

Historic Places Trust & Ors

Appellants	Te Runanga o Ati Awa ki Whakarongotai Inc 1 (represented by Kapakapanui) and Takamore Trustees; Waikanae Christian Holiday Park
Respondent	Kapiti Coast District Council
s271A & s274 Parties	NZ Historic Places Trust (Kouhere Taonga); Transit New Zealand; Heard, N 5
Decision Number	W023/02
Court	Judge WJM Treadwell; D Menzies; WR Howie
Judgment Date	4/7/2002
Counsel/Appearances	Laing, DJS; McClelland, MF; Hazelton, A; Watson, L; Heard, N; Sinnott, C 10
Quoted	Devonport v Local Government Commission [1989] 2 NZLR 203; Marlborough District Council v NZ Rail W040/96, [1995] NZRMA 357, 4 NZPTD 342; Purcell v Wanganui City Council W038/89, 7 NZTPA 26; Quay Property Management Ltd v Transit NZ Ltd & Napier City Council W028/00, 5 NZED 575; Rangitikei District Ratepayers Association Inc v Rangitikei District Council 28/09/00, Wild J, HC Wanganui CP12/00 15
Statutes	Historic Places Act 1993, s4, s4(c), s22(2)(c), s69; Resource Management Act 1991, Part II, s2 20 “kaitiakitanga”, s2 “wetland”, s5, s5(1), s6, s6(a), s6(e), s7, s7(a), s7(aa), s7(b), s7(c), s7(g), s8, s116, s123, s125, s168, s168A, s171, s171(1)(a), s171(1)(b), s171(1)(c), s171(1)(d), s172, s174, s175, s176, s176A, s185, s186, 25 s271A, [s274]
Full text pages:	45 + 2 pgs annexures

Keywords

appeal; requirement; link road; koiwi; noise; visual mitigation; urupa; waahi
tapu; community benefit; sustainable management 30

Significant in Law & Planning, Part II & s171(1)(b) RMA

*Efficient use and development of finite physical (transport) resource of
longstanding; concept of “wahi tapu areas” under Historic Places Act 1993
as compared with “waahi tapu” under the RMA; definition of “adequate” 35
under s171(1)(b) RMA in relation to alternative routes; importance of Part
II matters in numerical weighting systems adopted for assessing alternative
routes.*

SYNOPSIS

Two appeals against a decision on a notice of requirement (“NOR”) by the
Kapiti Coast District Council for the proposed Western Link Road (“WLR”) 40
designation. The proposal, which was intended to ease the pressure on SH1
from local traffic, was to be built in three stages.

The proposed route would sever the eastern part of the Waikanae Christian Holiday Park Camp ("Holiday Park") from the rest of the Park. An urupa administered by the Takamore Trustees, along with a large block of land registered by the Historic Places Trust ("HPT") as a waahi tapu area would also be affected by the NOR.

The WLR was originally planned as a state highway and had been protected by various statutory mechanisms since 1956. Since that time, a large part of the land covered by the NOR had been purchased either by Transit or its predecessors in order to provide for the intended route. The question before the Court was whether the WLR corridor was the best solution to the transport problems within the district.

The Court held that the present course of the WLR through the Holiday Park would cause noise and visual amenity detractions for the Holiday Park. These declarations could be mitigated, but not avoided. [8 ELRNZ 278 at 29] The owners had been aware of the WLR alignment before they established the Holiday Park, but had proceeded to commit considerable time and money into creating a facility which is now the largest Christian camp of its kind in New Zealand. Because the land was being taken, the question of injurious effect to the balance of the land was to be considered as an issue of compensation. [8 ELRNZ 278 at 43]

In relation to the waahi tapu and wetland areas, the areas containing middens, burials and other taonga had not been specifically identified by the appellants. The majority findings were that, provided excavation was done with care, the presence of tangible taonga should not be permitted to impede the progress of a major arterial route which would be of benefit to the community as a whole. The taonga could be removed with appropriate reverence and if human remains were found, the HPT could use its unfettered powers to protect the sites. [8 ELRNZ 295 at 26]

The Court was satisfied that the consultation process had been adequate, the WLR route had been set aside for this purpose for almost 50 years and there was no other reasonable alternative legally available at present. It concluded that the purpose of the RMA in s5, combined with the provisions of s7(b), were best achieved by the continuation of the WLR. [8 ELRNZ 316 at 20]

By a majority, the requirement was confirmed subject to additional conditions to be submitted for consideration.

Leave was granted to apply for costs.

FULL TEXT OF W023/02

General

[1] These are two appeals in respect of a proposed development within Kapiti District known as the Western Link Road by the Kapiti Coast District Council (the District Council). A third appeal has been abandoned.

[2] The members of the Court are not unanimous. The decision is therefore the majority decision of Judge Treadwell and Commissioner Howie.

The conclusions of Commissioner Menzies and her findings and reasons are separately recorded after the main body of the decision and the majority conclusion. Where there is a difference between the dissenting part of this decision and the main body of the decision, the latter represents the majority findings.

[3] Both appeals are against a decision of hearings commissioners in respect of a notice of requirement (NOR) for the proposed Link Road designation. The Link Road, in the course of this decision, will be referred to as such or by the initials NOR. The requirement was issued pursuant to ss 168A and 168 of the RMA and, if confirmed, will become a designation in terms of ss 175 and 176.

[4] The New Zealand Historic Places Trust (HPT) and Transit New Zealand (Transit) appeared respectively in support of the appellants and in support of the District Council. Mr Nigel Heard appeared for himself and in support of the appellants.

[5] The proposal, as set forth in the NOR, involves a three stage road link from the intersection of Poplar Avenue with State Highway 1 (SH1) in the south initially leaving the State Highway at right angles and paralleling the existing carriageway of Poplar Avenue, which will become effectively a type of slip road servicing residences presently to the north of Poplar Avenue.

[6] At a point to the southeast of the existing school, the link will then turn at right angles to the north and from thence will follow a course roughly equidistance between the present SH1 and the coast finally connecting with SH1 at the Peka Peka Road intersection, north of Waikanae. It will cross the Waikanae River by means of a new bridge. An alternate version of the Link Road once commenced at a point further south near Paekakariki where the initial stage was intended to cross through Queen Elizabeth II Park but this was abandoned leaving that park as representative of the dune system which was once prevalent in this area. The three links in sequence are to be developed as follows:

- Stage 1 – Raumati Road to Te Moana Road
- Stage 2 – State Highway 1/Poplar Avenue to Raumati Road
- Stage 3 – Te Moana Road to State Highway 1 at the Peka Peka Road intersection

[7] Although some lengths of the road are still subject to debate (in particular that part involved in Stage 3) in respect of archaeological matters, the main area of contention is within Stage 1 between Otaihanga Road and Te Moana Road. It is within this section that the Waikanae Christian Holiday Park Camp (Christian Holiday Park) is situated, and although largely to the west of the NOR the eastern part of the Park is severed by the carriageway. Immediately to the north of the Christian Holiday Park and to the east of the NOR is the urupa administered by the Takamore Trustees. A large block of

land encompassing the bulk of the land between the Waikanae River up to and beyond the urupa is registered by the HPT as a waahi tapu area. It is recorded as waahi tapu in the Heritage register of the District Plan but is not subject to a heritage order. The result of the HPT registration is to indicate that individual waahi tapu sites are probably within the area so identified. Such individual sites when identified would be within the ambit of s 6 of the Resource Management Act 1991 (RMA).

[8] The intention of the NOR is to provide a number of linkages convenient for local road users along existing roads and the Road itself will be the principal north south arterial for local traffic within the Kapiti District thus enabling that traffic to avoid SH1. This will ease the pressure on SH1 and will enable that road to function efficiently, well into the future. The NOR was originally to be the state highway itself but that idea had been abandoned in favour of upgrading the existing SH1, largely along its present route with the Link Road serving a local arterial function.

[9] The initial planning of the Link Road was aimed at affording a through state highway function rather than a local arterial function, which probably accounts for the direct line the NOR has taken in order to facilitate high speed traffic movement. As we will later discuss, some parties urged upon the Court that adequate consideration had not been given to alternative routes which might not achieve the purpose of a State Highway through function but would achieve the purpose of a local arterial Link Road.

[10] The state highway "*bypass*" now represented by the Link Road was first noted on plans and titles in 1956 by a midline proclamation and since then the NOR has been protected by various statutory mechanisms, including designations and now this requirement for some 45 years. The existing holiday park (which was created after 1956) and parts of the waahi tapu, Takamore area, have been affected since that time. The present requirement by the District Council is intended to replace the previous designation for which Transit was responsible thus reflecting the change from State Highway status.

[11] The widths of the corridor, thus created, has at all times been generous but the width has varied over the years to deal with local considerations. As a result, a swathe of land some 15 kilometres in length now exists largely devoid of any man-made obstructions to the path of the road construction. The central area in particular to each side of the corridor is extensively developed for residential and other purposes, including the Coastlands commercial development at Paraparaumu. That complex will lie a short distance to the east of the Link Road and can be serviced readily from that road.

[12] The third stage of the Link Road development to the north of Te Moana Road will pass through largely undeveloped areas. The evidence we have heard indicates that much of that land is intended for future residential development.

[13] We thus have a classic example of the effectiveness of mechanisms

designed to protect future public works from developments which may be in
conflict with those works. Transit and/or its predecessors, as the requiring
authority for State Highway purposes, purchased land affected from time to
time and now own a large part of the land covered by the NOR. Considering
that mechanism under the provisions of the RMA, the history fits well within
the purposes of s 5, which is the cornerstone of the Act. The intended route
of a highway of significance has been managed in a way which protects that
physical resource for future generations. Thus the protective mechanisms
set in place in 1956 have sustainably managed a significant physical resource
(s 5(1)). That section applies in respect of the corridor thus created, and we
are directed to have particular regard to the efficient use and development of
that physical resource and to the fact that it has finite characteristics.

[14] In making the comments we have made in the preceding paragraph,
we have isolated the matters referred to in Part II which are relevant to the
transport resource created but will later discuss Part II in relation to the many
other matters raised by the parties.

[15] To complete the history of the matter in respect of transport, none of
the parties to this case take issue with the necessity for a solution to the
transport problems within Kapiti District and presently apparent within the
State Highway network. The only argument is as to by what route a solution
is to be achieved. Before us, the solution appeared to have reduced to only
two meaningful options. The NOR along its existing corridor and an alternative
route, involving the use of existing streets of sufficient or near sufficient
dimensions to be suitable for a local arterial. High speed alignments are no
longer required therefore existing streets can be considered.

[16] Returning to the NOR corridor. As we have recorded, it is of generous
width, in some parts being up to 300 metres wide. This has enabled final
adjustments of carriageways within the corridor in an endeavour to mitigate
the effects upon those who are close to the link. In addition to that, the width
has enabled subdividers and developers to be reasonably satisfied that
development of land outside the corridor will not be hard against the
carriageway as has regrettably happened in some other parts of New Zealand
where designations have been miserly and have resulted in inadequate
protection of amenities contiguous with the final highway alignment. The
width has not been challenged by appellants. Had it been challenged its
necessity as opposed to its desirability may have been suspect under s 171 of
the RMA and we refer to that in our conclusion. The width allows for
significant mitigation measures.

[17] The District Council proposes to landscape those areas not required
for the carriageway itself and to form pedestrian, cycle, and horse riding facilities
within the NOR. The creation of such an amenity is a positive contribution to
community values but the fact remains that those closest to it will still be
faced with a dramatic change to what is presently there. Nevertheless, in

saying that, we must bear in mind that what is presently there has only come about as a result of the expressed intention to use that land in part for roading which will carry intensive traffic and by the use of statutory mechanisms to achieve that protection.

[18] To complete the history relating to the Otaihanga/Te Moana Road part of the route, the area has undergone change in relation to the activities of the Christian Holiday Park, to the district plan and to the RMA status of the land in and about the urupa.

The Christian Holiday Park (preliminary observations)

[19] The Christian Holiday Park commenced its activities upon the site after the 1956 proclamation identifying the midline of the proposed motorway as it then was. It obtained permission at one stage to build a concert hall near to areas which might be used for motorway purposes. Since its inception it has grown to be the largest Christian camp of its nature in New Zealand with over fifty buildings on site catering for in excess of 50,000 bed nights per year plus day time occupancy for conferences, youth camps, etc. It is a camp designed both for children and adults and part of its activities are in the nature of a retreat for peace and contemplation.

[20] We have no hesitation in accepting that the requirements of the park are largely incompatible with the stark commercial function of a transport arterial. We will discuss this in detail later. We must, however, observe at this stage that the alarm bells signalling the future advance of "*civilisation*" should have been ringing clearly and indeed the trustees of the Christian Holiday Park appeared to have realised this when they made efforts in 1965 to have the midline proclamation uplifted. This in fact happened but it was immediately replaced. We also accept that there was some indication to the trustees that the land would not be required for motorway purposes but, as can be seen, the physical use of the land was intended to remain much the same but the official word "*motorway*" would no longer be applied to it.

[21] As a result of negotiations concerning alignment of the carriageway, it has now been shifted as far away to the east of the buildings on the Christian Holiday Park as is possible in that direction. Further movement to the east is prevented within the confines of the Park land by the presence of a waahi tapu tree, known as the Maketu tree. This is a large macrocarpa which grew upon a sacred grave and in the course of time the trunk has grown to such a size that the tombstone and guardrails have been slowly engulfed by the living structure of the tree. Movement to the east is also precluded by the presence of the Takamore urupa itself. There is no argument concerning the sacredness and waahi tapu of those two areas.

[22] To move the alignment to the west whilst still endeavouring to keep it within the NOR would bring it hard against new residential development and would also result in the highway being closer to the residential components of the Christian Holiday Park. The western route would also

involve sand hills which may contain dune burials and would also immediately 1
affect a recently approved subdivision on the Weggery Estate. This is a large
rural lifestyle type subdivision which is also within the identified larger waahi
tapu area.

[23] If left on its present alignment, the residents of the camp when looking
from the main camp area to the east would have a clear view of the arterial 5
bridge as it crosses the Waikanae River where it will be above the southeastern
portion of the holiday park land. Further visual evidence of the road will be
afforded by a subway which must be constructed to gain entrance to the
Christian Holiday Park. That will replace the present rural type country road
approach. The arterial road would then disappear to the north where it goes 10
through the middle and below the crest of a sand dune and will then emerge to
cross a wetland on the Christian Holiday Park property where it will be elevated
above the present ground level. Sound barriers and a sound absorbent road
tarmac are proposed for noise purposes. It is further intended that the barriers 15
will be screened from view by planting. There is also room for screen planting
within the camp grounds. Nevertheless, those inhabitants of the park who
wish to view the Maketu tree or to use that remaining part of the camp property
for recreational purposes will have an unimpeded view from above of a busy
arterial road passing through and below the crest of the sand dune. The only 20
alternative which can really solve the problems of the Christian Holiday Park
would be to adopt one of the routes which we will discuss later, known as
MW2 or MW10.

**The Takamore Trustees and The Historic Places Trust (preliminary 25
observations)**

[24] Turning now to the concerns of the Takamore Trustees. The historic
background to this area in general is partially lost in the mist of time but since
the early part of the 19th century appears in recorded history. There is
absolutely no question that at least 2 acres (in imperial measurement) of the 30
land block known as a 24C Ngarara West in Maori ownership is a urupa and
used as such. We heard considerable evidence as to how this 2 acre area
came to be set aside as a urupa. The evidence is largely from the records of
the Native Land Court and those records are unsatisfactory.

[25] The dimensions of the areas which may be urupa appear to range 35
from 9 acres down to the 2 acres finally settled upon. The most prevalent
reference is to 5 acres but at some stage in 1897 or thereabouts it was reduced
to 2 acres and the 3 "*surplus*" acres were then allocated to other Maori owners.
That land was subsequently sold and is no longer in Maori ownership. We
are not prepared to accept on the evidence before us that the sale of that 40
3 acres was an acknowledgement by those concerned with the urupa that the
land was of no importance in so far as waahi tapu was concerned and, in
particular, we do not accept that it was acknowledgement by Maori that the
land did not contain koiwi (human remains).

[26] A site inspection shows clearly that the 2 acres set aside as urupa does not represent where burials have taken place in the past. Burial sites extend much further to the north than the legal urupa boundary would suggest and we are in no doubt that the potential for the finding of koiwi would also exist on the sand dune forming the western boundary of the presently fenced urupa.

[27] Section 6 of the RMA in relation to waahi tapu knows no legal boundaries. Therefore in respect of the sand hill areas in and about the fenced urupa but terminating at the cadastral boundary to the east, we would suspect that burials are probably present. We except the wetland at this stage from those observations.

[28] It is necessary to identify the legal standing of the registered waahi tapu in terms of the RMA. This case has demonstrated the difficulty that Parliament has created with its broad statement in s 6(e) that in achieving the purpose of the Act, all persons exercising functions and powers under it in relation to managing the use, development, and protection of natural and physical resources, as a matter of national importance shall recognise and provide for:

"The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga."

[29] In terms of s 4 of the Historic Places Act 1993 (HPA), the HPT is given statutory responsibilities. This section covers historic places and the historical and cultural heritage of New Zealand but none of those elements is given prominence over the other. Section 4(c) of that Act sets out the matters which the HPT should take into account and included in that section is the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi (sic) tapu, and other taonga. (It will be noted that "wahi" tapu (HPA) is spelt "waahi" in terms of the RMA. It should probably be spelt "wahi". For convenience in this decision, we will adopt the spelling in the RMA namely "waahi"). Section 69 gives to the HPT functions concerning the identification, recording, investigation, assessment, registration, protection and conservation of waahi tapu areas and to advocate the conservation and protection of waahi tapu areas. This is in addition to similar powers in relation to historic places. The use of the word "advocate" indicates that the HPT is not in a neutral role. We tend to accept the submission by counsel for the HPT that a more apt description of the Act would have been the "*Historic and Cultural Places Act*".

[30] The HPA does not set out to fully protect waahi tapu areas or archaeological areas because permission can be sought to destroy, damage or modify archaeological sites in advance of development. In the present appeal, elements of waahi tapu and archaeology are inextricably entwined. To give waahi tapu areas protection, they must be subject to a Heritage Covenant under s 5 of the HPA (which is not the case in the present instance) and also

desirably they should be subject to a Heritage Order under the RMA, if they can pass scrutiny and tests under those Acts.

[31] This brings us to the method of protecting or recognising waahi tapu sites. This appears to substantially rely on the RMA processes, including district plan provisions. There is also the powerful influence of Part II of the RMA and in particular s 6. Whether areas containing unidentified sites should or could be protected at all by such mechanisms was not argued before us.

[32] The interlink between the two is shown by s 22(2)(c) of the HPA which records that one of the objectives of registering waahi tapu is:

“...to assist historic places, historic areas, waahi tapu, and waahi tapu areas to be protected under the Resource Management Act 1991.”

[33] The HPA was passed in 1993, two years after the passing of the Resource Management Act. Territorial authorities must have regard to the trust registry and in the present case, the HPT took part in the district plan process resulting in the appearance of a waahi tapu area in the Heritage register. This recognised areas of concern to the Takamore Trustees in and about the urupa. The District Plan register does not, however, afford any protection but rather acts as a caveat requiring caution and investigation by potential developers. It is accepted by all parties that the registration of an area as waahi tapu and its subsequent appearance on a district plan does not fetter the powers of the Environment Court to investigate in depth the actual sacred significance of a piece of land alleged to be waahi tapu and potentially subject to development. The Court can also of course investigate the waahi tapu of unregistered sites for the purpose of applying s 6 of the RMA.

[34] In the present case, we are in some difficulty as to the dimensions of the area alleged to be waahi tapu. For the purposes of this first part of our investigation, we will take the expression waahi tapu in the HPT process of registration as encompassing that which the Takamore Trustees sought to be so identified in its application for registration. We are not forgetting the concept that all of the North and South Island are waahi tapu, this being the evidence given to us on behalf of the HPT. The Takamore Trustees also consider all land from the sea to the urupa as waahi tapu. Acceptance of those concepts would, of course, render the administration of the RMA in New Zealand virtually impossible hence our interest in specific rather than general waahi tapu in relation to this case.

[35] Exhibit 35A noted as “Waikanae Christian Holiday Park/Takamore area – NOR alignment” conveniently shows the areas we now discuss which are to the west of the cadastral boundary line which lies immediately to the east of the urupa. Shown in purple on that plan (and reflected in the district plan) is the urupa. In the course of the hearing, the Presiding Judge asked that the fenced area representing the land presently used as a burial ground, be superimposed in yellow and this was done. This shows that the present burial area differs from the 2 acre area shown purple in that it is narrower east/

west and longer north/south. From the southern boundary of the urupa in 1
roughly bulbous form, there is a dotted yellow line circling east, north, west
indicating the area which the Takamore Trustees requested be declared waahi
tapu in the Historic Places Register. That plan has some minor deviations to
the south where the dotted line goes further south than the southern boundary
of the urupa but nevertheless is more or less consistent with that which was 5
originally requested.

[36] When the HPT requested recognition of the waahi tapu area in the
district plan heritage register, its submission was fairly cryptic and referred to
the cadastral land description. This resulted in a more or less oblong piece of
land with a smaller oblong extension to the north appearing in the district plan 10
in lieu of the HPT waahi tapu registered area. That notation appearing on the
district plan heritage register is probably about one third greater in area than
the waahi tapu area originally sought. It extends further south into the land
owned and occupied by the Christian Holiday Park encompassing a further
wetland area which was not previously included in the area sought by the 15
Takamore Trustees.

[37] The difficulty is further compounded by the fact that the HPT when
it registers areas as waahi tapu concedes that the registration is restricted to
recognition of the fact that the *area* may contain smaller areas of waahi tapu
of an importance greater than the general waahi tapu concept, the latter 20
covering as it does the whole of the relationship of the Maori people with
lands and waters. We accept the approach of the HPT that there are degrees
of waahi tapu, indeed s 22(2)(c) HPA refers to "*wahi tapu*" and to "*wahi
tapu*" areas. It is thus open to the Court to investigate what it is that causes 25
particular areas to have great cultural and spiritual importance to Maori. In
that regard, it is the actual carriageway (as opposed to the requirement) where
it runs through areas clear of the registered urupa but within the areas identified
as waahi tapu, which is of greatest importance. We must also take into account
the fact that the area of waahi tapu as appearing in the District Plan register 30
exceeds the area originally thought significant by the Takamore Trustees. We
accept also that the expression "*Taonga*" can also relate to "*koiwi*" (human
remains) and treasures buried with them. In this decision we use the terms
separately, i.e. "*Taonga*" treasures and "*koiwi*" human remains.

[38] Also, in terms of s 6(a), the RMA requires the preservation of the 35
natural character of the coastal environment ... wetlands, and protection of
them from inappropriate use and development. "*Wetland*" is defined in s 2 as
including permanently or intermittently wet areas, which support a natural
ecosystem of plants and animals which are adapted to wet conditions. The
swamps/wetlands on the Christian Holiday Park/Weggery/waahi tapu land 40
come within that definition but in addition to their recognition in s 6 as being
of national importance, there is evidence, albeit tenuous in the course of these
proceedings, that there are burials and/or taonga within those wetlands. For

reasons the majority will later discuss the oral evidence as to burials was far from satisfactory. Thus some of the land affected by the NOR may be of national importance for two different reasons.

[39] Lastly within the grounds of the Christian Holiday Park flows an ancient punawai (spring) known as Te Puna o Rongomai – the spring of Rongomai. This spring was renowned historically for its healing qualities and was used for ceremonies. It should be avoided for reasons of its tapu values.

Analysis of factors relating to Part II of the Act in relation to the land owned and/or occupied by the Christian Holiday Park and/or occupied and claimed as waahi tapu by the tangata whenua

[40] In this part of this decision we will discuss Part II concepts as they affect the major appellants, namely the Christian Holiday Park, and the tangata whenua as represented by the Takamore Trustees and Historic Places Trust (HPT). In this way we will isolate issues with a view to then examining the obligations of the Council under s 171 of the RMA. We have already commented on the importance of the resource issues as represented by the NOR corridor itself and will return to that when we discuss traffic issues in more detail.

[41] To now assess the Christian Holiday Park issues in terms of Part II. We consider that the Christian Holiday Park is a facility which comes within the concept of promotion of sustainable management of physical resources under s 5. As such it should be managed and protected in a way which enables the people and communities involved with it to provide for their social, economic and cultural wellbeing and for their health and safety. Within that concept its potential should be sustained to meet the reasonably foreseeable needs of future generations. Any adverse effects resulting from the NOR should be remedied or mitigated, if possible, should that proposed activity affect the park and it most certainly does.

[42] We were frankly surprised at the lack of knowledge exhibited by District Council witnesses and in particular by its consultants as to the precise nature of the activities carried out on the land owned by this appellant. We therefore intend to take a little time in describing the park and its activities and in so doing will generally follow the evidence of Mr A Procter, the Secretary-Treasurer of the Christian Holiday Park.

[43] The park is a non-denominational charitable trust which was founded on 8 April 1963 by a group of keen Christian people. The objectives as stated in its constitution relate to various matters, inter alia:

- to Christian conferences or conventions for Christian teaching and ministry
- to sharing the gospel of Jesus Christ with children through Christian youth camps and by providing an atmosphere that fosters Christian living principles

- to provide for facilities to enable families or other groups to spend a holiday in a Christian environment.

[44] To this end the park provides a quiet, peaceful country atmosphere for rest, relaxation and refreshment to visitors, whether they be families, school groups, charity groups, solo parents or busy professionals. The park is within one hour's drive of Wellington and presently contains 29.5 hectares. It is within a tranquil rural setting complemented by mature trees. The entry is also tranquil and tree lined. The Waikanae River lies to the south and the park has riparian rights to that river. It permits the public to utilise a walkway through its land along the riverbank but is under no legal obligation so to do. A wetland lies to the north. It is within walking distance of the beach and is close to bush walks on nearby hills. The situation is unique in an urban area and we accept that the metamorphosis from urban to rural is pronounced when one enters the park from the east.

[45] The park provides 470 beds in 7 separate camp facilities comprising 21 accommodation buildings, 5 meeting halls, 5 seminar rooms, 4 dining rooms, 3 kitchens, a gym, church, crèche, medical room and workshop.

[46] The camp is split into different groupings of building complexes and in addition to group accommodation buildings and facilities, there is a public motor camp which can take 400 people, complete with kitchen and ablution blocks; 19 holiday flats in 3 different groups which can cater for 120 people; and Kauri Hall which is a large building used as gymnasium and conference hall – it can seat 800 people comfortably.

[47] In addition there are 8 staff houses, a bookshop, a canteen, and camp office/administration. We are told the current replacement value is some \$7.1 million plus \$827,000 in staff houses.

[48] To indicate the popularity of the camp, we are told that it has grown to be one of the largest Christian camps and conference facilities in New Zealand with the ability to host up to 7 different residential groups at one time. During 2001 the use of the park reached 52,354 visitor nights or an average of 143 people per night. This included 43 school groups, 146 conference groups and weekend groups and 19 school holiday programmes. Although the trustees endeavour to associate camp usage with Christian education, this is not a compulsory requirement in respect of schools.

[49] In addition many community groups such as schools, church, music and sports, use the main hall as a venue for concerts, dinner functions, or sports tournaments, independent of the park's actual activities. The bed night figure is therefore an extremely conservative figure insofar as total usage of the park is concerned.

[50] Activities can be quiet or boisterous, depending on the wishes of persons residing or making use of the facilities. It offers rest and relaxation with education and religious instruction for those who wish to avail themselves of those facilities. Because of the size of the complex there are many places

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where people can simply retreat from the stresses of everyday life, despite 1
what other activities may be occurring in other parts of the park at any one
time. Recreational activities available include horse riding, canoeing, swimming
(the park provides a large pool), water slide, tennis, archery, rock climbing, air
rifle, indoor basketball, indoor soccer, netball, soccer, rugby, mini golf, flying
fox, frisbee golf, rubber tubing, wobble wagon, horizontal bungee, go-karts, 5
and children's playground. There is a small farmlet with 10 horses,
approximately 50 sheep, 4 donkeys, rabbits and a peacock aviary.

[51] On the eastern side of the complex are the two grass covered dunes
affected by the NOR which are used for more extensive outdoor games and
activities and this area can cater for some 200 children. A range of activities 10
takes place there with the dune ridges and valley between facilitating an
extensive range of sports such as non-motorised downhill cart rides, cardboard
box sliding, frisbee golf course, team initiative courses and horse riding to
mention but a few. There are also open air church services and reflection
times at the Maketu grave tree. 15

[52] It can thus be seen that we are not dealing with a small scale enterprise.
We are satisfied the park benefits the community as a whole, and indeed has
benefits throughout New Zealand for those who come from afar to visit. The
trust is a non-profit making organisation and makes but a modest profit on its
activities. It is charitably motivated in that there are two free family camps per 20
year advertised through Birthright and Open Home Foundation. There is an
open door policy for people to walk on the grounds, use the picnic facilities
and gain access to the riverbank and the beach.

[53] The camp employs 15 staff and is active in improving its facilities in 25
the future.

[54] Lastly it performs an important community function, having recently
been approached by the Earthquake Commission to assist as a post-catastrophe
facility should there be a natural disaster affecting the Kapiti region. The Elm
Court facility is to be utilised in the future as an induction centre for Earthquake 30
Commission personnel. The trustees are particularly anxious that access to
the park from the east should not be inhibited in times of flood and the Court
here records that the subway proposed by the District Council to allow access
under the carriageway of the Link Road could become flooded in a 1:100 year
flood. We are however told that permanent access could be created from the 35
west and the conclusions of the Court require that to be a matter for which the
District Council must take financial responsibility.

[55] We are in no doubt that the proposed Link Road will have a
deleterious effect upon the tranquillity of the Christian Holiday Park. The
bridge across the Waikanae River being well above flood level will be a highly
visible structure as it swings over the paddocks presently used for frisbee 40
golf and for the grazing of livestock. This high level structure will appear more
dominant because of the 1.8 metre high sound barriers intended to be erected

on its western side. When the carriageway reaches land it almost immediately 1
passes over the intended subway entry and at this stage there is a "horns of
the dilemma" situation whereby if the height of the carriageway above the
level of the proposed park entryway is to be sufficient to enable usage of the
entry in flood conditions, then it will become even more dominant. Then,
almost immediately after clearing the subway, the Link Road would disappear 5
from the view of an observer standing to the west because it then cuts through
a sand dune before re-emerging to cross the wetland to the north-east of the
park property. At this stage sound barriers of 1.8 metres would also be erected.
The dilemma situation again arises because the sound barriers will not be
100% effective in screening 24 hour vehicle noises, particularly truck exhausts, 10
from those using the park.

[56] We record that here there was some confusion concerning visibility
of the roadway as a result of the District Council, following unsuccessful
mediation, accepting a lowering of the datum level of the carriageway in order
to achieve a less dominant visual effect. The appellants for their part were 15
working on the NOR plans showing the original higher level. We for our part
accept that the lower level will go a little way towards mitigating adverse
visual effects of the proposal and is therefore an amendment which could be
made in the course of proceedings.

[57] Visual mitigation will be enhanced by plantings but nevertheless the 20
camp will have lost much of the open space facility it presently enjoys to the
east of the go-kart track. We understand that that track is no longer affected
by the proposed public works and that there is no necessity to take that land
in connection with those works. The requirement should be amended to 25
reflect that situation.

[58] It is also intended to provide a road surface which is less noisy than
the normal form of surface used on roads of this type.

[59] We accept that the presence of this Link Road on its present course
through the holiday park will cause amenity detractions which can be mitigated 30
to a degree but not avoided. The park will be subjected to noise which in a
residential as opposed to a rural environment may be acceptable when
measured one metre from the wall of buildings but in this quiet setting becomes
an unwelcome intrusion. We accept also that some visual mitigation can be
achieved but that the park users will still be faced with structures which 35
cannot be hidden particularly when the viewer is close to them. Whatever
semantic cloak may be laid over the Link Road, the fact remains that one of the
most obtrusive and noisy elements of modern life will replace part of the park
complex which has hitherto been peaceful and tranquil. The only way in
which the park concerns can be met would be by the choice of a route which 40
completely avoids their property. We will come to a consideration of those
issues later.

[60] Because land is being taken, the question of injurious effect to the

balance of the land will fall to be considered when compensation is addressed. 1
We make clear however that the trustees of the park are not interested in that
issue but wish to retain the facility they have created for the purpose for
which it was created, namely a peaceful rural type setting which can be enjoyed
by adults and children alike without the intrusion of one of the more aggressive
facets of civilisation. 5

[61] Nevertheless, we record that the NOR has been in place in one form
or another since 1956 and at stages its potential route has been much closer to
the buildings on the park than at present. We do not accept that property
owners can, in the face of such a warning, go about their business as if there
was no future possibility that a major road may eventuate and, having 10
committed considerable money and time to the creation of a facility, then use
the presence of that facility as a reason for removing the NOR from its historic
alignment. Put another way, the trustees are now facing the physical reality of
a public work which has been signalled clearly since 1956, some years before
the land was acquired for the purpose of the park. 15

[62] We turn now to the concerns of the Takamore Trustees and to the
importance of the waahi tapu area in connection with the NOR. It will also be
convenient in the course of that discussion to consider the wetlands as a s 6
entity in its own right.

[63] The urupa itself is without question waahi tapu and in the opinion of 20
this Court must also without question remain physically undisturbed by the
carriageway or associated works of the NOR. This brings us to the concept of
waahi tapu which is a concept bereft of physical or cadastral boundaries. In
the present case neither we nor any of the parties are in any doubts that the 25
Takamore area is part of Maori ancestral lands. Much of it has been sold. The
only area near the NOR remaining in Maori ownership is the two acre urupa
reserve which itself does not reflect the greater area which should have been
set aside for that purpose. We are further disadvantaged in a judicial approach
to the general area by the fact that waahi tapu can be ephemeral, permanent, 30
site specific, or all embracing. What may be waahi tapu to one person or iwi
may not be so important to others.

[64] The common thread which ran through all the evidence is that Maori,
and in particular tangata whenua and manu whenua believe that the assertion
of waahi tapu status by those with authority so to do is an end to the matter 35
and must not be further questioned by those affected by the waahi tapu
status so given to any particular area. This indeed caused a confrontation in
the Court because the Court had heard evidence from Mr Buddy Mikaere on
behalf of the District Council which challenged on historical grounds the
basis for holding that the Takamore area, and in particular the area of the 40
wetland, contained any taonga or koiwi which would support a waahi tapu
status of such importance that the NOR should not remain in place that and
the public work should not proceed. Mr Mikaere is a professional historian of

some eminence but he is not tangata whenua of the area. This raised the ire of Mr J O Porotene, called on behalf of the Takamore Trustees, who was speaking as tangata whenua and in particular from the viewpoint of the hapu of the iwi Muaupoko who had lived along the western coast of Horowhenua, Kapiti and Wellington and who pre-dated Te Ati Awa in occupation of that area. It is probable that if there are any human remains (koiwi) in the wetland it would be from that hapu or iwi. That witness took extreme exception to Mr Mikaere daring to trespass on tangata whenua views with opinions when he was not tangata whenua and a heated oratorical outburst resulted within the precincts of the Court which was totally unacceptable to the Court.

[65] We make clear that we are concerned with evidence and if tactics of this nature are adopted by tangata whenua with a view to preventing or dissuading witnesses of undoubted academic calibre from assisting the Court, then we are of the opinion that such attempted interference in Court processes would, at the very least, be in contempt and render any person involved subject to such sanctions as the Court might impose. We might here add that we were also singularly unimpressed by Mr Porotene's statement that if the waahi tapu status of the Takamore area was not accepted by the Court then civil disobedience would follow with human chains blocking the progress of the Link Road. We record that the Takamore Trustees disassociated themselves from those comments.

[66] Returning now to the question of waahi tapu. Mr Mikaere for the District Council devoted a large part of his evidence to a criticism of the HPT in registering the Takamore area as waahi tapu. We heard at length from the Trust on this question and in particular from Mr Peter Adds, who was, until the end of October 2001, a member of both the Maori Heritage Council and the New Zealand Historic Places Trust Board. He made clear to us that the HPT on the recommendation of the Maori Heritage Council (which is part of the Trust structure), tended to register waahi tapu areas if they were satisfied that the location contained within it sites of importance which were individually waahi tapu. Essentially therefore, the HPT through its Maori Heritage Council, is empowered by law to adopt a practice which Mr Mikaere nevertheless criticised when he said:

"Their decision should have been that the area contains sites of cultural and historical importance, including waahi tapu, but the whole area is not waahi tapu, in the sense of that expression within the HP Act."

[67] In that regard, Mr Mikaere has misread the HPA which contains a definition of a "waahi tapu area" as an area of land "containing one or more waahi tapu".

[68] That gives the basis for the way in which the Maori Heritage Council approach the question of waahi tapu. By taking the "area" definition as contained in the Act, the HPT is most certainly carrying out its functions in assisting decision-making authorities called upon to adjudicate in terms of

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the RMA. Those authorities are alerted to the fact that the area almost certainly will contain some sub areas which are unarguably waahi tapu in a site specific sense. In that regard koiwi are one of the higher categories of waahi tapu with other taonga normally, but not necessarily, of a lower category.

[69] Also, in reaching a decision concerning whether or not an area is waahi tapu, the Maori Heritage Council move with considerable caution. The claim is investigated with the main thrust of the investigation being to ascertain whether there is universal consensus amongst tangata whenua, hapu and iwi concerning the waahi tapu status of a particular area of land. If that consensus is present, then, provided it has some historical support whether by oral tradition or otherwise, the Maori Heritage Council recommend that it be registered. Consultation with land owners is not a prerequisite. The HPA contains its own mechanisms for challenging that decision and it is not for this Court to interfere. It is not similar to the Heritage order procedures of the RMA (ss 187 et seq) which require public notification and service upon those directly affected.

[70] We accept the evidence of Mr Adds that registration as waahi tapu is not reliant on the presence of some form of physical remains which is the situation with archaeological sites. For example, it does not have to be a burial ground or the site of a battle. The status of tapu can arise at any time, and can even come about as areas advance in age. Waahi tapu are sacred places with some form of essential characteristics, ie sometimes death, sometimes association with people of note, sometimes activities, and sometimes resources, to instance but a few. We have used the word "*essential*" in one of its senses which is "*of or contributing the essence of a person or thinking – a basic or indispensable element.*" Tapu also have various forms of degree or potency. We are told that it is an extremely powerful psychological control mechanism that restrains the behaviour of individuals and whole communities towards elements declared to be waahi tapu.

[71] It was for these reasons that the Maori Heritage Council accept that they are unable to speak for tangata whenua for the purpose of deciding whether a place is tapu to local Maori. Thus as we have already recorded, the Council consider that its function is to see that waahi tapu registration applications are genuine and that they meet the criteria defined in the legislation. One important test applied was whether the application had the support of or was not opposed by the recognised tribal leadership and/or iwi authority in the general area.

[72] We have ample evidence, both archaeological, recorded history, recent events, and oral tradition, to cause this Court to conclude that the Maori Heritage Council were largely justified in their stance and their decision. We say "*largely*" because as we have already recorded, the limits of the waahi tapu as shown in the district plan do not accord with but exceed the area originally sought by the Takamore Trustees.

[73] However, the comments we have just made should be treated with 1
caution because waahi tapu can be a broad brush concept covering the whole
of New Zealand in reflecting the close relationship of Maori people, their
kaitiakitanga and their mana with the natural and physical forces which
constitute the land, the water and the air. We do not consider the expression
“waahi tapu” in the RMA is intended to cover such a blanket approach. 5

[74] We agree with the Maori Heritage Council that to adopt that type of
blanket approach to waahi tapu would be to make the waahi tapu registration
processes not only impossible but superfluous and would render the RMA
unworkable. The care taken by the Council is evidenced by the fact that there
are only some four locations in New Zealand with identified waahi tapu areas 10
as opposed to individual recognised sites. The area of Takamore has not
been elevated to full heritage status in terms of the HPA or the RMA.

[75] To now consider the corridor through which the carriageway of the
road would be physically constructed. There is the alignment presently shown
within the NOR and there is a more recent alignment shown as an ecological 15
corridor which brings the road closer to the boundaries of the urupa. Neither
is remotely acceptable to the Takamore Trustees. In relation to the wetland/
waahi tapu area, roadworks within the corridor will be largely restricted to
carriageway width over a length of 360 metres (approx) out of the total NOR
length of 15 kilometres. 20

[76] The route of the carriageway from the time it clears the sand dune
runs to the west of the Maketu tree and first proceeds through the wetlands
on the Christian Holiday Park property (largely clear of the waahi tapu
registration) then across a short stretch of higher ground and then through 25
the larger and ecologically more significant wetland immediately to the west
and north-west of the urupa site. Accepting that any deviation to the east of
the carriageway is impossible because of the presence of the urupa, the only
other alignment possible within this corridor or near to it would be through
dunes to the west which may well contain dune burials probably pre-dating 30
Te Ati Awa occupation.

*Majority Findings on Evidence Concerning Waahi Tapu Status of the
Takamore Wetland West and Northwest and Southwest of the Urupa*

[77] We have evidential difficulty insofar as koiwi (human remains) are 35
concerned within the swamp area, because none of the evidence we heard
(with the exception of some hearsay evidence concerning the activities of a
seer) directly related to swamp burial, even in the times of Muaupoko
occupation in the general area. Such evidence as there was referred to burials
within the registered waahi tapu area which covers dunes and swamps. There 40
is some oral evidence of the burial of taonga in a wetland (in which one we are
not certain but suspect the one by the urupa), namely waka and parts of
buildings. The only “evidence” we heard was cryptic and assertive bereft of

any back-up history or tradition which would cause us to give some support 1
to the concept of swamp burials in the area affected by the requirement. In
particular during the time of Te Ati Awa occupation there appeared no reason
why swamp burials would be preferred in that Te Ati Awa, being the dominant
tribe, would have little reason to hide human remains from potential enemies
but a burial could take place for preservation. Indeed it is significant to us 5
that when Te Ati Awa migrated back to Taranaki, they disinterred human
remains which appeared to be of importance to them and took them back to
Taranaki. There was no record suggesting that they were disinterred from a
swamp location. This conclusion accords with the evidence of Mr Mikaere.
[78] Therefore, historically, it would probably be Muaupoko remains in 10
the swamp and wetland areas, if any are there at all.

[79] However, militating against that is the evidence of some ecologists
and botanists and in particular Dr Keesing, that in pre-European times these
wetlands would have formed part of a forest and be under canopy. That
theme is reiterated in the Kapakapanui Report of July 1997. In that report the 15
low landscape of forest, wetlands, lakes and streams, was referred to and
there is a recurrent theme referring to forest cover down to the sea and, at
page 3 of the report, there is a quotation describing Heaphy's vision of the
coast in 1839 which refers to a "*green unbroken seam between the sea and
mountains covering everything with the sand dunes and the wetter swamps*". 20
There is however nothing to prevent swamp burials of koiwi or taonga in such
circumstances although it would not be the norm.

[80] We are frankly surprised that in a matter of such importance to the
Maori community and to the community as a whole, the evidence is so sparse. 25
The evidence of Mr Robert Herata Ngaia, Chairperson of the Takamore
Trustees, was as follows:

*"5.2 The old people who had passed the wahi (sic) tapu information to
me had always said that the whole wahi tapu was an area of about
25 acres. I was shown the exact extent of the area. This was the place 30
we submitted for registration. The area was known by us to contain
many burials. We have been told by Rameka and the other old
Kaumatua that the area was sacred and Koiwi were buried there. We
also know of houses and a waka that are buried within the area.
There are also other treasures. 35*

*5.3 The relationship that we the Takamore Trustees have with this Wahi
Tapu land is what defines us as a hapu and as Kaitiaki. We cannot
imagine how this place could have a road put through it. Caring for
this land and those who lie in it, as well as passing on the information
about this place is a sacred duty. It is a responsibility passed on to 40
us and one we will in turn pass on. Everything about this place and
our role as Kaitiaki goes to the heart of our values as Maori."*

[81] It will be noted that that evidence is very general and refers to a 25

acre area within which some 360 metres of road corridor will pass. Other 1
evidence leads us to believe that the houses and waka may be within what is
referred to as the Takamore wetland immediately adjacent to the urupa and
affected by the NOR, but we can find nothing in the evidence of that witness,
even giving full weight to oral tradition, to suggest that there are burials
within that wetland. The witness did not address local tradition except in the 5
most general way.

[82] The next witness was Mr Porotene, who referred to one recent burial
near Mackay's Crossing (which is some distance from the Takamore site) with
remains subsequently reburied in accordance with Maori custom. He referred
to the occupation of areas by Muaupoko. He is trustee of that tribal authority, 10
the tribe being occupants of the area prior to Te Ati Awa. He told us that
names and locations of specific waahi tapu were provided to the Hearing
Commissioners for this road designation and that it had not been shared in
that kind of public forum before. This is a hearing de novo and we assume the
same evidence is before us. It takes the matter no further, other than in a very 15
general way, concerning burials in land affected by the NOR corridor and the
proposed carriageway.

[83] The evidence of Te Taku Parai commences with the statement that
many ancestors are buried at Takamore. We found his evidence (apart from
that comment) extremely detailed and interesting covering key concepts of 20
Maori knowledge and cultural practice but not geographically precise.
However, the evidence is again very general in relation to the precise location
of any potential burial grounds which may be potentially affected by the
NOR. An example is clause 5.1 of his evidence where there is a cryptic comment 25
"in addition to our mate (deceased) the swamp itself contains tribal taonga
(treasures)". Indeed his evidence is equally consistent with the fact that
should the carriageway be shifted from its present location on to other
undeveloped land, it may in that event again strike burial grounds of cultural
importance to Maori people. 30

[84] He referred to the inappropriate nature of a fenced urupa as limiting
areas in which bodies are buried. He refers to the land of Takamore itself being
a taonga and that taonga would lie buried with the dead.

[85] In relation to the specific area with which we are concerned – namely
where the carriageway traverses swampland and other areas near the urupa – 35
he states:

*"5.7 Takamore has been and still is known amongst our people as a
treasure trove of taonga. Its outlying area and swamplands have
long been the resting home for our ancestors. Along with them are
whare taonga (treasured houses). Oral tradition of our elders of Te 40
Ati Awa talk about the abundance of taonga that lie at the bottom
of the swamp at Takamore. The most well known are the remains of
old wharenui (meeting houses) and the remnants of waka (canoes)."*

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In addition there is little doubt that many other prize pieces that were buried in the lake for reasons of preservation and safety away from marauding tribes. Quite aside from the presence of the sand-dunes and swamps of Takamore, the area is of immense importance to us culturally. As present day Kaitiaki by virtue of our whakapapa to that area, it is our responsibility to protect, maintain and uphold the integrity of these taonga for there are physical affidavit of what we have endured and a testimony of mana for our people.

[86] A note by the Presiding Judge beside this paragraph of evidence reads:

“Original meeting house in that area by waterside. SH 1 Marae the new position. The old would have been preserved in swamp.”

[87] Again, we are bereft of evidence rather than assertion that koiwi are in fact in this swamp. We have no evidence as to why koiwi were interred in the swamp rather than on dry land, nor any evidence as to who they may be, other than a strong presumption that they would be Muaupoko. The view of the majority of the Court is that in a matter of this importance, we are surprised at the paucity of evidence given to us. In relation to such evidence as we have, we have considerable doubt as to the presence of koiwi in the relevant swamp areas, but on a balance of probabilities, accept that there may be taonga in the form of buildings and/or waka. These as we have observed, should be protected and if necessary removed with appropriate ceremony to another site chosen by the tangata whenua.

The remainder of the paragraphs in this part of the decision leading to the subheading “The Historic Places Trust” are majority views.

[88] We do not therefore accept on the balance of probability that the swamps contain koiwi. As a possibility they may contain taonga and oral history lends support to that in relation to waka and buildings from the village which existed nearby prior to relocation near the rail head.

[89] Nevertheless, there is certainly nothing to prevent the Takamore Trustees and the tangata whenua from regarding all land in the vicinity of the urupa as waahi tapu in a general sense. The preservation of tranquility and peace within and without the urupa area and the preservation of important and uninterrupted views of the mountains to the east and the sea to the west are intrinsic values of importance to the waahi tapu concept.

[90] In respect of the waahi tapu areas, provided excavation is done with care, the presence of tangible taonga should not be permitted to impede the progress of a major arterial of benefit to the community as a whole. The taonga should not effectively sterilise the wetland for all time. They can be removed with appropriate reverence, if Maori so permit, but no solution of that type has been suggested. The veto attitude prevails. In relation to koiwi,

we are not persuaded there are burials of significance in this wetland if indeed there are burials at all. We have been given no historic evidence, oral or otherwise, to lead us to believe that there exists a probability of significant koiwi presence. If remains be found then the HPT has unfettered powers which it can use. It is not for this Court to influence the exercise of those powers.

[91] We must, in considering the balances inherent in the RMA, not only consider the reverence to be accorded to those already interred but in terms of s 5 must give consideration to the living who can be affected by substandard arterial transport systems.

[92] In general terms, and without, at this stage, entering into a consideration of alternative routes, we apprehend that all parties accept that a transport corridor must be chosen which will achieve efficiency and safety. We must also take into account the question of unacceptable delay if extensive investigation and procedures are required on alternate routes in order to give effect to those alternatives. Alternatives until fully investigated and subjected to the full HPA and RMA processes must remain speculative.

[93] This is the enigma that faces us all in this case where the peace of those long dead and the grief which may be caused to their descendants if remains are disturbed must lie in the balance. In addition to that, we are faced with the fact that they are lying in unidentified areas and the NOR on its present alignment may in fact not cause disturbance but may cause disturbance on a new alignment. If disturbance is caused, mitigation is possible with the co-operation of the Maori people by appropriate ceremonies associated with reinterment of remains in areas protected for all time – that approach is presently unacceptable to the tangata whenua.

[94] In the balancing exercise, we must point out that there is no mitigation possible in terms of the RMA or indeed in terms of any possible human salve if substandard roading systems cause injury or death. We have ample evidence that the State Highway together with the internal Kapiti/Paraparaumu system are at crisis level.

[95] When we come to consider the provisions of s 171, which is subject to Part II of the RMA, we will give weight to the matters we have just discussed which we feel in this case encapsulate the thrust of s 5 – a forward looking section directed in part at future generations. This is consistent with the observations we have just made.

[96] As to the wetlands, the evidence we have concerning their intrinsic value (leaving aside cultural value) is that they are small scale and not of great importance. Their main importance is as remnants of a heritage now threatened with extinction. Nevertheless s 6 of the Act directs us to regard wetlands as of national importance and we accept that on a New Zealand wide scale wetlands are a valuable but rapidly diminishing resource. They should not be interfered with unless no reasonable alternatives are available and mitigation measures are not possible.

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[97] In respect of both the waahi tapu areas nearest to the urupa which 1
include the Takamore wetland, we are bereft of any assistance from Maori as
to potential mitigation measures. Indeed the attitude is that it will not be
discussed because interference is simply not acceptable under any
circumstances.

[98] The District Council for its part has done its best to foresee the 5
primary concerns of Maori and deal with them. The Council is prepared to
take the narrowest track possible through the wetland and create a carriageway
with no batters or disturbance on either side of the actual swathe of land
necessary for that carriageway. There would be inter-linking drains enabling
the wetland to function without drying out and there would also be corridors 10
through which fauna could pass although the desirability of that type of
corridor appears debatable in that feral animals become used to the fact that
the corridor will be used and lie in wait for the small reptiles and birds which
may make use of it. The system proposed would involve excavation which is
an anathema to the Takamore Trustees. There are however further engineering 15
possibilities such as pre-loading but the trustees will not discuss those matters.
For our part we will not impose conditions of an engineering nature but pre-
loading would be a possible and preferred mitigation measure.

[99] The pre-loading option does not require excavation. The ground is
consolidated to form a roading foundation. That particular method did not 20
find favour with the HPT. We also do not know what are the views of the
Maori people about consolidation having regard to their belief that there are
koiwi in the area.

[100] We find that the areas in and about the urupa are waahi tapu in a 25
general sense and that the road will pass through such areas. The wetland
areas are also within the definition of wetland in terms of the RMA. Therefore
both waahi tapu and wetlands come within the statutory national importance
status by virtue of s 6. Should there be taonga in the swamp, conditions can
be imposed which will ensure protection and preservation under the control 30
of the tangata whenua. Should koiwi be uncovered that is a different matter.
The question of further conditions to deal with this contingency is not however
a matter for this Court. It is covered by the provisions of the HPA. None of
the existing conditions imposed by the Commissioners are under challenge as
a result of appeals except as we specifically record in this decision. A protocol 35
acceptable to HPT would nevertheless be a useful guide.

[101] The District Council must realise that any significant discovery of
human remains could result in the road being literally stopped in its tracks 40
whilst a realigned carriageway route is adopted. Both in relation to taonga
and koiwi, we make it clear that any observations on the part of this Court in
the course of this decision are neither binding nor persuasive on the HPT
which has its own role to play in terms of its own Act in relation to discoveries
of that nature made in the course of any development works. We also record

that general authorisation in terms of the HPA cover an unrealistically short 1
timeframe of two years in relation to a public work of this magnitude.

[102] To complete our discussion of Part II of the RMA, apart from Maori 2
issues, we will now address the other relevant matters contained in ss 6, 7 and 8.

[103] In respect of s 6 we have in the course of this decision covered the 3
matters referred to in subsections (a) and (e). In respect of the remaining 4
issues in s 6, we do not find the area contains outstanding natural features or 5
landscapes which makes it necessary to protect them from inappropriate use
or development; we do not find there are any areas of significant indigenous
vegetation or significant habitats of indigenous fauna. There was some
suggestion that the wetland contained within the Christian Holiday Park 10
complex contained a rare native fern. It had once been sighted but recent
investigations failed to locate it. We have thus addressed in the course of this
decision the other matters covered by s 6. We have recognised matters of
national importance in relation to Maori and endeavoured to provide for them
despite the lack of input from the tangata whenua. 15

[104] Turning to s 7, the first two subsections (a) and (aa) relate to the
question of Kaitiakitanga and the ethic of stewardship. The former expression
is defined in s 2 of the Act as:

*"Means the exercise of guardianship by the tangata whenua of an area 20
in accordance with tikanga Maori in relation to natural and physical
resources; and includes the ethic of stewardship."*

[105] The Council must have particular regard to those matters which
renders consultation a necessary element of any particular development. We 25
are satisfied that the consultation process in respect of the NOR has been
extensive and that the Council has been fully appraised of Maori concerns in
relation to managing the use, development and protection of the land within
the NOR corridor. The concerns of Takamore Trustees relate to spiritual and
cultural matters. The attitude of the tangata whenua is a total prohibition 30
upon any use or development.

[106] There is agreement that the land is historically ancestral land
(although most is no longer in Maori ownership) with elements of waahi tapu.
We therefore bring to the attention of the District Council the necessity for
future consultation with the tangata whenua should the NOR proceed in order
that the provisions of subsections (a) and (aa) may be given full weight. The 35
areas of land not required for the carriageway itself and within the waahi tapu
registered area would remain very much the concern of the tangata whenua.
We do not intend however, to impose any condition in that regard.

[107] In relation to s 7(b) in connection with the use and development of
natural and physical resources, the view of the majority of the Court is that the 40
existence of a roading corridor protected by law since 1956 is an important
issue to which the Court must have particular regard. Setting aside the question
of taonga and koiwi which may be present in swamp areas, the majority have

no doubt that it would be a gross mis-management of resources to embark upon the whole gamut of legal procedures relating to another road route with potential disruption to people and communities and with no guarantee of success when there is an area available which has been set aside for a period of almost 50 years for that purpose. There is no other reasonable alternative which is presently legally available, therefore to accept that there is a viable alternative for the purpose of s 171(c) is not supported by evidence.

[108] In respect of s 7(c) the Council in respect of maintenance and enhancement of amenity values, have gone to considerable trouble to ensure that the corridor as opposed to the carriageway, is of sufficient width to enable the provision of walkways, bridal paths and planted areas for the purpose of addressing that issue.

[109] In respect of the balance of s 7 apart from protection of heritage value, value of the sites in relation to Maori culture and traditions, waahi tapu, and other taonga (which we have addressed separately) there is nothing further in issue apart from subsection (g) relating to finite characteristics of natural and physical resources. The corridor itself is a finite resource and in terms of s 7, is part of a statutory hierarchy to which we have had particular regard. The Court should not lightly set to one side the potential use of that resource.

[110] Lastly in respect of s 8 relating to the Treaty of Waitangi, a large part of the decision of this Court is devoted to that part of the Treaty which is encapsulated in s 6(e). There is also the question of consultation. The majority of the Court records at this stage that we consider the Council has carried out its obligations in terms of the RMA and in terms of the Treaty of Waitangi.

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[111] The HPT presented a concise and well structured case covering the Waikanae area and in particular the NOR. Generally speaking from an archaeological viewpoint, we accept that the NOR would be the least favoured route but it is ironic that the reason for this conclusion is that the presence of development inhibitions since 1956 has meant that land of generous widths, some 15 kilometres in length, has remained relatively undisturbed apart from agriculture, farming and forestry activities. It is furthermore ironic that even the most modern techniques involving radar or involving manual probing are singularly ineffective in locating items of archaeological importance, particularly in swamp areas and it is those latter areas that have assumed great importance in this case. Comment about existing techniques must, however, be treated with caution because the world of archaeology knows no limit as to time and it may well be that in the future, possibly well into the future, adequate techniques may be developed. It is therefore critically important that sites be protected from destruction if possible.

[112] It is also ironic that many of the sites which lie hidden beneath the surface in the Waikanae area will never see the light of day unless major investigative excavation is undertaken. Earthworks associated with roading

are a major form of excavation but they can hardly be said to come within an investigative framework. Roding contractors are mainly anxious to get on with the job and sites of significance are likely to suffer damage or destruction before the machine operators realise that works should halt pending archaeological investigation of any particular find. Thus the investigative function is subservient to the main thrust of the public work.

[113] From the evidence, we have concluded that the swathe of land covered by the NOR is likely to contain a number of middens, burials (particularly in dunes), taonga and possibly some remnants of permanent settlement.

[114] Having said that, this particular cultural and archaeological potential would apply to all of the Waikanae area virtually from Paekakariki to Te Horo and from the sea to the ranges. In its pristine state with forest, wetlands, lagoons, foreshore, rivers, dunes, and the foothills, it was an area over which Maori had free range and sovereignty in pre-European times. However the value of the whole area from an archaeological or cultural viewpoint has been drastically compromised by intensive urban development.

[115] Furthermore, the area is steeped in the culture of Maori as handed down by oral tradition from pre-European times. Archaeologists who gave evidence before us appeared divided on whether archaeology should be regarded as an isolated science concerned with finding physical remnants of past human activity or whether it should encompass also an assessment of the value of such finds in the context of the cultural and spiritual history of the civilisations from whence came those artefacts.

[116] It is not for us to determine the appropriate philosophical approach to be adopted by archaeologists. For our part, as persons not skilled in that field, we find it difficult to disassociate physical finds from their context within human civilisation because the Court is directed by the RMA to take all those matters into account. Thus in the context of the RMA, an archaeological site concerned with spiritual or cultural aspects of Maori assumes a greater importance by reason of the provisions of s 6 of the Act. Therefore, if archaeologists feel competent to make comment upon the culture and tradition of Maori, that would assist us in the application of s 6(e) of the Act. On the other hand, we fully understand the reluctance of non-Maori archaeologists to enter into discussions of a cultural and spiritual nature which they consider more properly the province of the tangata whenua.

[117] Therefore, in so far as the Court is concerned, the archaeological sites per se are sites covered by various legal protective mechanisms under the HPA, particularly if uncovered during the course of development. If such sites are also part of Maori heritage, then we, as a Court in the terms of the RMA, are directed to recognise and provide for the relationship of the Maori people to those sites.

[118] Having said that, it is evident to us from the evidence that the majority

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of sites likely to be discovered are middens. These were, to a degree, brushed 1
aside by Mr Mikaere as old rubbish tips but their value is far greater in that
they provide valuable evidence of the fauna and flora of the area at any
particular time. They can also provide evidence of more permanent settlement
if they are found associated with signs of villages, etc. Some are also of a size 5
where they form a landscape feature in themselves. Middens by their very
nature cannot be investigated without destruction. They should not, however,
be investigated in haste whilst a roadwork machine crouches nearby. On the
other hand, a sudden and accidental discovery of a midden in the course of
any type of development must be accepted as a possibility and investigation
of it must in those circumstances be conducted within reasonable time 10
constraints.

[119] From Paekakariki north, we have the Queen Elizabeth II Park which
has preserved a large area of dune country for all time. This terminates at
Poplar Avenue and from there to the urban limits of Waikanae, land has largely
been disturbed by human activity with the exception of the NOR corridor. 15
From there on the land is relatively undisturbed both to the east and the west
of the NOR.

[120] To put the concerns of the HPT in time context. The total time of the
NOR development will be some 15 years from start. It will be approximately 20
five years before construction starts. Stage 1 should then be completed fairly
rapidly to be followed successively by Stages 2 and 3. The HPT recommend
that a systematic survey be undertaken of the whole of the NOR corridor and
there is time for that study to be undertaken and completed. A condition is
therefore to be placed on the requirement whereby archaeologists employed 25
by or authorised by the HPT are entitled to access land owned by or controlled
by Transit and/or the District Council at any time subject to consent of lessees
or licensees. We cannot impose conditions on other land owners.

[121] This investigation will be expensive and we have given serious
thought as to whether the District Council should be required by a condition 30
to pay. We have concluded that it should not be the subject of a condition.
As we have recorded, it is fortuitous that the land is still relatively undisturbed
along the length of the NOR corridor. The purpose of that corridor has been
known since 1956 and there has therefore been some 45 years during which
thorough investigation of the area could have been undertaken. We accept 35
that the HPT is not well funded and would be unable to throw massive resources
at one particular historical area to the detriment of all others in New Zealand.
We have concluded that this area is of regional and of national importance
from an archaeological viewpoint and that funding for such investigation
should be a matter for regional or national authorities to address. We take the 40
matter no further save to say that we hope authorities concerned with such
matters may heed the comments we have made.

[122] Although inadequate from a purist viewpoint, we consider the

conditions presently imposed in respect of the requirement provide some 1
safeguard to the archaeological importance of this area.

Mr Nigel Heard

[123] Mr N Heard is a s 271A party and lives very close to the Maketu tree. 5
He and his family are seriously concerned at potential disruption of their
lifestyle, in particular by noise, and by the fact that the rural landscape, which
they enjoy, will be severed by a busy arterial route. Before he purchased his
property, he made some investigations from Transit. He had a contact who
was well versed in potential future activities in connection with major roading
in the area. He was told that the NOR would be most unlikely to be used as a
state highway corridor and thinking indicated that SH1 would continue on its
present alignment. That proved to be true. There was, of course, nothing
further he could do at that stage. He chose to purchase the property and
accept the risk of roading development on information then available to him. 10

[124] Mr Heard was not advised of the mediation proceedings conducted 15
as part of these appeals for what reason the Court does not know. This is to
be regretted. The mediation was, however, unsuccessful therefore there has
been no harm done other than to deprive him of his legal rights to attend
which, of itself, is a serious matter. As a result, it was not until the hearing that
he became fully aware of the noise mitigation measures affecting his property. 20
Although this did not assuage all of his concerns, he accepted that mitigation
measures would have some effect.

[125] He also complained of a total lack of consultation by the District 25
Council and we are satisfied that he has, to a degree, been isolated from the
consultation processes which have tended to take place with the major players
in this particular exercise.

[126] We appreciate the sincerity and clarity with which his views were 30
expressed to the Court. The effect upon his property is one of the cumulative
effects recognised by the RMA. However, the fact remains that the warning
had been signalled since 1956 that roading could follow the NOR route or a
route closely similar and the fact that one individual property is more closely
affected than others would not cause us to conclude that the requirement
should be abandoned.

[127] We record the general views he has expressed which we have or will 35
cover in the course of this decision.

Traffic

[128] As a major part of the general background to our considerations 40
of s 171, it is necessary to consider in some detail the traffic aspect of this
proposal. There have been numerous alternative routes suggested but
essentially at this stage in proceedings there is the NOR and two routes
known as MW2 and MW10. MW2 forms the first leg of MW10 from Waikanae
River to Te Moana Road and the rest of the MW10 link goes through residential

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areas to meet the NOR at a point north of Te Moana Road. Generally speaking, 1
the MW2 and MW10 routes bypass the NOR to the east and are well clear of
the Christian Holiday Park and the Takamore waahi tapu area. We will briefly
comment on other routes but it must be made abundantly clear that this Court
cannot and will not recommend alternatives. We are restricted to an assessment
as to whether the District Council has given adequate consideration and/or 5
whether it would be unreasonable to expect use of an alternative site.

[129] It must also be borne in mind at this stage that we are dealing with
the requirement not the final public work except insofar as s 176A is concerned.
It is dangerous to be too specific concerning methods of construction and the
precise course of a carriageway in respect of a public work of this magnitude 10
except to the extent that it may serve to avoid further delay if an outline plan
is rendered unnecessary.

[130] The traffic evidence we received was extensive but we will deal with
this in more detail when we consider the adequacy of Council consideration.
It is accepted that the State Highway system is of national importance although 15
not specifically mentioned in the RMA under that heading. That matter was
considered in terms of s 5 in the case of Marlborough District Council v NZ
Rail (1995) NZRMA 357. The Court was there considering the Interisland
ferry link which is the sea link for New Zealand-wide road and rail services. It
was held that in a particular circumstance it is possible to hold that a particular 20
activity assumes such importance in the context of sustainable management
of New Zealand as a whole that it can of itself assume national importance and
be considered accordingly. The State Highway system as it travels south
towards Wellington is therefore, in the opinion of the Court, a matter of national 25
importance in terms of s 5 of the Act and indeed we detected no challenge to
that concept in the course of the hearing. It follows therefore that any activity
designed to increase the efficiency and safety of the State Highway system
must of itself assume particular importance, the extent of that importance
being a matter of degree. The whole matter continues to be covered by s 5. 30
The finding of the Court is that the development of the State Highway together
with the link road form an integrated traffic management system and is of
national importance.

[131] In that regard it was accepted by all parties that a Link Road roughly
between Mckays Crossing near Paekakariki and a point in the vicinity of Pekapeka 35
Road was not only desirable but necessary. The function of that link was
downgraded from State Highway status to local arterial status when Transit
relinquished its designation and the present NOR was substituted. It is of relevance
that at the time that decision was made Transit had not decided upon the four
laning of SH1 therefore the local arterial assumed greater importance in alleviating 40
the present and future congestion caused by the two lane segments of the present
system between Peka Peka and Mckays Crossing.

[132] The appellants who oppose the present NOR point to this change in

importance and maintain that as a result the Council has given inadequate consideration to alternatives which would involve some use of the present roading network and in particular Te Moana Road. This would involve a reappraisal of MW2 and/or MW10.

[133] As we understand the case as presented to us no party is suggesting abandonment of the link concept. We mention this here because the alternatives involve the acquisition of private property and bringing the local arterial road into settled residential areas. Although there is no precise number it appears that there will be measurable disruption of existing households by acquisition and potential further amenity detraction to contiguous properties caused by increased traffic through those residential areas. Furthermore, from the maps which have been produced to us it appears that Te Moana Road is of varying width from 30 metres to 19 metres. It appears likely that were the road designed to take arterial traffic there would be further property disruption caused by land taken for street widening purposes. It is possible but not desirable to form a four lane arterial within 19 metres along parts of Te Moana Road.

[134] The appellants tended to set this to one side and point for instance to the Christian Holiday Park as being of more importance than the disruption of say 25 households. This is a balancing exercise but a reading of s 5 of the Act indicates to us that those who have placed reliance on longstanding planning provisions should not lightly have their interests brushed aside merely on a numerical count. People and communities in this area have relied upon the provisions of this Act as reflected in the District Plan roading provisions and have provided for their social, economic and cultural wellbeing and for their health and safety. Others who have continued to develop their properties without regard to the NOR corridor now seek amenity detraction shifted from their properties to the properties of those others. For our part we do not see that the Christian Holiday Park and/or the Takamore Trustees can claim any form of priority in terms of Part II of the Act in relation to amenity detraction except to the extent that their interests are acknowledged as important within the meaning of the various provisions of Part II.

Conclusion on Part II

[135] We have devoted the preceding part of this decision to the provisions of Part II. We have considered the main issues in relation to Part II but have not overlooked other matters which were brought to our attention such as landscape, cultural landscape, coastal environment and matters of that nature. We record that we do not accept that the corridor is part of the coastal environment within the meaning of s 6 thus requiring its protection from development. Queen Elizabeth II Park is an example of coastal environment but as one proceeds further north (with the possible exception of the land traversed in the third stage of development) the area is heavily urbanised, apart from the golf course and the Harakiki wetland in the centre, and is not part of

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the coastal environment. The obvious intention of s 6(a) is to protect reasonably 1
pristine environments. The use of the words “*natural character*” support that
viewpoint. The subsection also is not prohibitive legislation in that it relates to
“*inappropriate*” development. It would be ironic to suggest that a swathe of land
intended for future development as an arterial road and protected for that future
public work should now be made unavailable for that use because it has remained 5
relatively free of development as a result of such protection.

[136] We have discussed Part II at the commencement of our deliberations
because any consideration of the requirement under s 168 is subject to Part II.
Therefore, as we read s 171, even were we to answer the questions posed in
171(1)(a), (b) and (c) in the affirmative and further consider that the matters in 10
(d) were not relevant then this Court could still decide to strike down the
requirement if it felt it were offending the provisions of Part II.

[137] However, the majority of the Court have not reached the conclusion
that Part II of the Act is fatal to the NOR. Our conclusion on balance is that
this Court and the District Council are perfectly justified in upholding the 15
NOR (provided alternatives have been given full and adequate consideration)
on the basis that the community stability promoted under s 5 of the Act would
be enhanced by the adoption of that route and that community expectations
since 1956 relating to social, economic and cultural wellbeing and health and
safety will come to fruition. The results of a major change in direction to the 20
carriageway beyond the NOR corridor will challenge that long standing
expectation and reliance and almost certainly will have adverse and unexpected
effects on many householders and residents who have relied on the plan. We
will discuss that when we come to look at s 171. 25

[138] Concluding this part of this decision, the majority of this Court do
not think the Part II provisions lead to a conclusion that the NOR route be
rejected. It is not our function to decide upon the best route. However we
find that the provisions of s 5 are supportive of the NOR. The provisions of
s 6(e), although of national importance, are not of sufficient weight in the 30
present case to defeat the community benefit which will flow from construction
of the link road. The NOR provides for the needs of the whole community and
for a future regional resource notwithstanding the obvious and potential effects
on archaeological and cultural features and consequential amenity and cultural
effects in that regard. Mitigation of those effects can be achieved by detailed 35
alignments, profiles and design. Cultural protocols to be applied during
construction would also be desirable. We lastly observe that actions following
the discovery of koiwi or taonga are for the HPT to determine. We observe,
however, that in relation to taonga we could see no evidence to suggest that 40
there is any particular reason why, if found, they should remain in situ within
any particular wetland. Removal to other wetlands with appropriate ceremony
if taonga are found does not appear contrary to the provisions of s 6(e).

Section 171(1)(a) of the RMA

[139] This subsection requires us to decide:

whether the designation is reasonably necessary for achieving the objectives of the public work or project or work for which the designation is sought; ...

[140] It was submitted that the District Plan has provision for roading to be dealt with as a controlled activity and because that is a public notification process it could achieve the objectives of facilitating the public work without the necessity for the requirement processes. Accepting for a moment that the provisions of the District Plan in relation to controlled activities of this nature is intended to extend to public works as opposed to private works undertaken as part of a subdivision and or redevelopment, we do not consider that these processes can be regarded as any form of substitute for the requirement procedures.

[141] The Act does not require a person applying for a resource consent to have ownership of the land involved. Thus theoretically the District Council could give planning consent for a road as a controlled activity over the land contained in the NOR or any other alternate route. Presupposing that Council obtained a resource consent the situation would still be unsatisfactory.

(a) The landowner affected by the controlled activity consent would immediately have his property blighted. The compensation provisions of the RMA s 185 relate to designations or requirements and, although this particular section of the Act has convolutions and difficulties not yet tested in the Courts, it is a method of forcing a requiring authority to take the land and pay compensation. Similarly s 186 enables the requiring authority to acquire the land by proclamation. Thus a designation or requirement carries with it protection for both parties plus a mechanism for putting into effect the public work if difficulties are experienced in acquisition. That is not the case with a resource consent. To obtain such a consent in respect of road is a pyrrhic victory because it has no teeth. The Council cannot acquire the land compulsorily. The landowner for his or her part would also have a property suffering from planning blight possibly affecting the views of potential purchasers and would have difficulty in obtaining compensation.

(b) Section 125 of the RMA concerning the commencement of consent activity could also impose considerable difficulties if the controlled use resource consent mechanism were used. Section 123 of the Act gives unlimited time for the consent to be operational once it has started subject to any specification to the contrary in the consent. This is a "*duration of consent*" condition and means that the consent holder once his consent is operational has unlimited rights in the future to exercise that consent. However, s 125 is the section which covers the commencement date from which that future duration would run. This provides that unless a shorter

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or longer period is expressly provided for in the consent it lapses on the expiry of two years after the date of commencement of the consent (a date fixed by the Act) unless the provisions of that section are complied with relating to substantial progress or effort having been made towards giving effect to it. The date of commencement of consent is covered by s 116 and essentially starts the clock running as to the time within which the consent must be exercised. No certainty as to the future flows from the resource consent process.

- (c) The requirement procedures override those RMA provisions and provide a requiring authority with certainty before expending public monies on investigation etc. as a preliminary to any major public work.
- (d) However, the last and most important effect of a requirement when it becomes a designation is that the landowner cannot without the prior written consent of the requiring authority change the character, intensity or scale of the use of the land if that would prevent or hinder the public work or project or work to which the designation relates (s 176). This prevents capital works being undertaken by the owner which might increase the ultimate acquisition cost.
- (e) The plan can also be changed without the consent of a resource consent holder.

[142] We are therefore perfectly satisfied that the provisions of the District Plan concerning controlled activities are no substitute for a designation.

[143] As we have recorded the designation, following a requirement, protects the future of the public work and indeed this present case is a classic example of appropriate designation and proclamation procedures being put in place in the past whereby the corridor has been protected since 1956. Physically, most of the work can proceed once the present requirement is confirmed and the designation put in place. Although s 171(1)(a) refers to "*the objectives of the public work*" which appears to refer to the work itself rather than the requirement, we are satisfied that a designation is reasonably necessary for achieving that ultimate objective without disruption to community standards and expectations as envisaged by Part II of the Act. In other words people can plan for their future, and have so planned since 1956, because of the warning signals which have been on the District Plan since that date. The objectives of a through road can thus be achieved.

Section 171(1)(b)

[144] The next subsection to consider would be subs (b) but for convenience we propose to deal with the following subsections first in order to devote a completely separate part of this decision to (b).

Section 171(1)(c)

[145] This subsection reads:

"whether the nature of the public work or project or work means that

it would be unreasonable to expect the requiring authority to use an alternative site, route, or method ..."

[146] Inherent in this subsection by use of the word "*method*" is the construction of the public work itself rather than the requirement. This approach is reinforced by the preamble to this subsection which reads "*whether the nature of the public work ...*". There is one aspect of this subsection which in our opinion applies and one aspect which does not. It is an economic section with overtones of environmental effect.

[147] To address the manner in which the subsection could hypothetically apply in the present case, it is helpful to consider a situation where it would be relevant to the question of alternative sites, or routes. "*Site*" in the context of this section appears to refer to a specific entity such as the site of a sewage treatment plant, landfill or highway corridor. If we had a situation where there was an alternative presently available (not speculative) which did not offend any of the provisions of Part II of the Act (and that is not the present case) but which was far more expensive, then, taking into account the fact that the nature of the public work itself along the NOR will be obtrusive and potentially offensive in terms of Part II, it would not be unreasonable to expect the requiring authority to use that alternative route despite additional cost. In the present case however that is not the situation and it would in our view be unreasonable to expect the requiring authority to enter another thorn thicket of Part II considerations by attempting to shift the route into settled residential areas. Also, with any alternative it would be advisable for the District Council to again embark upon requirement procedures with no guarantee of success. We do not therefore consider there to be any available alternative within the meaning of this subsection.

[148] On the question of "*method*" we do not think the requiring authority has given sufficient attention to methods of spanning the wetlands in the Takamore area not so much in relation to protecting the intrinsic value of the wetlands but out of respect to the views of Maori as to what may be buried in those swamps. This is an example of an economic cost which may not be unreasonable in view of the requirements of s 6(e) which requires us to consider as a matter of national importance the relationship of the Maori people to those s 6 matters. The appellants, the Takamore Trustees, have not however discussed issues of this nature with the District Council but have remained totally opposed to any development and consequently would not enter into any meaningful discussions concerning mitigation or amelioration. The present stance of the Council is not unreasonable in the absence of input from the party most affected.

[149] We have already recorded that we consider that the Court is being drawn into final design details which may need further thought. Such details can be included in an outline plan if the territorial authority considers such a plan to be necessary.

Section 171(1)(d)

[150] In relation to this subsection, we have already commented on National Policy statements in relation to the coastal environment and do not accept that the corridor forms any relevant part of that environment. For the reasons we have given we would also observe that if it did its contribution to that environment has only come about as a result of the use of techniques intended to protect the highway corridor. Had it not been for the application of those techniques we are in no doubt that this land would long ago have been ground under the heel of development. Therefore, although we are required to have particular regard to these matters, the history of the reasons for protection of the dunes etc. within the corridor cause us to adopt an approach whereby that aspect of this appeal does not loom large in our considerations.

[151] Insofar as the Regional Plan is concerned it recognises the protection of transport corridors as part of its transportation policy. There are also general provisions in the plan concerning natural environment, Maori values, ecology, etc. The District Plan is not inconsistent with the Regional Plan.

Section 171(1)(b)

Whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work or project or work; ...

[152] This is essentially the crux of this case apart from Part II considerations. The Court needs to be satisfied that the requiring authority has not acted arbitrarily or given but cursory consideration to alternatives. We are not required to assess the relative merits of each alternative and then ourselves make a choice as to the preferable alternative. We cannot direct choice of another alternative therefore, in the absence of exercise of a power of adjournment, we would be left without powers under ss 172 and 174 to do anything but cancel or confirm the requirement. Also this subsection is directed at alternatives – not the route covered by the requirement

[153] In many ways this particular subsection has been made unnecessarily complex. The word “adequate” is a perfectly simple word and we have no doubt has been deliberately used in this context. It does not mean “meticulous”. It does not mean “exhaustive”. It means “sufficient” or “satisfactory”. Indeed one of its definitions in the Oxford English Reference Dictionary (1996) is “barely sufficient” – a definition we do not intend to follow because it does not accord with the general thrust of judicial authority. It does, however, support the concept that a District Council is not required to go to unreasonable lengths to support a chosen route or site for a particular public work.

[154] Before starting an examination of the consideration given by the District Council to this matter we do take some issue with the way in which the consultants, Opus International Limited, undertook its examination of alternative routes. It is for that reason that we have taken some trouble in

setting out the Part II matters in the preceding parts of this decision. Opus 1
adopted a weighting system when considering alternative routes or methods.
This approach was followed during its initial route assessment and more
specifically during its reappraisal following the Commissioners' decision.
Various aspects of each route were given a number and generally the higher
the number the more unacceptable was the particular chosen route. 5
Unfortunately the consultants did not adopt the weighting given to
developments in terms of the RMA. Part II of the Act has a specific weighting
system of its own in respect of developments, namely:

- Section 5 "*The purpose of this Act ...*"
- Section 6 "*In achieving the purpose of this Act, all persons exercising 10*
functions and powers under it ... shall recognise and provide for the
following matters of national importance ..."
- Section 7 "*In achieving the purpose of this Act, all persons exercising*
functions and powers under it ... shall have particular regard to ..."
- Section 8 "*In achieving the purpose of this Act, all persons exercising 15*
functions and powers under it ... shall take into account the principles
of the Treaty of Waitangi."

[155] It will therefore be seen that there is a statutory hierarchy of importance
and we are frankly surprised that the consultants in all their various reports to
Council did not specifically cover these matters although we accept that by
implication some regard was had to them. Nevertheless, having said that, we
are satisfied that the Council was made aware by the detailed reports provided
of all the matters set forth in Part II. Also councillors themselves cannot be
held to be ignorant of the law. As an example, the fact that the Council itself 20
incorporated the Takamore area into its plan as a waahi tapu area is sufficient
in the view of the Court to indicate that the importance of Maori values in
terms of s 6 of the RMA was clearly in Council's mind. 25

[156] In respect of the Maori values referred to in s 6 of the RMA the Court
was also concerned at one stage that a report known as "*Tangata Whenua 30*
Values Assessment prepared by Kapakapanui" July 1997 had not been made
available to councillors, this report clearly reflecting the views of Maori. There
was some confusion and hesitation as to whether councillors had seen this
report and indeed we were told at one stage that a councillor was prepared to
give evidence on oath that the report had never been received by councillors. 35
Mr Peter Knight, the Infrastructure Development Manager, Kapiti Coast
District Council, finally produced a last minute but unchallenged rebuttal
whereby he pointed to a report given to all councillors and, annexed to that
report, was the Kapakapanui report. We are therefore satisfied that this
important document was available for consideration by the Council through 40
its councillors. In any event, the report is not of great assistance in that it is
a veto of the NOR. It does, however, raise an alternative route – a route which
received consideration by Council as we will later record.

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[157] We will consider the history of events concerning the NOR and subsequent events whereby further consideration was given following the extensive 197 page Commissioners' report. 1

[158] It must be remembered that up until the date of issue of the NOR all investigations had been undertaken on behalf of Transit with only preliminary investigations conducted by Council. In the context of the word "*adequate*" 5 we do not accept that the District Council was under any obligation to audit or revisit the matters at that stage investigated by Transit but was entitled to place some reliance upon investigations up to that date particularly as it subsequently continued to employ the services of many of the consultants previously associated with the public work. 10

[159] We will discuss the history in a fairly abbreviated form because this Court in turn is not an auditor of Council's actions unless it is shown that matters of importance have been overlooked, ignored or given only cursory attention.

[160] Firstly, in relation to traffic. It would not be fruitful for this Court to revisit all the various alternatives or alignments within alternatives in relation 15 to the transport issues. The primary point at issue is not if there is to be a Link Road but where it is to go. To serve its dual function of a local arterial and a relief route for SH1 the Link Road must in general terms be roughly equidistant between the present State Highway and the coast. It must also be conveniently located to the west of the Coastlands development at Paraparaumu and be 20 readily accessible to the commercial area of Waikanae. The NOR and some alternative routes all meet that requirement and thus will serve both the local and State Highway function by attracting local or regional traffic from the east and the west. Routes closer to the coast would not prove attractive for local 25 traffic generated from the eastern part of Paraparaumu and Waikanae and that traffic would undoubtedly continue to use SH1 rather than deviate further to the west. The NOR itself was criticised for being too close to the coast but we are satisfied that it would still serve an arterial attraction.

[161] Te Moana Road will continue to serve an important function as a link 30 to the Waikanae commercial area. It would furthermore serve as a type of collector to feed traffic to and from the NOR which appears to have been given little specific attention when considering MW2 one of the alternatives. MW2 uses a large part of Te Moana Road for arterial purposes instead of the part of the NOR which traverses the Christian Holiday Park and the Takamore 35 waahi tapu area. Therefore MW2 may not add greatly to traffic increase on Te Moana road because, if the NOR route is chosen then the central generation of local traffic serviced by the NOR will be drawn to the intersection of the NOR with Te Moana Road. That would also substantially increase traffic on Te Moana Road in any event but might not be sufficient to warrant the increase 40 of carriageway width (with attendant disruption to the amenities of frontage properties) as could be the case if it became the principal arterial. Traffic flow predictions were nevertheless available to Council.

[162] It is convenient for us to consider the history of roading considerations from the evidence of one witness because the factual background is not in dispute. The dispute is whether the Council has given adequate consideration to alternatives to the NOR. Insofar as the District Council is concerned the matter started with published reports of the Kapiti roading study dated September 1995 and March 1996. These investigations were undertaken by Traffic Design Group Limited (TDG) in association with Beca Carter Hollings & Ferner. Essentially three crucial elements were identified, namely:

- The necessity of planning and providing for the development of a network of local arterial roadways throughout the rapidly expanding urban areas of Waikanae, Paraparaumu and Raumati localities.
- The appropriate form and location of the network elements that would provide for the long-term inter-regional route though the district of State Highway 1.
- The need to modify and further study the details of the arterial connections to and internal layout of the proposed district commercial/administrative/cultural centre at Paraparaumu known as Coastlands.

[163] The study confirmed previous recommendations which would have been made on behalf of Transit. These are:

- That the pattern of local arterial roadways previously recommended and now incorporated in the street hierarchy of the Kapiti Coast District plan are necessary and appropriate. (These were produced to the Court as Exhibit 29 and showed the NOR route as a major district arterial fed by secondary arterials and collector roads). Additions to the roading hierarchy were also shown to the north of Waikanae in the present undeveloped area identified for future expansion.
- The long-term future route of SH1 should continue on its present location as an "*eastern bypass*". It will be noted that the purpose of a State Highway in relation to the urban areas we are discussing is to be as a bypass rather than a principal route.
- That essential and urgently required additional capacity across the Waikanae River be provided by a complementary district arterial located, to a large extent, on the designation previously intended as a relocated State Highway route and known then as the "*Sandhills bypass*".
- That necessary and convenient access to the district centre at Paraparaumu and the nearby concentration of activities requires the Western Link Road to be located on the western boundary of the centre and extend southwards to Poplar Avenue.
- That this Western Link Road extend northwards to Pekaheka to provide an alternative convenient route to that of the State Highway at peak holiday times and directly serve the expanding urban areas

north of Waikanae.

- The situation is exacerbated by high weekend and holiday demands.

[164] Mr McCombs, the witness for TDG and a principal of that firm, conveniently backgrounded the history of the NOR which we do not intend to traverse in any detail. It is however of interest that in 1956 when the centre line proclamation was put in place the legislation then current specifically required avoidance of all boroughs, inner cities and town boards. This to a degree would have resulted in positioning the NOR roughly where it now is. In the event, the proposed route went through the centre of land which was subsequently developed for urban purposes. Further predictions are for development to occur towards the Pekapeka end of the proposed NOR and in areas near Te Horo and Otaki.

[165] The evidence (which is not disputed apart from the results of the four laning of SH1), is that the traffic problems in and about SH1 between Waikanae/Mckays Crossing and further south are reaching a critical level with road safety being compromised resulting in injury and death. We have no evidence that four laning of SH1 will, by itself, achieve a long term solution. On the contrary – the bulk of expert testimony indicates that the tandem nature of the solution is necessary and desirable.

[166] Turning to the roading history the initial study was aimed at a mid-term network based on SH1 strategy adopted by Transit. It was generally based around the year 2001. That mid-term strategy was replaced by a horizon year of 2021 once a decision was made to continue SH1 on its present alignment. Growth scenarios indicate growth in and about Otaki, with some lifestyle development but that the majority of residential development will continue to be attracted to the central areas of the district of Waikanae and Paraparaumu/Raumati. Future projections indicated that further study was needed in particular concerning the local road network.

[167] The transition of the NOR from State Highway to local arterial necessitated further intersections in addition to the six contemplated in relation to the State Highway. A roading hierarchy was identified and provision made for these matters. A study was also undertaken in the Paraparaumu central area and the north south arterial arrangement was then revisited. Four alternatives were investigated:

- Widening of State Highway route to four lane standard from Paraparaumu to Pekapeka together with a new two lane arterial located on the proposed NOR between Raumati Road and Kapiti Road only.
- Western Link Road (Sandhills arterial) to be an eventual four lane facility on the proposed NOR between Raumati Road and Te Moana Road leaving the State Highway route in its present form.
- Mid-Waikanae variant relocating the proposed Sandhills arterial on a revised alignment to that of the proposed designation north of

Otaihanga Road to connect with Te Moana Road roughly midway between the SH1 route and the coast. 1

- Coastal route to provide a crossing of the Waikanae River near the coast on an arterial which effectively extends the western end of Mazengarb Road across the river bridge to the Waikanae Beach locality. 5
- A combination of various alternatives namely to widen to four lanes a section of SH1 through Waikanae and across the Waikanae River southwards to the vicinity of the Otaihanga Road intersection and then say a two lane bypass of Paraparaumu south to Raumati Road as suggested by an earlier study. 10

[168] These schemes and minor variations were examined for engineering practicality and effectiveness with the aid of a transport model. It was found that either the Sandhills arterial or the mid-Waikanae variant schemes should be preferred in terms of traffic effectiveness, likely construction cost and environmental impact. The “*near coast*” location (ie further west) was found not to be acceptable to achieve the traffic attraction function for the majority of local traffic. The option of simply widening the existing State Highway was also considered unsatisfactory because it would effectively concentrate traffic movements within Waikanae township and the Paraparaumu centre involving significantly high levels of turns to and from the major route. Other factors also militate against this option. 15

[169] A change in thinking therefore occurred and Mr McCombs identified it as follows. In relation to the original State Highway bypass following the NOR route. He said that early ideas “*needed to be replaced with a revised long-term network form that properly achieved the separate functions of providing for the high volumes of local traffic demands jointly with supplying appropriately high levels of service desired by inter-regional and regional travellers. It was readily accepted by all interests concerned that since two major north-south oriented routes would be required in future, then the necessarily distinct different functions could be, and indeed should be separately provided.*” 20

[170] We record that the Link Road now proposed will be jointly financed by Transit and the District Council and one of the factors which are important to Transit is that the Peka Peka/Poplar Avenue link will supply a reasonably convenient alternative continuous through route to create sufficient diversion away from the SH1 route and thus ensure adequate levels of service for through traffic at all times. 25

[171] Transit has now decided to four lane SH1 for most of the relevant part of its length which will substantially improve the level of service which can be provided by that road, particularly if the Link Road proceeds. 30

[172] Mr McCombs’ analysis for weekend and weekday traffic to the design year of 2021 was: 35

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"The analysis shows that, except for the motorway option, the recommended use of the form plan within the Notices of Requirement as recommended from the studies most suits future travel desires for all flow conditions. In particular the recommended scheme is to be preferred over the mid-Waikanae variant."

[173] The views of Mr McCombs were not shared by Mr W J Barclay who gave evidence on behalf of the Christian Holiday Park. Both he and Mr McCombs are well-qualified and in particular both have post-graduate experience in traffic engineering and both are principals in consultancies dealing with traffic planning and traffic engineering.

[174] Mr Barclay is basically advocating a complete new look at the whole situation because of the now different function of the Link (Sandhills) route. He points to the fact that it is now to function as an urban arterial with long distance highway traffic continuing to use SH1. He considers this difference to be significant in that previously the road was to be a long distance road with through traffic having priority but now it is an arterial to distribute traffic through the built-up area. He summed it up in his evidence when he said *"And by and large the cars at one end will not be the same as the cars at the other."* He furthermore stated *"It is not enough just to downgrade the motorway concept and call it an arterial. The road's form and design needs to be completely rethought."* He does not agree that the position of the NOR particularly its middle section, will achieve the purpose of attracting local traffic from SH1.

[175] As a result, he does not consider that the Council has given sufficient consideration to alternative routes based on the new concept. Nevertheless, addressing the time lapse since reports were first produced he considers analysis and conclusions remain sound and he has no difficulty supporting the concepts behind the Council's strategy. He does not accept that minor residential streets should be used. His initial evidence was based on the fact that Te Moana has a road reserve of 30 metres – which it does not. Essentially Mr Barclay comes down to the mid-Waikanae option using Te Moana Road as being more favourable for local traffic. In that regard however he points to the network definition report which had reservations on that option because of the inability to extend the route northwards to SH1 at a later stage without substantial property acquisition. That is in effect the route now known as MW10. He criticised the public consultation process because it set out some nine options using local roads including the coastal route options. The mid-Waikanae alternative was not put to the public. The public did not accept the use of minor local roads and the result there was a preference for the Sandhills route.

[176] When this was brought to the attention of Council as a result of a position paper prepared by Mr Barclay the Council directed its attention to the mid-Waikanae option and responded with an option and issues reports. This is reflected in the evidence of Mr McCombs where he found that either of

the Sandhills arterial or the mid-Waikanae variant could be preferred in terms of traffic effectiveness although subsequently in his evidence Mr McCombs considered the Sandhills route preferable.

[177] After the hearing before the Commissioners and the delivery of the decision the Council again commissioned further investigation into the mid-Waikanae option and embarked upon a complete reappraisal process as described in evidence by Mr Coop. Therefore in March of 2000 a further report was commissioned with the Council revisiting and investigating ten separate route concepts numbered MW1 to MW10 on a variety of alignments. As we have recorded MW2 is the option corresponding most closely with the concept promoted by the Christian Holiday Camp. A coloured annexure to this decision shows these various routes.

[178] Mr Barclay then considered the question of road user benefits and in particular pointed out that in 2021 it was considered by some witnesses that road user costs for the mid-Waikanae route would be higher than for the recommended scheme and the benefits lower. In the event, he did not consider the cost benefit analysis to be particularly relevant because the short-term benefits of the realignment would be more significant.

[179] Mr Barclay then considered the use of Te Moana Road and concluded that once the motorway concept was abandoned the objections to the mid-Waikanae route disappeared. He criticised the weighting or attribute scores for the two options. Lastly he did not discount the NOR option but did not accept that the consideration of alternatives for the project was sound. Mr McCombs produced some rebuttal evidence and Mr Barclay responded to that rebuttal. Mr McCombs does not agree that short-term solutions are effective nor does he accept that the NOR has limited attraction for the majority of the population intended to be served. In response to Mr Barclay's comments and the comments of this Court as to the Sandhills arterial or the mid-Waikanae variant being the options apparently preferred by Mr McCombs, Mr McCombs correctly pointed out that he was making that statement in connection with the bridge crossing of the Waikanae River.

[180] When considering the question of bridges we have found some difficulty with the evidence relating to bridge crossings particularly in relation to MW9. MW9 was heavily marked down on the basis of cost as against the NOR route. MW10 was likewise discounted on the basis of property acquisition costs. MW9 where it crosses the Waikanae River and proceeds towards Te Moana Road is largely on the alignment of MW10. However the bridging costs relative to MW9 have been assessed at virtually double that attributed to MW10 and/or the NOR corridor. We find this inexplicable and it is a matter which the Council may care to consider further if it so wishes but it is not in our view of sufficient moment in the whole context of this exercise to warrant adjourning the matter for further consideration by Council of the suggested alternative.

[181] Of the evidence produced by traffic engineers the evidence of Transit largely supports the evidence called on behalf of the District Council in favour of NOR. 1

[182] From our viewpoint there is a danger in an exercise such as this in basing a decision on the evidence of traffic engineers alone. Their evidence is significant but Mr Barclay for instance, by addressing his evidence to traffic matters alone has set to one side the physical resource represented by the NOR corridor. He should not be criticised for this because his evidence has been given largely from a traffic engineering viewpoint. By a majority, we find that when a balance is to be arrived at, as it must be in this case, even if one accepts the evidence of Mr Barclay, it is s 5 consideration which swings the balance in favour of the NOR corridor when one takes into account the other matters of RMA importance to which we have referred. Lastly on this question, relative to the adequacy of consideration of alternatives by Council, a Council is entitled to accept the views of its consultants who are contractually bound to it. Such acceptance however should not be at the expense of further investigation if the Council is alerted to matters which their consultant may not have considered. In the present case as soon as the Council was further alerted to the mid-Waikanae option as a result of the paper prepared by Mr Barclay it properly went into a reappraisal mode in order to test the situation. It did this even after it had received a decision from Commissioners favourable to the NOR concept. It therefore cannot be said that it did not consider the changing scene from State Highway to local arterial. We will now embark on a further examination of these reappraisals. 10 15 20

Adequate Consideration of Alternatives 25

[183] The Court has heard extensive detailed evidence concerning the value or otherwise of the various alternatives and in particular the mid-Waikanae option. We again repeat that it is not our function to substitute our opinion for that of the Council. We have already discussed in the preceding part of this decision our views on the traffic engineering evidence concerning the NOR and the mid-Waikanae option and we record that the mid-Waikanae option is the only option on which we had any expert testimony indicating that to be an alternative route which could be favoured. All other alternatives suggested to us are fraught with various difficulties and we heard no engineering evidence whatsoever to suggest that those other options such as the link to the west of the Christian Holiday Park; the coastal links; or other solutions involving minor streets should be investigated further. 30 35

[184] The main evidence concerning consideration of alternatives emanated from Mr Peter Coop, the Principal Planner with Opus International Consultants Limited of Wellington. We record that his evidence was not challenged to any serious degree by other parties in cross-examination except: 40

- As to the inadequacy of investigations into the activities of the Christian Holiday Park. That weakness seemed to permeate the whole

District Council case, and

- The waahi tapu/wetlands issues.

[185] The evidence of Mr Coop covers the processes of consideration after the issue of the NOR. Insofar as the District Council is concerned the assessment process was that adopted prior to an October 1997 report entitled "Kapiti Urban Roding Project: Options and Issues Report". That particular process began with the setting of objectives and an identification of options. Those options we accept covered a very broad range compatible with the primary objective of a type of Link Road through the area we have been discussing. The options commenced with a "*do minimum*" (which involved tinkering with the existing roding network) to the Western Bypass for SH1. We do not intend to address these matters save to say that all those issues were brought to the attention of Council for consideration. Seven options were included in a shortlisting process and resulted in an assessment whereby three concepts were basically addressed, namely:

- Base option which involved a second bridge across the Waikanae River with existing roads being primarily used for access. This would be a local traffic two lane option and three bridges were initially considered.
- Option 5 was an option to maximise the existing road network with a coastal route from Paekakariki through Queen Elizabeth Park to Pekapeka plus an inland route from Poplar Avenue to Te Moana Road and then to SH1 with two new two lane bridges across the Waikanae River, this being an option to maximise the existing road network.
- Option 8 was the Western Link Road involving construction of a new district road from Poplar Avenue to Pekapeka Road intersection generally along the NOR corridor, together with a bridge near the Christian Holiday Park.

[186] Reasons were given for not favouring other options.

[187] A newspaper supplement was then delivered to all households in Kapiti eliciting public input. Public displays were also mounted in strategic public places. The Council considered all those responses. The consultants gave their conclusions on the various options at that time including a summary of majority community responses. The community response as summarised by Mr Coop (and with which we have no particular argument) was:

- We know we have a traffic problem in Kapiti and it's getting worse fast.
- Do something about it; make sure it's a long-term solution; don't come back in 10 or 15 years time because you selected a short-term expedient concept in 1997.
- The options in ten years will be even harder to achieve, given Kapiti's fast pace of change and development.
- Use the current designated corridor.

[188] The Council had undertaken specialist assessment which concerned the following: 1

- Traffic management
- Archaeology
- Ecology
- Landscape 5
- Water management
- Noise
- Vibration
- Land use and community effects
- Statutory plans 10
- Property impacts
- Engineering, construction and cost
- Benefit/cost

[189] Kapakapanui were consulted in August of 1997 in relation to alignments south of Raumati Road. This particular concept involved the use of an upgraded Poplar Avenue rather than traversing a coastal route through Queen Elizabeth Park. Alternative alignments were also looked at in 1997 for the route between Otaihanga Road and Te Moana Road. Those particular alignments were assessed and costed. Both the alignments at that stage favoured passed to the west of the Christian Holiday Park and skirting the base of the dunes of the lifestyle block subdivision owned by the Weggery Estate. Opus erroneously had formed the belief that the Christian Holiday Park had indicated a preference for that route which would take the road further away from the Takamore urupa. Nevertheless, after discussion at the August 1997 meeting, Kapakapanui informed Opus that it opposed Alignment 12 because of impact on the urupa and the registered waahi tapu area but that it would accept an alignment known as Alignment 11 which again went to the west of the Christian Holiday Park but instead of skirting the bottom of the dunes cut well into them and intruded significantly into the Weggery lifestyle block subdivision. This largely avoided the wetlands. 15
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[190] It must also be remembered that any route to the east following the inland toe of the dunes would impinge upon the wetland included in the Takamore waahi tapu area. 35

[191] Further consultation took place with affected owners and that consultation indicated opposition from people residing west of the NOR alignment who had relied upon the historical alignment in making investment and development decisions and that those to the west of that alignment were now strongly opposed to it on the grounds of noise, vibration, adverse visual effects and matters of that nature. The Christian Holiday Park for its part considered that the moving of the alignment to the west was the least preferred of those it had seen because that alignment brought the carriageway closer to the residential facilities on the western side of the park. That alignment would 40

also seriously compromise the Weggery subdivision being developed at that time off Flaxmere Street within the registered waahi tapu area – a subdivision initially opposed by the Takamore Trustees but finally agreed to by them subject to agreed conditions. Residences have been erected in that subdivision, and in the opinion of the Court that subdivision, consented to as it was by the parties, essentially constricted the options available to Council if the NOR corridor or a similar path was to be followed in that it inevitably prevented an alignment further away from the urupa.

[192] It was at this stage that signs of impossibility of agreement began to evidence themselves.

[193] The alignment of the carriageway had been shifted further to the east of the Christian Holiday Park while still endeavouring to avoid disadvantage to residents in Kauri Road but had also been shifted further west from the urupa resulting in a type of S-bend unsuitable for high speed traffic. Some disadvantages to the Weggery subdivision were evident. In September of 1997 this amended alignment was discussed with Kapakapanui who made it clear that their concession in accepting Alignment 11 was enough and they would not support the new alignment. At that particular meeting it was becoming evident that no alignment through the area north of the Waikanae River and terminating at the northern extremity of the waahi tapu area would be acceptable. Also at that meeting alternative proposals concerning two lane traffic were discussed but that was not favoured by Opus because of reduced traffic management efficiency.

[194] In October of 1997 the mid-Waikanae option was raised by Christian Holiday Park as a result of the report from Barclay Traffic Planning. We have already commented upon this earlier in this decision. Problems associated with that route were discussed as we have commented.

[195] A further alignment to the east of the urupa was considered which would still affect the property of the Christian Holiday Park but would affect only a small corner of the registered waahi tapu area. Its main disadvantage was that it passed very close to the urupa itself – much closer than the carriageway proposed within the NOR alignment. It would also affect specific waahi tapu areas such as Tuku Raukau (the old village) and Makatu (the macrocarpa tree burial site). It would also come much closer to residents at the end of Puriri Street.

[196] At this stage the Council considered all the various reports up to that time and confirmed the intention to proceed with the NOR.

[197] The comments we have made relate generally to the central area within Stage 1 of the NOR. We do not intend to discuss the other two stages of the NOR which we have already addressed to a degree in the preceding parts of this evidence because these were not greatly in issue in the cases presented by the appellants.

[198] The NOR, as we have recorded was subject of a hearing before

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independent Commissioners who confirmed it subject to conditions. 1

[199] We have also previously recorded that the Council, after receiving a favourable decision from the Commissioners, still resolved to reappraise the routes between Otaihangā Road and Waikanae North. This led to a further report known as "*Kapiti's Western Link Road Findings of Reappraisal of Route Options Otaihangā Road to Waikanae North*" dated March 2000. It also resulted in the Kapakapanui report to which we have previously referred which was made available to councillors. The reappraisal process was conveniently set out in the evidence of Mr Coop in graphic form and a copy of that reappraisal is appended. In June of 1999 the Council wrote to the appellants and to 189 residences in the vicinity of all the route options identified and met with each of the appellants. The Christian Holiday Park identified one of the mid-Waikanae options as being acceptable to it. Public response was varied and specialist assessments were commissioned to assist with the appraisal of the alternative routes which were either in existence or had emerged as a result of this reappraisal process. The specialist assessments related to: 15

- Future urban growth
- Traffic
- Physical and cultural heritage
- Noise 20
- Vibration
- Ecology
- Water
- Air quality 25
- Visual appearance
- Road safety
- Social impact

[200] The report giving preliminary findings of the reappraisal of route options Otaihangā Road to Waikanae North dated October 1999 was then prepared and a draft was subjected to independent peer review; discussed at a Council workshop; and was referred to in meetings with the appellants before a second newspaper article was published and further public consultation carried out in October of 1999. At this stage the key points (according to Mr Coop) which emerged were: 30 35

- Kapakapanui/Takamore Trustees reiterated total opposition to any route through the Takamore area.
- The Christian Holiday Park reiterated opposition to the NOR route and to MW8 and their support for MW2 or MW10.
- Weggery & Co Limited reiterated opposition to the NOR route and their support for either the original State Highway designation adjoining the Takamore urupa or MW9. 40
- Consultation demonstrated that the Council could reasonably expect

opposition from residents adversely affected by alternatives to the NOR and there was also incredulity that the Council still appeared to be dithering over where to put the new road. 1

[201] Further specialist assessments were carried out and as recorded all were subjected to independent peer review by Mr Aburn, an experienced resource management consultant who gave evidence before us concerning that review. 5

[202] The Council further investigated future growth of Kapiti in order to justify the part of the route extending beyond Te Moana Road to the north.

[203] The Council then considered the traffic effectiveness of the various routes; their environmental effects; comparative costs; and matters of that nature. The final report concluded by assessing the various routes and indicated that NOR and MW10 (which had a similar cost to the NOR) would be highly effective but that MW10 had a different set of environmental issues to the NOR which were more socially oriented because MW10 proceeded through an already developed residential area. There was also some concern that a shorter bridge considered for the costing of MW10 might not receive the approval of the Regional Council because of the possibility of floodwaters backing upstream of such a constricted crossing. 10 15

[204] Unsuccessful mediation then took place and following consideration of issues raised in mediation further investigations were made.

[205] Landscape mitigation measures were considered and plans prepared together with plans for wetland reinstatement, recreation and enhancement; road reconstruction techniques through the wetland area; consideration of archaeological sites and cultural protocol; noise mitigation and matters of that nature. 20 25

[206] The appellants for their part take issue with some parts of the Council's consideration process which they consider to be inadequate. With great respect to the appellants, the majority of the Court do not think their evidence at any stage addresses in any meaningful way the inadequacy of the process but rather the fact that they do not agree with the outcome. In particular, the Kapakapanui report was a straight veto of the NOR with a suggested alternative which had been considered by council. The report assumed the Council would accept the report as a platform for a second stage report to be prepared at some indeterminate time in the future. The Council never accepted that proposition. 30 35

[207] We do not intend to go into great detail concerning each and every witness we heard from the District Council save to say that every aspect of the particular proposal was addressed by experts and whether or not the appellants agree with those experts it was always open to the Council to accept their conclusions within the framework of "*adequate consideration*". 40

[208] For our part we have concluded that the Council's appraisals and reappraisals of this particular project have far exceeded what would be required in terms of s 171 of the Act. It is regrettable and indeed in some ways distressing

to this Court that a resolution acceptable to all parties cannot be achieved but in terms of Part II and s 171 of the RMA we consider a fair and just decision has been reached by Council after carrying out its legal and moral obligations.

The District Plan

[209] We have briefly referred to the Regional Plan in the foregoing parts of this decision and in respect of the District Plan we see no reason to discuss the contents of that plan. The reason is that the NOR already forms part of the plan and the plan is structured around it. Therefore submissions directed at parts of the District Plan which might suggest that the NOR should not form part of it overlook the fact that the plan as a whole contemplates a link corridor along the NOR route. If there are some parts of the plan which are presently incompatible with that concept it would be open to this Court to amend those provisions but in essence the plan contemplates the NOR and needs no amendment. Were the Court to remove the requirement at that stage the plan would need considerable amendment and the Court has power in that regard. We therefore do not find any of the provisions of the plan persuasive one way or the other.

Consultation

[210] There is some suggestion, and in particular by the Takamore Trustees, that the process of consultation has disadvantaged tangata whenua. The evidence of Mr Peter Knight addresses these issues starting with record of an initial hui on the roading project held on 22 April 1997. At this stage we agree that the Council were addressing the corridor which had existed more or less since 1956 rather than any particular changes to it. The Council however at that stage had recognised the waahi tapu of the Takamore area by including it in its plan as an overlay above the proposed designation.

[211] In that regard allegations of predetermination were made by both the tangata whenua and by the Christian Holiday Park. Those allegations seemed to suggest that the Council should have ignored the resource represented by the corridor and should have effectively started afresh with no regard for that particular aspect. However, in our view, it would be completely unreal for the Council to ignore the resource represented by that corridor. We can see nothing to suggest that the Council unquestioningly accepted the presence of the corridor to the exclusion of all else and we need go no further than to point to the fact that even when the Council had a favourable decision from Commissioners it still went to the time and expense of reappraising the whole matter in the light of further submissions which had been made to it. We can find absolutely nothing to suggest that councillors had a set mind and we are not persuaded of that merely because Council entered into preliminary agreements concerning costs and expenses etc. in relation to various investigations and or preliminary works. Time can not stand still and in many ways, in this case, it has stood still for long enough.

[212] In any event consultation started on 22 April 1997 and the Kapakapanui report to which we have already referred was the result of that particular meeting. As we have also observed that report issued a veto on the NOR corridor with an alternative suggested. A second meeting on 10 May 1997 was held and the Kapakapanui unit was subsequently formed and this unit spoke for Te Ati Awa ki Whakarongotai. Mr Knight attended a meeting of the kaumatua of Ngati Toa on 2 June 1997 where the project role of Kapakapanui (if they were to be mandated) was outlined. He also went to a meeting with kaumatua of Ngati Raukawa on 10 June 1997 for the same purpose but was not allowed to speak at that prearranged meeting. Consultation is to be free to all parties and not to be arbitrarily curtailed at the whim of one which appeared to be the case in that instance. On 26 May 1997 Kapakapanui became the consultant interface between the project team and the Council and a contract was signed on 25 June 1997 whereby Kapakapanui were considered as a partner in the project.

[213] As the majority of the Court understand it the main complaint of Kapakapanui (representing the tangata whenua at this stage in the proceedings) appears to be that the Council although they consulted, did not accept the conclusions in the Kapakapanui report. In the view of Mr Knight a good working relationship had developed between the Council and Kapakapanui resulting in seven meetings after the two initial hui. Various other consultations occurred concerning preferred options but it was perfectly obvious at this stage that Kapakapanui were not interested in the carriageway suggested though the NOR or indeed interested in the NOR at all other than to oppose it.

[214] Mr Knight in his evidence in relation to a meeting of 29 September 1997 referred to an endeavour to see if an agreement could be reached on an alignment which both parties could live with. A discussion between the Christian Holiday Park representatives and Kapakapanui indicated:

- Both parties agreed a bypass road was needed
- Neither party had concerns about the northern or southern section of the road
- Both parties were concerned about what could happen between Otaihangā Road and Te Moana Road
- The Christian Holiday Park did not favour a “western” alignment
- Kapakapanui did not favour the “east-west” alignment
- There was no alignment in the immediate vicinity which was acceptable to both parties
- Both parties favoured an alignment which had two bridges, one at Greenaway Road and one at Queens Road thus splitting the traffic load between two separate grids
- Both parties favoured further time for more public consultation if this were required

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[215] The Kapakapanui report clearly alerted Council to Maori values and to their views on the carriageway passing near the urupa and through the wetlands. 1

[216] The NOR was then issued and after the submission period expired the Council again offered to meet with iwi and discuss compensation. 2

[217] On the question of consultation we express some reservations about the thoroughness of consultation with the Christian Holiday Park particularly in view of the fact that Council advisers were not aware of what took place in that area. We are also concerned that Mr Nigel Heard was not consulted, he being a party to proceedings. 5

[218] Nevertheless in the context of the consultative process, even accepting that the Council had a statutory obligation to consult, we are satisfied that at all times the parties were actively engaged in consultation and or willing to be engaged and no issue can be taken particularly on behalf of tangata whenua that they have been ignored. The only issue which is clear from the hearing in relation to consultation is that the tangata whenua are aggrieved that they have not been able to veto the project. That is a majority opinion of the Court. 15

Legal Issues

[219] We are indebted to counsel for the submissions filed. There are only three issues upon which there appeared to be any particular argument as to the law to be applied. The first relates to the question of closed minds. We have previously set forth the history of consideration of alternatives by Council and in particular the consideration given even after a favourable decision by Commissioners. The Court of Appeal in Devonport v Local Government Commission [1989] 2 NZLR 203 at 207 said: 20

"As was recognised in CREEDNZ even strong expressions of prior views do not disqualify persons on whom such a task is imposed. They may have provisional views and policies but they must keep open minds in the sense that at the time or period of decision they must genuinely consider the issues, applying any prescribed criteria, and not merely go through the motions. In other words as Mr Randerson accurately put it, they must remain amenable to argument. Fairness obviously requires as much." 30

Also in Rangitikei District Ratepayers Association Inc v Rangitikei DC HC Wanganui CP 12/00 Wild J said at p 19: 35

"I have no doubt that some Councillors formed quite strong views on the issue. There is nothing wrong with their doing so, provided they kept an open mind – remained open to persuasion – up until the time for decision arrived. Any requirement upon a decision maker to have no views forming in the mind is as contrary to human nature as it is to commonsense, and is not the law." 40

[220] Having regard to the history we have recorded we do not accept that the various contracts of a preliminary nature which the Council entered into

and comments made by its officers indicated that the Council's collective mind was closed. 1

[221] The second question relates to substitution of one amenity detraction for another as envisaged by Purcell v Wanganui City Council 7 NZTPA 26. In the present case there will be an unsightly sound barrier but, unlike Purcell, it is sufficiently distant to enable screening by appropriate planting. 5

[222] The third issue relates to s 171(1)(c). In Quay Property Management Limited v Transit NZ Ltd and Napier City Council Decision W28/2000 the Court referred to the difficulty in interpreting this subsection. In the present case we have found that consideration of alternatives was adequate. In paragraphs 145 et seq we considered s 171(1)(c) and, applying the facts of this case, reached a different interpretation. Whichever of those interpretations adopted does not affect our conclusions. 10

[223] A further interpretation could relate to the present case in that it could be submitted that the nature of the work which has resulted in acquisition of land along a defined corridor since 1956 would make it unreasonable to expect the District Council to abandon that asset or embark upon another alternative. We are not however relying on that interpretation in the present case because it was not fully argued. 15

Conclusion

[224] By a majority, Commissioner Menzies dissenting, the Court confirms the requirement in regard to the NOR. The purpose of the Act as set forth in s 5 combined with the provisions of s 7(b) are best achieved by continuation of the NOR. The ramifications of withdrawal of the requirement with potential private development of the protected corridor and amenity affectation to settled areas are counter to the purposes of the Act as contained in s 5. There is also the distinct possibility that a through route may never eventuate. We do not consider there is any benefit in further extensive investigation of other routes. The relationship of the Maori people to the matters referred to in s 6(e) is of national importance, but in the circumstances of this case do not override that conclusion. In particular, the evidence as to specific areas of waahi tapu within the registered area is not persuasive, particularly in relation to koiwi. We do not consider the alternative acceptable to the District Council, namely the Eco Corridor to be preferred because of its closer proximity to the actual urupa at Takamore. Therefore the corridor as shown in Plan 35A together with the carriageway alignment shown on that plan, is the proposal confirmed by this Court. Minor carriageway deviations necessitated by engineering requirements or deviations caused by discovery of taonga or koiwi are to be permitted. The appeals are dismissed accordingly except in relation to the conditions we now address. These are to be drafted, agreed by the parties if possible, and referred to the Court within 21 days. 20
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[225] Additional conditions in respect of the Christian Holiday Park relate:

(a) To the confirmation of the roadway at its lower datum level, a level

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accepted by the District Council following mediation. 1

- (b) The extension of the sound barrier on the western side of the road to a more northern point as finally agreed in the evidence.
- (c) A requirement of that there be an alternative access road provided by the District Council to the holiday park on its western boundary giving alternative emergency access in case flooding should occur within the subway. 5
- (d) That the sacred spring Te Puna o Rongomai upon the property be protected during construction works.

[226] Our remaining concern with the Christian Holiday Park is that the corridor as it now appears, is wider than necessary for the proposed arterial road. It is in our opinion desirable but not necessary for the Council to acquire land beyond that which is necessary for the construction and operation of the highway. Thus we would hold pursuant to s 171, that the acquisition of further land owned by the Christian Holiday Park is not necessary for the purpose of the public work, but is desirable for the purpose of mitigating its appearance. The Christian Holiday Park are capable of attending to those matters in regard to effect upon its property. We would expect that the parties could readily agree upon a readjustment of the corridor boundaries through the Christian Holiday Park property should that appellant desire to retain more of its land. 10 15 20

[227] All other matters pertaining to the activities of the Christian Holiday Park can in our opinion be covered by compensation.

[228] In respect of the Takamore Trustees and the waahi tapu area, the majority are of the opinion that the HPT has ample powers to deal with matters which may arise during the course of construction. If the parties so desire, we are prepared to impose a condition preventing excavation of the swampland within the waahi tapu area originally identified by the Trustees beyond that necessary to form a carriageway and associated berms required for a four lane arterial. It may be preferable to compact the route rather than excavate, but we do not intend to impose a condition in that regard. However, whatever method is chosen, a condition should be imposed for the purpose of mitigating damage to the integrity of the wetland requiring linkages between the severed areas to enable ready movement of liquid and/or fauna between the severed segments. A condition should also allow deviation from the Plan 35A route necessitated by discovery of taonga or koiwi. 25 30 35

[229] In respect of the HPT we have already indicated that a condition should be imposed enabling access by staff of the Trust for the purpose of archaeological investigation and/or assessment of land owned by Transit and/or the District Council subject to consent being given by any occupiers for the time being. 40

[230] The parties have 14 days to suggest any further conditions which may be necessary.

[231] Except as set forth in the previous part of these conclusions, the appeals are dismissed and the requirement confirmed. 1

[232] On the question of costs, we are presently of the opinion that costs should lie where they fall. We do not regard the appeals lodged as vexatious or frivolous and record that they raised issues of importance. Furthermore, the attitude of the Environment Court and its predecessors in respect of matters which ultimately involve the acquisition of private land and/or affectation to that land has been that those parties should not be disadvantaged by financial penalty. Having said that we are nevertheless not disposed to make a cost order in favour of those parties because it is our view that they have had the benefit of a full and exhaustive hearing before Commissioners and a reasoned and thorough judgment following that hearing. Thus the parties should bear their own costs. We are nevertheless prepared to hear submissions seeking costs should any of the parties so wish. 5 10

Decision of Commissioner Menzies dissenting

[233] The route of the NOR bisects an area identified as waahi tapu known as Takamore. The area is partly owned by the Holiday Park, and also by Transit and the Weggery estate. The Takamore waahi tapu area was regarded as of special importance, 'sacred' by mana whenua. Evidence was given by Robert Ngaia of Te Ati Awa, that not only does tradition record through oral history that: 15 20

"The whole waahi tapu was an area of about 25 acres. I was shown the exact extent of the area. This was the place we submitted for registration. The area was known by us to contain many burials. ... We also know of houses and a waka that are buried within the area. There are also other treasures." 25

Referring to the Christian Holiday Park land, he said: *"We also know that many of our dead lie within their land."*

[234] This evidence was endorsed by Te Taku Parai, who affirmed that the Takamore wetlands had been the burial site used by ancestors for a long time. He stated: *"In addition to our mate (deceased) the swamp itself contains tribal taonga – treasures."* He went on to explain: 30

"Takamore has been and still is known amongst our people as a treasure trove of taonga. Its outlying area and swamplands have long been the resting home of our ancestors. Along with them are whare taonga (treasure houses). Oral tradition of our elders of Te Ati Awa talk about the abundance of taonga that lie at the bottom of the swamp at Takamore. ... In addition, there is little doubt that many other prized pieces that (sic) were buried in the lake for reasons of preservation and safety away from marauding tribes." 35 40

[235] Under cross-examination he explained that the lake that he referred to was an old lake on the part northern side of the Takamore cemetery. In

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addition, a kaumatua of Muaupoko, Mr Porotene, stated in evidence that he 1 supported the oral history given by the Takamore Trustees.

[236] It was explained that such oral history was not previously given as 5 evidence before the Maori Land Court or other such public hearings, in order to protect the taonga from feared theft or destruction by other parties. That was the reason given for the lack of early written historical reports about the waahi tapu, even though, nonetheless, it was regarded as being significant.

[237] Conflicting evidence was given on Te Ati Awa burial practices since 10 their adoption of Christianity, but evidence was given that when Te Ati Awa migrated back to Taranaki, they disinterred human remains and took them back to Taranaki with them. There was no record suggesting that Te Ati Awa disinterred remains from a swamp location, or the Takamore area in particular. It therefore can be deduced that according to tradition, the burials remain in place in the Takamore wetland.

[238] It could be inferred that since Te Ati Awa were more recent dwellers 15 in the Kapiti area, and the oral history was of ancient burials in the Takamore wetland, that the oral history was derived from the traditions of Muaupoko or other iwi. However, the history was put forward by Te Ati Awa, who did not specifically state that it came from Muaupoko.

[239] Ecological evidence was given by Dr Keesing concerning the changes 20 to the vegetation cover of the area, and in particular to the Takamore wetland. He had examined earlier aerial photographs and noted that they indicated that the area had been cleared, drained and grassed for pasture use, and that indigenous vegetation had gradually regrown. He put forward the theory that in pre-European times the wetland area would have had a forest cover, and the wetland would have 25 been under canopy. The Kapakapanui Report of July 1997 supports this theory. In the report the previous landscape of forest, wetlands, lakes and streams is described, supported by a quotation describing Heaphy's vision of the coast in 1839, referring to a "*green unbroken seam between the seas and mountains covering everything but the sand dunes and the wetter swamps*". 30

[240] Thus there was argument and evidence that while changes, including 35 drainage, had been made to the Takamore wetland for stock grazing, the previous cover was likely to be an overshadowing canopy of forest, with perhaps the northern wetland, referred to as a lake by Te Taku Parai, visible. Such a forest could exist in conjunction with a wetland, an aspect not disputed by Dr Keesing, and the evidence he gave of previous drainage suggests that a more extensive wetland did exist. Therefore there appears to be physical 40 evidence that supports the oral history of Te Ati Awa that a wetland at Takamore existed in pre-European times. The wetland burials could have taken place under the forest cover and surrounds, as an effective method to conceal and protect the koiwi and taonga.

[241] This tradition was regarded as of considerable significance by the Takamore Trustees, who saw their role as kaitiaki, being to protect the integrity of

the waahi tapu at Takamore as well as and including the identified urupa. 1
Kaitiakitanga is an aspect that in terms of s 7(a) the Court "*shall have particular regard to*". The Takamore Trustees, under cross-examination made it clear that they saw their kaitiaki role as being to protect the integrity of the Takamore waahi tapu. There was no conflict from other iwi in the area that the site was not as stated by Te Ati Awa. Other tribes had supported the preparation of the 5
Kapakapanui Report which identifies Takamore as a waahi tapu. The status of the Takamore area as waahi tapu was also supported by Historic Places Trust, and in the application for registration by the HPT "*had the support of kaumatua, kuia, whanau, two local hapu, the marae and Te Ati Awa as a whole*".

[242] The identification of the Takamore wetland as a waahi tapu, and 10
based on the traditions of Te Ati Awa, an ancient burial ground and storage or repository for ancient wooden artefacts, creates a predicament for the location of an arterial road. There was no disagreement among all witnesses but that the Takamore waahi tapu was indeed regarded as ancestral Maori land. The relationship of Maori and their ancestral lands is listed as a matter of national 15
importance in s 6(e) of the Act. The witness for the Kapiti Coast District Council, Mr B Mikaere, also affirmed that Takamore was ancestral Maori land, although he held other views concerning waahi tapu. Excavations of human remains have been carried out in the past to allow the construction of roads and highways, such as through the Bolton Street Cemetery. However Te Ati 20
Awa explained that such an option would interfere with their traditions, culture, values and with the waahi tapu. Te Taku Parai, in explaining this relationship stated:

*"In this case the land of Takamore is itself a taonga, but of particular 25
relevance are the taonga that lie buried with the dead."*

He went on to state:

*"Protecting this place goes to the heart of our values as Maori. If we were 30
to accept mitigation our values would go out the door."*

[243] Tangata whenua stated that that would be the effect if the arterial 30
road was routed through the Takamore area. The arterial road would destroy the values of the site for them, and they could not envisage any form of mitigation to avoid such destruction. This does not imply that protection of the waahi tapu in terms of s 6(e) will result in sterilisation of the land. Rather, 35
protection of the area could be regarded as an important aspect of the cultural history of New Zealand which can remain for future generations.

[244] The importance of the proposed route therefore must be considered 40
in relation to s 6(e) and s 5, with respect to the cultural wellbeing of Te Ati Awa and manu whenua, and this in turn balanced against the overall community social, economic and cultural wellbeing with respect to sustainable manage-
ment.

[245] While the health and safety of the living are important with respect to the establishment of an arterial route, the question at issue is whether the

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protection of a cultural resource in the current path of the NOR has such 1
significance that it should be sustainably managed, rather than destroyed.

[246] All parties accepted that there is a need to relieve current and
anticipated congestion on SH1, and support the concept of an arterial road.
While the question of delay in road construction is a matter of concern as
well, particularly from the aspect of economic efficiency, the matter has not 5
proceeded for 46 years from the original motorway conception, and
construction is not planned to be started for another five years, so the issue
of delay needs to be regarded with some caution. The decision goes to the
heart of sustainable management of natural and physical resources. While
delay does have an effect on the community, as has been the case in recent 10
years as the traffic load has increased, the question of long term sustainable
management of which resource must be made with care.

[247] Doubt was raised by Mr Mikaere for Kapiti Coast District Council
about whether the oral history and tradition in fact relates to the Takamore
wetland at all, that it may apply, if correct, to some other place, and further that 15
there is a high possibility that no koiwi are buried in the Takamore wetland. In
addition, the view was put that even if koiwi were to be disturbed, that with
suitable ceremonies they could be exhumed and re-interred elsewhere. This
view does not accord with the history, culture and traditions of mana whenua
which were provided in evidence. The area is accepted as a waahi tapu. 20

[248] The matter then is about the destruction of the Takamore waahi tapu by
dissection by the proposed arterial road. The Takamore waahi tapu, must be
weighed against the issue of current traffic congestion in Kapiti and, in the long
term, what on balance is thought to be the best option for sustainable management. 25

[249] The provisions of s 171, which is subject to Part II of the RMA, will
be considered in relation to the matters just outlined. The principle of s 5
provides strong guidance that not only do we need to consider the current
situation, but future generations. The Takamore waahi tapu area is one of
only about four waahi tapu areas registered throughout New Zealand by the 30
Historic Places Trust. It is also listed on the Heritage register of the Kapiti
Coast District Plan 1999 as W4, Waahi Tapu Area. It is the only *area* to be so
identified by the Kapiti Coast District Council and includes the separately
identified Takamore cemetery (W1). There are only two other waahi tapu
identified in the Heritage register. W2 is a cemetery at Waikanae and W3 is an 35
urupa and tree in Queen Elizabeth Park. This therefore is essentially one of
only three waahi tapu on the Heritage register of the Kapiti Coast District
Plan. The relationship of iwi with this ancestral land would therefore seem
significant for the wider community, as a resource for the future. We heard
evidence that the intrinsic values of the wetland were not of great importance 40
but evidence on possible mitigation measures was also offered.

[250] Maori did not offer evidence on wetland mitigation measures.
Protective measures suggested by ecological evidence would, they indicated,

conflict with cultural values, as the measures assume construction of a road across the waahi tapu, with or without excavation into the wetland. 1

[251] Kapiti Coast District Council identified the waahi tapu area which includes the Takamore wetland on their Heritage register three years ago, and did not raise doubts about the validity of the oral history and traditions at the time. The registration passed the scrutiny of the District Plan process. They also included reference to the waahi tapu in the NOR, but did not address the conflict between the two. Local Maori might have previously been satisfied that their traditions and taonga had been respected and protected by the District Council and legitimately have been surprised and disappointed that the District Council now questions the need for protection the Heritage register indicates. The Kapiti Coast District Council are prepared, at some greater expense, to narrow the carriageway, to restrict disturbance on either side of the route, and to undertake particular works to protect the remaining sections of wetland. The proposal for conserving and enhancing some of the remaining wetland outside the carriageway is for inter-linking drains to enable the wetland drainage to pass to either side. Corridors for fauna movement under the carriageway are also proposed and the issue of feral predators using the corridor as a fast food delivery system is proposed to be countered by planting suitable vegetation as screening cover. However, the options for wetland protection, while likely to be beneficial for local fauna, and the wetland generally, do not address iwi cultural values relating to impact on the site. Excavation of the narrow route was regarded as damaging the waahi tapu. 5 10 15 20

[252] Another engineering possibility for road construction across the waahi tapu, without excavating it, is to undertake pre-loading, or compression of material in the wetland. However, such an approach was indicated by HPT as likely to destroy the taonga. A further option, to avoid both excavation and compression, is for bridging but the Takamore Trustees advised that to put an elevated road over the waahi tapu would still destroy the significance of the area valued by them. 25 30

[253] The areas in and about the urupa are clearly waahi tapu and the road as proposed would pass through the waahi tapu area. The wetland areas are also within the definition of wetland in terms of the RMA and therefore both waahi tapu and wetlands assume a statutory national importance status by virtue of s 6. Should koiwi be disinterred during roading construction, then a difficult issue arises. 35

[254] Such a discovery could result in construction of the road being immediately stopped by HPT. The risk of resource, cost and delay implications of such an occurrence should not be treated lightly by the Kapiti Coast District Council. 40

[255] While environmental effects inevitably deal with linkages, there is a point where relative importance must be distinguished. It seems reasonable to contend that the SH1 is of national importance, and there is a proposal to

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widen the relevant section of the road to deal with congestion through the Kapiti area. However, it does not seem clear that a district arterial road which also benefits SH1 (with respect to efficiency) must therefore also be of national importance.

[256] We heard evidence that Te Moana Road was indicated on the road hierarchy as intended to carry heavier traffic loads, so increased traffic and environmental impacts, as a feeder road to the arterial, is a likely consequence, with respect to the NOR. Kapiti residents have both placed reliance on the longstanding road planning provisions, although never previously tested in terms of the RMA, as well as the Heritage register identification more recently, under the provisions of the RMA, of the waahi tapu area. People and communities in this area have relied on the provisions of this Act and have provided for their social, economic and cultural wellbeing and for their health and safety in reliance upon it. The fact is that the two areas, the NOR, and the waahi tapu area, are in conflict and this must be addressed. Although the Christian Holiday Park were aware of the intended road development, albeit in another form, it could be argued that they undertook their extensive development aware of this risk and they and other owners have benefited by the open space protection afforded by the proposed road up till now. However, the Christian Holiday Park is now a significant amenity. Given these conflicts and the possible impact on others of an alternative route, the issue focuses on Part II of the Act, in terms of a broad judgment overall of sustainable management for the future.

[257] In weighing the two matters: the NOR as proposed or protection of one of only about four registered waahi tapu areas in New Zealand, I look to what the impacts are in either case. The arterial road is now proposed in conjunction with upgrading of the State Highway, a proposal that was not assumed in earlier studies. By comparison, the iwi who hold that the Takamore waahi tapu area has cultural significance have stated that the significance would be destroyed for them, both for current and future generations. The owners of the Takamore waahi tapu area, the Holiday Park, and other owners, are sympathetic to this value to iwi, so the lack of ownership does not necessarily present the obstacle that might otherwise be the case. It was argued that if the NOR were to be uplifted then the Holiday Park would suffer greater impact from residential development than might otherwise be the case (perhaps) from the proposed road. The current open space might not necessarily remain as not all is in public ownership. Further, Kapiti Coast District Council and Transit may wish to sell current holdings to raise funding for other development. Both aspects, roading or other development, have impacts but the Takamore waahi tapu area cannot be proposed for another site. It is either observed and protected, as indicated in the District Plan, or destroyed by the proposed NOR. Mitigation in this case is not a viable option but avoidance is.

[258] Therefore the conclusion is drawn that the waahi tapu should be enabled to remain intact, to recognise and provide for s 6(e) matters of national importance, and to enable continued sustainable management of this resource for the future. 1

[259] Disallowance of the NOR on the proposed route through the Takamore waahi tapu area would inevitably have short term planning and cost implications for Kapiti Coast District Council. In the longer term there is opportunity for protection of open space as well as the waahi tapu area in the centre of Kapiti as an amenity for future generations. This in terms of the RMA is preferable to adopting a short term expedient that gives priority to district road issues rather than the recognition of a registered waahi tapu of importance to iwi. 5 10

Conclusions of Commissioner Menzies

[260] That the NOR be withdrawn for the section from Waikanae River to Te Moana Road. This will enable sustainable management of the Takamore waahi tapu for future generations. 15

[261] That the NOR be upheld on remaining sections to enable relief of traffic congestion and to improve access routes within Kapiti District, subject to conditions outlined in the main decision. 20 25 30 35 40