

**IN THE ENVIRONMENT COURT  
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA  
KI TĀMAKI MAKĀURAU**

**Decision [2021] NZEnvC 175**

IN THE MATTER of objections under Section 23 of  
the Public Works Act 1981

BETWEEN MURRAY NELSON SHAW  
AND MARGARET EVELYN  
SHAW

(ENV-2019-AKL-000316)

Objectors

AND HAMILTON CITY COUNCIL  
Respondent

Court: Environment Judge M J L Dickey  
Commissioner J A Hodges  
Commissioner R M Bartlett

Hearing: at Hamilton on 24 May 2021 with a site visit on 25 July  
2021

Appearances: Mr M Shaw, Ms R Rapana and Mr R Rapana for the  
Objectors  
Mr L Muldowney and Ms K Cornege for Hamilton City  
Council

Date of Report: 10 November 2021

Date of Issue: 10 November 2021

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**REPORT OF THE ENVIRONMENT COURT TO  
HAMILTON CITY COUNCIL**

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1. Report issued.
2. Costs are reserved.



## To Hamilton City Council

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## Introduction

[1] Murray Nelson Shaw and Margaret Evelyn Shaw (**the Shaws**) have filed objections with the Court under s23(3) of the Public Works Act 1981 (**PWA**) in respect of notices of intention to take land served on them by the Hamilton City Council<sup>1</sup> under s23(1)(c) PWA.

[2] The purpose of the take is to establish part of a road, the East-West Minor Arterial connection, which is designated as part of the Southern Links Project. This joint project between the Council and Waka Kotahi (the New Zealand Transport Agency) involves the construction of 32 kilometres of transport network in the Peacocke area.<sup>2</sup> The project was developed following the joint Hamilton Southern Links Investigation by Waka Kotahi and the Council carried out from 2011 to 2013.

[3] The land to be taken covers 1.9170 hectares of the Shaws' property at 143 Hall Road, R.D.2., Peacocke, Hamilton City.

[4] A plan of the land is provided in **Annexure A**.<sup>3</sup> The land required is in two parcels labelled R9a and R9b, part of Lot 515, encompassing a vegetated gully and stream. The land in between R9a and R9b is owned by the Council. The Shaws own an additional 16.7824 hectares of land within the area outlined in blue on the plan.

[5] Their objection stems from their attachment to the land and in particular, the gully, in which they have established and maintained a bird park since 2006, and which they open to the public. The bird park includes the stream, with wetlands and ponds developed by the Shaws, along with substantial tree plantings and aviaries. Mr Shaw considers that the construction of an arterial road within part of the property would destroy some of the bird park enclosures and other features and would make the remaining part of the bird park much less attractive to visitors.<sup>4</sup> Access to severed

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<sup>1</sup> Hamilton City Council is the local authority for the purposes of s 16 of the Public Works Act 1981.

<sup>2</sup> AR Parsons, Affidavit affirmed 3 June 2020, at [11].

<sup>3</sup> Reproduced from MN Shaw, Affidavit dated 19 March 2020, Exhibit A. A Title Plan is attached as Annexure F.

<sup>4</sup> MN Shaw, Statement of evidence (**SOE**) dated 26 March 2020, at [4] and [5].

parts of the land would be required, including to three houses and a workshop.<sup>5</sup>

### **The Southern Links Project for which the land is required**

[6] The project comprises urban and rural major arterial roads, including connections between Hamilton's strategic transport network and national and regional state highways (shown in **Annexure B**).<sup>6</sup> Establishing this network and, within it, the 2.3 kilometre long East-West Minor Arterial connection, is the primary objective of the Project.<sup>7</sup>

[7] The parts of the city linked by the East-West Minor Arterial are the Peacocke residential land and the planned Peacocke Suburban Centre to the east, and the city's strategic network via the centrally located north-south arterial, and Glenview via State Highway 3 to the west. Notably, the final location of the Peacocke Suburban Centre was a key consideration in the location of the East-West Minor Arterial. This changed from the 2007 Structure Plan alignment to the alignment within the current Structure Plan, which is consistent with the Southern Links designation.<sup>8</sup>

[8] The location of the Peacocke Suburban Centre is shown in **Annexure C**<sup>9</sup> as a red circle at the intersection of Peacockes Road and the East-West Minor Arterial, providing a direct route from the Peacocke Suburban Centre to a new roundabout on State Highway 3.

[9] The East-West Minor Arterial is programmed to be constructed in two stages, meeting at a new roundabout to be constructed on land at 144 Halls Road, opposite the Shaws' land. The North-South Arterial will cross the East-West Minor Arterial at that roundabout.

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<sup>5</sup> MN Shaw, Affidavit dated 19 March 2020, at [14].

<sup>6</sup> Reproduced from ADA Gray, Affidavit affirmed 24 April 2020, Figure 1 – East-West Minor Arterial in context of Southern Links designations.

<sup>7</sup> ADA Gray, Affidavit affirmed 24 April 2020, at [19].

<sup>8</sup> ADA Gray, Affidavit affirmed 24 April 2020, at [28].

<sup>9</sup> Reproduced from ADA Gray, Affidavit affirmed 24 April 2020, Figure 5 – Annotated Structure Plan showing connectivity.

[10] Stage 1 will be west of the roundabout and includes the Shaws' land. A concept design of the route showing the current designation boundaries is shown in **Annexure D**.<sup>10</sup> Works at the western end of Stage 1 have been completed, including the new roundabout on State Highway 3 and the first 300m of the East-West Minor Arterial which provides access to a 250-lot subdivision.<sup>11</sup>

[11] Further details are included in the Council's notice of reply to the Shaws' objection, including that:<sup>12</sup>

- (c) The Land will form part of urban arterial road sections that will establish the key transport network within the Peacocke area and become the basis for future urban development there.
- (d) The Project will provide the critical arterial transport and utility infrastructure to enable development of the Peacocke Growth Cell in accordance with the Council's Peacocke Structure Plan as set out in HCC's Operative District Plan.
- (e) In 2016 the Land was designated for the purpose of a road under the Resource Management Act 1991. The Land is required for the Project.
- (f) Construction of the part of the project affecting 144 Hall Road, described as East West Minor Arterial Road Stage 2, is programmed to begin in the summer of 2021/2022 and is likely to take two years to complete.
- (g) Construction of East West Minor Arterial Road Stage 1 is underway. ...

[12] The designated route for the East-West Minor Arterial is 40m wide and will carry a two-lane minor arterial road with a likely speed limit of 50km/h. The total width for the transport components is around 23m, leaving 17m in width for landscaping, embankments, wider walking and cycling facilities, etc., within the designated route.<sup>13</sup>

[13] An aerial photograph of the route through and possible access options to the Shaws' property is included in **Annexure E**, based on a concept design of the road.<sup>14</sup> The land along the road alignment between the two parts of the Shaws' land is owned by the Council. The Shaws' company, Phoenix Downs Limited, had a grazing lease

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<sup>10</sup> Reproduced from AR Parsons, Affidavit sworn 7 May 2021, page 78.

<sup>11</sup> AR Parsons, Affidavit sworn 7 May 2021, at [19](a).

<sup>12</sup> Notice of reply dated 24 January 2020 at [5](c) – (g).

<sup>13</sup> ADA Gray, Affidavit affirmed 24 April 2020, at [20] and [21].

<sup>14</sup> Reproduced from ADA Gray, Affidavit affirmed 24 April 2020, Figure 10 – Aerial Photograph and Possible Access Options.

over part of the Council's property which expired at the end of June 2021 but may be renewed on a monthly basis.<sup>15</sup> The Shaws' bird park operations extend into this area.<sup>16</sup>

[14] In addition to land required for road construction on the Shaws' property, land to the south of the road alignment (on R9b) will be required for stormwater pond construction within the western boundary.

[15] During the hearing we sought further information about the location of the pond from the Council's experts: Mr AR Parsons, the Council's Strategic Development Manager, Mr ADA Gray, the Council's traffic engineer and Mr GR Eccles, the Council's planning witness.

[16] As to whether any progress had been made on a suggestion that the stormwater pond could be moved onto land owned by a developer, we were advised that it had not progressed past an idea but was one that in principle the Council would be open to, subject to commercial arrangements. We understand that as the pond is in the natural low point, a wholesale relocation is not possible and if anything, it would be a small movement.<sup>17</sup>

[17] When the notice of requirement was lodged, the designated location for the stormwater pond was a natural point for water to be dealt with. In the intervening period there has been a change of stormwater treatment philosophy and ponds on both sides of the valley are being considered. However, investigations are still at the background report design philosophy stage. We were told that it may be possible to relocate the ponds but if additional land was required or had to be taken, then that process would no longer meet the project timetable.<sup>18</sup>

[18] It was confirmed to us that there would still be a land requirement from the Shaw property involved with a storm water device. It just may not be as great.<sup>19</sup>

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<sup>15</sup> Notes of Evidence (**NOE**) at page 58, line 29, referring to Tab 8 page 108 of the Common Bundle.

<sup>16</sup> TK Lawrence, Affidavit sworn 6 May 2021, at [6(b)].

<sup>17</sup> NOE at page 59, line 27 – page 60, line 19.

<sup>18</sup> NOE at page 65, line 20 – page 66, line 16.

<sup>19</sup> NOE at page 76, line 15 – page 77, line 2.

## **Designation of the land**

[19] Notices of requirement (**NOR**) for the Southern Links network were issued in August 2013 and publicly notified on 29 January 2014. Submissions closed in March 2014. A joint Waikato Regional Council and Hamilton City Council hearing was held between June and September 2014 and the Commissioners' decision to confirm the HCC Southern links NOR, subject to conditions, was issued on 24 October 2014. Mr Shaw gave evidence at the hearing. The Commissioners did not elect to impose a condition requiring an underpass as requested by the Shaws in their submission.<sup>20</sup>

[20] The Commissioners' decision was not appealed by the Shaws. The sole appeal was received from a directly affected landowner on a site-specific severance matter, not in relation to the East-West Minor Arterial alignment that affects the Shaw property. That appeal was resolved through mediation and a consent order. The Southern Links NOR was then confirmed and included in the Hamilton City District Plan (Proposed and Operative) as designation reference A106 on 9 March 2016, with a 20-year lapse period.<sup>21</sup>

## **Funding arrangements**

[21] Having secured the designation, the Council and Waka Kotahi have put funding arrangements for the project in place. In November 2017, a detailed business case was prepared and provided to Cabinet, the Ministry of Business, Innovation and Employment and the NZTA Board for consideration in late 2017. The Council signed a facility agreement with the Crown, after public consultation through the Long-Term Plan process, for an interest free loan of \$180.4 m through the Housing Infrastructure Fund on 29 July 2018.<sup>22</sup> There is an associated Waka Kotahi financial assistance package.

[22] Once funding had been secured, the Council commenced negotiations with the owners of land required for the parts of the project for which the Council was responsible, which includes the East-West Minor Arterial. An initial meeting with the

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<sup>20</sup> GR Eccles, Affidavit affirmed 24 April 2020, at [21], [52], [54] and [58].

<sup>21</sup> GR Eccles, Affidavit affirmed 24 April 2020, at [59] and [60].

<sup>22</sup> AR Parsons, Affidavit sworn 7 May 2021, at [13] to [16].



Shaws took place on 28 August 2018 and discussions continued for over two years. We discuss the overall communication process later in this report.

### **The Public Works Act process**

[23] The process to be followed by the Council when acquiring land for essential works is set out in the Act. Section 18 sets out “Prior negotiations required for acquisition of land for essential works” and s 23 sets out the process to be followed if a council issues a notice of intention to take land. For ease of reference, we set out the relevant provisions in **Appendix 1** of this report.

[24] Section 24(7) of the Act sets out the powers and responsibilities of the Environment Court when it hears an objection. That subsection provides:

The Environment Court shall—

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

[25] There is a substantial body of evidence for us to consider before we can make our determination. We summarise the evidence and discuss the relevant provisions of the Act before setting out our determination towards the end of this Report.

[26] We start by recording that in terms of process:

- (a) The Council served notice, by a letter to the Shaws signed by the Council’s Chief Executive, of its desire to acquire their land on 11 March 2019, as required by s18(1)(a) and inviting them to sell the land to the Council as required by s18(1)(c). This was some six months after the first discussions

with them about the acquisition of their land. The letter included an estimate of the compensation to which the Shaws would be entitled and stated the Council's commitment to negotiate in good faith in an endeavour to reach agreement on the sale of the land.

- (b) Discussions continued between the parties until the Council issued a notice of intention to take land in accordance with s23(1)(c) on 19 November 2019. That notice was in the form prescribed in Schedule 1 of the Act, including a plan showing the land to be taken, which is reproduced in **Annexure F** of this report, and was signed by the Council's Chief Executive as required by the Act.
- (c) The Shaws served a notice of objection in accordance with s23(3) on 12 December 2019.
- (d) The Council served a notice of reply to the objection on 24 January 2020 in accordance with the requirements of s24(2).<sup>23</sup>

[27] We are satisfied that the Council has complied with the relevant provisions of the Act relating to the serving of notices.

### **Objection to the taking of land**

[28] The grounds for the Shaws' objection were set out in a memorandum from legal counsel acting on behalf of the Shaws dated 12 December 2019, as follows:

1. Adequate consideration has not been given to alternative sites, routes, or other methods of achieving the objectives of the Hamilton City Council;
2. It would not be fair, sound, or reasonably necessary for the Land to be taken, for achieving the objectives of the Hamilton City Council;
3. In particular, but not by way of limitation, adequate consideration has not been given by the Council, in connection with the proposed land taking under the Public Works Act 1981, to alternative routes for the road that is proposed for construction across the Land, to avoid the adverse effects of disturbance of the landform and ecology of the

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<sup>23</sup> For the avoidance of doubt, the 24 January 2020 date complies with the one-month statutory time frame required by s24(2) when the period between 25 December and ending with 15 January is excluded in accordance with the Act.

Mangakotukutuku Stream;

4. In particular, but not by way of limitation, it is not fair, sound, or reasonably necessary to acquire the Land by compulsion without committed consideration of alternative routes and methods for achieving the objectives of the Hamilton City Council.
5. It would not be fair, sound or reasonably necessary to take only those parts of Lot 515 deposited plan 495213 that are marked as Section 2 and Section 8 in the Notice. If the land is acquired by the Council without also acquiring that balance land, or parts of it, the Objectors will be substantially disadvantaged by uncertainty about access to the balance land and the inability of the Objectors to make efficient and practical use of it.
6. It is not fair or sound to take the Land without making adequate endeavours to negotiate in good faith with the Objectors in an attempt to reach an agreement for acquisition of the Land, including negotiation of the nature of access that could be provided for the balance of the Objector's land holding in the vicinity of the Land, as should have been undertaken in accordance with section 18 of the Public Works Act 1981;
7. If the land is to be taken by compulsion, the Council should also be required to acquire the balance of Lot 515 deposited plan 495213.

### The Council's notice of reply

[29] The notice of reply set out the statutory or other authority under which it proposed to take the land, and the nature of the work to be constructed, or the purpose for which the land is required, in accordance with s24(2)(a) and (b) of the Act.

[30] The Council set out its position in relation to the grounds for objection, including the following:<sup>24</sup>

...

- (i) The Objectors lodged a submission (**submission**) and presented evidence in support of their submission. ... The submission did not oppose the Southern Links project nor appeal any aspect of the recommendation or decision. No submitter opposed the east/west arterial alignment.
- (ii) Southern Links was developed as a network. Each road link forms part of the preferred network selected and is located based on a combination of environmental considerations, including ecology, landscape, cultural, heritage, land use, transport planning and

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<sup>24</sup> Notice of reply dated 24 January 2020 at [6](a)(i), (ii), (iv),(v) and [6](b)(iii), (iv).

engineering factors.

- (iii) The designated network was selected from a wide range of alternatives, refined progressively using a range of criteria. These criteria included project cost, constructability, road user benefits, road safety, noise and vibration, air, effects on the Waikato River and streams, flora and fauna, archaeology and heritage, geology, contaminated sites, hydrology, urban design, landscape design, property, community, severance issues, known cultural sites, cultural protocols, river crossings, connectivity (walking and cycling, private passenger vehicles, freight, public transport) and route security. Multiple options were evaluated under these criteria. The final network was selected because it ranked highest of the options compared using those criteria.
- (iv) The independent commissioners' hearing report in respect of the Notices of Requirement dated 24 October 2014 concluded:

#### 6.2.4 Findings

For all the reasons set out above, we are satisfied that the Requiring Authorities have given adequate consideration to alternative sites, routes and methods and that the proposal is reasonably necessary to meet their objectives for the proposal.

- (b) The environmental and financial consequences of constructing crossings over the Mangakotukutuku Stream gully were assessed as part of the evaluation of alternative alignments. The environmental and financial consequences of the east/west arterial alignment, which includes constructing crossings over the Mangakotukutuku Stream gully, are reasonable and acceptable, and compare favourably against all reasonable alternatives considered.

...

- (iii) The recommendations from the ecological assessment with regards to ecological mitigation and restoration and bat management have been addressed in the conditions applied to the designation.
- (iv) Costs were considered as part of option development and selection of the preferred option. The Southern Links cost estimates were independently peer reviewed using a parallel estimate process. The economic evaluation for Southern Links was also independently peer reviewed.

[31] The notice stated that the Council considers it is fair, sound and necessary for the land to be taken for the purposes of the Southern Links project. The Council also considered it had made every endeavour to negotiate in good faith with the objectors to reach an agreement for the acquisition of the land and had complied with its obligations under s18 of the Act. The Council said it remained open to continuing to negotiate in good faith with the objectors.

## **Outline of the Environment Court process**

[32] Following receipt of the notice of reply from the Council on 24 January 2020, the Court followed the procedures in s24(3) to (6) of the Act, which led to a hearing in Hamilton on 24 May 2021.

### ***Pre-hearing process***

[33] In the intervening period:

- (a) Court-assisted mediation took place on 16 June 2020.
- (b) Further Court-assisted mediation was requested in a joint memorandum of counsel dated 7 October 2020 as “Counsel agree that sufficient progress has been made that there would be value in further mediation”. However, an evidence exchange timetable was set in the event that the mediation proved unsuccessful.
- (c) Prior to the further mediation occurring, counsel for the Council advised the Court that:<sup>25</sup>

Shortly after agreeing to further mediation (as reflected in the joint memorandum), the Objectors appeared on “Seven Sharp” indicating that they “are not going anywhere” and “will do what they have to do” to stop their land from being taken. This included obstructing HCC’s legitimate access to neighbouring properties (which has had the effect of disrupting planned geotechnical work).

Additionally, the Objectors have been unwilling to grant HCC access to their land, which is necessary for potential solutions to be explored. From HCC’s perspective, this is contrary to prior undertakings to provide access. Significantly, there is now insufficient time to properly explore potential accommodation to protect the Objectors bird park prior to mediation.

- (d) The mediation took place on 1 December 2020 and did not result in resolution.
- (e) An evidence exchange timetable was agreed. However, the Shaws did not submit any further evidence.

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<sup>25</sup> Memorandum of counsel dated 9 November 2020 at [3] – [4].

(f) Mr Muldowney submitted that:<sup>26</sup>

...since early 2021, discussions have broken down. Mr Shaw has served various notices on Council, its employees and representatives which indicate a strong and entrenched opposition to the land acquisition process.

(g) On 16 February 2021 Mr Lang, counsel acting for the Shaws, sought leave to withdraw as counsel for them, effective immediately. On 19 February 2021, Ms Van Esch, who had been a point of contact between the Council and the Shaws, advised Mr O'Brien (for the Council) that she no longer worked for the Shaws and all future correspondence should be posted to Mr Shaw.

(h) On 11 March 2021, the Court received a letter dated 8 March 2021 from Mr Shaw confirming that Mr Lang and Mr Fletcher, a solicitor who had acted for Mr Shaw, no longer represented the Shaws. We note that, while the Shaws were legally represented at the times when they submitted their Notice of Objection and when Mr Shaw prepared his affidavits and statement of evidence and until mid-February 2021, we understand that they were unrepresented after that time.

[34] We are aware that the Council responded to questions from the Shaws relating to the Southern Links designation by letter dated 6 June 2019, signed by Mr Parsons.<sup>27</sup> Mr Shaw has not advised us of other questions that remain unanswered by the Council that are relevant to our determination of the case.

[35] Mr Shaw also sought assistance from the Court to address matters between him and his legal counsel. The Court advised Mr Shaw by Minute dated 8 April 2021 that "Requests for full disclosure of information from Mr and Mrs Shaws' previous lawyers are outside of this Court's jurisdiction".

[36] We have included a more detailed chronology of events in **Appendix 2**. At the hearing Mr Shaw raised the matters that were concerning him, and we respond to those below.

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<sup>26</sup> Submissions on behalf of the respondent dated 24 May 2021 at [28].

<sup>27</sup> Included in KJ O'Brien, Affidavit affirmed 7 May 2021, Part 8 at page 159.

***The Environment Court Hearing***

[37] The hearing proceeded on 24 May 2021. Mr Shaw attended and advised us that he was assisted by lay persons Mr R Rapana and Ms R Rapana. While Mr Rapana spoke for Mr Shaw, Mr Shaw also spoke on occasion.

[38] A pre-hearing application from the Council regarding certain evidence it wanted to be kept confidential was not pursued. Mr Muldowney acknowledged that all the material was available to the public and that Mr Shaw had been privy to all of those materials at the relevant time.<sup>28</sup> It was agreed that Mr Shaw would lead off with his presentation and the Council would follow.

[39] Mr Shaw confirmed that he had recently received the evidence from the Council. He then sought to present a statement of evidence but was unwilling to be sworn.<sup>29</sup>

[40] Mr Shaw raised concerns and made requests of the Court, the first being:<sup>30</sup>

In order to proceed we first require the court register enter into the court file everything we are about to proclaim please and that we require a full disclosure and full disclosure of the accounts receivables and all other intangible pertaining to this matter. Entered into the court register by all concerning parties. We require the court register to forward original copies to us by courier, registered mail as soon as possible please. (*vi*)

[41] When asked by the Court what documents he required he replied “Every, all the documents that we have sent by registered mail to all parties”. When asked for further clarification of what he wanted, he said “... originals, we’ve got heaps of copies”.<sup>31</sup> In another response he said:<sup>32</sup>

Well we want this road closed down because there are better alternatives and we need the council to listen. We’ve got 42,000 signatures. If they’re not going to listen to that, then we’ll be taking further options.

[42] Other matters raised by Mr Shaw and/or Mr Rapana were:

(a) That “In order to proceed we also require the court and all concerning

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<sup>28</sup> NOE at page 3, line 24 – page 4, line 29.

<sup>29</sup> NOE at page 5, line 6 – page 7, line 11.

<sup>30</sup> NOE at page 7, lines 12 – 17.

<sup>31</sup> NOE at page 9, line 11.

<sup>32</sup> NOE at page 7, lines 25 – 28.

parties to please answer the questions in our correspondence pertaining to who ‘you’ is”<sup>33</sup>

- (b) A challenge to the authenticity of the signature on a submission Mr Shaw said was made in 2007.<sup>34</sup>
- (c) That Mr Shaw will not be paying any costs.<sup>35</sup>
- (d) An alleged conflict of interest.<sup>36</sup>
- (e) That the s23 notice has to be signed by the Minister of Lands, not Kevin O’Brien.<sup>37</sup>

[43] Mr Rapana acknowledged that “We accept that the Council have a right to put a motorway through that land”.<sup>38</sup>

[44] Parts of the morning session proceeded with difficulty, which led to Mr Shaw and Mr Rapana being removed from the Court by court security officers for a five-minute period. Following the morning adjournment, Mr Shaw advised the Court “... we’re going to leave because we’ve heard all this before”. Although the Court requested him to stay, he and the Rapanas left at noon. Before leaving Mr Shaw did, however, consent to the Court making a site visit at a later date.

### *Visit to site by the Court*

[45] The members of the Court visited the Shaw property on 25 June 2021 and were shown around the site by Mr and Mrs Shaw. A copy of our minute dated 29 June 2021 recording details of the visit is included as **Appendix 3**. We record that the Shaws did not permit any Council officers to accompany us on the site visit. The site visit proceeded on that basis. At no stage during the site visit or afterwards did the Shaws indicate that they sought further hearing time.

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<sup>33</sup> NOE at page 9, lines 1 - 6.

<sup>34</sup> NOE at page 10, lines 14 - 30.

<sup>35</sup> NOE at page 34, lines 10 – 16.

<sup>36</sup> NOE at page 34, lines 16 – 20.

<sup>37</sup> NOE at page 34, lines 20 – 21.

<sup>38</sup> NOE at page 12, lines 28 – 29.



***Responses to the matters raised by Mr Shaw at the hearing***

*Original copies of documents*

[46] Mr Shaw sought that he be provided with original copies of all documents. He acknowledged that he had been provided with “heaps of copies” and we are satisfied that copies of all the Council’s evidence were made available to the Shaws. The evidence included copies of documents and correspondence sent to the Shaws.

*Who is ‘you’?*

[47] Mr Shaw asked for clarification on many occasions through communications with the Council and the Court as to “who ‘you’ is”. Both he and his representative Mr Rapana raised it again at the hearing.

[48] At the request of the Court, Mr Muldowney gave his understanding of the question as follows:<sup>39</sup>

... it’s directed at the correspondence that’s been passing between Council and Mr and Mrs Shaw in relation to this objection and there have been references in that correspondence to Mr and Mrs Shaw and the word “you” has been used and I suspect that the context is simply that and that “you” in this case means Mr and Mrs Shaw and the registered proprietors of the relevant land which is the subject of the proposed taking.

[49] We agree with Mr Muldowney.

*Authenticity of a 2007 submission purportedly by Mr Shaw*

[50] Mr Shaw referred to a submission purported to have been made by him in 2007 and questioned its authenticity.

[51] The only submission from Mr Shaw in evidence before us was attached to the Affidavit of Mr Eccles.<sup>40</sup> That document was signed on 27 February 2014 and related to the designation process. It was accompanied by a letter from MN and ME Shaw and signed by both. The letter stated that:

I’m not apposing [*sic*] to the southern links system ... and .. As long as we are

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<sup>39</sup> NOE at page 16, lines 4 – 10.

<sup>40</sup> GR Eccles, Affidavit affirmed 24 April 2020, Exhibit GE-1.

compensated for our dreams and hard work, in our case we have built a park and ponds with thousands of trees some are native and exotic.

[52] In his First Affidavit dated 16 December 2019, more than two years after the date of the submission, Mr Shaw stated:<sup>41</sup>

Margaret and I (“we”) initially raised no opposition to the roading project, provided that the plantings and other improvements on our property were to be taken care of in the roading process and provided we would properly compensated for land lost.

[53] Whatever the true circumstances are in relation to the submission of concern to Mr Shaw, we have relied on his evidence set out in paragraph [52] above, not what was said in a much earlier submission. Consequently, the content of the submission does not affect our Report and we do not consider the matter further.

Authority to sign a notice of intention

[54] Mr Shaw stated incorrectly that the notice of intention should have been signed by the Minister of Lands not Mr O’Brien.<sup>42</sup> As stated in paragraph [26](a) above, the notice of intention was signed by the Council’s Chief Executive, in accordance with the requirements of Schedule 1 of the Act.

Costs

[55] In accordance with s24(13) of the Act, the Environment Court may award such costs as it considers just either in favour of or against the objector or, in this case, the local authority. This will be addressed after the issue of this report following consideration of submissions from both parties, if any.

Alleged conflict of interest of Ms Cornege

[56] Mr Shaw alleged that Ms Cornege had a conflict of interest because of her husband’s involvement in a case involving Dixon Homes.<sup>43</sup> This was addressed in submissions by Mr Muldowney,<sup>44</sup> who advised us that Ms Cornege’s husband is a

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<sup>41</sup> MN Shaw, Affidavit dated 16 December 2019, at [3].

<sup>42</sup> NOE at page 34, lines 20 – 21.

<sup>43</sup> NOE at page 34, lines 16 – 20.

<sup>44</sup> NOE at page 83, line 22 – page 84, line 4.

practising solicitor. In or about 2017, Mr Cornege provided advice to Mr Shaw in relation to a property in Dixon Road and a dispute with a commercial or property developer.

[57] Ms Cornege advised Mr Muldowney that she knew nothing about the dispute, and we accept that. We are satisfied that no conflict of interest exists.

### **The Shaws' evidence**

[58] We received two affidavits sworn by Mr Shaw dated 16 December 2019 and 19 March 2020 and a statement of evidence dated 26 March 2020 from Mr Shaw. We did not receive any other evidence from or on behalf of the Shaws that responded to the Council's evidence.

[59] As previously indicated in paragraph [52] above, the Shaws did not initially oppose the roading project.<sup>45</sup> In his affidavit dated 16 December 2019, Mr Shaw stated that once the designations had been confirmed the Shaws became aware of "... the likely extreme environmental and financial consequences of constructing crossings over the Mangakotukutuku Stream gully and the availability of a better road alignment for the east/west arterial that is proposed to cross our property".<sup>46</sup>

[60] He expressed concern that the Council had not made serious attempts to negotiate with them over the acquisition of their land and they had not had a proper opportunity to discuss the potential compensation issues with the Council. He said they were still in the dark about access arrangements to parts of their property that would be severed by the proposed taking of land. The Shaws were concerned they would have serious problems in making reasonable use of parts of their land if the road proceeds.

[61] Mr Shaw expanded on these matters in his second affidavit dated 19 March 2020. He requested that the alignment he had previously identified to the Council be reconsidered to avoid unnecessary financial and environmental costs. He referred to a series of meetings he had attended with the Council between 30 August 2018 and

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<sup>45</sup> MN Shaw, Affidavit dated 16 December 2019, at [3].

<sup>46</sup> MN Shaw, Affidavit dated 16 December 2019, at [4].

6 November 2019. He stated that at most and possibly all those meetings he and other family members had made it clear to the Council representatives that they should be considering an alternative route approximately 600m to the south of the designated route. He attached a plan showing his proposed alternative route to the Affidavit and it is reproduced in **Annexure G** of this Report. He considered the alternative would avoid two crossings of the Mangakotukutuku Gully, saving considerable cost and ecological damage.<sup>47</sup>

[62] Regarding negotiations for the purchase of land, Mr Shaw stated that he:<sup>48</sup>

... mentioned that there had not been any serious negotiation about purchase of our land by the Council. That situation has not changed. ... The Council has presented us with a valuation, but has not made any offer to purchase the land from us.

[63] Mr Shaw stated he had received finalised valuations from their valuer, which were “about to be sent to the Council for comparison with their valuation. That is as far as the negotiation about land purchase has got”.<sup>49</sup> We note that Mr O’Brien confirmed that the Council received the valuation on 6 April 2020.<sup>50</sup>

[64] Mr Shaw also noted that they did not know what access arrangements were proposed for parts of their land that would be severed. He stated that parts of Lot 515 DP 495213 and Lot 1 DPS 60471 would be severed from Hall Road and inaccessible from the other side of the gully. He believed it was unfair and unreasonable for the Council to take any of their land against their will when they had not been given details about access to severed parts of their land, including to three houses and a workshop.<sup>51</sup>

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<sup>47</sup> MN Shaw, Affidavit dated 19 March 2020, at [3] – [6].

<sup>48</sup> MN Shaw, Affidavit dated 19 March 2020, at [10].

<sup>49</sup> MN Shaw, Affidavit dated 19 March 2020 at [11].

<sup>50</sup> KJ O’Brien, Affidavit affirmed 3 June 2020, at [38].

<sup>51</sup> MN Shaw, Affidavit dated 19 March 2020 at [12] to [15].

[65] In his Statement of Evidence dated 26 March 2020, Mr Shaw stated:

3. I believe, and my other family members believe, that the Council has taken an unreasonable and unfair approach to selecting our land as part of the route for the east west arterial in the Southern Links roading project. The Council has not paid enough attention to the values of our property and the effects that the road will have on those values.
4. Since we sold our civil construction business on 7 January 2006, I have been retired and have focussed much of my attention and resources on development of a bird park at our Hall Road property. The bird park includes ponds developed in the gully and stream, substantial tree plantings and aviaries.
5. The construction of an arterial road within part of our property would destroy some of the bird park enclosures and other features, and would make the remaining part of the bird park much less attractive to visitors.
- ...
7. The current proposed alignment for the road requires a 200-metre long crossing of the Mangakotukutuku gully and stream. The crossing is to the east of our property and is avoidable.
- ...

[66] Mr Shaw recorded in his second affidavit that meetings had taken place between the parties on 30 August, 2 October, 1 November, 4 December and 11 December 2018 and 11 March and 6 November 2019. The evidence provided by the Council went into considerable detail about communications between the parties once it had financial arrangements in place to proceed with the project.

### **Summary of the evidence**

[67] We have considered all the evidence and summarise key aspects below under a series of topic headings for ease of reference.

#### ***The Shaws' position on the taking of the land and its area***

[68] The Shaws indicated they were unhappy and did not want to sell their land at their first meeting with the Council on 30 August 2018.<sup>52</sup> This was their stated preference through the intervening period and clearly remains so.

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<sup>52</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, at [14].

[69] On or about 21 February 2019, Ms Van Esch advised Mr O'Brien (the Council's property negotiator<sup>53</sup>) that the Shaws were seeking the purchase of all three parcels of land they owned, not just Lot 515.<sup>54</sup>

[70] On 12 March 2019, Ms Van Esch advised Mr O'Brien that the Shaws would ideally like to stay on their property and that if the Council was not willing to allow that, it "... need[ed] to come up with a realistic figure that they buy the whole ..." of Lot 515.<sup>55</sup> By letter dated 13 March 2019 to the Shaws,<sup>56</sup> Mr O'Brien advised that in broad terms he had been authorised to continue to work with the Shaws on a valuation of the whole of Lot 515 on a without prejudice basis. He expressed his appreciation that the Shaws were willing to work together with the Council for this purpose. He advised that consultants need access to the site for investigation and valuation purposes.

[71] Over time, the Shaws' position in relation to the taking of land has firmed to the point where at the hearing, Mr Shaw stated "We're going to have demonstrations that you won't believe if you come and take this road or take our land".<sup>57</sup>

[72] We note Mr Parsons' evidence in May 2021 that:<sup>58</sup>

Unfortunately, the relationship between HCC and the Objectors has deteriorated over recent months, to a point where the Objectors have purported to trespass 'Hamilton City Council or Geotech staff, employees, contractors or affiliated parties' from their property and have taken steps to interfere with HCC's pre-construction works on neighbouring properties.

***Access to land for valuation and site investigation purposes***

[73] At a meeting on or about 2 October 2018, Mr O'Brien advised the Shaws that the Council would be appointing valuers and that the valuers and surveyors would

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<sup>53</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, at [2] states: "In 2018 Hamilton City Council (**HCC**) engaged TPG to act as its agent to manage the acquisition, either by private treaty or compulsorily under the provisions of the Public Works Act 1981 (**PWA**), of land required for the establishment of new roads and other infrastructure in the new residential suburb of Peacocke ...".

<sup>54</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, at [21] and Exhibit KO1 at pages 129 and 130.

<sup>55</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, at [27] and Exhibit KO1 at page 139.

<sup>56</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, Exhibit KO1 at pages 140 and 141.

<sup>57</sup> NOE at page 34, lines 23 – 24.

<sup>58</sup> AR Parsons, Affidavit sworn 7 May 2021, at [3].

require access to the Shaws' property.<sup>59</sup> On 15 October 2018, Ms Van Esch<sup>60</sup> emailed Mr O'Brien to say that the Shaws would not be allowing anyone on their property as "we don't want the motorway coming through our private park and damaging all our hard work and taking our house".<sup>61</sup>

[74] Following a further meeting on 4 December 2018, the Shaws allowed an inspection to take place on 11 December 2018 to enable a valuation report to be prepared.<sup>62</sup> Notes and plans of an engineering inspection undertaken during the site visit were emailed to Mr Shaw on 21 December 2018 for checking for accuracy, as previously agreed, with hard copies sent by mail.<sup>63</sup>

[75] A copy of the subsequent engineering report was sent to Ms Van Esch on 31 January 2019.<sup>64</sup> The report identified "... a range of options that we will need to discuss with you". and "... the report clearly highlights issues with some of the structures on site ...". For valuation purposes, the Council advised that "... we have instructed our valuer to value the property on the basis that the ponds are fit for purpose".<sup>65</sup>

[76] On 12 March 2019, the Council advised the Shaws that consultants needed access to the site for investigation and valuation purposes. During April, the Council also corresponded with Ms Van Esch about a "walkover" of the whole of the route of the East-West Minor Arterial, including the Shaws' land. It was agreed that a site visit would take place on 16 April 2019, even though the Shaws were not happy about it.<sup>66</sup> Ms Van Esch emailed Mr O'Brien on the same day to record that two engineers out of 20 that were supposed to come had come out that day.<sup>67</sup> She wrote:

No one is to entre (*sic*) the property without permission and no one will be looking at anything else on the property beside the road area, we are not happy about you coming on in the first place and differently (*sic*) aren't allowing engineer (*sic*) etc to see the weirs or the rest of the property, you have your

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<sup>59</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, at [15].

<sup>60</sup> Property Manager for Phoenix Downs Limited.

<sup>61</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, at [16] and Exhibit KO at page 001.

<sup>62</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, at [17] and [18].

<sup>63</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, at [18] and Exhibit KO1 at page 002.

<sup>64</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, Exhibit KO1 at page 014.

<sup>65</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, Exhibit KO1 at page 014.

<sup>66</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, Exhibit KO1 at pages 144 – 146.

<sup>67</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, Exhibit KO1 at page 142.

valuation which they went through everything that is enough.

[77] A further visit took place on 9 May 2019.

[78] By letter dated 14 October 2019, in response to a telephone request the previous week, Mr Lang, who represented the Shaws at the time, advised Mr O'Brien that:<sup>68</sup>

... you raised the question of access to parts of the Shaw property for the purpose of further survey work. Mr and Mrs Shaw have previously refused access on the basis that they believe the access was required for purposes other than the acquisition of land for the road corridor. My instructions are that Mr and Mrs Shaw confirm that they do not agree to that additional access being provided.

[79] A detailed summary of requests and responses relating to access is set out in a memorandum to the Court from Mr Muldowney dated 3 June 2021. This indicated nine requests were made and consents were granted for three inspections or surveys.

### ***Valuations***

[80] The Council's valuation report was emailed to Ms Van Esch on 20 February 2019.<sup>69</sup>

[81] The Shaws provided the Council with a copy of their valuation on 6 April 2020.

[82] In late 2020, the Shaws instructed their valuers to provide an updated valuation report for their land.<sup>70</sup>

[83] On 10 February 2021, Mr O'Brien emailed Ms Van Esch asking if the Shaws intended to share their updated valuation with the Council and, if so, when that might occur. On 19 February 2021, Ms Van Esch advised that she no longer worked for the Shaws and that all future correspondence should be posted to Mr Shaw. The Council had not received the updated valuation by the date Mr O'Brien affirmed his Supplementary Affidavit on 7 May 2021.

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<sup>68</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, Exhibit KO1 at page 163.

<sup>69</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, Exhibit KO1 at page 013.

<sup>70</sup> KJ O'Brien, Affidavit affirmed 7 May 2021, at [5] and [6] and Exhibit KO2 at page 001.



[84] Mr Parsons' Affidavit of 3 June 2020 records that:<sup>71</sup>

From HCC's perspective, the key barrier to negotiations over the designated land has been the lack of any valuation evidence being put forward by the Shaws. HCC put its valuations forward over a year ago and without a counter-proposal or valuation evidence until very recently it has been difficult to see what more we could do to negotiate, apart from keeping the lines of communication open and responding to requests for information/clarification, which has been done.

[85] The difference between the Shaws' valuation of the designated areas at \$4.7m and the Council's valuation at \$335,000 means it is likely that it will need to be resolved through the Land Valuation Tribunal.<sup>72</sup>

[86] We summarise later the Council's attempts to progress valuation and negotiation about the undesignated land.

### ***Future access to parcels of Shaws' land not taken by the Council***

[87] Mr Parsons stated:<sup>73</sup>

At the 1 November 2018 meeting, I offered in discussion to fund and construct all access works necessary in order to enable access and development rights on their property and achieve their subdivision consent lodged with HCC... This included all necessary utility service extension along the designated corridor, and the construction of an intersection on the designated corridor within a timeframe that suited the Shaws' development plans at the time.

[88] Annexure E shows access options proposed by the Council to different parts of the Shaws' land and was reproduced from Figure 10 of Mr Gray's Affidavit affirmed on 24 April 2020.

### ***Offers made by the Council***

[89] By email dated 22 February 2019, prior to the Council issuing the Notice of its Desire to acquire the land, Mr O'Brien encouraged the Shaws to "... avail yourselves of any reasonable professional advice that you feel you need to ensure that you are fully informed through this process, and Council will cover your costs for this".<sup>74</sup>

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<sup>71</sup> AR Parsons, Affidavit affirmed 3 June 2020, at [22].

<sup>72</sup> AR Parsons, Affidavit affirmed 3 June 2020, at [32].

<sup>73</sup> AR Parsons, Affidavit affirmed 3 June 2020, at [24].

<sup>74</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, at [22] and Exhibit KO1 at pages 129 and 130.

[90] When the three-month minimum period for good faith negotiations expired on 11 June 2019,<sup>75</sup> Mr O'Brien advised Ms Van Esch that the Council was happy to extend the negotiations until 31 July 2019 before deciding, if necessary, to serve a Notice of Intention to take the land.<sup>76</sup>

[91] On 6 June 2019, Mr O'Brien emailed Ms Van Esch and Mr Lang, the Shaws' legal counsel, offering to meet as they had not done so since 11 March 2019. Mr and Mrs Shaw agreed in principle to a meeting. However, it was not a good time for them, and they said they would be back in touch about timing of the meeting as soon as possible.<sup>77</sup>

[92] A meeting was held at the Shaws' property between the Shaws and the Mayor, Chief Executive, Ms Saunders and Mr Parsons of the Council on 6 November 2019. The Chief Executive wrote to the Shaws on 18 November 2019 confirming a number of matters discussed, including:<sup>78</sup>

At the meeting, you indicated you may be willing to explore potential opportunities regarding acquisition of land outside of the designated area. You were to let us know which title or titles that this would apply to by 7 November 2019. In your email of 6 November 2019 you advised that Council would not receive the information because Murray will not be negotiating until we all come back for a tour around the park. Without knowing what additional area outside the designation area that Murray wishes Council to purchase it is difficult for Council to consider different options for purchase outside of the designated area. Please feel free to send through information if you wish Council to consider alternative options.

...

As we explained, HCC remains open to negotiating with you in parallel with the Public Works Act land acquisition process.

...

Many thanks again for your time and inviting us into your home. We remain committed to working with you in good faith and being open and transparent with you as we move through this process.

[93] On 19 November 2019, Mr O'Brien attempted to serve the Notice of Intention

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<sup>75</sup> We note this is three months from the date of serving the Notice of Desire to take the land.

<sup>76</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, Exhibit KO1 at pages 155 – 161.

<sup>77</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, Exhibit KO1 at page 163.

<sup>78</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, Exhibit KO1 at page 165 – 167.

on Mr Shaw on the roadside, but Mr Shaw confirmed he would not take it from Mr O'Brien's hand. The same day, Mr O'Brien advised Mr Lang of events and stated:<sup>79</sup>

I reiterated to Murray that I was happy to meet at any time to discuss any elements of the purchase but Murray said the only meeting he wanted at this stage was to show us how we were going to damage the bird park.

[94] Both Mayor Southgate and Chief Executive Richard Briggs independently participated in a site tour of the Shaws' property in late 2019.<sup>80</sup>

### ***Council's consideration of Mr Shaw's proposed alternative route***

[95] As stated earlier, the Shaws requested the Council on a number of occasions to investigate their suggested alternative route to the south as it would avoid two crossings of the Mangakotukutuku gully, saving considerable cost and ecological damage.<sup>81</sup> The Shaws provided no supporting expert evidence to demonstrate that would be the case.

[96] It is relevant that, before the route through the Shaws' property was selected, the original options evaluation for east-west routes near their property considered three locations including at distances of approximately 100m, 600m and 1.8km to the south.<sup>82</sup> The following images show Mr Shaw's alternative route compared to the Structure Plan.<sup>83</sup>

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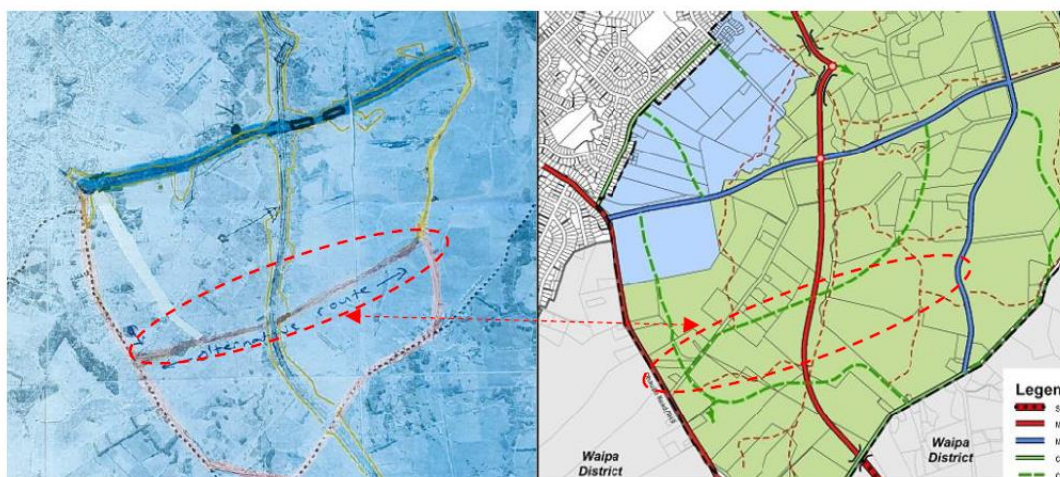
<sup>79</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, Exhibit KO1 at pages 170 and 171.

<sup>80</sup> AR Parsons, Affidavit affirmed 3 June 2020, at [26].

<sup>81</sup> MN Shaw, Affidavit dated 19 March 2020, at [3] – [6].

<sup>82</sup> GR Eccles, Affidavit affirmed 24 April 2020, at [24].

<sup>83</sup> Reproduced from ADA Gray, Affidavit affirmed 24 April 2020, Figure 9 – Mr Shaw's alternative route compared to Structure Plan.



[97] The location of Mr Shaw’s alternative route is similar to that of a collector road in the Structure Plan. Mr Gray considered that Mr Shaw’s route is a plausible route for a road, but not one that delivers the network connectivity and efficiencies that the East-West Minor Arterial will deliver. His evidence was that, if Mr Shaw’s alternative was adopted, it is likely that an equivalent (likely a collector road), would be required somewhere in the vicinity of the designated alignment through the Shaws’ property.<sup>84</sup>

[98] Mr Parsons stated “...we had considered alternatives in considerable detail at the Notice of Requirement stage ...”. He went on to say “However, we recognised that it was important to Mr Shaw to have the alternative route evaluated by HCC's experts considered by Elected Members”. On 18 June 2020, Council resolved that Mr Shaw’s alternative would be evaluated by the Strategic Growth Committee on 20 August 2020.<sup>85</sup> The minutes of that meeting record that the Shaws were to be invited to present their views at the August meeting.<sup>86</sup>

[99] In preparation for the Committee meeting, an expert group undertook an evaluation of the proposed alignment using a multi-criteria analysis process (**MCA**).<sup>87</sup> This was consistent with the original MCA process in which categories and criteria used aligned with those used in the original MCA. For consistency, both MCA processes were facilitated by Mr Eccles as an independent consultant.<sup>88</sup>

<sup>84</sup> ADA Gray, Affidavit affirmed 24 April 2020, at [42] and [45].

<sup>85</sup> AR Parsons, Affidavit sworn 7 May 2021, at [21] and [22].

<sup>86</sup> AR Parsons, Affidavit sworn 7 May 2021, at AP-2, Tab 2, page 105.

<sup>87</sup> AR Parsons, Affidavit sworn 7 May 2021, at AP-2, Tab 2, pages 111 – 142.

<sup>88</sup> GR Eccles, Affidavit affirmed 6 May 2021, at [5] to [7].

[100] Mr Eccles stated that:<sup>89</sup>

The alternative alignment did not compare favourably against the designated alignment through both the MCA scoring and when considered against the Additional Matters agreed between the parties.

HCC (as Requiring Authority) has considered an alternative route for the east-west arterial using methodology and criteria consistent with that used at the time of the original route selection in 2011/12, and the additional criteria required to ensure an up to date assessment was carried out. The Shaws actively participated in that process, including presenting to Council before it determined to accept the recommendations in the 2020 MCA. That process has found the alternative route proposed by Mr Shaw to be inferior to the designated route.

[101] Mr Gray, the only expert traffic engineer giving evidence, did not consider Mr Shaw's suggested alternative alignment to be suitable for the function of the East-West Minor Arterial. Even if it were suitable, he considered that the additional uncertainty, cost, and delay to HCC and developers and other landowners from undermining a robust and effective designation would outweigh any potential cost saving or benefits.<sup>90</sup>

[102] At the Committee meeting Mr Lang, for the Shaws, made legal submissions. Mr Shaw also made a presentation on behalf of himself and Mrs Shaw. Their written material was made available to us as part of the Council's evidence.<sup>91</sup>

[103] It was resolved:<sup>92</sup>

That the Strategic Growth Committee:

- a. receives and considers the verbal submission from the Shaws on the alternative alignment they propose for the Peacocke East-West Minor Arterial Road;
- b. notes that the staff assessment of the alternative alignment for the Peacocke East-West Minor Arterial presented by the Shaws as part of Environment Court mediation indicates that:
  - the alternative alignment is less favourable based on the criteria used for assessment during the Hamilton Southern Links designation processes; and

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<sup>89</sup> GR Eccles, Affidavit affirmed 6 May 2021, at [16] and [24].

<sup>90</sup> ADA Gray, Affidavit affirmed 24 April 2020, at [16].

<sup>91</sup> AR Parsons, Affidavit sworn 7 May 2021, at AP-2, Tab 2, pages 143-159.

<sup>92</sup> AR Parsons, Affidavit sworn 7 May 2021, at AP-2, Tab 2, page 160.

- implementing the alternative alignment would have significant adverse performance, cost and time consequences for the Peacocke East-West Minor Arterial project, and on the Housing Infrastructure Fund funding for the Peacock Network Infrastructure;
- c. approves option 1 - staff continue with the implementation of the designated alignment in accordance with the approved business case including land acquisition using the Public Works Act compulsory processes where required;
- d. commits to making an open written offer to the Shaws confirming that in giving effect to the existing designated route it will incorporate urban design and ecological treatment which sensitively manages the interface between the transport corridor and the Shaw property and the operation of the Bird Park;
- ...

[104] This was conveyed to the Shaws by letter of 18 September 2020, with an invitation to contribute to the design process.<sup>93</sup>

### ***Summary***

[105] Based on the evidence, we are satisfied that:

- (a) The Council offered to purchase the land in its notice of desire dated 11 March 2019.
- (b) In a letter dated 13 March 2019, Mr O'Brien advised the Shaws that the Council had authorised him to continue to work with the Shaws on a valuation of the whole of Lot 515,<sup>94</sup> as requested by the Shaws through Ms Van Esch,<sup>95</sup> on a without prejudice basis.
- (c) The Council addressed the Shaws' concerns about future access to their property at a meeting on 1 November 2018.<sup>96</sup>
- (d) The Council evaluated the alternative route suggested by Mr Shaw as described in paragraphs [95] to [104] above and we consider that the evaluation process was appropriate and fair.

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<sup>93</sup> AR Parsons, Affidavit sworn 7 May 2021, at [30] – [33] and AP-2, Tab 1, pages 062 – 065.

<sup>94</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, Exhibit KO1 at pages 140 and 141.

<sup>95</sup> KJ O'Brien, Affidavit affirmed 3 June 2020, Exhibit KO1 at pages 139.

<sup>96</sup> AR Parsons, Affidavit affirmed 3 June 2020, at [24].

- (e) The Council made a number of offers to the Shaws as set out in paragraphs [89] to [94] above.
- (f) The Council has been seriously constrained in its ability to progress negotiations with the Shaws by the Shaws' refusal to allow access to the land at different times and their extended delay in providing their valuation to the Council.

### **Current status of the project**

[106] Regarding the relevant time for considering the test in s24(7)(d) (set out at paragraph [24] above) Mr Muldowney submitted, and we agree, that:<sup>97</sup>

... [it] is the time the objection is heard: the Court cannot ignore relevant events that have occurred, or issues that have arisen, since the Notice of Intention was given.<sup>98</sup>

[107] Mr Parsons provided an update of progress on the project, including the following:<sup>99</sup>

- (a) The Council has secured funding from the Housing Infrastructure Fund, which includes a 10-year interest free loan for \$180.4m. There is also an associated Waka Kotahi financial assistance package of approximately \$110.0m.
- (b) Of the \$367m total for the Peacocke Network Infrastructure Project, approximately \$84m has been spent to date, out of \$210m that the Council has contractually committed to. A further \$25m is in the final stages of procurement and the remainder is in design.
- (c) 36 out of 39 properties are now in Council ownership. The Council has access to a further two during the construction phase and will take title following completion of construction. All property on the East-West Arterial, other than the Shaws' property, has been acquired by proclamation

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<sup>97</sup> Submissions on behalf of the respondent dated 24 May 2021 at [35](c).

<sup>98</sup> *Grace v Minister of Land Information* [2014] NZEnvC 82 at [5]; *Remarkables Park Limited v Queenstown Airport Corporation Limited* [2019] NZEnvC 34 at [34].

<sup>99</sup> AR Parsons, Affidavit sworn 7 May 2021, at [13] and [19].

or agreement (or will be legally acquired when construction is complete).

- (d) Construction of the designated major new intersection on State Highway 3 and an associated 300m of East-West Arterial has been completed in order to meet the access and timing needs of a consented housing development in that locality.
- (e) Design of the East-West Minor Arterial is underway with construction scheduled to start in the summer of 2022/3. To meet the project schedule, the Council will need to complete a detailed design during 2021, to allow time for contract documentation and procurement in early 2022 prior to construction beginning in the 2022/23 summer season.
- (f) During waterway crossing optioneering workshops in March and April this year, potential options were considered that may reduce the Shaws' concerns regarding access and impacts on how the waterway is dealt with.

## **Our evaluation in accordance with the Act**

### ***Powers and responsibilities of the Environment Court***

[108] These are set out in paragraph [24] above.

### ***Objectives of Hamilton City Council (s24(7)(a))***

[109] The Council's project objectives are set out in the NOR assessment of environmental effects, as follows:<sup>100</sup>

- a) Facilitate the achievement of HCC's strategic objectives for integrated land use planning, urban growth, infrastructure provision and economic development;
- b) Protect the Southern Links transport corridor to facilitate the provision of an integrated transport network which supports the future urban development of the Peacocke Structure Plan Area;
- c) Protect the Southern Links transport corridor in the Peacocke Structure Plan Area in light of the risk of build-out along the preferred route;

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<sup>100</sup> GR Eccles, Affidavit affirmed 24 April 2020, at [17] referring to Southern Links NOR – AEE Supporting Information, prepared by AECOM New Zealand Ltd for NZTA and HCC, dated 5 August 2013.



- d) Provide for growth needs in the south of Hamilton City through the protection of the long-term function of state highway and key arterial, collector and local road networks;
- e) Provide connectivity between the Peacocke Structure Plan Area and the existing Hamilton City infrastructure network, hospital, airport and state highway network;
- f) Improve the amenity and safety of key arterial, collector and local road networks in Hamilton City;
- g) Provide new transport routes to redistribute freight and regional trips to Hamilton on to appropriate corridors that will relieve congestion and make existing networks operate more efficiently;
- h) Provide opportunities for passenger transport and alternative transport modes which will not preclude the potential development of rail transport in the long-term;
- i) Improve residential, industrial and retail environments in Hamilton City, in particular in Hillcrest, Melville and Hamilton East through the provision of an integrated transport network which will, in turn, reduce travel trips and demand on existing transport networks; and
- j) Provide an appropriate road corridor to accommodate network utilities and services to provide for growth in the south of Hamilton City.

[110] For completeness, we have also considered the wider objectives of the Southern Links Infrastructure Project as a whole, as they are relevant to the adequacy of consideration of alternatives. The wider objectives are set out in Section 1.3 of the Hamilton Southern Links Investigation ACRE Assessment report dated 24 September 2012 (**Assessment Report**).<sup>101</sup>

[111] Having ascertained the Council's objectives, we proceed to the other matters we are obliged to consider.

### ***Consideration of alternatives (s24(7)(b))***

[112] We are to enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving the Council's objectives as they relate to the location of the East-West Minor Arterial connection and the stormwater pond serving the road on the Shaws' property.

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<sup>101</sup> Produced as Exhibit 4 by GR Eccles.

[113] In *Olliver Trustee Limited and St Heliers Capital Limited v Minister for Land Information*,<sup>102</sup> the Environment Court said, and we agree, that:

There is no jurisdiction under s24(7)(b) for the Court to compare alternatives and say that an alternative is preferable to the solution ... proposed by the Transport Agency on the Minister's behalf. Our role under s24(7)(b) is to examine the methodology adopted by (or on behalf of) the Minister in considering alternatives.

[114] Further, we note the observation of the Supreme Court in *Seaton v Minister of Land Information*<sup>103</sup> that “s24(7)(b) .... is a check on proper process”.

[115] We are satisfied that there are no practicable alternatives to locating at least part of the stormwater pond on the Shaws' land based on the evidence summarised at paragraphs [15] to [18] above. We are also satisfied that an appropriate design of the stormwater ponds will be determined through the Integrated Catchment Management Plan process where discussions are taking place between the Council and the Waikato Regional Council.<sup>104</sup> This will determine the final extent of land required to be taken.

[116] We received evidence on the road alignment alternatives considered by the Council from Mr Eccles and Mr Gray. We considered that the level of detail provided in that evidence was insufficient to enable us to appropriately enquire into the adequacy of the consideration given to alternatives. We referred therefore to the evidence given to the Joint Council Hearing of Notices of Requirement for the Southern Links Project.<sup>105</sup> From that material we received the following additional evidence from Mr Eccles:<sup>106</sup>

- Exhibit 1: Grant Eccles Statement of Evidence 12 June 2014.
- Exhibit 3: Southern Links Easement Stage Option Assessment.

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<sup>102</sup> *Olliver Trustee Limited and St Heliers Capital Limited v Minister for Land Information* [2015] NZEnvC 55 at [24].

<sup>103</sup> *Seaton v Minister for Land Information* [2013] NZSC 42, (2013) 17 ELRNZ 168, [2013] 3 NZLR 157 at [16].

<sup>104</sup> NOE at page 65, line 20 – page 66, line 16.

<sup>105</sup> As provided for by s24(6A)(a) of the PWA. Refer to Appendix 1.

<sup>106</sup> We were also provided with rebuttal evidence from GR Eccles dated 8 July 2014 (Exhibit 2), which was related to consideration of an alternative route for the Weston Lea Drive connection to the East-West Minor Arterial, which did not affect the alignment of the East-West Minor Arterial, and did not assist us.

- Exhibit 4: The Assessment report referred to in paragraph [112] above.

[117] We reviewed all the above evidence and the relevant parts of the Decisions Report of the Independent Hearings Commissioners dated 24 October 2014. In particular, we considered the Assessment Report. There would be no benefit in repeating the content of the above documents in any detail and we limit our comments below to key matters.

[118] The East-West Minor Arterial forms part of an integrated transport network covering a land area of approximately 60 square kilometres in and to the south of Hamilton City.<sup>107</sup> The network is required to support the future urban development of the Peacocke Structure Plan area and provide links between State Highways 1 and 2 and to the City Centre and Hamilton Airport. Further details are provided in paragraphs [6] to [9] and [12] above.

[119] The alternatives investigation was undertaken to satisfy the requirements of s171(1)(b) of the Resource Management Act 1991 and was subject to a full public consultation process and decision process in accordance with that Act. It was undertaken in four stages starting area wide before proceeding to a corridor level, then a route level and finally at an easement level. Twelve network options were developed for assessment using a Multi Criteria Analysis (**MCA**) process, which we accept as recognised good practice for large and complex projects like the Southern Links Project.

[120] The options evaluation process included consideration of project cost, constructability, road user benefits, road safety, noise and vibration, air, effects on the Waikato River and streams, flora and fauna, archaeology and heritage, geology, contaminated sites, hydrology, urban design, landscape design, property, community, severance issues, known cultural sites, cultural protocols, river crossings, connectivity (walking and cycling, private passenger vehicles, freight, public transport) and route security.<sup>108</sup>

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<sup>107</sup> Assessment Report at 1.1.

<sup>108</sup> Council's Notice of reply dated 24 January 2020 at [6(a)(iv)]; our own review of the Assessment Report, in particular Table 6; and Exhibit 3: Options Assessment – Southern Links Easement Stage dated 25 June 2012 at page 5 of 7.

[121] The MCA process was undertaken at each of the four stages as route selection was refined. Sensitivity testing was undertaken by varying the categories and weighting of marks, which demonstrated that clear networks emerged over others.<sup>109</sup> The options considered for east-west routes near the Shaws' property were three locations at distances of approximately 100m, 600m and 1.8km to the south.<sup>110</sup>

[122] Having reviewed the evidence and documents as outlined above, and considered the matters raised by the Shaws, we are satisfied that:

- (a) the options evaluation process was wide-ranging, comprehensive and robust and, in our view, was in accordance with recognised good practice;
- (b) adequate consideration was given to ecological effects during the evaluation process;<sup>111</sup>
- (c) the final network was selected because it ranked highest of the options compared;
- (d) adequate consideration was given to routes south of the designated route at the time of the options evaluation;
- (e) reconsideration of a southern route as proposed by the Shaws was undertaken to an appropriate level of detail using the same MCA process as the original options evaluation and scored negatively when compared against the designated alignment;
- (f) moving the designation further to the south and away from the Shaw dwelling would result in multiple other issues arising and a transfer of effects from the Shaw property to others; and

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<sup>109</sup> Assessment Report at 4.0.

<sup>110</sup> GR Eccles, Affidavit affirmed 24 April 2020, at [24].

<sup>111</sup> GR Eccles, Affidavit affirmed 24 April 202, at [26]: "... the reach of the tributary stream within the Shaw property, and the adjoining Colchis property, was highly modified and the ponds are artificially created. Thus, the ecological values of the tributary in that reach were rated lower than the remainder of the tributary and the main stem of the Mangakotukutuku Stream. The habitat around the ponds itself was also not identified as being conducive to long-tailed bat presence, which was another important ecological factor".

- (g) if the designation alignment was moved south it is likely that an equivalent (likely a collector road), would be required somewhere in the vicinity of the designated alignment.<sup>112</sup>

[123] We are satisfied that the Council gave adequate and genuine consideration to alternatives, including the alternative identified by the Shaws.

***Would the taking of land be fair, sound, and reasonably necessary for achieving the objectives of the Minister? (s24(7)(d))***

[124] Under this head we address the following issues:

- The nature of our enquiry;
- Our determination of fairness, soundness and reasonable necessity, having regard to the matters advanced by the Shaws;
- The effects of the taking of the Shaws' land.

*The nature of our enquiry under s24(7)(d)*

[125] In *Olliver Trustee Limited and St Heliers Capital Limited v Minister for Land Information*,<sup>113</sup> the High Court set out the following principles in relation to the taking of land under the Public Works Act:

[20] The compulsory acquisition of land by the Crown involves significant interference with an individual's property rights. The Crown's powers when compulsorily acquiring land must therefore be strictly construed.<sup>114</sup>

[21] The Act sets out a carefully prescribed cascading process designed to strike a balance between the public interest in the Crown or a local authority acquiring land for public works,<sup>115</sup> and the rights of land owners whose land is required for public works. The process set out in the Act commences with a regime for acquisition of land by agreement,<sup>116</sup> and progresses to a system for the compulsory acquisition of land,<sup>117</sup> which ultimately is acquired by proclamation

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<sup>112</sup> ADA Gray, Affidavit affirmed 24 April 2020, at [45] and [47].

<sup>113</sup> *Olliver Trustee Limited and St Heliers Capital Limited v Minister for Land Information* [2015] NZHC 1566.

<sup>114</sup> *Deane v Attorney-General* [1997] 2 NZLR 180 (HC) at 191.

<sup>115</sup> "Government work" and "local work"; Public Works Act 1981, s 16.

<sup>116</sup> Public Works Act 1981, s 17.

<sup>117</sup> Public Works Act 1981, ss 23-25.

issued by the Governor-General.<sup>118</sup> Each step in the statutory regime is carefully calibrated to ensure the rights of landowners are not compromised more than is reasonably necessary.

[22] The importance of reasonableness in the statutory process was made in the following way by Upjohn LJ (as he then was) in *Simpson's Motor Sales (London) Ltd v Hendon Corporation*:<sup>119</sup>

... The underlying assumption of Parliament is that in conferring compulsory powers upon statutory authorities for public purposes, the acquiring authority will act reasonably in the public interest, that is, not only in the interests of their own ratepayers or shareholders, as the case may be, but with due regard to the interests of the person being dispossessed.

[23] Similar observations were made by Baragwanath J in *Waitakere City Council v Brunel*, when he said:<sup>120</sup>

... Rather than an exercise in arbitrary power, [the power of compulsory acquisition] is one of democratic process by, in this case, a council possessing the authority of an elected body, subject to review by the Environment Court according to criteria that it be fair, sound and reasonably necessary.

[126] In *Waitakere City Council v Brunel*, the High Court provided assistance in understanding the meaning of the terms “fair”, “sound” and “reasonably necessary” in s 24(7)(d) of the Act.<sup>121</sup> The term “fair” may be limited to a “sense of equitable” or “free from irregularities”.<sup>122</sup> The term “sound” was said to connote “solid and substantial”.<sup>123</sup> The concept “reasonably necessary” may be engaged even if an alternative proposal is available. The Court noted that the three criteria in s24(7)(d) of the Act overlap.<sup>124</sup> All three criteria must be satisfied.

[127] The statutory duty to be fair must be exercised in good faith, acting reasonably in the public interest but with due regard to the interests of the person being dispossessed.<sup>125</sup>

[128] In relation to the Court’s jurisdiction to make a declaration as to whether the Council has satisfied the good faith requirements under s18, Mr Muldowney submitted that:<sup>126</sup>

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<sup>118</sup> Section 26.

<sup>119</sup> *Simpson's Motor Sales (London) Ltd v Hendon Corporation* [1963] Ch 57, at 83.

<sup>120</sup> *Waitakere City Council v Brunel* [2007] NZRMA 235 (HC) at [47]; see also *Seaton v Minister for Land Information* [2013] NZSC 42, [2013] 3 NZLR 157 at [47].

<sup>121</sup> *Waitakere City Council v Brunel* [2007] NZRMA 235 (HC) at [27].

<sup>122</sup> *Waitakere City Council v Brunel* [2007] NZRMA 235 at [48].

<sup>123</sup> *Waitakere City Council v Brunel* [2007] NZRMA 235 at [49].

<sup>124</sup> *Waitakere City Council v Brunel* [2007] NZRMA 235 at [48].

<sup>125</sup> *Deane v Attorney-General* [1997] 2 NZLR 180 at page 191.

<sup>126</sup> Submissions of behalf of the respondent dated 24 May 2021 at [33].

The Court does not have the power to make a declaration as to whether Council has satisfied the good faith requirements under s18. However, if the requirements have not been adhered to, or the taking is being conducted in bad faith, the Court may consider compliance with s18 as part of its s24(7) inquiry.<sup>127</sup> Council accepts that the good faith requirements properly form part of the Court's inquiry and asserts that at all material times it has acted in the utmost good faith.

[129] We consider that the way in which the duty to be fair must be exercised and set out above are significant indicators as to the breadth of the enquiry which we are to undertake.

[130] Finally, under this head, we refer to two different illustrative decisions arising from objections to the taking of land that Mr Muldowney submitted could assist the Court in its enquiry.<sup>128</sup> In the first case, *Gray v Minister of Land Information*,<sup>129</sup> the Environment Court found:

We accept that taking the land would cause hardship to Mrs Gray. Fortunately, she would be able to retain the part of her land lying to the east of the new highway, and if the Department of Conservation makes the severance to the west open to the public, she would still be able to enjoy the features that she described. This would be only a small consolation to her for the loss of her land and her ambitions for it. The full financial compensation to which she would be entitled would not completely compensate for the loss of her ambitions either. Even so, having regard to the fact that the route of the highway passing through her land has been designated following extensive public participation processes and Court proceedings, we do not consider that taking the land would be unfair, or unsound. We find that the Crown has acted reasonably in the public interest and with due regard to the interests of the owner.

[131] In the second case, *Grace v Minister for Land Information*, the Environment Court found:<sup>130</sup>

[24] ... It is quite clear from Mr Quinn's evidence that quite a minor realignment of the carriageway, within the existing designation, can avoid the necessity of building batters (or anything else) on the affected portion of Mrs Grace's land, will not require the purchase of any other land, and will still not encroach on the Takamore Urupa.

[29] Our conclusion on the question in subparagraph (b) must then be that there is a least one potential alternative route (within the existing designation

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<sup>127</sup> *Ravji v Wellington Hospital Board* PT Wellington W030/89, pp4-5 (upheld on appeal on other grounds in *Ravji v Wellington Hospital Board* HC Wellington AP75/89, 14 February 1990).

<sup>128</sup> Submissions of behalf of the respondent dated 24 May 2021 at [38] to [46].

<sup>129</sup> *Gray v Minister of Land Information* EnvC Auckland A117/2000, 2 October 2000 at [65].

<sup>130</sup> *Grace v Minister for Land Information* [2014] NZEnvC 82 at [24], [29], [41].

corridor) available that can avoid the taking and use of any of Mrs Grace's land. Until it came to light in the course of the hearing before us, it had never been suggested to Mrs Grace, and there is no trace of it, or anything having a similar effect, being given any, let alone adequate, consideration as a means of achieving the Minister's objectives. We acknowledge that the cost of adopting it is not insignificant, but in the context of the other issues we shall discuss it might at least have been given adequate consideration.

[41] Mrs Grace goes on to describe her connection with the land in this way:

21. The land in question, as part of the area known as Tuku Rakau, is where Wiremu Parata Te Kakakura and his people settled and lived for many years. It is waahi tapu, being where people lived their lives, harvested resources, established their wharenuui, their wharemate, their urupa, their homes and their gardens. It is where they constructed their birthing shelters, buried the whenua and secreted the pito of their offspring. It is where they discussed, negotiated and made important decisions for life and survival. It is a historic place, a place of archaeological interest and is likely to include an area of human internment. I say likely because we have been told that burials took place in the upper parts of the land – which makes sense to me because it is the high, safe ground.

...

*Fairness, soundness and reasonable necessity having regard to the matters advanced by the Shaws*

[132] We observe from the various written communications that the Council was clear in its desire to work in good faith throughout the process. There is nothing in the evidence to suggest that was not the case through their process of negotiations with the Shaws, particularly taking into account its actions as described in paragraphs [87] to [92], [94] and [95] to [104].

[133] It is also clear to us that the Council was constrained in its ability to progress negotiations with the Shaws because of their opposition to the taking of the land, which deepened over time. This opposition manifested in their unwillingness to allow access to the land for valid investigation purposes at different times, their lack of response to various offers made by the Council and the delay in providing their valuation to the Council, which extended through until May 2021. For these reasons, we are satisfied that the Council acted in good faith and endeavoured to be fair but was constrained in doing more by the position taken by the Shaws.



[134] We are also satisfied that the process followed by the Council was comprehensive and robust, including its consideration of alternatives. Further, we consider that the Council has acted both reasonably in the public interest, and equitably taking into account the interests of its ratepayers with due regard to the interests of the Shaws. Finally, we are satisfied that the taking of the Shaws' land is reasonably necessary to achieve the Council's objectives.

*The effects on the Shaws of taking their land*

[135] By letter dated 18 March 2021, Mr Shaw advised that (*sic*) "... we have been building for over thirty years we have kauri, totara and many other trees that we planted ourselves (*sic*) over thirty years ago".

[136] Mr Shaw's evidence is that, since retirement in 2006, he has focussed much of his attention and resources on the development of the bird park at their property, including ponds developed in the gully and stream, substantial tree plantings and aviaries. We were able to observe the park as it now exists during our site visit and saw the various features described. We could see that a significant amount of development has occurred by way of a constructed concrete pathway and the formation of various ponds and that there is a wide range of trees spread across the property.

[137] The Council identified that some of the structures on the site are unconsented. This was not pursued at the hearing as, for the purposes of land valuation, the Council had assumed they are fit for purpose. Mr Shaw recorded that "... we started the dams/weirs to stop the rubbish from the landfill entering into Te Awa O Waikato/The Waikato River this was back in 1989-1990 although we never at that time owned the land which we brought in 1991...".<sup>131</sup>

[138] Mr Shaw stated that:<sup>132</sup>

... since then we have built a 7 Ha park, 2 kms of concrete footparths (*sic*) with 9 ponds and planted out with some 4500 trees many both exotic and native 30 years old.

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<sup>131</sup> Letter dated 24 March 2021 at [4].

<sup>132</sup> Letter dated 24 March 2021 at [4] – [8].

... our place is just so beautiful in autumn with reds and oranges from the maple trees and liquid ambers.

Grow the trees and the birds will come this has been on our mind for 30 years and now the bird life is a real treasure with Ruru, Kereru, Tui seen here most days along with White Faced Heron and Dab Chick which are now on the endangered list.

... our park is open to the public everyday ...

[139] We accept that Mr Shaw has put a lot of effort into developing the property and that, understandably, he wants to protect what he has achieved. However, when evaluating the effects of taking the land on the Shaws, our findings must be based on all the relevant evidence presented to us. The only expert evidence on the ecological values of the land to be taken was provided by Mr Eccles, who stated that:<sup>133</sup>

Ecological matters were one of the criteria considered during the MCA. The main stem of the Mangakotukutuku Stream was identified as a constraint given its high ecological values and largely unmodified state.

While the Shaw property contains a tributary of the Mangakotukutuku Stream it was noted that the reach of the tributary stream within the Shaw property, and the adjoining Colchis property, was highly modified and the ponds are artificially created. Thus, the ecological values of the tributary in that reach were rated lower than the remainder of the tributary and the main stem of the Mangakotukutuku Stream. The habitat around the ponds itself was also not identified as being conducive to long-tailed bat presence, which was another important ecological factor.

[140] It is clear that if the road is constructed, trees within the designated area will need to be removed and changes to the form and/or location of some features of the park will be required, including aviaries, ponds, the concrete paths and possibly some buildings. Nevertheless, use of the land for a bird park could continue, albeit in a different form. As Mr Gray's evidence is that, because of the urban development that will occur in the Peacocke area generally, a road of some description will be required in the general location of the East-West Minor Arterial even if the Arterial was moved further south as proposed by the Shaws.

[141] The circumstances of this case are not the same as those in *Grace v Minister for Land Information*, where consideration of an alternative route was found to be necessary.

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<sup>133</sup> GR Eccles, Affidavit affirmed 24 April 2020, at [25] – [26].

[142] However, the circumstances here are broadly like those in *Gray v Minister of Land Information*. Here, and as in that case, the route of the highway passing through the land has been designated following extensive public participation processes and Council hearing proceedings. We find that the Council has acted reasonably in the public interest and with due regard to the interests of the owner.

[143] With appropriate access provided to different parts of the residual land, which the Council has undertaken to provide, it will still be possible for the Shaws and the public to continue to enjoy the bird park. We acknowledge this will be small consolation to the Shaws for the loss of their land and the commitments they have made to development of the bird park.

[144] The full financial compensation to which they may be entitled is unlikely to completely compensate for the loss of their future aspirations. These are matters that will be the subject of compensation determined in a separate process to the process of taking the land under the Public Works Act. Also, while there was discussion in the evidence about the whole of Lot 515 being acquired by the Council at the request of the Shaws, this does not appear to have progressed as the Shaws subsequently decided they did not wish to sell any of their land. Accordingly, if the Shaws now wish to pursue the option further, they will need to do so through the acquisition process.

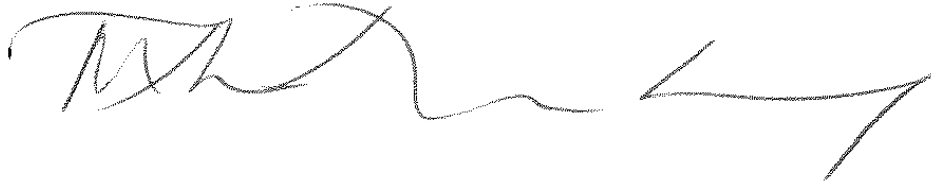
#### **Findings on s24(7)(d) considerations**

[145] Considered overall, we find that the taking of interests in the Shaws' land as proposed by the Council is fair, sound and reasonably necessary for achieving the Council's objectives.

[146] We dismiss the objection in all respects.

**Costs**

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



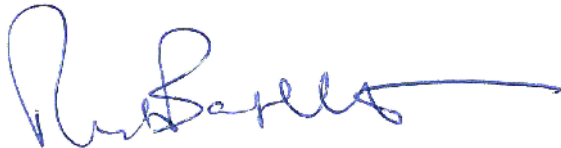
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MJL Dickey  
Environment Judge



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JA Hodges  
Environment Commissioner



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RM Bartlett  
Environment Commissioner



## Appendix 1 – Relevant provisions of the Public Works Act 1981

### *Section 18 Prior negotiations required for acquisition of land for essential works*

- (1) Where any land is required for any public work the Minister or local authority, as the case may be, shall, before proceeding to take the land under this Act—
- (a) serve notice of his or its desire to acquire the land on every person having a registered interest in the land; and
  - (b) lodge a notice of desire to acquire the land with the Registrar-General of Land who shall register it, without fee, against the record of title affected; and
  - (c) invite the owner to sell the land to him or it, and, following a valuation carried out by a registered valuer, advise the owner of the estimated amount of compensation to which he would be entitled under this Act or the betterment that he may be liable to pay; and
  - (d) make every endeavour to negotiate in good faith with the owner in an attempt to reach an agreement for the acquisition of the land.
- (2) If, after a period of 3 months,—
- (a) the owner fails to respond to any invitation issued under subsection (1); or
  - (b) the owner refuses to negotiate with the Minister or the local authority, as the case may be; or
  - (c) an agreement for the sale and purchase of the land is not made with the owner under section 17,—

the Minister or local authority may, within 1 year after notifying the owner under subsection (1), proceed to take the land under this Act.

### *Section 23 Notice of intention to take land*

- (1) When land (other than land owned by the Crown) is required to be taken for any public work, the Minister in the case of a Government work, and the local authority in the case of a local work, shall—
- ...
- (c) serve a notice on the owner of, and persons with a registered interest in, the land of the intention to take the land in the form set out in Schedule 1.
- ...
- (3) Every person having any estate or interest in the land intended to be taken may object to the taking of the land to the Environment Court in accordance with the provisions of the notice.
- ...
- (5) Where the Minister or local authority has confirmed the intention of taking the land, the notice of

intention so confirmed shall cease to have effect unless, on or before the expiration of 2 years after the date of such confirmation, a Proclamation taking the land has been published in the *Gazette*.

***Section 24 Objection to be heard by Environment Court***

- (1) On receiving a written objection under section 23, the Environment Court shall, as soon as practicable, send a copy of the objection to the Minister or local authority, as the case may require.
- (2) Within 1 month after receiving a copy of the objection or within such further period as the Environment Court may allow, the Minister or local authority, as the case may require, shall send to the Environment Court and serve on the objector a reply to the objection containing the following information:
  - (a) the statutory or other authority under which it is proposed to take the land; and
  - (b) the nature of the work to be constructed or the purpose for which the land is required; and
  - (c) such other matters as may be appropriate having regard to the objections made and to any practice directions issued by the Environment Court.
- (3) The Environment Court shall inquire into the objection and the intended taking and for that purpose shall conduct a hearing at such time and place as it may appoint.
- (4) Not less than 15 working days' notice of the time and place so appointed shall be given to the objector and to the Minister or local authority, as the case may require.
- (5) Every such hearing shall be held in public unless the objector gives written notice to the Environment Court before the date of the hearing that he requires the hearing to be held in private.
- (6) At every such hearing the Minister or the local authority may be represented by counsel or by an officer of the Minister's department or local authority, as the case may require, and the objector may appear and act personally or by counsel or any duly authorised representative.
- (6A) The Environment Court may, whether or not the parties consent:
  - (a) accept evidence that was presented at a hearing described in section 39(1) of the Resource Management Act 1991, or at a related inquiry or appeal heard by the court; and
  - (b) direct how evidence is to be given to the court.

(7) The Environment Court shall—

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

...

- (9) At the same time as the Environment Court submits its report and findings to the Minister or local authority, it shall send a copy of the report and findings to the objector, and make copies of them available to the public.
- (10) The report and findings of the Environment Court shall be binding on the Minister or, as the case may be, the local authority.
- (11) Any objection filed under section 23 may be withdrawn by the objector at any time before the court makes its report and findings under this section.
- (12) Where the objection is withdrawn by the objector pursuant to subsection (11), the court shall not be obliged to make a report and findings under this section.
- (13) The Environment Court may award such costs as it considers just either in favour of or against the objector, the Crown, or the local authority.
- (14) Subject to sections 299 and 308 of the Resource Management Act 1991, no appeal shall lie from any report or recommendation of the Environment Court under this section.

## Appendix 2

### Further details of the Court process

24 January 2020	Notice of reply to objection by the Council
7 February 2020	Counsel for the Council sought directions on an evidence exchange timetable which sought by consent that the objectors (i.e., the Shaws) file any further affidavit evidence (including expert evidence) by 20 March 2020
11 February 2020	The Court directed Counsel for the objectors to confirm in writing that there are no issues as to the timetable directions sought in paragraph 4 of the memorandum of 7 February 2020.
13 February 2020	Counsel for the objectors confirmed that the proposed directions were acceptable to the objectors.
17 February 2020	Directions confirmed by the Court.
20 March 2020	Mr Shaw's Affidavit dated 19 March filed in accordance with agreed timetable
27 March 2020	Mr Shaw's statement of evidence filed, after a short delay resulting from self-isolation requirements arising from Covid 19.
16 June 2020	Court assisted mediation
7 July 2020	Joint memorandum of counsel advised the Court that "Agreement was reached on a process by which the issues raised by the objector can be considered outside the Court process, with the objective of resolving those issues without the need for a Court hearing".
7 October 2020	Joint memorandum of counsel advised the Court that sufficient progress has been made that there would be value in further mediation, and respectfully request that a further court-assisted mediation be allocated on the first available date after 1 November 2020.
13 October 2020	The Court directed further mediation as requested. A date of 1 December was agreed for the mediation.
9 November 2020	<p>Counsel for the Council advised the Court that:</p> <p>Shortly after agreeing to further mediation (as reflected in the joint memorandum), the Objectors appeared on "Seven Sharp" indicating that they "are not going anywhere" and "will do what they have to do" to stop their land from being taken. This included obstructing HCC's legitimate access to neighbouring properties (which has had the effect of disrupting planned geotechnical work).</p> <p>Additionally, the Objectors have been unwilling to grant HCC access</p>



	<p>to their land, which is necessary for potential solutions to be explored. From HCC's perspective, this is contrary to prior undertakings to provide access. Significantly, there is now insufficient time to properly explore potential accommodation to protect the Objectors bird park prior to mediation.</p> <p>Counsel sought that a timetable for evidence exchange be set in the event that mediation was unsuccessful and a hearing was required. The proposed date for the objectors to file and serve any further evidence was 15 December 2020, with the Council filing and serving further evidence by 12 February 2021 and the objectors filing and serving any evidence strictly in reply by 26 February 2021.</p>
17 November 2020	<p>Counsel for the objectors confirmed that the objectors are committed to seeking resolution of the objection issues through mediation and stated:</p> <ol style="list-style-type: none"> <li>4. In principle the option of parallel mediation and evidence preparation tracks would be acceptable for the objectors if it did not place any greater immediate strain on them in facing a forced sale of the family home and the bird park that is their passion. The preference for the Shaws is to focus on the 1 December mediation, which is not a normal part of day to day activity for them, as it may be for the Council and its advisors.</li> <li>5. There is a way in which the wishes of the Council and the objectors' situation can both be accommodated. The timetable directions could provide for any additional evidence for the Council to be filed and served by the suggested date of 15 December 2020 and for the objectors to file and serve any further evidence by 12 February 2021, and finally for the Council to file and serve any evidence strictly in reply by 26 February 2021.</li> </ol>
20 November 2020	<p>The Court <u>directed</u> that a judicial telephone conference to be convened on Wednesday, 25 November 2020 and required confirmation of availability by 5.00pm on Monday, 23 November 2020.</p>
25 November 2020	<p>The Court convened a judicial telephone conference to explore whether mediation was still worthwhile and to discuss matters relating to the timetable proposed by counsel in their memoranda. In a minute issued the same day the Court directed that the scheduled Court-assisted mediation was to proceed on 1 December 2020 and that a further judicial telephone conference would be convened at on 8 December 2020.</p>
8 December 2020	<p>At the further conference, neither party considered that further Court-facilitated mediation was required but the Court reserved leave to the parties if they considered a further Court-facilitated alternative dispute resolution process might assist in the future. The hearing timetable was extended by two weeks by consent.</p> <p>The Shaws did not submit any further evidence.</p>

16 February 2021	Mr Lang, counsel acting for the Shaws advised the Court that “Recent discussions between myself and the objectors have resulted in agreement being reached that I will no longer be involved as counsel in these proceedings”. He sought leave to withdraw as counsel for the objectors, effective immediately.
19 February 2021	Ms Van Esch advised Mr O’Brien that she no longer worked for the Shaws and all future correspondence should be posted to Mr Shaw.
1 March 2021	Counsel for the Council sought a telephone conference with the Objectors and their solicitor on the record (or any other lawyers instructed) to ensure that the Objectors are aware of and understand the Court process.
11 March 2021	<p>The Court received a letter dated 8 March 2021 from Mr Shaw confirming that Mr Lang and Mr Fletcher no longer represented the Shaws. He stated that “...because of the unacceptable malpractice between both legal teams we find ourselves having to take matters into our own hands”. Mr Shaw also sought answers from the Council to his unanswered questions.</p> <p>He stated “... there will be no teleconference between HCC legal team and us until further notice from the Principal in this matter Murray Shaw (de jure), applied or expressed”.</p> <p>He directed the Court to (<i>sic</i>)“... inform the HAMILTON City Council and its legal team and all concerning parties to cease and desist all claims as we have invited all concerning parties to meet with us on numerous occasions and have had no response therefore we take that as Full Acceptance of all our claims”.</p>
12 March 2021	Mr Fletcher filed a memorandum indicating his intention to make an application to withdraw as the solicitor on the Court record for the objectors as he was aware that they no longer wished him to continue with the role.
15 March 2021	<p>A judicial telephone conference call was held on 10 March 2021, directed by the Court to discuss the outstanding matters and make amendments to the current evidence exchange timetable. The Registry had contacted Mr Shaw by phone, e-mail and registered mail to convey the directions to him. On 12 March 2021, a formal notice was issued by e-mail as well as couriered to the objectors' physical address, using overnight Saturday delivery.</p> <p>The Court was advised by the Spark conference call operator that Mr Shaw refused to be connected to the conference call. Therefore, the conference proceeded in his absence in a limited manner. In order to uphold the fixture in May 2021, the Court directed the objectors to file any further evidence by Friday 26 March 2021.</p>

	No further evidence was filed.
19 March 2021	<p>The Court received a letter dated 16 March 2021 from Mr Shaw referring to his earlier letter of 8 March, noting that he had not received a response and that (<i>sic</i>):</p> <p style="text-align: center;">“BE IT KNOWN TO ANY AND ALL THAT, we Murray Nelson Shaw (de jure), STATE OUR INTENT TO PEACEFULLY DENY CONSENT TO GOVERNED BY ANY AND ALL, THAT ALL DEMANDS MADE ON US AND OUR PROPERTY IS TO CEASE AND DESIST IMMEDIATELY.</p>
22 March 2021	By minute of this date, the Court directed that Mr and Mrs Shaw were to confirm to the Court their positions on the applications by Mr Lang and Mr Fletcher no later than Thursday 25 March 2021.
25 March 2021	<p>The Court received a letter dated 18 March from Mr Shaw wanting to know “...who put an objection in on our behalf ...” and who “you” is? He also sought assistance from the Court to address matters between him and his legal counsel.</p> <p>On the same day, we received a letter from Mr Shaw dated 23 March 2021. This again sought answers to earlier questions and for assistance from the Court in addressing matters between Mr Shaw and his counsel. He also sought proof that Mr Muldowney, counsel for the Council, has “Legal and Lawfull Authority, as a Public Servant to bother us at all?”. He stated:</p> <p style="text-align: center;">Failure to respond to our notice by Mr Muldowney within 21 working days will be deemed that all concerning parties cease and desist all demands on us and our property, and we humbly direct Judge Dickey to inform all concerning parties of our intent please.</p>
29 March 2021	The Court received a letter dated 24 March from Mr Shaw, again referring to issues relating to his legal counsel, but also providing background information about the bird park. We subsequently received further letters covering a number of the issues raised in earlier correspondence.
8 April 2021	<p>The Court made an order pursuant to Rule 5.44(1) of the District Court Rules 2014 and s278 of the Resource Management Act 1991 declaring Messrs Lang and Fletcher have ceased to be solicitors on the record for Mr and Mrs Shaw.<sup>134</sup></p> <p>In the same minute, the Court stated that requests for full disclosure of information from Mr and Mrs Shaw's previous lawyers are outside of this Court's jurisdiction.</p>

<sup>134</sup> Minute of the Environment Court dated 8 April 2021 at paragraph [10].

16 April 2021	<p>A judicial telephone conference was held to discuss what directions needed to be made to progress the matter. Mr Shaw was notified of the conference prior to it starting and was given two opportunities to participate. Mr Shaw declined on both occasions and the Court proceeded without him. An opportunity was provided for the Shaws to respond by 19 May 2021, if they wished, to the evidence to be filed by the Council on 7 May, with the hearing proceeding on 24 May 2021 as previously directed.</p> <p>The Shaws did not respond.</p>
17 June 2021	<p>The Council advised the Court by memorandum that Mr Shaw objected to a nominated council representative attending the site visit. (The Council provided the Court with a copy of a letter dated 7 June 2021, received by the Council on 11 June 2021 but not sent direct to the Court).</p>
21 June 2021	<p>Despite Mr Shaw's indication of non-attendance, the Court considered it necessary to proceed with the judicial telephone conference. A judicial telephone conference was convened in the absence of Mr Shaw, following which the Court decided to proceed with the site visit in the absence of a representative of the Council.</p>

## Appendix 3

IN THE ENVIRONMENT COURT  
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA  
KI TĀMAKI MAKĀURAU

IN THE MATTER OF    the Public Works Act 1981

AND                      of an objection to the taking of land  
                                 pursuant to section 23 of the Act

BETWEEN              MURRAY NELSON SHAW &  
                                 MARGARET EVELYN SHAW

                                 (ENV-2019-AKL-000316)

**Objectors**

AND                      HAMILTON CITY COUNCIL

**Respondent**

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### MINUTE OF THE ENVIRONMENT COURT

(29 June 2021)

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#### Introduction

- [1] As foreshadowed in the Court's Minute of 4 June 2021, we visited the Shaw property at 148 Hall Road, Peacocke at 10 am on 25 June 2021. Judge Dickey, Commissioner Hodges and Commissioner Bartlett were accompanied by a Court security officer. We were shown around the site by Mr Murray Shaw and Mrs Margaret Shaw.
- [2] We collected from the Shaws' mailbox, with Mr Shaw's permission, a package of photographs provided by Hamilton City Council that had been delivered by courier just before our arrival. The Shaws did not wish to see the contents



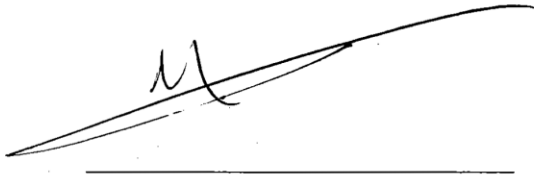
Shaw v Hamilton City Council

and did not wish a copy to be left with them. Given that we only received the Council package on arrival we did not refer to that material during the site visit. However, we have since looked at that material.

- [3] Prior to commencing the site visit Judge Dickey explained its purpose, that being to give a physical context to the maps, photographs and diagrams provided to the Court during the hearing and to understand the layout and topography of the site and the East West Arterial Route.
- [4] Mr Shaw then drove the whole party around the property on existing concrete paths (though sometimes off path to access some areas) in a golf buggy.
- [5] We began the tour at Hall Road and followed the general route of the East-West arterial, stopping first near the Shaw's home where we were shown a designation boundary peg close to the house. We were advised by Mr Shaw that the arterial route boundaries had been marked by surveyors and he pointed them out as we circumnavigated the site. A number of pegs were no longer visible.
- [6] We had with us an A3 map marked 'Tab 4, 025' prepared by Hamilton City Council and provided to us during the hearing and were able to follow the boundary line shown on it to ascertain its location. After showing us around the route boundary and filtration ponds, Mr Shaw drove us up to the subdivision area at Dixon Road and then around the northern boundary of the property.
- [7] Returning to Hall Road we were driven across it and in the general direction of the East West Arterial to approximately the location of its junction with the North South Arterial route. Mr Shaw pointed out the location of the bridge ('viaduct' in his terms) that would cross a gully there. We then stopped at a further viewpoint on the corner of Hall Road opposite the Colchis property where Mr Shaw showed us the point at which the same gully petered out at its upper end in pasture. He pointed out the location of Peacocke Road and the general route of the North South Arterial on the paddocks to the north.

- [8] We returned to our vehicle and after thanking the Shaws left the site at approximately 10:50am.
- [9] Having completed the site visit we declare the hearing closed. Our decision is reserved and will issue in due course.

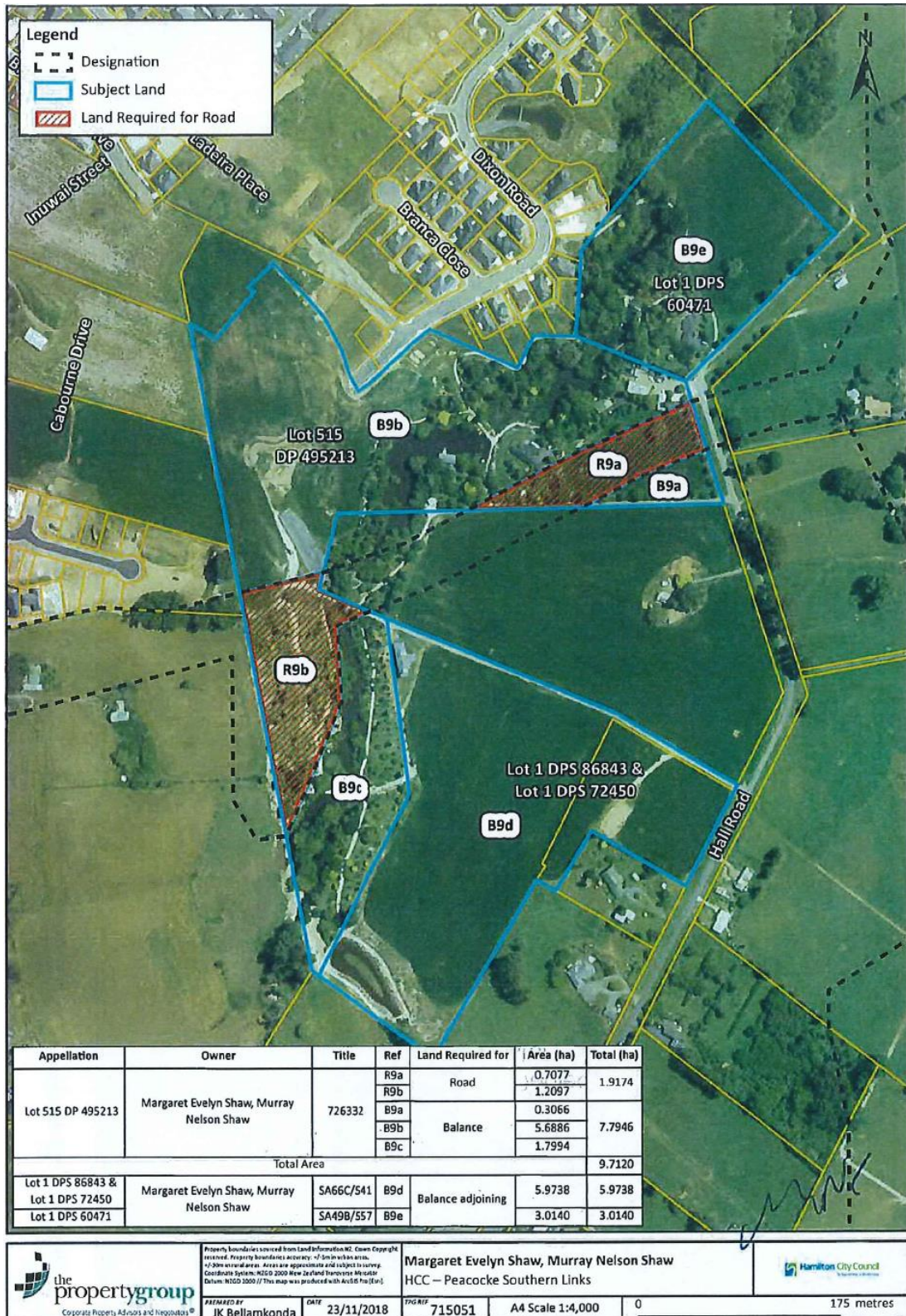
For the Court:

A handwritten signature in black ink, appearing to be 'MJL', written over a horizontal line.

**MJL Dickey**  
**Environment Judge**

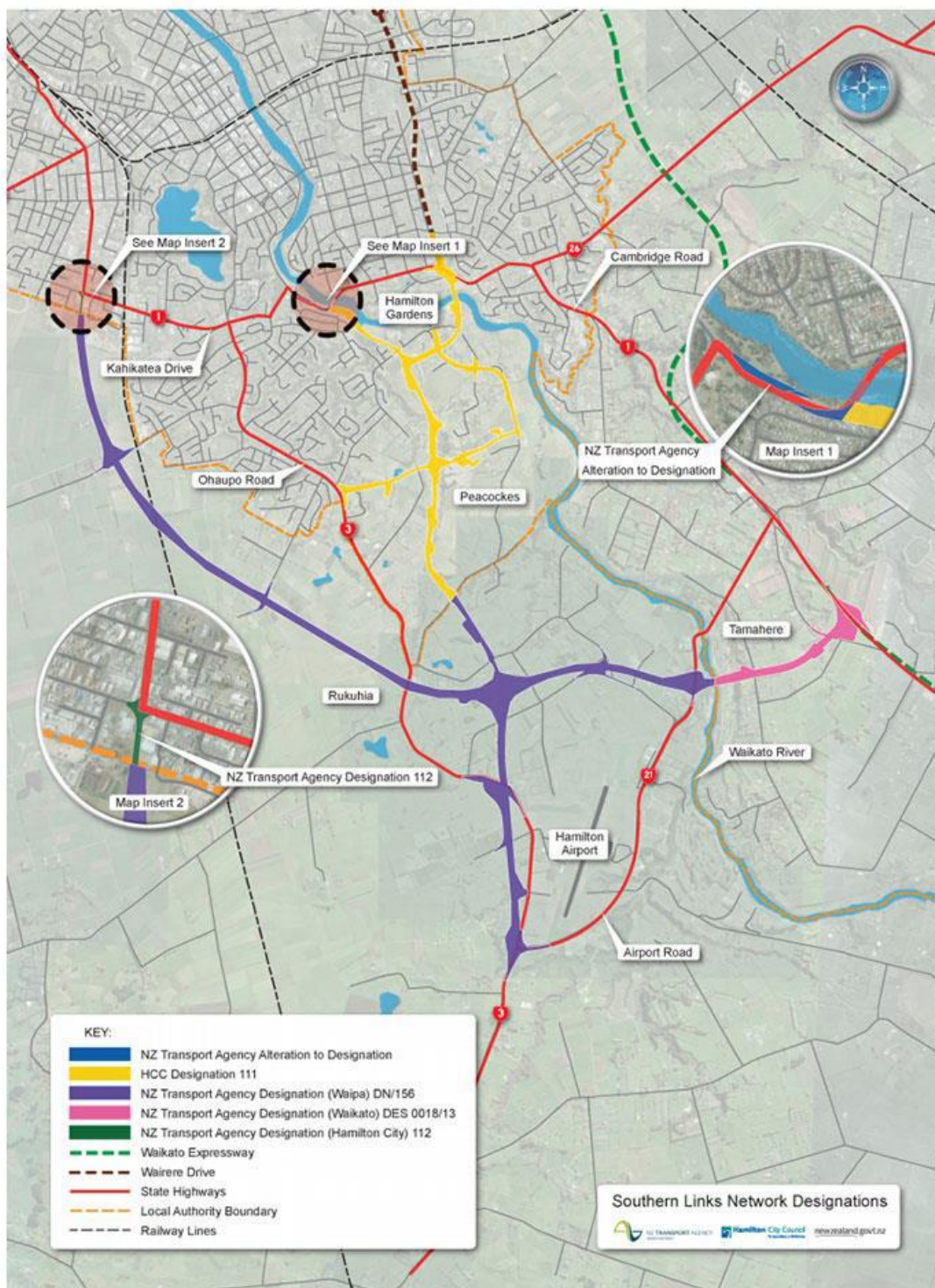


# Annexure A

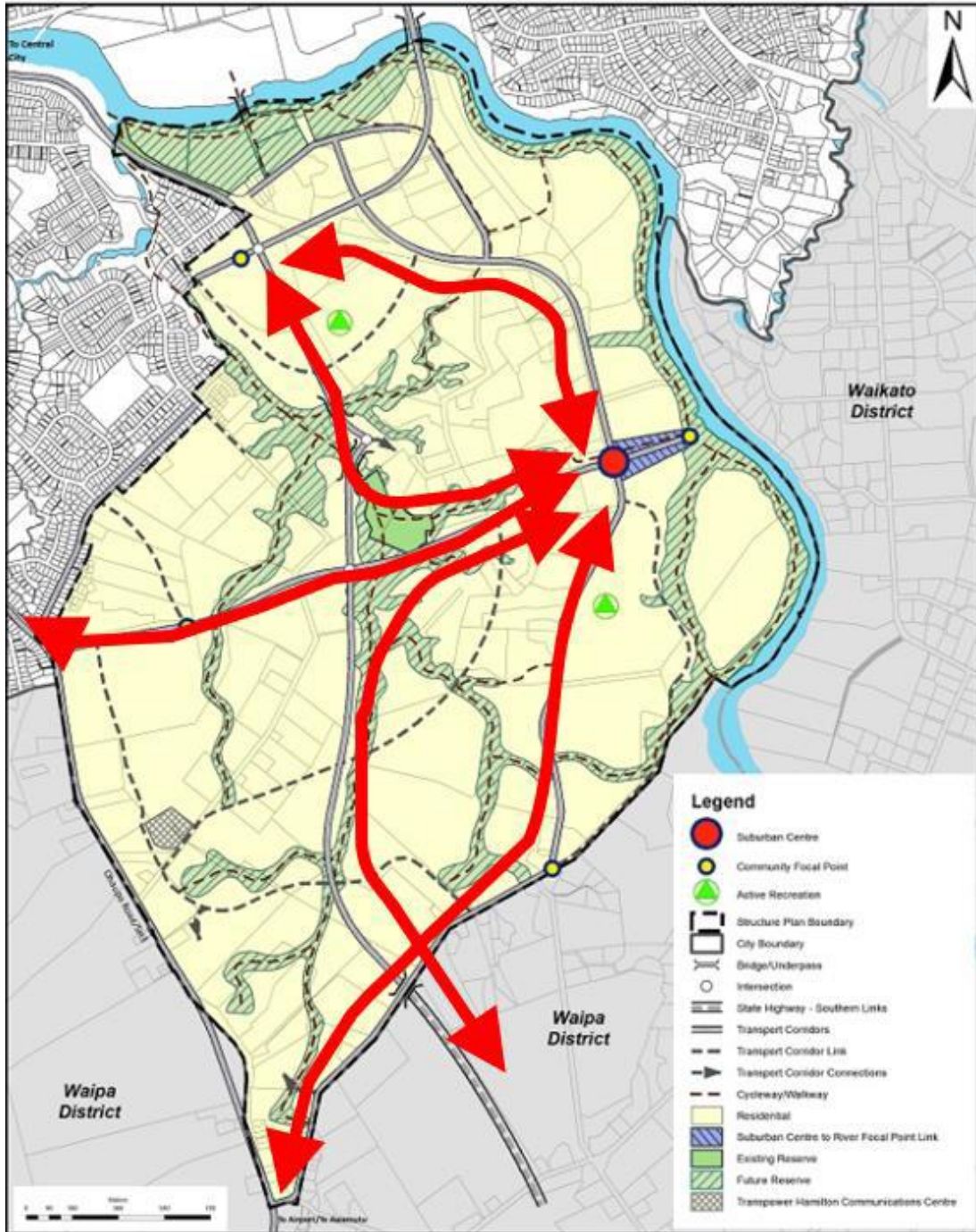




# Annexure B

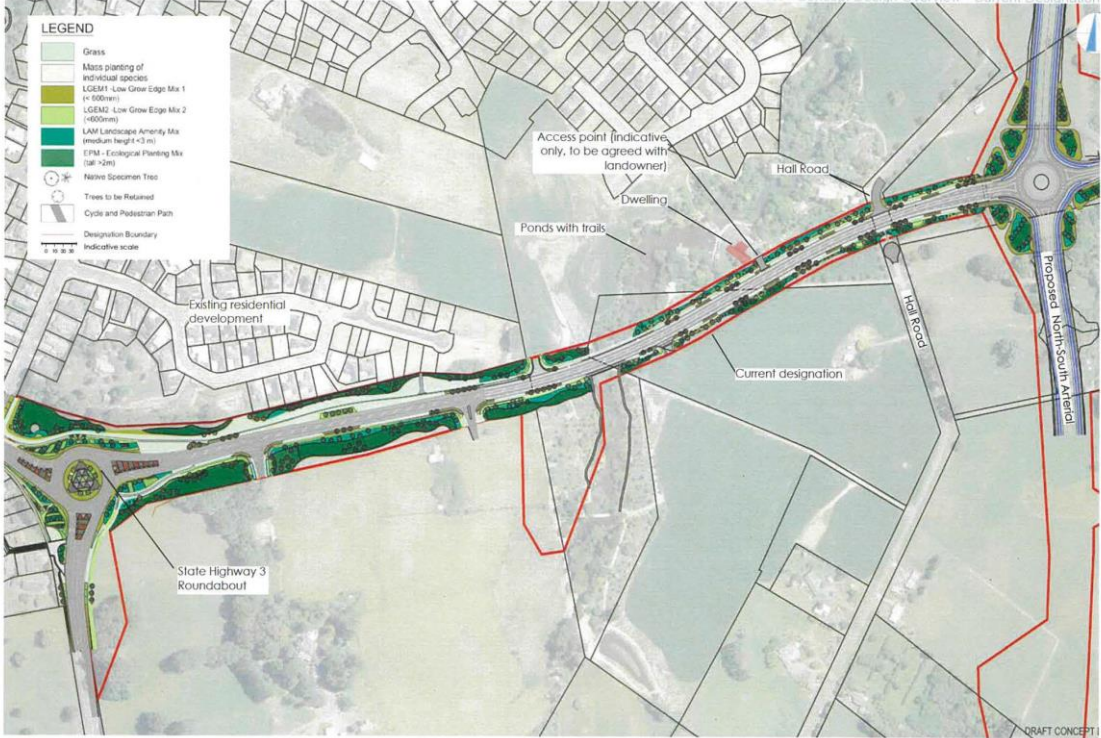


# Annexure C





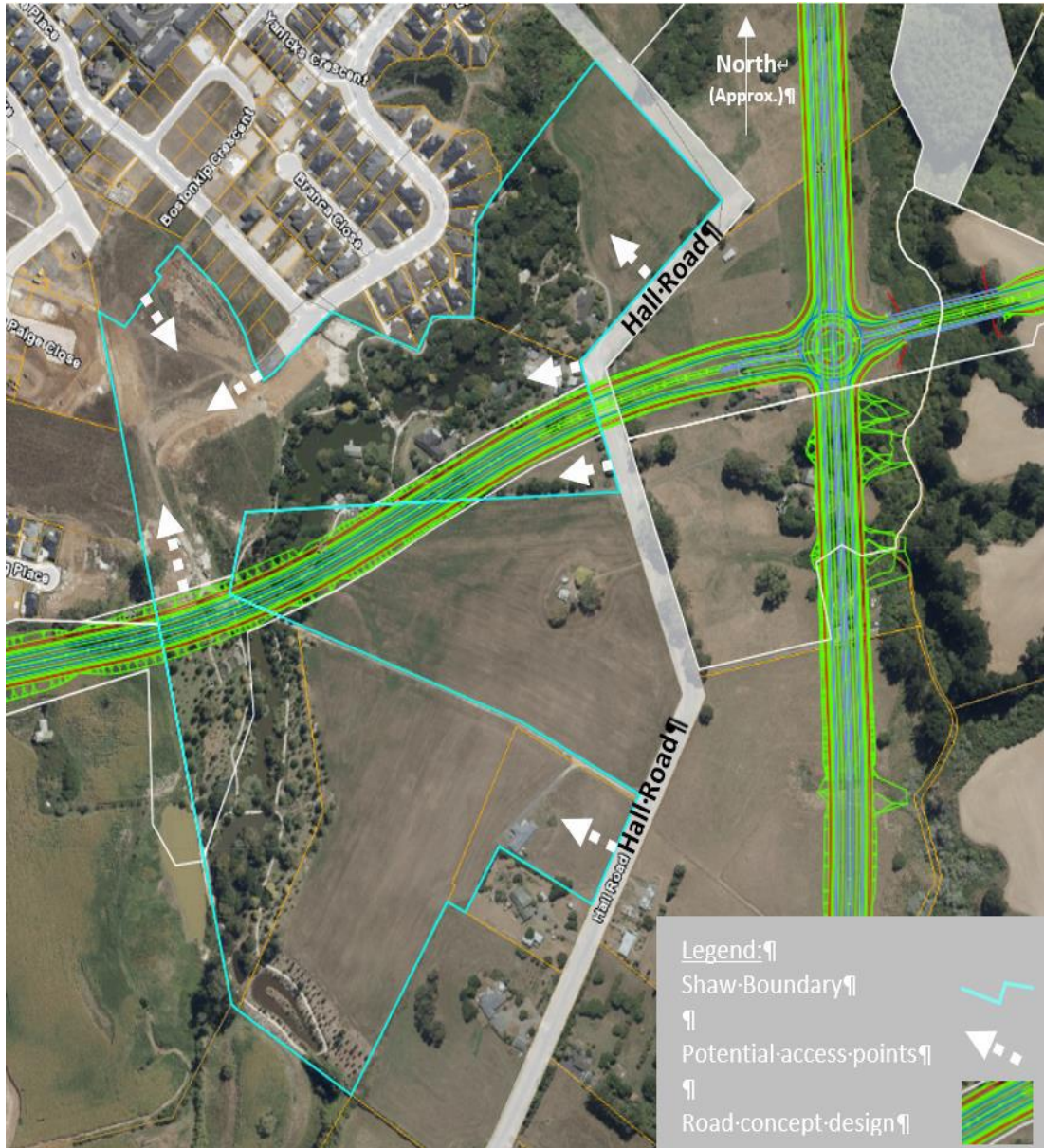
Annexure D



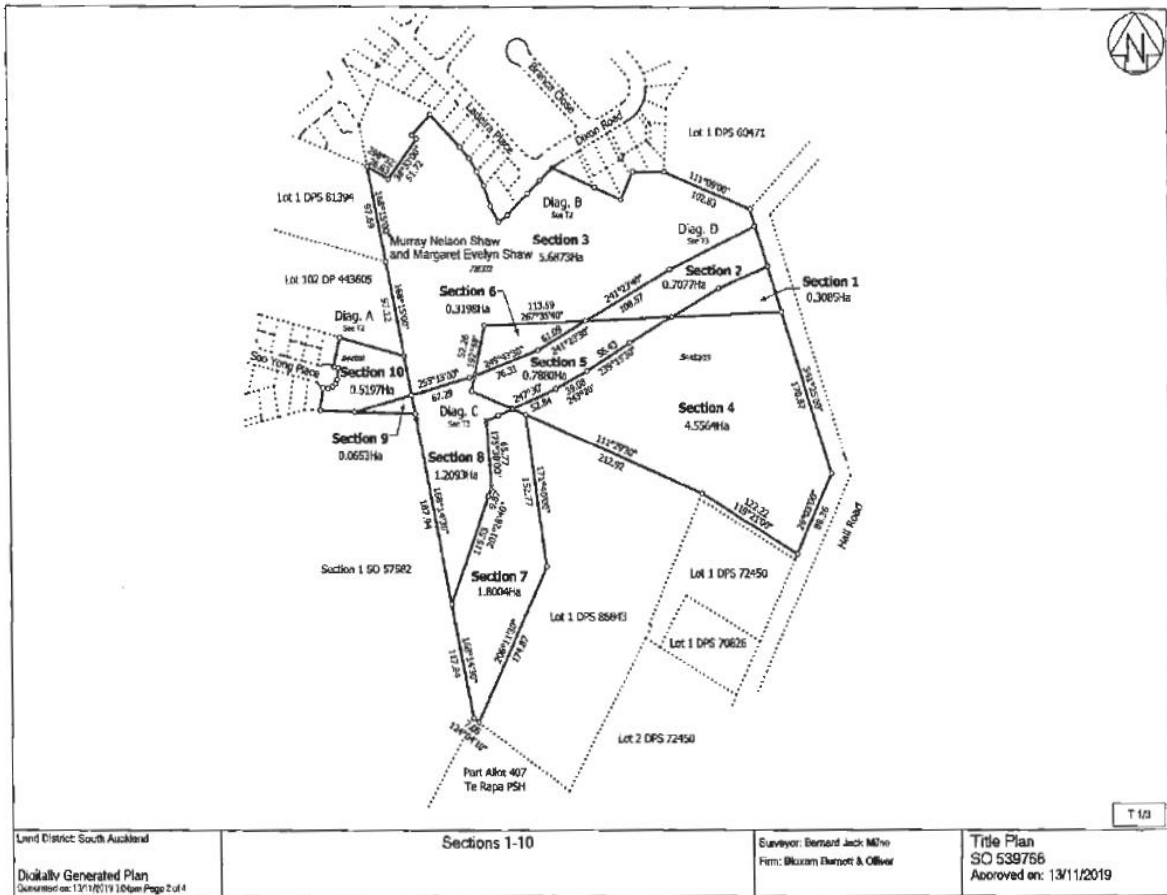
Concept Design for Discussion Only

DATE: 28 JULY 2020 SCALE: NTS

# Annexure E



# Annexure F



Land District: South Auckland  
 Digitally Generated Plan  
 Generation no: 13/11/2019 10:06am Page 2 of 4

Sections 1-10

Surveyor: Bernard Jack MBE  
 Firm: Wikram Ekanott & Olliver

Title Plan  
 SO 539756  
 Approved on: 13/11/2019

T 1/3



Annexure G

