THE RESOURCE MANAGEMENT ACT 1991

REQUIRING AUTHORITY:	**ASHBURTON DISTRICT COUNCIL**
TERRITORIAL AUTHORITY:	**ASHBURTON DISTRICT COUNCIL**
SUBJECT MATTER:	A Notice of Requirement pursuant to s168A of the Act – Ashburton Second Urban Bridge
REFERENCE:	
HEARING DATES:	

Appearances:

- Cedric Carranceja and Emma Moore for the **Ashburton District Council**, as a territorial authority requiring a designation for a public work within its district.
- Pru Steven for the **Ashburton Bridge Action Group Inc.** (276)
- **R (M) Anderson** (213)[1]
- **N D Truman** (43)
- S Cross for **C** & **M Cross** (147 / 8)
- C M Hutchison for **The New Zealand Transport Agency** (254)
- **M Tarbotton** (32 & 215)
- **J Taylor** (40)
- M Walker for **Walker Foodmarket Ltd,** trading as The Netherby Four Square Supermarket
- M Blackburn for **The Scout Association of New Zealand, Upper South Island Regional Office** (135)
- C Stevens **(46)**
- **N (P) Darrell** (31)
- **L Keeley** (97)
- **J Stonyer** (30)
- **G Ricketts** (45)
- **B Lester**
- **N Stuthridge** (28)
- **N** & **G Cross** (143/4)
- **A Toneycliffe** (231
- **F Jones** (2)

[1] The numbers in brackets are those given the submissions on receipt by the Ashburton District Council. In the case of some of those who were heard we could not locate a founding submission in the material made available to us. Regardless, we have taken what those people said in to consideration in reaching our recommendation.

- K Leadley for **A Craig** (67)
- **S Rush** (17)
- **J Wilson** (296)
- **G Wilson** (295)
- **S Cross** (149)
- **G Beckley** (39)
- **P Scott** (50)
- **F Young** (318)
- Paul Jessep for the **Mania-o-Roto Scout Zone** (156)
- **J Cavill** (78)
- **B Mitchell** for himself (183) and for the **Ashburton Scout Group Committee** (257)
- **D Saunders** for himself (313) and **A Saunders** (314)
- **C Campbell**
- **W H Breach** for himself and **M Breach** (79 & 80)
- L Bray for **R Bray**
- **Dr M Wootten** (272)
- **S McKay** for herself (56) and for **Frame Co** (4)
- **D Thompson** (162)
- **R Gane** for himself (242) and for V Gane (241)
- **A Corbett** (177)
- **J Leak** (99)
- **D Philpott**
- **O Philpott** (212)
- **R Perkins** (92)
- **D Rawlinson** (275)
- **K Leadley** (195)
- **Ms R Whillans (presentation of a s42A report)**

<u>Summary of recommendation</u>: that the proposed designation be confirmed, subject conditions.

RECOMMENDATION OF THE COMMISIONERS

INTRODUCTION[2]

On 4 November 2013 the Ashburton District Council, pursuant to s168A of the Act, gave notice of its requirement for a new designation in the (partly operative) Ashburton District Plan. That notice was described as being

> … for a designation for a public work, being the construction, operation and maintenance of a new second urban bridge across the Ashburton River and associated road infrastructure, referred to collectively as the Ashburton Second Urban Bridge (ASUB).
>
> The ASUB will directly link the southern end of Chalmers Avenue with a new bridge across the Ashburton River, and onto a new 2-lane road through 'green fields' east of Tinwald to connect with Grahams Road at the south end of Tinwald, as shown on the Designation Plans … attached to and forming part of this Notice of Requirement.
>
> The physical construction works of the ASUB is not required until approximately 2026 …[3]

In the light of the last-quoted passage a 15 year term was sought for the designation. Outline Plans of the kind contemplated by s176A (3) were not included in the material accompanying the Notice of Requirement, nor have resource consents (anticipated in that material as likely to be required for aspects of the proposed work) yet been sought.

The Notice of Requirement was publicly notified on 7 November 2013, with submissions closing on 5 December 2013. A total of 336 submissions were received[4] in respect of the Requirement – most in opposition. The principal issues (of resource management significance) raised by submitters were summarised in Ms Whillans' s42A report as follows

- Pedestrian Safety
- Heavy traffic in residential area
- Noise
- Light spill
- Economic cost to community
- Access and Exit to properties
- Visual Effects
- Property Values
- Fragmentation of property

In addition, many of the submitters expressed concern about the way in which the Ashburton District Council had gone about the various steps taken by it over a quite lengthy period prior to

[2] In this section and in those to follow, quoted passages are either shown within double quotation marks or shown in-set and in a font smaller than the rest of the text

[3] Notice of Requirement, p1

[4] Eight of these were received late, but were nevertheless accepted by the Ashburton District Council. One further submission was received at a very late stage and this was not accepted.

(and including) its ultimate decision to proceed under s168A of the Act. We will address these concerns also within this recommendation.

We (A Carr and J Milligan) have been appointed as independent hearings commissioners "to hear the submissions and make a recommendation to the *Requiring* Authority on the Notice of Requirement for the Ashburton Second Urban Bridge" (our emphasis). The form of this delegation reflects the wording of s171 – rather than that of s168A – and we interpret it as a delegation to us of such of the powers and functions as are available to *territorial* authorities under the former section; that is, it is for us to *recommend* what decision the Ashburton District Council should make pursuant to s168A (4) and, by analogy with s172, for the Council to decide what the decision is to be and to give reasons if it "rejects the recommendation in whole or in part, or modifies the requirement" – cf. s172 (3).

As required by the terms of our commission we conducted a hearing at Ashburton over the period 10 – 13 March 2014. At the end of the hearing Mr Carranceja elected to make his final submissions in writing and these were received by us on 21 March 2014.

In the discussion to follow we will adopt the convention used at the hearing and (as we understand it) by Ashburton residents generally: we will regard the Ashburton River as running from west to east. Thus: the coast is to the east; Tinwald is (largely) to the east of State Highway 1; the proposed new bridge will convey traffic to the north or south; and so on.

THE PROPOSED DESIGNATION

Relevantly, s166 of the Act is as follows:

> In this Act—
> **designation** means a provision made in a district plan to give effect to a requirement made by a requiring authority under … section 168A …

The Notice of Requirement

(i) Identified land – both by way of notations on the District Planning Maps and a schedule giving legal descriptions and areas – *required* (under the heads 'road' and 'stormwater') for the purposes of a public work;

(ii) Provided an intended 'designation notation': "Ashburton Second Urban Bridge, associated new road and ancillary stormwater infrastructure";

(iii) Specified the *nature* of that work as

> To construct use and maintain a new 2-lane bridge and associated principal road directly linking Chalmers Avenue with a new road through green-fields to the east of Tinwald to a connection with Grahams Road …

(iv) Was accompanied by a set of proposed conditions, management plans, conceptual intersection re-designs and the like, together put forward in mitigation of what might otherwise have given rise to adverse effects on the environment; and

(v) Had attached to it various technical reports that would later form the basis of evidence led at the hearing.

Seen in the light of the s166 definition, elements (i) – (ii) above are clearly intended to form part of the designation – that is, provisions to be made in the District Plan. The reports referred to in (v) above are, equally clearly, evidential material relevant (so far as we are concerned) to the extent that they form part of the information tendered to us in the course of the hearing.

The items grouped under (iv) above seem intended to form the basis of the exercise of the powers conferred by s168A (4) of the Act – that, after considering the requirement and the submissions received,

> The territorial authority may decide to—
> (a) confirm the requirement:
> (b) modify the requirement:
> (c) impose conditions:
> (d) withdraw the requirement.

Much of that material does not relate *directly* to the work in respect of which designation is sought. Most has to do with what might be called the 'downstream' effects arising from completion of those works; in particular, the consequences of increased traffic movement on Chalmers Avenue and the impact of *that* on the immediate environment of that road. At first sight, therefore, it seems that material of that sort is relevant in two respects:

- as to whether "the effects on the environment of allowing the requirement" are such that it should be rejected as inconsistent with Part 2 of the Act; and/or
- as going to 'conditions' of the kind envisaged by s168A (4) (c).

We shall have something more to say about both of these later.

THE STATUTORY CRITERIA

Section 168A (3) sets out the matters that we are to take in to account:

> When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—
> (a) any relevant provisions of—
> (i) a national policy statement:
> (ii) a New Zealand coastal policy statement:
> (iii) a regional policy statement or proposed regional policy statement:
> (iv) a plan or proposed plan; and
> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—
> (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
> (ii) it is likely that the work will have a significant adverse effect on the environment; and
> (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and

(d) any other matter the territorial authority considers reasonably necessary in order to make a decision on the requirement.

This provision is identical to that found in s171, which sets out the obligations of territorial authorities when considering requirements made by *other* requiring authorities. However, and while it is similar to the criteria applicable to resource consent applications, the two are not identical. In particular, the grammatical structure of the first part of ss3 (above) suggests that the consideration which is to be given to the following lettered clauses is for the (primary) purpose of informing a judgment about "the effects on the environment of allowing the requirement".[5]

There seems some merit in this approach, particularly where (as in the present case) it is not intended that the works should take place for some time. In that event the 'environment' likely to be affected by activities associated with (and/or facilitated by) the proposed public work may *not* be that existing at the time that the requirement is itself considered. At least some of the matters set out in clauses (a) to (d) may be relevant to a consideration of what the relevant and future environment is likely to be *at the time at which the proposed public work is put in hand*.

The Notice of Requirement addresses this possibility in another way, saying:

> The physical construction works of the ASUB is not required until approximately 2026. It is expected that by the time that the ASUB is required to be constructed, the environment within which the designation is located will have undergone a degree of change from the current low density rural-residential use of land to a land use that is more in accordance with the recent (2010) district plan review zoning to Residential C and D.

A similar point may be made, rather less forcibly, in relation to the environs of Chalmers Avenue. For these reasons – and without attempting to resolve the 'grammatical' conundrum suggested above – we will place the issue of environmental effects towards the end of our consideration of s176A (3) matters and before we turn to an overall consideration of Part 2. We begin, however, with an examination of what it is that the words 'subject to part 2' require.

Subject to Part 2

Section 168A (3) is expressly made "subject to Part 2", a form of words used elsewhere in the Act; particularly in s104 (1) where the criteria of judgment in resource consent applications are similarly constrained. In that context the meaning of those words is relatively well understood – they require the exercise of

> … a broad judgment [as to] whether or not the proposal promotes the sustainable management of natural and physical resources. Such a judgment allows for a comparison of conflicting considerations and the scale or degree of them, and their relative significance in the final outcome.[6]

[5] We take the words 'allowing the requirement' as encompassing (i) the insertion of appropriate provisions in a district plan (ii) the public work contemplated by those provisions, and (iii) the pattern of activities which that work will enable.

[6] *Genesis Power Ltd v Franklin DC* (A148/2005)

That exercise occurs within a decision-making framework that has, broadly speaking, two possible outcomes: the grant or the refusal of consent. Thus, and in the majority of cases the question comes down to which of those outcomes would better achieve the purpose of the Act.

In 'designation' cases the criteria of judgment are more narrowly expressed. In other parts of this recommendation, we will refer to the ways in which Courts have construed, and confined in scope, the matters to which we must have regard. In her submissions on behalf of Ashburton Bridge Action Group Inc. Ms Steven argued for a broader interpretation, relying on a decision of the Environment Court in *Nelson Intermediate School v Transit NZ*.[7] That case involved the requirement, by Transit NZ, for a designation for state highway purposes of land within the district of the Nelson City Council. The Court placed Part 2 of the Act in the forefront of its reasoning when coming to its conclusion that the requirement should be cancelled. In doing so it directly addressed the question: "How far is the Court able to go in examining the merits of a designation for a public work?"

It began its exploration of this question by analyzing the proposal in Part 2 terms. As it said, at [63] and [64]:

> We intend to adopt the approach of examining the matter sequentially as follows
>
> (a) the applicability of sections 6-8 and the various factors of section 5 without reaching an overall integrated decision as to sustainable management;
> (b) considering the matters in the NOR and their application;
> (c) considering the submissions received; and
> (d) considering the four limbs of section 171(1)(a)-(d)
>
> The final step will then be to integrate all issues and facts in order to reach a decision as to sustainable management.

Through the use of this process the Court felt itself obliged to compare the merits of various alternatives to the proposal for which a designation had been sought when having "particular regard to … [t]he efficient use and development of natural and physical resources" – s7(b). This approach was, so the Environment Court thought, required by the decision of the Privy Council in *McGuire*[8], and led to the first of its 'major conclusions': "That everything in section 171 is subject to Part 2 considerations".

Adapting section references to the present case, it seems that by those last words the Court meant that the *meaning and requirements* of each of the Section 168A (3) criteria were to be understood *in the light* of Part 2. As a consequence (so the Environment Court thought) a much more 'in-depth' consideration of alternatives was mandated than the words of ss3 (b) seem, at first sight, to permit.

There are, so we think, problems with applying this approach when considering whether the present requirement should be confirmed:

[7] 26 March 2004, 10 ELRNZ 371
[8] *McGuire v Hastings District Council* [2001] NZRMA 577

(i) At the time the statutory regime was different from that now guiding our deliberations. In particular, the matters to which 'particular regard' was to be had included "[w]hether the nature of the public work or project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route or method."

(ii) In the event, the Court found *as matters of fact* that adequate consideration to alternatives had not been given *and* that it was not unreasonable to require the use of alternatives. As a consequence it cannot be said that the approach adopted in *Nelson Intermediate School* is required as a matter of law.

(iii) We note that, in the *Nelson* case, the Environment Court cited a passage for the decision of the High Court in *Auckland Volcanic Cones Society v Transit NZ*[9] which seems somewhat inconsistent with the approach that the Environment Court itself took. That passage is:

> Mr Cavanagh submitted that … at each stage of consideration of s171, the Court ought to test each alternative against Part II. We do not read s171 nor the comments of Lord Cook of Thorndon in the *McGuire* case as requiring the Court to adopt that approach. Lord Cooke of Thorndon's reference to the strong directions (in ss 6-8) to be born in mind at every stage of the planning process is a reference to the obligations on a requiring authority, the Environment court and this Court on appeal to have regard to those considerations. For the reasons given earlier we are satisfied that the Environment Court did not misdirect itself when considering the requirement to consider the alternatives under s171(1) (b) in particular, subject to Part II.

(iv) Later cases, and in particular the High Court decision in *Meridian Energy* [10] have clearly departed from that decision in ways that are binding on us.

Relevant Statutory Documents – Section 168A (3)(a)

There are no relevant national policy statements[11] and the current New Zealand Coastal Policy Statement does not reach to the area of present concern. While we were referred to provisions of the Canterbury Regional Policy Statement 2012 (as to the integrated management of fresh water resources) and the Canterbury Natural Resources Regional Plan (as to air quality) they do not seem to us to have any bearing on the question of whether the present requirement should be confirmed.

The section of Ashburton River affected by the present proposal is the subject of an earlier designation for the purposes of 'Soil Conservation and River Control', the requiring authority being the Canterbury Regional Council. This provides no impediment to the present proposal.

The land to the south of the river through which the proposed road is intended to run is presently of a 'rural / residential' nature. It has, however, been the subject of significant re-zoning – to

[9] [2003] NZRMA 306, at [61]. As here quoted, the passage is taken from the decision in *Nelson Intermediate.*
[10] *Meridian Energy v Central Otago District* [2010] NZRMA 477
[11] We note the existence of the National Policy Statement for Freshwater Management, but do not understand it to have application to the present circumstances

Residential C and D, the latter being a relatively low-density but nevertheless 'urban' zone. These alterations clearly direct the future growth of Tinwald to the east of the state highway and show that the proposed new road will directly connect the eastern suburban areas of north and south Ashburton.

Chalmers Avenue – from South Street to Walnut Avenue – is classified as a Principal Road, second (behind Arterial Roads) in the four-stage categorisation provided in the District Plan.[12] The Plan describes roads in this category as providing

> The connections between arterial roads and inter-connect the major rural, suburban commercial and industrial areas. They may also provide the boundaries of neighbourhood areas, along with arterial roads. Generally these roads cater for trips of intermediate length. They will generally connect to arterial roads and to collector roads.

Appendix 10.1 to the Plan contains a table in which the 'typical' total flow on Principal (Urban) Roads is shown as between 1000 and 6000 vehicles per day.

Chalmers Avenue intersects with South Street and Walnut Avenue, both Principal Roads that provide links to west Ashburton – the first via State Highway 77, an Arterial Road. To the south of the river Grahams Road – the southern terminus of the proposed new road – is also classified as a Principal Road. Should the present proposal proceed it is anticipated that the short length of Chalmers Road to the south of South Street and the whole of the new road would have 'Principal' status, thus completing an eastern connection between roads of that class.

Whether adequate consideration has been given to alternative sites, routes, or methods or undertaking the work – Section 168A (3)(b)

We take the legal position to be that expressed in *Meridian Energy*[13]:

> If the Environment Court is called upon to review the decision of the territorial authority it is required to consider whether alternatives have been properly considered rather than whether all possible alternatives have been excluded or the best alternative has been chosen.

The matter of consideration of alternatives was addressed in some depth by Mr Rice, Dr Taylor and Mr Baker. Mr Rice in particular set out the sequential process that had been followed, commencing with the 2006 Ashburton Transportation Study, which initially identified three options (that can broadly be categorized as an eastern bypass to Ashburton, an extension of Chalmers Avenue and a widening of the state highway carriageway) with the second option identified as best meeting the requirements of the Land Transport Management Act. He noted however that the Council did not adopt this recommendation, preferring instead to undertake further investigations as to the alignment of the second bridge. This second study included thirteen possible options ranging geographically from an eastern bypass to a western bypass with various intermediate locations in between. From the plan provided by Mr Rice, it appears evident that at least one consideration in selecting these possible routes was the ability to link

[12] There are three arterial routes within the Ashburton District, the third being a 'Scenic Route'
[13] Above.

into the existing roading network within Ashburton, albeit that some options would have required more new roading construction than others, and thus in our view, none appear to be wholly fanciful alignments.

Each of the thirteen options was then evaluated at an 'Options Assessment Workshop' using fifty assessment criteria following which two were selected, an extension of Chalmers Avenue to link to a new road on the south of the river and an extension of Chalmers Avenue to link to Grove Street within Tinwald. However ultimately the outcomes were not favourably received by the community and thus the Council commissioned a third study into the alignment option for the second bridge.

The third study involved the evaluation of nine options, and importantly, also involved the establishment of a Community Reference Group (Mr Rice notes that two of the nine possible options emerged from this Reference Group). The options were assessed by the project team using a multi criteria assessment approach, and the analyses were presented to the Community Reference Group for review, comment, and amendment. In addition and with the involvement of the Group the various assessment factors used were also weighted to reflect their relative importance to the community. The two highest scoring options were then taken forwards for further investigation, following which the alignment for which designation is now sought was identified.

On their part, a common theme from the submitters was that the Council always intended to build the bridge in that location, and from this our inference is that they believe the process in considering alternative alignments was biased. A number of submissions set out examples of comments made and/or aspects of the process followed to support these views. However in many cases, the submission goes on to give reasons why the bridge location is 'wrong' such as road safety, noise or odour concerns that may arise. It is therefore somewhat difficult to disentangle concerns that the optimal location has not been identified (which is not a matter for us under *Meridian Energy*) with concerns that an inherent preference for one route has resulted in the alternatives not being properly considered (which is a matter to which we must turn our minds) and where in the words of one submitter, consultants have been "steered" to the Council's preferred result.

In considering this matter, we have been surprised by the extent of evaluation of possible route options that the Council has carried out. It seems to us that if the Council was determined to promote the Chalmers Avenue alignment, it was open for them do so as an outcome of the Ashburton Transportation Study in 2006 but instead they chose to defer the matter pending additional investigations. Similarly, the Council could have selected this alignment following the second study but again they chose to carry out further investigations. It was only after the third study, where the same route was again identified, that the Council instigated designation. We find it hard to countenance that the Council would have chosen to carry out these additional exercises had it already obtained the result that it was purportedly looking for. Rather, it seems to us that this is evidence of a robust process being followed by the Council, whereby alternative options were proposed and evaluated, and on occasion, re-evaluated. Similarly, we note that the alternatives were considered in a structured manner through using specific assessment criteria. This again suggest to us that a rigorous process was followed, since there are many qualitative and less transparent ways in which such a task can be carried out.

A second matter to which we have had regard is whether it appears that any alternative options were deliberately omitted from consideration, as might be expected if the Council had pre-determined the outcomes. In this regard it is helpful to note that the Community Reference Group's involvement in the third assessment of route options gave rise to two additional options being considered. Further, we were not told that any options proposed by the Community Reference Group were discarded by the Council without consideration. While we are mindful that there is no requirement to consider all possible alternatives, it does not appear to us that any alternatives were proposed and dismissed without proper consideration.

We are therefore satisfied that adequate consideration was given to alternatives by the Ashburton District Council.

Whether the work and the designation are reasonably necessary for achieving the objectives of the requiring authority – Section 168A (3)(c)

In Section 1.1 of the documents attached to and forming part of the Notice of Requirement the Council's objectives were expressed as to

- Improve safety for all road users;
- Improve connectivity for everyone in the Ashburton area;
- Meet the current and future needs of the Ashburton district / community;
- Provide security for the Ashburton road network and State Highway by providing alternative access in the event the current bridge cannot be used;
- Ensure that State Highway 1 continues to take its inter-district and heavy traffic.

Mr Carranceja argued that we are not entitled to look behind that expression of purpose, citing a 1993 decision of the Planning Tribunal in support:[14]

> We are satisfied that the designation is reasonably necessary for achieving the Area Health Board's objectives … It is not for us to pass judgment on the merits or otherwise of this objective. What we are required to do is to have *particular regard* to whether the proposed designation is reasonably necessary to achieving it.

The designation then proposed was for the identification of land within the Residential 2 zone of the (then) Invercargill District Scheme[15] as for a 'Community Health Centre' for the purpose of "encouraging those with minimal mental health disabilities to develop life skills enabling them to cope with the various challenges they face living within the Community."

The Tribunal's refusal to "pass judgment on the merits … of the objective" was in response to a concern "about bringing together a group of people suffering from various health disabilities" – that is, a submission that directly questioned the method by which the Southland Area Health Board proposed to implement "a nationwide health care policy to retain psychiatric patients in the community wherever possible." Seen in that light, the Court's statement is consistent with a

[14] *Babington v Invercargill DC* (1993) 2NZRMA 480.486
[15] By the time of the hearing this document had become a Transitional District Plan

long-standing judicial reluctance to interfere in the exercise, by responsible public bodies, of their statutory responsibilities.

We do not think, therefore, that *Babington* goes quite as far as Mr Carranceja wished to take it – that is, it does not prevent us from enquiring as to whether the objectives *as expressed* are in truth those which actually motivate a requiring authority.

Several submitters came close to arguing that, in the present case, the Council's expressed objectives were disingenuous at best. Some appeared to be of the view that the *real* purpose of the designation was to provide an alternative (and, perhaps, more attractive) route for Ashburton through-traffic.

That is, of course, not what the expressed objectives say: the emphasis *there* is upon providing interconnectivity for the Ashburton urban area and its surrounds. Apart from somewhat generalised complaints about predetermination, secrecy, procedural unfairness and bad faith on the part of councilors, council officers and consultants employed by the Council there was little presented to support this approach, and we are not persuaded by it. On the contrary; we think that the evidence supports a quite different proposition – that the Council's understanding evolved as investigations progressed, and that the objectives (in their final form) were a consequence of those investigations rather than of some pre-conceived stance.

Mr Rice, a Senior Transportation Engineer employed by Opus International Limited and called by the Ashburton District Council (as requiring authority) was involved in the preparation of the 2006 Ashburton Transportation Study – an exercise commissioned jointly by the Ashburton District Council and (what is now) the NZ Transport Agency. According to Mr Rice, at the time of the commencement of this study

> The widespread feeling around town was that the traffic issues on the bridge were due to the volume of inter-district traffic on SH!, and that a bypass was the best way of addressing those issues.

Mr Rice seems originally to have shared this view. However the work which he then undertook (or for which he was responsible) later established it to be unfounded. In particular, number-plate surveys undertaken early in 2006 established that, *at peak times*, through traffic – that is, traffic that did *not* have an origin or destination within urban Ashburton – amounted to 12% to 14% of the traffic on the existing bridge (later rounded up to "less than 20%"). Further transportation modelling, which incorporated (among other things) predictions of Ashburton urban development arising from re-zoning decisions now incorporated in the Ashburton District Plan, suggest that while total volumes on the bridge are likely to increase, the *proportion* of this increased volume arising from through traffic is likely to *decrease*. Mr Rice noted that

> Traffic modelling carried out for the ATS and for this project is consistently suggesting that the bridge and nearby intersections are likely to be operating at Level of Service … E or F by 2026 if no changes are made to the transportation system. Such a LOS indicates severe congestion.

Fundamentally, therefore, the Ashburton Transportation Study and the studies that followed established that congestion on the (State Highway) bridge is primarily a 'local' issue – one for the Council to resolve. We were told that the 'objectives' set out above were formulated *after*

these conclusions had been reached and the earlier "widespread feeling" had been shown to be unfounded. **We conclude that those objectives properly set out the basis upon which the Ashburton District Council has chosen to proceed with *a* second 'urban' bridge across the Ashburton River.**

One consequence of this conclusion is that it deals with a theme to be found in many of the submissions received: that the present proposal is essentially for 'State Highway' purposes and, as such, should not be progressed at the expense of local ratepayers. In our view, the Council's objectives are *primarily* local, it being clearly contemplated that the present State Highway should continue to operate as such. Given that, and if a second urban bridge *is* to be built, such a project is, as a matter of law, *necessarily* one for which the local authority must assume financial responsibility.

To return to the statutory criterion – is the (now proposed) work and designation *reasonably* necessary for achieving the expressed objectives? Put simply, the present proposal involves the construction of a 2 lane road (with provision for pedestrians and cyclists) so as better to link areas of urban and peri-urban land to the east of Ashburton, presently separated by the river and served only by the single State Highway bridge. We think it fair to say that few (if any) of the submitters in opposition to the present proposal would have objected to something *expressed in that way*. It seems to us that *any* instantiation of such a proposal must inevitably involve acquisition of land, roadworks and the construction of a bridge. What seems to be at issue is not whether a second river crossing is required, but where.

It is at this point that the decision in *Babington* comes in to play: the 'where' involves policy considerations that are beyond our reach, except to the extent of the question (already discussed) as to whether reasonable consideration has been given to alternatives.

At a more detailed level, Ms Whillans' s42A report contains an assessment of the extent to which each of the objectives will be met by the proposed work. We adopt what she there says and do not repeat it here. Suffice it to say that she concludes that the work is likely to result in the achievement of those objectives and may thus be regarded as 'reasonably necessary' for that purpose. What she does *not* attempt to do (and what we think we are not *entitled* to do) is to embark upon a comparative enquiry – an assessment of each of the various possibilities raised in an attempt to decide which of them is *most* successful when seen in the light of the stated objectives. Unlike the Court in *Nelson Intermediate School,* the question of whether the Council might reasonably be required to use another alternative is not before us.

We conclude, therefore, that the proposed work is reasonably necessary for achieving the objectives of the Ashburton District Council for which the designation is sought. The question that remains is whether the *designation*, considered as the technique of inserting provisions of the presently proposed kind in to the Ashburton District Plan, is *also* necessary for achieving those purposes.

Designation has long been seen as having four functions: those of

(i) Enabling the construction and operation of public works where those activities would otherwise be contrary to the provisions of a district plan;

(ii) Founding a process of land acquisition (where necessary), subject to the payment of compensation;
(iii) Protecting designated land against developments that might make it more difficult (or more costly) for the public work to proceed; and
(iv) By giving notice of a proposal, enabling people to factor its future existence in to their own decision-making.

Items (i) and (ii) above are relevant only where, as in the present case, the requiring authority does not have a sufficient interest in the land. Items (iii) and (iv) are of particular importance where (as again in the present case) commencement of the work is some time away. Taken in conjunction, these four provide a proper basis for adoption of the technique. In the particular case of roads, designation is also an inevitable consequence of the work – the indication, within a district plan, of the fact that a road *exists* is itself an example of designation. **Again, we conclude that the technique of designation is reasonably necessary for achieving the Council's objectives.**

The effects on the environment of allowing the requirement

Our approach to the overall issue

Because "the physical construction works of the ASUB is not required until approximately 2026"[16] it is unlikely that there will few environmental effects of significance before that time. On possible exception to this is that development of a kind contemplated by recent zone changes will *not* occur on the designated land, this as a consequence of the intention of the Ashburton District Council to construct the road and bridge and of its power to constrain development that may conflict with that intention.

It is probable that changes will by then have taken place within existing roads, particularly at the Chalmers Avenue intersections – these may be to deal with problems existing at the present time (of which we have some evidence), those arising as a consequence of volume increases unrelated to the proposed works, or maybe in anticipation of changes thought likely to occur once the proposed works are completed. None of these are part of the proposed designation. Instead, the Council's authority to undertake them arises from a combination of *present* designations (acknowledgements within the Plan – and, in particular, the Planning Maps – that they presently exist as roads) and the Council's powers as a roading authority under the Local Government Act. This is a point of some importance, to which we will return later.

As we see it, our consideration must primarily be directed to environmental effects occurring at and beyond the time when the works are implemented *on the environment as it is likely to be immediately prior to that time*. In general, this was *not* the position taken by submitters – they tended to contemplate feared impacts of (particularly) increased traffic upon an environment very much like that presently existing. We do not think that this is the right way of looking at things.

[16] Notice of Requirement

What (we think) we must do is to assess the changes now in prospect as they might affect the environment of a decade hence – one that has developed from that which now exists in a manner that answers to anticipated growth along lines set out in the District Plan. As the Notice of Requirement says:

> It is expected that by the time the ASUB is required to be constructed (approximately 2026) the environment within which the designation is located will have undergone a degree of change from the current low density rural-residential use to a land use that is more in accordance with the recent (2012) district plan review zoning to Residential C and D.

Something similar can be said in relation to traffic effects on the environs of Chalmers Avenue. As a starting point, it is clear from the submissions of those who live and work in that area that noticeable traffic increases have occurred in recent years – much of it of a 'heavy traffic' nature. Seemingly this is the result of changes in farming practice and the growth of industrial development to the north-east of Ashburton to which it has, in part, given rise. Some of the increased traffic is drawn from State Highway 1 – typically east along South Street to Chalmers Avenue, and then north along that street to the Ashburton Business Estate area (with, presumably) similar return patterns. Not all of this, however, is 'through traffic' – much comes from (or is going to) the Tinwald area and, at present, can only complete what are in essence 'local' trips by passing across the State Highway bridge. Again, our approach to traffic (and other) effects of the proposed new bridge and its approach road on the Chalmers Avenue environment will be to compare the environment of something more than a decade hence and prior to construction of the bridge, with that likely to occur post-construction of the bridge.

We emphasise here that this is not (as Mr Carranceja seemed to think) a 'permitted baseline' approach. We are not attempting to construct a hypothetical environment by 'deeming' the development land to contain activities that the plan permits. Instead, we are concerned to gain an appreciation of what the *relevant* environment might be at the time at which the present project is likely to produce effects on it.

In what follows we address issues raised by submitters, largely by concentrating on the evidence called in support of the present proposal. We approach the matter in this way because, although the various issues were raised repeatedly by submitters (both in their formal submissions and at the hearing), they did not in general seek to engage with either the applicant's evidence or the various investigations and reports upon which that evidence was based. Essentially, the position of those opposed to the project can be summarised as: 'Here are our concerns; it is for those supporting the project to establish that they are unfounded.'

<u>Traffic related effects – changes in volume and character</u>

Mr Rice's evidence is critical to this issue, as it is to others. His paragraph 129 is as follows

> It is important to remember when considering the future of the Project, that construction is not proposed until 2026. It is likely that there will be significant changes in the transport system and adjacent environment between now and when the Project is developed. Changes relevant to the Project are likely to include the following:
>
> - Urban development on land recently zoned Residential C and D in East Tinwald;

- Further development of Lake Hood, including residential, commercial and recreational development;
- Development of the Ashburton Business Estate;
- Urban Development of other land on recently zoned Residential on the urban fringes of the remainder of Ashburton;
- Development of the AE Networks Stadium on SH77;
- Probable traffic signals at the Walnut Avenue intersections with SH1 and East Street, presently the subject of a NZTA Requirement;[17]
- Possible traffic signals on SH1 in Tinwald. The location for these has not yet been decided; and
- Growth of State Highway Traffic.

According to Mr Rice, these will include "[s]ignificant increases in traffic, including heavy vehicles, in … Chalmers Avenue as a result of the development of the Business Estate."

We note *firstly* that these changes are consistent with development directions established through the most recent District Plan review and *secondly* that increased traffic in Chalmers Avenue is both anticipated by and catered for by the Plan in virtue of its categorisation of it as a 'Principal Road'. In that regard Mr Rice had this to say:[18]

> I consider that carrying vehicles servicing the surrounding rural areas is one of the key functions of a Principal road in a rural service town.

The traffic modelling undertaken indicates that, by 2026, traffic volumes in Chalmers Avenue, expressed in vehicle-per-day terms, will significantly exceed the 'typical' flows indicated in the Plan[19] – this in the *absence* of a second urban bridge. We take these predictions as indicating, not that some sort of Plan-based limit is likely to be exceeded, but that the *descriptive* information contained in the Plan does not fully accommodate the way in which Principal Roads, including Chalmers Avenue, will come to fulfil their Plan-allocated function.

We conclude that, while Chalmers Avenue can *now* be described as a 'residential' street, such a description does not properly reflect its likely future role with or without the proposed bridge, a role that includes "carrying vehicles serving the surrounding rural area". Physically it appears well suited to that role – between Walnut Avenue and the river it has a reserve width approximately twice that of nearby residential streets.

Ashburton-wide predictions available from the model provide a means by which (i) the likely 2026 environment can be understood and (ii) the consequences to *that* environment of the presently-proposed project assessed. In broad terms Mr Rice's evidence, based on these predictions, is that, with the exception of Chalmers Avenue (and, presumably, Bridge Street to the north) traffic volumes in all affected parts of the Ashburton road network are likely to be less as a consequence of the proposed work than would otherwise be the case. By contrast, volumes on Chalmers Avenue will likely be *greater* – overall by about 30%, with traffic flows in the peak

[17] This is as modified by Mr Rice in the course of his evidence
[18] His paragraph 275
[19] 1000 – 6000vpd. In round terms the relevant figures are: Present flow, 6000vpd; 2026 projected flow without the proposed bridge, 8000vpd; projected flow following completion of the project, 12000vpd.

hours increasing by up to 60%. His conclusions may be expressed in this way: following completion of the project

- State Highway 1 will be relieved of much 'local' traffic;
- The new route is unlikely to be attractive as a bypass for through traffic (in part because of the way in which intersection control is likely to be exercised);
- Chalmers Avenue will continue to perform its 'Plan' functions – that is, those of a Principal Road in the traffic network of the Ashburton District; but
- Traffic volume increases will occur in Chalmers Avenue significantly beyond those to be expected in the absence of the proposed second bridge; and
- The 'heavy vehicle' component of this increase is likely to be around 90vpd – predominantly 'local' movements between east Tinwald and north Ashburton.

These points were taken up by other witnesses and used to found opinion evidence within their areas of expertise. From his standpoint as a Transport Engineer, however, Mr Rice went on to consider the performance of a number of intersections – most of them with Chalmers Avenue – which "have been identified as having existing safety issues, including issues for pedestrians and cyclists, which may be exacerbated by the Project." This led to suggested 'mitigation measures' – essentially proposals for intersection (and other) improvements which would, in his view, sufficiently address current and future issues. Those improvements were (generally) indicated in drawings of a 'preliminary' or 'conceptual' kind, intended to form part of a suite of conditions proffered as appropriate for imposition under s168A (4)(c) of the Act. We shall have more to say about conditions of this kind later; for the moment we accept that the intersection design improvements proposed will go a long way towards mitigating the safety considerations that Mr Rice was addressing.

Traffic related effects – access issues

Several submitters were concerned that increased traffic following completion of the project would make access to their properties more difficult. Two elements of this concern were developed in the course of the hearing.

The first related to the Netherby shopping centre, located at the intersection of Chalmers and Walnut Avenues. Shops in that centre rely *firstly* on the present ability of customers to access them despite the intervention of those two Principal roads, and *secondly* on the availability of on-street parking. In particular, the Netherby Four Square Supermarket has the advantage of a parking area established within Chalmers Avenue, a facility which (conceivably) might be imperiled as the result of intersection re-construction necessitated by increased traffic.

We appreciate the problem. Nevertheless we think that remedies for it can be found by the Ashburton District Council in the exercise of its function as a local roading authority. Some proposals have already been made and (according to the proposed conditions) proposals for this (and other) intersections are to be developed as part of the 'outline plan' process.

The second 'access' issue relates to the Mania-o-Roto Scout Zone, a facility located near the north bank of the Ashburton River and to which access is gained by the (relatively undeveloped) portion of Chalmers Avenue lying to the south of South Street. Chalmers Avenue is not within

the proposed designated area but this part of it will be significantly affected by the northern approach to the proposed bridge – works to be undertaken on the combined authority of the existing designation and the Local Government Act. These works may have a profound impact on the 'operability' of the Scout Zone.

Fairly late in the day we were provided with a conceptual layout for this approach to the proposed bridge intended to alleviate 'access' concerns relating both to the Scout Zone and to the Squash Club on the other side of the avenue. We are not convinced that this layout provides appropriate access to the former, and we urge the Ashburton District Council to give further detailed consideration to this issue both before, and at the time of, its consideration of outline plans for the works. We are confident that a suitable solution can be found.

Traffic related effects – Air quality, vibration and noise

The 'before and after' traffic assessments of Mr Rice also informed the evidence of Messrs Kvatch and Cenek and Dr Chiles. The first, an Environmental Scientist with expertise in the assessment of air quality impacts, concluded that construction of the second bridge, and the alteration in traffic movements consequent upon that, would not result in significant changes to local air quality. Interestingly, his Figure 1 – Modelled Ambient Air Concentrations 2026 – showed overall *improvements* following bridge construction. His explanation for this (as we understood it) was that the free flowing nature of traffic following construction of the proposed bridge reduced the (reasonably significant) contribution that idling motors make to air pollution, and that would otherwise occur absent the bridge.

Mr Cenek is a consulting engineer with expertise in ground vibration. In relation to the Chalmers Avenue area his view was set out in paragraph 75 of his brief of evidence:

> Provided roads are managed to existing roughness levels and HGV travel speeds are at present I do not expect the project to result in any increase in the amplitude of traffic induced ground vibrations over existing levels … However I note from the NoR that the Chalmers Avenue section of the Project will progressively surfaced with bituminous mix as the existing chipseal surface comes up for resealing … [I]t can this be expected that the amplitude of vibrations will be less than present providing vehicle speeds remain unchanged.

This, and the existence of an opportunity to progressively strengthen vulnerable parts of Chalmers Avenue in the interim, led him to discount fears that underground services and the integrity of the road itself might be compromised by increased traffic.

Dr Chiles, an acoustic engineer, after pointing out that changes in traffic patterns consequent upon construction of the proposed bridge would advantage some areas presently affected by traffic noise concluded that, in relation to areas in which *increases* would occur, "[t]he additional effect due to traffic associated with the project is generally an increase of 1 dB. In the case of Chalmers Avenue this will be off-set by resurfacing with a low-noise asphaltic surface."

Each of these witnesses also dealt with construction effects, and each concluded that, given appropriate standards as envisaged by the proposed conditions, the effects should be acceptable.

Effects directly related to the project

Concerns were expressed about landscape, light spill and glare, drainage (particularly stormwater drainage) and ecosystemic effects of the proposal, both during the construction phase and following completion. We are satisfied that these issues were appropriately 'cleared away' by the evidence of Messrs McKenzie, Bretherton, Groves and Harding. So far as those concerns related to the construction phase we would add this: construction is an inescapable aspect of urban development. So long as the adverse effects of those works are minimized through the use of 'best practice' techniques – a matter to which some of the 'conditions' are directed – it is not unreasonable to expect that they will be tolerated in light of the limited time over which they occur.

Further, and to the extent that there may be concerns as to effects on residents within the environs of the project:

(i) We expect that, by the time that those works commence that environment will have undergone significant change in ways that indicate a consciousness both of the project and of its likely consequences. It is the effect on this *altered* environment with which we must principally be concerned;

(ii) Those who, at the time of completion of the project, are living and working within that environment will, as well as being affected by such adverse consequences as might arise, may also be significant beneficiaries of its *positive* effects

Finally, we acknowledge submissions of present residents in the area to the effect that their lands will be fragmented, their (current) development opportunities curtailed and their planned life disrupted. We accept that these things may well occur as a consequence of both the designation and the proposed work – as they are likely to do in almost every case in which major public works are proposed. To some extent these consequences may be alleviated through the expressed willingness of the Ashburton District Council to enter in to negotiations for the acquisition of the land that it requires. All we can say about this is that, while it may not be seen as an *adequate* response, it is the only one available in cases of this kind.

Social effects

Many submitters were concerned with 'community severance' – the likelihood (as they saw it) that the project would divide the present community and create barriers between residents and the facilities and services to which they must necessarily have resort. That concern seemed principally to do with consequences to those living to the east of the State Highway and north of the river. As a graphic illustration of this point one of the submitters provided us with aerial photographs of much of Ashburton (mostly the eastern part) upon which had been indicated the location of churches, schools, sports grounds, community services, retirement homes and the like, presently to be found on either side of Chalmers Avenue and Bridge Street.[20]

There was, however, little to support the assertions (and inference) that increased traffic on those streets, over and above that likely to eventuate in the absence of the proposed bridge, was likely to have the feared effect. This is to be contrasted with the *Nelson Intermediate School* case

[20] All of the Tinwald examples are to the west of the proposed route.

(cited by Ms Steven and to which we have already referred) in which direct evidence of that sort was placed to the forefront – that case had to do with a Transit requirement "to identify and protect a new arterial route" intended to cater for peak volumes of around 4000 vehicles per hour at speeds (in places) up to 70kph.

Dr Taylor, a consultant and researcher in the field of applied social research and social assessment of 29 years' experience, gave evidence touching on this issue. While the overall contest of his evidence was an investigation of the social effects of various *alternatives* to the present proposal he said (paragraph 59):

> In my view social severance could arise if the ability to cross Chalmers /Avenue safely by vehicle or foot was reduced significantly. I have addressed these issues in my discussion of effects at paragraph 44, and in particular relation to the need to provide extra pedestrian crossings, including close to Netherby shops.

And, at paragraph 44, relying on the traffic evidence of Mr Rice and the 'mitigation elements there recommended:

> I consider that there will be beneficial social effects relating to active transport…[21]

On the information available to us we cannot conclude that 'community severance' is a real issue.

Positive effects

It is clear that, when considering "the effects on the environment of allowing the requirement", we must take 'positive' aspects in to account. We need not spend much time on these here the existence of them is clear and, we think, almost universally acknowledged. They include:

- Improvements in urban and peri-urban social connectivity, particularly between the eastern parts of Ashburton and the access or residents in eastern Tinwald to facilities serving Ashburton as a whole;
- An improved active transportation environment, giving rise to fewer traffic delays and better opportunities for pedestrian and cycle movement;
- Greater security of north/south movement;
- A likely improvement in road safety.

We appreciate that these are improvements in the *general* environment of Ashburton. As is often the case, the positive and adverse effects on the environment of the present proposal do not always accrue in the same place or to the advantage of the same people. This is a matter which, amongst others, we must weigh in coming to an overall conclusion.

[21] He here gives a single response to two issues – the possibility of increased severance as the result of increased traffic on Chalmers Avenue and the probability of increased connectivity across the river.

Other relevant matters – Section 168A(3) (d)

Many of the submitters who appeared before us were concerned about what they saw at best as flawed process and at worse as evidence of bias and predetermination – claims of poor communication, inadequate consultation, positive misdirection, bad faith and the existence of (more or less) hidden agendas abounded.

Ordinarily, issues of this sort are regarded as outside the jurisdiction of people in our position – we are to be concerned with whether the proposal meets statutory criteria, while what might be called 'policy' issues remain matters for (in this case) the District Council. The conventional view here is that, as elected bodies, such councils must eventually answer to the voters. In particular, the usual response given in cases of this kind is that consultation (of any sort) is not *required*.

Nevertheless a recent decision of the New Zealand Supreme Court may have opened the door a little.[22] That decision suggests that, although consultation is not a *statutory requirement* of some processes mandated by the Act, there may be circumstances in which it becomes necessary. So, as an argument in the present case might go, evidence of appropriate consultation may be required in order to identify all reasonable alternatives, this for the purpose of enabling a decision to be made as to whether a designating authority had given reasonable consideration to *all* of them.

Evidence of the consultative process adopted was given by several witnesses called in support of the proposed designation, amongst them Dr Taylor. Of particular importance in this context was his evidence of the establishment of a Community Reference Group, which he saw as an 'important part of the overall approach to evaluation of options …" That group contained members "self-identified at open days" and were representative of "a number of localities and interests" and included individuals who were (seemingly from the outset) opposed to the present proposal.

At paragraph 35(d) of his evidence Dr Taylor said:

> Members were told that a Chatham House Rule applied – that members should not discuss who said what in a meeting. The intent of this rule was to ensure that discussions were open and members could feel they were able to speak freely at meetings and not have their views repeated outside the meeting. *On the other hand members were also encouraged to speak to their communities of interests about the project and comparative assessments* … (our emphasis)

Several of those who gave evidence before us said that this was not what happened – according to them they were told that the 'Chatham House Rule' was, effectively, a 'gag' which prevented them from acting as a conduit between their communities of interest and the Reference Group and, through it, to the process of identification and evaluation of alternatives. Yet the minutes of the first meeting of the Group which were provided to us by submitters – and which the minutes of the second meeting show were subsequently discussed and agreed – clearly set out the position as outlined by Dr Taylor.

[22] *EDS v King Salmon*, SC [2014] NZSC 38, Decision 17 April 2014

We can accept the view of Stuart Cross that "members may not have had a full understanding of the Chatham House Rule and this was confused with confidentiality …" What we do not accept is that the procedure of the Community Reference Group inhibited the consultative processes that it was set up to undertake to the extent of preventing full identification of the alternatives available to the Ashburton District Council in the achievement of its stated objectives.

CONDITIONS

By the end of the hearing the originally proposed set of conditions had undergone some modification and a revised version was included with Mr Carranceja's final submissions. Essentially that has 4 parts

(a) Three general conditions relating to lapse, identification of "the Project" and alterations following construction;
(b) An 'accidental discovery protocol' in reasonably common form;
(c) Conditions relating to the 'outline plan' required by s 176A of the Act; and
(d) A condition relating to the kind of asphaltic seal to be used on both the new road and on Chalmers Avenue.

During the hearing we expressed some concerns about these – in particular, about the way in which the last two appeared (in part) to require the performance of work on roads lying *outside* the designated area.

Section 176A is drawn in a way appropriate to circumstances in which the requiring authority is other than the territorial authority for the land in which the designated is intended to be made. However subsection (7) provides that it is to apply, "with all necessary modifications, to public works, projects, or works to be constructed on designated land by a territorial authority."

Section 176A(3) says that

> An outline plan must show—
> (a) The height, shape, and bulk of the public work, project, or work; and
> (b) The location on the site of the public work, project, or work; and
> (c) The likely finished contour of the site; and
> (d) The vehicular access, circulation, and the provision for parking; and
> (e) The landscaping proposed; and
> (f) Any other matters to avoid, remedy, or mitigate any adverse effects on the environment.

The first four are clearly site-related – that is, they have to do with activities on the land that has been designated in a district plan. The fifth, however, appears wide enough to enable 'mitigating' conditions to have effect beyond the area of that land. Our concern is with the status and effect of those which, in the present case, purport to do so. Conditions of this sort – that is, conditions intended to mitigate environmental effects that might otherwise be of significance – are common in 'consent' cases. In that context it is clear that, when assessing the likely environmental effects of a proposal, decision-makers may consider anticipated adverse effects *as*

they would be mitigated through implementation of appropriate conditions. Of necessity, this approach assumes that the conditions relied upon are enforceable.

We assume that the conditions proposed are intended to become part of the Ashburton District Plan – perhaps through their inclusion in a schedule entitled 'Conditions to which Designation … is subject'. If that is the case, however, s176 (1)(a) applies:

> (1) If a designation is included in a district plan, then—
> (a) section 9(3) does not apply to a public work or project or work undertaken by a requiring authority under the designation;

Section 9(3) requires adherence to *district rules* – the point being that it is only those elements of a district plan that control activities.[23] Accordingly, and even if the proposed conditions were intended to have that status (and they are not), "work undertaken by a requiring authority *under* [a] designation" (our emphasis) would be beyond their control.

We return to a point made earlier – that existing roads are *already* designated for that purpose. Thus it seems to us that, as a matter of law, the power to impose conditions conferred by s168 (4) (c) *cannot* sustain requirements that work be on land *not* the subject of a particular designation, at least where *that* land is the subject of another designation.

This leads us to conclude that the proposed conditions, to the extent that they contemplate roading alterations *outside* the designated land,[24] *cannot* be 'conditions' in the ordinary sense – at best they function as expressions of intention made by or on behalf of the Ashburton District Council, for the performance of which that body will be politically (but not legally) responsible.

Where does that take us? In a variety of cases – most relating to the extent to which consent authorities need to cover all possibilities – Courts have said that reliance may be placed on the proposition that public authorities will carry out their responsibilities responsibly – that is, to particularise to the present case, that roading authorities will act (subject to budget constraints) so as properly to meet public needs in relation to roading – needs which include the proper provisions of cycling and pedestrian facilities, the avoidance of nuisance and so on.

We intend to adopt that approach here. We acknowledge that, something more than a decade in advance of the proposed work, the Ashburton District Council has given detailed consideration to the question of the ways in which it may need to deal with changes consequent on the implementation of its present proposal. As we have said before, we think that the design work done so far illustrates that most of the submitters' concerns *can* be allayed, although precisely *how* may not yet be entirely clear.

[23] Neither of the two exceptions provided – one of them being express allowance by way of a resource consent – apply in the present context.
[24] On Chalmers Avenue (including its intersections and the section from South Street to the river), Grahams Road, Johnson Street, Wilkins road, Carriers Road and Bridge Street

PART 2 CONSIDERATIONS

Our consideration of this requirement and the submissions received – s168A(3) – is "subject to Part 2". The 'traditional' approach to that requirement has been spelled out in a line of cases beginning with the judgment of Greig J. in *New Zealand Rail*:[25] that is, we should exercise an overall broad and integrated judgment as to whether the (single) purpose of the Act would better be served by confirmation or withdrawal of the requirement.

> The proper application of section 5 involves a broad judgment whether or not the proposal promotes the sustainable management of natural and physical resources. Such a /judgment allows for a comparison of conflicting considerations and the scale or degree of them, and their relative significance in the final outcome.[26]

This approach has been subject to recent re-consideration at the highest judicial level.[27] For present purposes the importance of that decision appears to be that, in coming to such a conclusion, we are to remember that the words introducing the various Part 2 (and other) criteria mean what they say. We are, in short, to give the stated matters the consideration, weight, importance and (at times) decisive force that the relevant section requires. We approach Part 2 on that basis.

Section 8

None of the information before us indicates that the principles of the Treaty of Waitangi are in any way relevant to the present issue. We note that (i) the Council has, according to Mr Baker,[28] consulted with Te Runanga o Arowhenua, (ii) no submissions raise concerns in relation to s8 matters, and (iii) the proposed conditions include an accidental discovery protocol. We conclude that there is nothing to which we must "take in to account" in terms of this section. We reach a similar conclusion in relation to the matters contained in sections 7 and 6.

Section 7

Of the matters to which we are required by this section to have "particular regard" only the following appear relevant:

(b) The efficient use and development of natural and physical resources:

The present importance of this lies in the directions of development now identified in the Ashburton District Plan. Efficient development in accordance with these directions, and efficient use of the developments envisaged, will be advanced by both a second bridge and a convenient roading system within Ashburton of the kind now proposed.

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[25] *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
[26] *Genesis Power v Franklin District*, A148/2005 at [51]
[27] *EDS v NZ King Salmon*, already cited
[28] A Resource Management Planner called in support of the project

(ba) The efficiency of the end use of energy

The project will aid in this through the establishment of a less congested transportation network allowing shorter trip times, a point born out in the evidence of Mr Kvatch.

(c) The maintenance and enhancement of amenity values
(f) Maintenance and enhancement of the quality of the environment

We note that, under these heads, the question of *adverse* consequences does not arise. We have referred to consequences which, in our view, will be beneficial generally to the environment of wider Ashburton and to those living, working and visiting the town.

Section 6

The only matter that appears to be of possible significance here is that contained in clause (a) -

> The preservation of the natural character of … rivers and their margins, and the protection of them from inappropriate subdivision, use, and development

The evidence of Messrs McKenzie and Harding (a Landscape Architect and an Environmental Consultant respectively) satisfies us that the natural character of the Ashburton River at and near to the proposed bridge is not such as to render the proposed development 'inappropriate' – when that word is understood "against the backdrop of what is sought to be protected or preserved".[29] In particular, and as Mr Harding notes, works impinging on the river must be the subject of consent applications to be considered by the Canterbury Regional Council, at which time (in his view) this issue may most appropriately be considered.

Section 5 and the overall judgment

In our view – and on an 'overall' basis – the purpose of the Act will be better met by confirming the requirement, subject to conditions. We accept that, for some people, completion of the project will have an adverse impact on their ability to provide for the matters set out in the first part of s5(2). The predominant consideration there is, however, on the wellbeing (etc) of "people and communities", and we think that this is a case in which these wider considerations should predominate.

We think also that, while there will undoubtedly be adverse impacts on aspects of the 'environment' of people, particularly those in the Chalmers Avenue area, when considered overall these impacts are not inconsistent with the environment envisaged by the district's planning documents and can sufficiently be avoided, remedied or mitigated by the 'conditions' proposed.

In that regard we have given consideration to the matter discussed earlier – the status and enforceability of the conditions themselves. Despite our concerns in relation to this we have come to the conclusion that they should be included as they stand. We think that, if the

[29] *NZ King Salmon*, at [105]

Ashburton District Council accepts our recommendation, it will by that act have committed itself to the fulfillment of those conditions *by way of what is in essence a 'political' undertaking.* That is where any attempt on our part to re-draft the parts of the proposed conditions with which we are now concerned would likely lead.

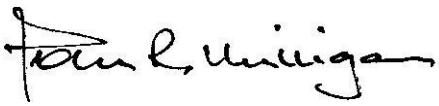
We confirm that, in coming to these conclusions we have given the various considerations the weight and importance that the Act requires.

FORMAL RECOMMENDATION

For the foregoing reason we *recommend* that the Ashburton District Council

(a) Confirms the present requirement, and
(b) Accepts, as (or as if) imposed conditions, those attached to the final submissions of Mr Carranceja.

A Carr
Commissioner



J Milligan
Commissioner

8 May 2014