on the subject land. The only consideration of that was Mr Green's consideration of a parking structure. We imply no criticism of Mr Green. We do not know the scope of his engagement by the City Council. However his evidence goes nowhere near a sufficient consideration of alternative methods of developing the proposed work on the Constellation Drive site that could satisfy a responsible proponent of the proposal. We had evidence of only cursory consideration

[46] Statement of evidence of D R Hughes, paragraph 3.3, pg 4.

of an alternative method. Nor could Mr Green's evidence provide a basis for considering the question raised by section 171(1)(c), namely, whether the nature of the work makes it unreasonable to expect the City Council to use an alternative method.

[121] So even if particular alternative layouts proposed by the appellant could be set aside as speculative or suppositious options (and on Mr Sherrell's evidence we find that they were not), the absence of evidence of anything more than Mr Green's cursory consideration leads us to reject Mr Kirkpatrick's submissions that the City Council had made an in-depth investigation of alternative methods and comprehensively considered alternatives.

Conclusion

[122] Although the questions set out in section 171(1) are not conditions of confirming a requirement for a designation, Parliament has directed decision-makers to have particular regard to them. The potential effects of a designation on the environment and on private owners of land affected may be considerable. Proponents of designations should not expect that failure to give more than cursory consideration to alternative sites, routes or methods might be overlooked because of the advantages of the work or project the designation is intended to facilitate.

[123] In the present case, from at least the time of its formal submission the appellant directed the City Council's attention to consideration of alternative methods requiring less of land. There is no evidence that the City Council took seriously its responsibility to do so.

[124] Identification and genuine consideration of alternative methods would not have compelled the City Council to work in tandem with the appellant in a commercial development if it chose not to. Such consideration would not have obliged the Council to join with the appellant in developing the land. The Court would not substitute its own policy decision about use of the land. We do not accept any of those submissions made on the City Council's behalf.

[125] Parliament has directed the Court to have particular regard to whether adequate consideration has been given to alternative sites, routes and methods of achieving the work or project. The Court takes that explicit direction seriously.

[126] The City Council has omitted to make a businesslike identification and comparison of alternative methods on the site, as required by paragraph (b) of section 171(1). A result of that is that the Court is not able to make a credible decision on the

question raised by paragraph (c) of that subsection. We are not able to judge whether the nature of the work makes it unreasonable to expect the City Council to use an alternative method occupying less of the site, for lack of evidence comparing the relative benefits and disbenefits of the proposal and such an alternative method.

[127] For this purpose we assume that all the relevant considerations referred to in section 171 and elsewhere in the Act are favourable to the City Council's current proposal. Even so, and accepting that paragraphs (b) and (c) of section 171(1) are criteria, not conditions, in the circumstances of this case it is our judgment that the City Council's omission leaves us without the assurance we need to have to confirm the requirement for a designation applying over the whole of the subject land.

Determinations

[128] For those reasons, the appeal is allowed to the extent that the requirement is modified by excepting from the designation of the rest of the subject land for a busway station and park-and-ride facility the part of the land having an area of 7511 square metres identified on the plan produced by Mr Sherrell (Attachment 45) as "Area not required for Park-and-Ride Parking" is excepted.

[129] Any party has leave to apply for any further or other order or directions necessary to give effect to this decision.

[130] The question of the appellant's costs of and incidental to the appeal is reserved. If the Court's adjudication of that question is required, counsel may submit memoranda in the customary way.

DATED at **AUCKLAND** this 7th day of June 2001.

For the Court:

D F G Sheppard
Environment Judge