

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKAURAU ROHE**

**CIV-2021-404-1618**

**UNDER THE**                      Judicial Review Procedure Act 2016  
**IN THE MATTER**                of an application for judicial review  
**BETWEEN**                      **ALL ABOARD AOTEAROA INCORPORATED**  
   **Applicant**  
**AND**                                **AUCKLAND TRANSPORT**  
   **First Respondent**  
**AND**                                **THE REGIONAL TRANSPORT COMMITTEE FOR**  
   **AUCKLAND**  
   **Second Respondent**  
**AND**                                **AUCKLAND COUNCIL**  
   **Third Respondent**

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**SYNOPSIS OF SUBMISSIONS ON BEHALF OF AUCKLAND TRANSPORT,  
THE REGIONAL TRANSPORT COMMITTEE FOR AUCKLAND AND  
AUCKLAND COUNCIL**

**Hearing: 26, 27 and 28 April 2022**

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## MAY IT PLEASE YOUR HONOUR

### 1. INTRODUCTION

- 1.1 The core legal issue in these proceedings is whether the Regional Transport Committee for Auckland (**RTC**) and Auckland Transport (**AT**) Board could reasonably be satisfied that the Auckland Regional Land Transport Plan 2021 (**RLTP**) was consistent with the Government Policy Statement on Land Transport 2021 (**GPS**).<sup>1</sup> That document contains four strategic priorities (safety, improving freight connections, better travel options and climate change); as well as further matters that require consideration when the RTC and AT judge whether the RLTP is consistent with the GPS.
- 1.2 In its submission on the draft RLTP, the applicant contended that the RLTP was legally required to deliver greater reductions in GHG emissions over the RLTP period (2021-2031) than AT has forecast, citing the climate change strategic priority in the GPS.<sup>2</sup> Before this Court, it submits that that in order to be lawful, the RLTP “had to make the greatest contribution it could to reducing transport emissions and meeting the Climate Change Commission’s target”, and that AT “had to pull the transport investment lever as far as it could”.<sup>3</sup>
- 1.3 There is no dispute that anthropogenic climate change is one of the most significant issues currently facing the world. Neither is there any dispute that urgent measures need to be taken to address it, and that in New Zealand a reduction in transport emissions needs to be a key part of that solution. The dispute relates to the extent to which the RLTP was required to achieve greenhouse gas (**GHG**) emission reductions, given the factual and legal context in which it was prepared.
- 1.4 The respondents say that consistency with the GPS cannot be reduced to a sole focus on climate change, or GHG emission reductions in particular. Before determining that it was satisfied that the RLTP was consistent with the GPS, the RTC was required to, and did, consider the proposed investment programme in the RLTP against the four strategic

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1 Statement of claim at [69(b)] and [71].

2 All Aboard Aotearoa submission on the draft RLTP (NJL1-92).

3 Applicant’s submissions at [6.40].

priorities and other parts of the GPS. These included statements of expectation in the GPS that the Auckland Transport Alignment Project (**ATAP**) would be funded through the National Land Transport Plan (**NLTP**) - and by extension included in the RLTP - and the level of funding available to particular activity classes.

- 1.5** Even viewing the climate change strategic priority in isolation, the RTC could properly be satisfied of the RLTP's consistency with it, given a forecast *reduction* in GHG emissions of 5% over the 2021-2031 period of the RLTP,<sup>4</sup> despite forecast population growth of 16% in the region for the period 2021 – 2031.<sup>5</sup> This contrasted with the large *increases* in transport-related GHG emissions in the immediately preceding period (an 11% increase between 2009 and 2018).<sup>6</sup>
- 1.6** Whether or not *further* reductions in GHG emissions could have been achieved under a different programme of investments to that proposed in the RLTP – a valid policy question when developing and considering submissions on the draft RLTP – is not the legal issue for this court. To address that question would be to stray outside the proper bounds of judicial review, and into the merits of the RTC and AT Board decisions that are challenged. In any event, AT's evidence explains how the RLTP was prepared within the context of "real world" limitations including historic investment decisions still reflected in the RLTP, Auckland's low population density and geographic sprawl, rapid and ongoing population growth, activity classes to which funding from the National Land Transport Fund (**NLTF**) is tagged, and significant funding constraints.
- 1.7** Given the central allegation that the RLTP was inconsistent with the GPS, the most relevant evidence is as to what those two documents actually say. The Court must consider the RLTP *as it is* (not as it could be, had different policy judgments of the type outlined in *All Aboard Aotearoa's (AAA's)* evidence been made); and compare it to the GPS *as a whole* (not just what it says about climate change). For this reason, opinion evidence from AAA witnesses as to how the RLTP could have been

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4 The statement of claim (at paragraph 66(a)) and applicant's submissions (in several places, but starting from paragraph 1.7) consistently refer to projected emission reductions for the period **2016** to 2031 (1%). This is not the relevant emissions reduction figure because it is not the period of the RLTP. The relevant projected reduction to GHG emissions is 5%, which relates to the RLTP period **2021** to 2031.

5 See minutes of RTC meeting of 18 June 2021 at 4 (JC1-1088).

6 RLTP at 35 (NJL2-1150).

different and achieved greater reductions in GHG emissions, whilst rebutted by AT's witnesses, is of little relevance to the legal issues the Court must determine.

## **2. ISSUES AND SUMMARY OF RESPONDENTS' POSITION**

**2.1** The issues the Court will need to determine, based on the pleadings and applicant's submissions, together with a summary of the respondents' position on those issues, are set out below.

**2.2** **Issue 1:** Did the RTC have reasonable grounds to be satisfied that the RLTP was consistent with the GPS, and contributed to the purpose of the Land Transport Management Act 2003 (**LTMA**)?<sup>7</sup>

Yes. The RTC properly considered the RLTP against each of the four strategic priorities in the GPS, and other relevant parts of that document, before recommending that the AT Board approve the RLTP. In particular, given the projected 5% reduction in GHG emissions that would be achieved under the RLTP from 2021 to 2031, it could properly be satisfied as to consistency with the climate change strategic priority.

**2.3** **Issue 2:** Were the challenged decisions of the RTC, Auckland Council's Planning Committee and the AT Board vitiated by failings in the process for developing the RLTP?<sup>8</sup>

No. The applicant has not pleaded any breach of the LTMA's procedural requirements for preparing an RLTP (for example, the consultation requirements in section 18). Its allegations of illegality under the first cause of action<sup>9</sup> are confined to a breach of section 14 of the LTMA. The LTMA does not prescribe how projects or programmes are included in the RLTP, and AAA's evidence that the RLTP could have been compiled differently, using an alternative methodology, is beside the point. ATAP's influence on the RLTP was to be expected given substantial overlaps between the RLTP and ATAP both in terms of timing and content, and was a positive influence because it increased the likelihood of projects

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7 Statement of claim at [69] and [71]; Applicant's submissions at [1.8].

8 Applicant's submissions at [1.9] and [1.18].

9 Statement of claim at [62] and [69].

included in the RLTP being funded. It did not result in any breach of the LTMA requirements.

**2.4 Issue 3:** Were the challenged decisions vitiated by material inaccuracies in the advice AT provided to the RTC, Planning Committee and Board?

No. Where, as in this case, more than one view could reasonably be held about the effect of particular interventions (such as reducing road capacity) on GHG emissions, the decision-makers were entitled to prefer the advice they received from AT. The decisions made were supported by evidence, and within the decision-maker's permissible field of judgment. The advice received was accurate, but in any event the Court cannot determine whether specific elements of the advice were "materially inaccurate" as alleged without straying beyond its proper role of deciding lawfulness, and into the merits of those decisions.

**2.5 Issue 4:** Did the Planning Committee fail to identify all reasonably practicable options before deciding to endorse the RLTP on 24 June 2021?<sup>10</sup>

No. The Committee properly considered the only two reasonably practicable options available to it: to endorse, or not endorse, the final RLTP for submitting to the AT Board. These were properly identified as the only reasonably practicable options given the LTMA confers the roles of preparing and approving the RLTP respectively on the RTC and AT Board, rather than Auckland Council.

**2.6 Issue 5:** Did the Planning Committee breach section 80 of the LGA by failing to identify its decision to endorse the RLTP as being significantly inconsistent with plans or policies of Council including Te Tāruke-ā-Tāwhiri (TTT)?<sup>11</sup>

No. Despite its importance, TTT is not a plan or policy to which section 80 applies. In any event the Committee's endorsement decision was not inconsistent with TTT, primarily because TTT did not set out any level of GHG reductions that the RLTP would need to achieve, and because the

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10 Statement of claim at [78(c)]; applicant's submissions at [1.17(1)].  
11 Statement of claim at [79]-[81]; applicant's submissions at [1.17(b)(ii)].

modelled indicative pathway of a 64% reduction for transport sector emissions saw this being achieved through a range of behavioural and policy responses well beyond the scope of the RLTP.<sup>12</sup> The Committee recognised the need for further work beyond the RLTP given the goals set by TTT, and for this reason when deciding to approve the draft RLTP for consultation and endorse the final RLTP, also made resolutions in relation to a Transport Emissions Reduction Plan (**TERP**) that would include a broad range of range of initiatives to reduce GHG emissions.

**2.7 Issue 6:** If errors are found, what relief should be granted?<sup>13</sup>

Any errors in decisions of the RTC and AT Board are best addressed by the Court making a declaration that the RTC acted unlawfully and providing guidance for its future decision-making. Further orders setting aside these decisions could have adverse consequences for projects and programmes that have been included in the NLTP, approved by Waka Kotahi/New Zealand Transport Agency (**WK**) under section 20 of the LTMA, and already underway.

The Council accepts that if the Court finds it to have erred, the primary relief sought in respect of the Planning Committee's decision (a declaration that the Committee acted unlawfully) is appropriate. No further orders are required.

**3. STATUTORY FRAMEWORKS**

**Land transport planning framework**

**3.1** The decisions under challenge sit within a national framework of land transport planning, funding, and operation. That framework is made up of central and local government participants, and national, regional, and local infrastructure. It is funded variously by the NTLF, direct Crown investment, and local authorities. Regional Land Transport Plans have a relatively narrow role within the overall transport planning framework.

**3.2** The key components of that land transport framework are as follows.

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12 TTT, page 51 (MT1-0561).

13 Statement of claim at [74], [81] and [85]; applicant's submissions at [9.1] to [9.7].

- 3.3** The LTMA deals with various aspects of land transport in New Zealand. Besides land transport planning and funding, the LTMA addresses such matters as road tolling schemes, regional fuel taxes, and the planning and regulation of public transport.
- 3.4** The purpose of the LTMA in section 3 is “to contribute to an effective, efficient, and safe land transport system in the public interest”. None of the adjectives in that purpose – effective, efficient and safe – is defined in the LTMA; each should bear its normal everyday meaning within the context of the Act. “Effective” means that the land transport system is successful in producing the desired result; “efficient” means that it does so as quickly and cost effectively as possible; “safe” means that it is free from danger.<sup>14</sup>
- 3.5** The purpose of the LTMA is to *contribute to* these outcomes. It does not have the goal of achieving them in and of itself.
- 3.6** Section 3 in its current form was enacted as part of the Land Transport Management Amendment Act 2013, which sought to simplify the Act’s planning and funding framework. Prior to that, the statutory purpose was broader, and (of relevance to this case) expressly included issues of sustainability and social and environmental considerations. It stated:
- (1) The purpose of this Act is to contribute to the aim of achieving an affordable, integrated, safe, responsive, and sustainable land transport system.
  - (2) To contribute to that purpose, this Act –
    - (a) provides an integrated approach to land transport funding and management; and
    - (b) improves social and environmental responsibility in land transport funding, planning and management; and
    - (c) provides the [New Zealand Transport] Agency with a broad land transport focus; and
    - (d) improves long-term planning and investment in land transport, including planning and investment in coastal shipping and rail;

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<sup>14</sup> *Collins Dictionary* (13th edition, Collins, Italy, 2018):  
“**effective**” means “productive of or capable of producing a result” (page 631);  
“**efficient**” means “functioning or producing effectively and with the least waste of effort” (page 631);  
“**safe**” means “affording security or protection from harm” (page 1478).  
*Shorter Oxford English Dictionary* (6th edition, Oxford University Press, New York, 2007):  
“**effective**” means “concerned with or having the function of accomplishing or executing” (volume 1, page 799);  
“**efficient**” means “making, causing: that makes a thing what it is; effective, producing the desired result with the minimum wasted effort” (volume 1, page 800);  
“**safe**” means “uninjured, unharmed: having escaped or avoided injury or damage” (volume 2, page 2646).

- (e) ensures that land transport funding is allocated in an efficient and effective manner; and
- (f) improves the flexibility of land transport funding by providing for alternative funding mechanisms.

**3.7** The reference to efficiency and effectiveness was in the context of the allocation of land transport funding.

**3.8** The Explanatory Note to the Land Transport Management Amendment Bill (which resulted in the Land Transport Management Amendment Act 2013) stated (emphasis added):<sup>15</sup>

**The funding framework will be refined to focus on the effectiveness and efficiency of public expenditure.** This will be reflected in a new purpose and streamlined decision-making criteria that will emphasise effectiveness, efficiency, and safety...

The Bill proposes changes to the purpose and decision-making criteria that will make the application of the Act simpler, clearer, and easier to understand and interpret, reduce compliance costs, and simplify processes. With public investment in the land transport system worth \$3 billion annually, such streamlining has the potential to yield significant gains over time.

**3.9** This focus on better use of public expenditure was also emphasised in the speech from the Minister of Transport, Hon Gerry Brownlee, on the first reading of the Bill:<sup>16</sup>

This bill will amend the Land Transport Management Act 2003. The Act provides the planning and funding framework that channels around \$3 billion of central government funding each year into road construction and maintenance, and public transport. The bill is part of the Government's ongoing efforts to cut unnecessary red tape and create a better, more effective legislative framework for transport. The bill will lead to streamlined decision-making and fewer prescriptive planning processes for those in the transport sector. It will allow councils greater flexibility to plan for the needs of their region, and it will ensure that both central government and local government get better value for money from their investments in public transport.

**3.10** The 2013 amendment was a conscious decision to narrow the statutory purpose, concentrating on "better value for money" in public expenditure and removing broader considerations such as sustainability and social and environmental responsibility. What remains in section 3 is efficiency and effectiveness (from a land transport funding or public investment perspective), as well as safety.

**3.11** This recasting of the statutory purpose was carried through into the specific provisions of the LTMA, including the core requirements of an

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15 Land Transport Management Amendment Bill (Government Bill 46-1).  
16 Hansard (11 September 2012) 683 NZPD 5101.



RLTP in section 14. Before the 2013 amendments, when making the RLTP for Auckland (then referred to as a regional land transport programme), AT had to be satisfied that the programme contributed to certain matters listed in section 15(a)(ii), which specifically included:<sup>17</sup>

- protecting and promoting public health; and
- ensuring environmental sustainability.

This was removed by the 2013 Amendment Act.

- 3.12** It is therefore no longer part of the LTMA's statutory purpose, or the core requirements of an RLTP, to protect or promote public health, or to address environmental outcomes such as sustainability.

#### *Government Policy Statement*

- 3.13** The most significant component, and centre, of the land transport planning framework is the GPS<sup>18</sup> which the LTMA requires the Minister of Transport to issue at least every 6 years.

- 3.14** While the GPS is statutory in origin, the LTMA states that it is not a direction for the purposes of the Crown Entities Act 2004, and it is not a legislative instrument or disallowable instrument for the purposes of the Legislation Act 2012.<sup>19</sup>

- 3.15** Rather, the GPS is a strategic document and is the mechanism by which the Government signals to WK, and to other participants in the land transport system such as local authorities and AT, the Crown's investment strategy for land transport and the results the Crown wishes to achieve from allocation of funding for the coming decade. However, the GPS cannot require that any particular activity be approved or declined for funding under section 20.<sup>20</sup>

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17 Section 15(a)(ii)(D) and (E) of the LTMA, as it then was. The provisions applying to RLTPs in other areas of New Zealand (section 14) and to the national land transport programme (section 19B) were in equivalent terms. The 2013 amendments consolidated the requirements for all RLTPs (including Auckland) into a single section, the current section 14.

18 Young-Cooper at [10]; Chetwynd at [22]; section 66 LTMA.

19 And as a result it is not an enactment for the purposes of the Legislation Act 2019.

20 LTMA, section 70.

**3.16** The GPS must state:<sup>21</sup>

- (a) the results that the Government wishes to achieve from the allocation of funding from the NLTF over a ten-year period;
- (b) the Government's land transport investment strategy; and
- (c) its policy on borrowing for the purposes of managing the NLTF.

**3.17** More specifically, the GPS must include:<sup>22</sup>

- (a) the categories (known as activity classes) which are to be funded;
- (b) the revenue which the Crown anticipates coming into the NLTF;
- (c) a maximum and minimum level of expenditure for the NLTF overall, and allowable variations;
- (d) funding ranges for each activity class;
- (e) the results which the Crown wishes to achieve through the NLTF; and
- (f) a statement of investment expectations as to how WK ought to give effect to the GPS.

**3.18** In preparing a GPS the Minister must be satisfied that the GPS contributes to the purpose of the LTMA.<sup>23</sup>

*New Zealand Transport Agency/Waka Kotahi*

**3.19** WK is a statutory Crown agent<sup>24</sup> established under the LTMA.<sup>25</sup> Its functions are varied but relevantly include the administration of the

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21 LTMA, section 68(1).

22 LTMA, section 68(2).

23 LTMA section 67(1).

24 Crown Entities Act 2004, section 7 and Schedule 1.

25 LTMA, section 93, Part 4.

NLTF.<sup>26</sup> WK must “give effect” to the GPS when performing its functions in respect of land transport planning and funding.<sup>27</sup>

**3.20** The NLTF is the principal source of transport funding in New Zealand. It comprises the net inflows of land transport and certain other legislatively hypothecated revenue (eg tolls) and associated borrowing.<sup>28</sup> The NLTF can be used only to pay for specified transport activities.<sup>29</sup> Relevantly, that includes land transport activities of territorial authorities, regional councils, WK itself, and approved public organisations (which includes AT) which WK has approved under section 20 of the LTMA.

**3.21** Funding from the NLTF is authorised via the NLTP, which WK is required to prepare and adopt every three years. The content of the NLTP is specified in the LTMA,<sup>30</sup> and relevantly includes activities and combinations of activities which have been approved already by WK, and those which WK anticipates being funded from the NLTF if they are included in a regional land transport plan.<sup>31</sup>

**3.22** In preparing the NLTP, WK must:<sup>32</sup>

- (a) ensure that the NLTP:
  - (i) contributes to the purpose of the LTMA;
  - (ii) gives effect to the GPS;
- (b) take account of any regional land transport plans.

**3.23** As the LTMA makes clear, and as explained in the affidavit filed by Ms Chetwynd, inclusion of an activity in the NLTP is a necessary precursor to funding from the NLTF, but is not in and of itself sufficient. There is an additional gateway: activities must be approved by WK under section 20 as qualifying for payment from the NLTF. There is an additional set of matters under section 20 in respect of which WK must

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26 LTMA, section 95.

27 LTMA, section 70(1).

28 LTMA, section 10.

29 LTMA, section 10(3).

30 LTMA, section 19C.

31 LTMA, section 19C(f).

32 LTMA, section 19B.

be satisfied, including that the activity and combination of activities is consistent with the GPS.<sup>33</sup>

**3.24** As Ms Chetwynd puts it:<sup>34</sup>

Any transport activity that requires NLTF funding therefore goes through a series of gates before it is ultimately funded; inclusion of in the RLTP which prioritises activities on a regional basis, inclusion in the NLTP which prioritises activities on a national basis, and then approval by Transport Agency-NZTA under section 20 LTMA through a business case process. There is no guarantee of funding at any stage.

**3.25** Activities which have already been approved must be in the NLTP.<sup>35</sup> In practice this means that a large proportion of the NLTF has already been committed prior to the adoption of any new NLTP. That reflects the long time scale over which such activities are delivered.

*Specific Government commitments*

**3.26** Within the envelope of the GPS, there are specific commitments made by the Crown to particular projects known as Government Commitments. They are:<sup>36</sup>

- (a) ATAP, discussed further below;
- (b) Let's Get Wellington Moving (**LGWM**);
- (c) Road to Zero (road safety improvements);
- (d) the New Zealand Rail Plan.

**3.27** These commitments are funded from the NLTF, from Central Government separately from the NLTF, and in some cases enjoy local contribution.

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33 See also section 20D LTMA which makes clear that funding for a particular activity may be declined or approved.

34 Chetwynd at [38] and [70].

35 LTMA, section 19C(d).

36 GPS, page 36, section 3.5 (JC1-0039).

### *Crown funding for land transport*

**3.28** In addition to funding through the NLTF, the Crown provides funding to progress some specific transport initiatives via Vote Transport appropriations as part of the usual Budget cycle.<sup>37</sup> That includes projects such as the Auckland City Rail Link, and the New Zealand Upgrade Programme (**NZUP**). As Ms Chetwynd explains, while the Auckland RLTP must include these projects, neither AT nor the RTC has any say in them. They are Government projects,<sup>38</sup> and are highlighted in the GPS.<sup>39</sup>

### *Regional land transport plans*

**3.29** The LTMA requires the establishment of RTCs by regional councils.<sup>40</sup> Outside Auckland, membership comprises representatives of the regional council, territorial authorities in that region, and WK.

**3.30** A principal responsibility of each RTC is “to prepare a regional land transport plan, or any variation to the plan, for the approval of the relevant regional council”.<sup>41</sup>

**3.31** In regions other than Auckland, the RTC is the forum at which constituent district and city councils and the regional council moderate and determine, among themselves, what projects the region will put forward for funding from the NLTF. In effect each council makes a bid for projects to be included and the job of the RTC is to coordinate those bids to produce an integrated investment programme across local authority boundaries.

**3.32** The situation in Auckland is described by Ms Chetwynd.<sup>42</sup> Reflecting the unique position of AT, the LTMA provides for the Board of AT to perform both the RTC role and the regional council role with respect to the preparation and approval of the RLTP for Auckland. The Auckland RTC

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37 Chetwynd at [39] and following.

38 Chetwynd at [67].

39 GPS section 3.6 (at [132] to [135]) (JC1-0040).

40 LTMA, section 105.

41 LTMA, section 106.

42 Chetwynd at [42] and following.

comprises the AT Board which includes a non-voting representative from WK, and a non-voting KiwiRail member.

- 3.33** The Auckland RTC is responsible for preparing the RLTP for submission to the AT Board and making recommendations accordingly. However, it is the AT Board which is ultimately responsible for approving the RLTP.
- 3.34** In preparing the RLTP, the RTC is carrying out a planning function; it can prioritise or even veto projects, but it does not have an operational or delivery role. Likewise, the RLTP itself does not “do” anything on the ground nor is it a decision to do anything: apart from stating objectives, policies, and measures (see paragraph 3.36 below), it is simply a plan for the purposes of applying for funding from the NLTF.
- 3.35** The fundamental purpose of an RLTP is the same everywhere in New Zealand: to set out a prioritised package of investments for the particular region. The RLTP and NLTP processes are a mechanism to reconcile what the region wants and will fund every three years, and what Central Government is willing and wanting to fund, within the overall framework of Government policy as expressed through the GPS.
- 3.36** Like any RLTP, the Auckland RLTP must also set out the region's land transport objectives, policies, and measures for at least the 10 financial years from the start of the RLTP.<sup>43</sup> It must include:<sup>44</sup>
- (a) a financial forecast of anticipated revenue and expenditure on activities for the 10 financial years from the start of the RLTP;
  - (b) all regionally significant expenditure on land transport activities to be funded from sources other than the NLTF during the 6 financial years from the start of the RLTP; and
  - (c) identification of any activities that have inter-regional significance.

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43 LTMA, section 16(1).

44 LTMA, section 16(2).

**3.37** As such, the RLTP covers the full range of land transport activities, irrespective of funding source. However, for the purpose of seeking payment from the NLTF, the Auckland RLTP must include, for the first 6 financial years of the RLTP:<sup>45</sup>

- (a) the land transport activities proposed by AT;
- (b) the land transport activities that the RTC decides to include, and which are proposed by Auckland Council (other than those proposed by AT) or by WK. An organisation may only propose an activity for inclusion in the RLTP if it or another organisation has accepted financial responsibility for the activity;<sup>46</sup>
- (c) certain information about each activity, including the objective of the activity, estimated costs, duration and proposed funding sources (apart from the NLTF).<sup>47</sup>

**3.38** The RLTP must also set out the order of priority of those activities which are significant.<sup>48</sup> Significance is determined by reference to the significance policy adopted by the RTC, separately from the RLTP.

**3.39** The RLTP must also include information about various other matters as specified in section 16(6), including a list of the activities which have already been approved for funding from the NLTF, but are not yet completed.

**3.40** Section 14 LTMA says that an RTC, before submitting an RLTP to a regional council or AT for approval, must be satisfied that the RLTP contributes to the purpose of the Act; and is consistent with the GPS on land transport. This requirement is the focus of the first cause of action.<sup>49</sup>

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45 LTMA, section 16(3).

46 LTMA, section 16(4).

47 LTMA, section 16(3)(e).

48 LTMA, section 16(3)(d).

49 Under section 14 the RTC must also have considered alternative regional land transport objectives, and the feasibility and affordability of those alternative objectives, and taken into account certain mandatory matters as specified in section 14(c). There is no claim in relation to these requirements.

**3.41** On top of this statutory framework the content of the Auckland RLTP is subject to a number of real-world constraints. Most notably:<sup>50</sup>

- (a) a limited (and rapidly contracting) funding environment;<sup>51</sup>
- (b) projects which require significant lead time for planning, construction, and commissioning, and which exceed the statutory planning cycles;
- (c) existing and committed transport infrastructure – future planning does not start with a blank slate;
- (d) in the case of Auckland in particular, high anticipated population growth, challenging geography, and existing patterns of development and population dispersal.<sup>52</sup>

### **Local government statutory framework**

**3.42** Local government in Auckland is governed by two principal Acts. The Local Government Act 2002 (**LGA**) is the general statute applying to all councils throughout New Zealand. In Auckland, this is overlaid by the Local Government (Auckland) Council Act 2009 (**LGACA**), which provides for the unique features of local government in Auckland.

**3.43** It is convenient to begin this outline of the local government framework with the LGA, although it is the LGACA which is mainly relevant because that Act legislates for the role and functions of AT.

#### *Local Government Act 2002*

**3.44** The purpose of the LGA is to “provide for democratic and effective local government that recognises the diversity of New Zealand communities”,<sup>53</sup> and the purpose of local government is to enable democratic local decision-making and action by, and on behalf of, communities, and to

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50 RLTP at 3 to 4 (NJL2-1118) and 11 to 12 (NJL2-1126); NLTP at 8 to 9 (JC1-1246).

51 Chetwynd at [52]-[58]; Bunn at [26]-[27].

52 Young-Cooper at [15].

53 LGA, section 3.



promote the social, economic, environmental and cultural well-being of communities in the present and for the future.<sup>54</sup>

**3.45** Under the LGA, the role of a local authority is to give effect, in relation to its district or region, to the purpose of local government.<sup>55</sup> Auckland Council is a local authority,<sup>56</sup> established by section 6 of the LGACA.

**3.46** To this end, local authorities have full capacity to do anything a body corporate may do, so long as:<sup>57</sup>

- (a) it is for the purposes of performing its statutory role;
- (b) it is wholly or principally for the benefit of its district or region;  
and
- (c) it is not contrary to the LGA, any other Act or the general law.

**3.47** Section 14 of the LGA sets out various principles relating to local authorities. They must act in accordance with these principles when performing their role. Section 14 is discussed further below in relation to the second cause of action against the Council.

**3.48** The general tenor of the LGA is to empower councils to give effect to their purpose, subject to democratic control through their elected members.<sup>58</sup> This broadly empowering approach is balanced by the decision-making and accountability regime in Part 6 of the LGA (which includes sections 77 and 80, alleged to have been breached in this case). On the whole, Part 6 does not prescribe or limit substantive powers, but sets out procedural requirements which apply in the exercise of those powers.

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54 LGA, section 10.

55 LGA, section 11(a).

56 More precisely it is a unitary authority i.e. a territorial authority (city or district council) with the powers of a regional council.

57 LGA, section 12(2) to (5).

58 *Mt Wellington Race Park Club Inc v Auckland Council* [2020] NZHC 1245 at [89].

**3.49** As mentioned, the LGACA provides for additional matters (beyond those in the LGA) which are particular to Auckland. In summary, these are:

- (a) Auckland Council's unique governance structure – this is discussed further below in the section headed "Auckland Council";
- (b) provisions relating to transport management in Auckland, including the establishment, purpose, functions and powers of AT. This is also addressed further below, in the section headed "Auckland Transport";
- (c) matters relating to water supply and wastewater services in Auckland (presently undertaken by Watercare Services Limited);
- (d) provisions for the establishment and operation of the Independent Māori Statutory Board;
- (e) heightened procedural and accountability obligations in relation to "substantive" council-controlled organisations (CCOs) of Auckland Council. A substantive CCO is one which is responsible for delivery of a significant service or activity on behalf of the Council, or which owns or manages assets with a value of more than \$10 million.<sup>59</sup> AT is a substantive CCO.

*Auckland Council*<sup>60</sup>

**3.50** As mentioned, the Council was established in 2010, as the successor to seven territorial authorities and one regional council.

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59 Definition in LGACA, section 4.

60 The summary in this section of the submissions is derived from Tyler at [3.1] to [3.9].

- 3.51** The Council has a shared governance structure comprising:
- (a) the Governing Body (the Mayor elected by all Aucklanders, and 20 councillors elected on a ward basis); and
  - (b) 21 local boards (each with between five and nine members elected by local board area, with a total of 149 members).
- 3.52** The Governing Body and local boards are both "responsible and democratically accountable for the decision making of the Auckland Council" with responsibility sitting with either the Governing Body or local boards depending on the nature of the decision.<sup>61</sup> Generally speaking, the Governing Body focuses on the big picture, and on region-wide strategic decisions;<sup>62</sup> while local boards represent communities in their area and make decisions on local issues, activities and facilities.
- 3.53** The Governing Body delegates some of its powers and responsibilities to committees which it has established, including the Planning Committee. The Planning Committee is responsible for guiding the physical development and growth of Auckland through a focus on land use, transport and infrastructure strategies and policies relating to planning, growth, housing and the appropriate provision of enabling infrastructure. Among other things, the Planning Committee has delegated responsibility for relevant regional strategy and policy, and transportation.
- 3.54** The LGA provides that local authorities may establish CCOs, which are entities controlled at least 50% by one or more local authorities.<sup>63</sup> Local authorities may transfer undertakings to CCOs who may carry out functions in lieu of or on behalf of the council. There is a comprehensive accountability regime applying to CCOs.<sup>64</sup>
- 3.55** Auckland Council currently has four substantive CCOs which are established to look after specific council assets, services or infrastructure: AT, Watercare, Eke Panuku Development Auckland and

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61 LGACA, section 14.

62 Under section 14 LGACA, the Governing Body is specifically responsible for the Council's financial management, setting of rates, and the governance of CCOs.

63 Definition in LGA, section 6.

64 Part 6 of the LGA.

Auckland Unlimited. Aside from AT, these are limited liability companies in which the Council is the sole shareholder.<sup>65</sup> As discussed further below, AT is unique in being the only CCO created by legislation rather than “voluntarily” through the LGA establishment process.

- 3.56** CCOs operate separately from the Council but are accountable to it. The Council sets their direction and monitors their performance through a variety of tools and processes.<sup>66</sup>

#### *Auckland Transport*<sup>67</sup>

- 3.57** AT is a statutory body established by section 38 of the LGACA. In broad terms, AT has responsibility for the "Auckland transport system", which is defined as the roads in Auckland (excluding State highways), Auckland public transport services, and certain public transport infrastructure.<sup>68</sup> AT also has a land transport planning function, as discussed in more detail below.

- 3.58** AT's statutory purpose is to contribute to an effective, efficient, and safe Auckland land transport system in the public interest.<sup>69</sup> It has a range of statutory functions and powers (elsewhere in New Zealand, these are performed by local authorities), as set out in sections 45 and 46 of LGACA. These include the management and control of “local” roads in Auckland, which involves the exercise of both operational and regulatory powers. The roads themselves remain vested in the Council.

- 3.59** AT's governing body is its board of directors (**AT Board**). As fixed by the LGACA, the AT Board must comprise at least six but no more than eight voting directors, of whom two may be members of the governing body of Auckland Council; and one non-voting director nominated by WK.

- 3.60** Decisions relating to the operation of AT must be made by, or under the authority of, the AT Board. These decisions must be in accordance with AT's Statement of Intent, any rules made by the Council under section 49

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65 Section 38(3) of the LGACA says that for the purposes of the LGA, the Council must be treated as if it were the sole shareholder of AT.

66 Including the appointment of directors, the Council's CCO Accountability Policy, and Council input into the CCO's statement of intent: see Tyler at [3.9].

67 This section of the submissions is based on Chetwynd at [9] to [21].

68 LGACA, section 37.

69 LGACA, section 39.

of the LGACA, and the provisions of Part 4 of the LGACA, which include AT's purpose in section 39.

- 3.61** As already mentioned, AT is a CCO of the Auckland Council.<sup>70</sup> It is different to other Auckland CCOs, however, because it is established by legislation and its powers and functions are also set out in statute. Elsewhere in New Zealand, local authority transport functions are vested in councils and not conferred directly on CCOs, which in practice means the council can decide whether it wishes to have a transport CCO and if so, what particular functions and powers it wishes the CCO to have. This is not the case in Auckland, where the LGACA determines what AT's powers and functions are.
- 3.62** AT has exclusive authority to carry out the statutory functions and powers conferred on it under section 46 of the LGACA: the Council is expressly prohibited from performing these.<sup>71</sup> However, these functions are undertaken within the context of various Auckland Council policy 'levers' and accountability obligations, provided for in the LGACA, with which AT must comply.
- 3.63** One of AT's statutory functions under section 45 of the LGACA is preparation of the RLTP. The obligation to do so is in section 13(2) of the LTMA. AT cannot delegate its power to approve or adopt the RLTP.<sup>72</sup>
- 3.64** As such, and perhaps surprisingly, the Council does not have a formal or legal role in preparing or adopting the RLTP: the LTMA confers both the regional council role and the RTC (combined regional and district council) role, discussed above, on AT. Prior to amendments to the LTMA in 2013, the Council had responsibility for preparing the regional transport strategy, but that document has now been subsumed within the RLTP,<sup>73</sup> with the effect that any formal Council involvement in the process was removed.
- 3.65** This was considered to be unsatisfactory by an independent CCO review commissioned by the Council.<sup>74</sup> There is a need for alignment between

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70 LGACA, section 39.

71 LGACA, section 50.

72 LGACA, section 54(1)(ab).

73 The RLTP is an amalgamation of two former documents: the Council's regional transport strategy and AT's investment programme.

74 See CCO Review Report at 32 (MT1-0036).

the RLTP and the Council's planning documents. This is important to ensure that the RLTP is consistent with the Council's land use planning and that there is adequate funding for the projects included in the RLTP.<sup>75</sup>

**3.66** This alignment is achieved by providing that the Council has oversight of the development of the RLTP, and resolves whether or not to endorse it before final approval by AT's Board.<sup>76</sup> This is further discussed below in relation to the second cause of action.

### **Climate change statutory framework**

**3.67** The Climate Change Response Act 2002 (**CCRA**) established a legal framework to enable New Zealand to meet its international obligations under the United Nations Framework Convention on Climate Change (the Paris Agreement). The purpose of the CCRA is (in summary) to:<sup>77</sup>

- (a) provide a framework for New Zealand climate change policies which will contribute to achieving the Paris Agreement objectives, and allow New Zealand to prepare for and adapt to the effects of climate change;
- (b) enable New Zealand to meet its international obligations in relation to climate change including the reduction in GHG emissions;
- (c) provide for a GHG emissions trading scheme; and
- (d) provide for GHG levies.

**3.68** The CCRA was significantly amended in 2019 by the Climate Change Response (Zero Carbon) Amendment Act 2019 (**Zero Carbon Act**) to address climate change mitigation and adaptation. This included

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75 Tyler at [3.14].

76 Tyler at [3.15].

77 CCRA, section 3.

introduction of a national GHG emissions reduction target (the **2050 target**),<sup>78</sup> which requires that:

- (a) net accounting emissions of GHGs in a calendar year, other than biogenic methane, are zero by the calendar year beginning on 1 January 2050 and for each subsequent calendar year; and
- (b) emissions of biogenic methane in a calendar year-
  - (i) are 10% less than 2017 emissions by the calendar year beginning on 1 January 2030; and
  - (ii) are 24% to 47% less than 2017 emissions by the calendar year beginning on 1 January 2050 and for each subsequent calendar year.

**3.69** The Zero Carbon Act also:

- (a) established the Climate Change Commission (**CCC**), which has a role to advise the Minister for Climate Change on a range of matters;<sup>79</sup>
- (b) requires the Minister (based on the CCC's advice) to prepare "emissions budgets" and "emissions reduction plans" to achieve the 2050 target. The emissions budget states the total permitted emissions for the relevant period. The emissions reduction plan sets out the policies and strategies for meeting the emissions budget;<sup>80</sup> and
- (c) requires the CCC to prepare a "national risk assessment" and the Minister to prepare a "national adaptation plan".

**3.70** The CCC has provided advice to the Government on recommended emissions budgets for the periods 2022-2025, 2026-2030 and 2031-2035.<sup>81</sup> The Minister has not yet set an emissions budget in

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78 CCRA, section 5Q.

79 CCRA, section 5J.

80 CCRA, sections 5X, 5Y and 5ZG.

81 Draft advice published 31 January 2021, final advice published 9 June 2021.

response to those recommendations, nor prepared the first emissions reduction plan. That plan, which will set the scale and pace of change for all sectors of the New Zealand economy, including transport, is intended to be published by 31 May 2022, and this direction will flow through into the next RLTP.<sup>82</sup>

**3.71** The Government's legislative and regulatory response to carrying out New Zealand's international commitments under the Paris Agreement is being effected through the CCRA, and the mechanisms summarised above. The first stage at which the CCRA regime is likely to be directly felt, in the context of land transport planning, is when the Minister's first emissions reduction plan is published at the end of May this year.

**3.72** In the meantime, neither the CCRA (including the Zero Carbon Act) nor any regulations or instruments made under that Act imposes any relevant obligations in relation to the content of RLTPs, or on the RTC or AT Board when preparing and approving the Auckland RLTP. The nearest the CCRA gets to incorporating the 2050 target and GHG emissions reductions into public decision-making is to make it a permissive consideration, in section 5ZN:

**2050 target and emissions budget are permissive considerations**

If they think fit, a person or body may, in exercising or performing a public function, power, or duty conferred on that person or body by or under law, take into account-

- (a) the 2050 target; or
- (b) an emissions budget; or
- (c) an emissions reduction plan.

**3.73** The discretion public bodies have to consider the 2050 target or emissions budgets when performing public functions is apparent from the language used in this section. The statement of claim does not allege that the respondents were in breach of section 5ZN when making the decisions under review: indeed, section 5ZN is not referred to at all.

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<sup>82</sup> Young-Cooper at [26(f)]. Also Ministry for Primary Industries *Emissions Reduction Plan* <<https://www.mpi.govt.nz/consultations/emissions-reduction-plan/>>.



## Te Tāruke-ā-Tāwhiri Auckland's Climate Plan

- 3.74** TTT is a climate plan for Auckland, adopted by Auckland Council. TTT is not a legally required document, and has not been adopted within any specific legal or legislative context.
- 3.75** The intention of TTT is to set out an overarching Tāmaki Makaurau response to climate change, by identifying principles and values for addressing climate change as a region.<sup>83</sup> TTT says that it is “a roadmap to a zero emissions, resilient and healthier region that is better connected to its environment and able to thrive in the face of ongoing change and disruption.”<sup>84</sup>
- 3.76** While the Council took a leadership role in facilitating the development of the Plan and will continue to lead by example, it is a plan for Auckland rather than for the Council or Council group as such.
- 3.77** TTT is many-faceted, but the elements of particular relevance to these proceedings are now summarised.<sup>85</sup>
- 3.78** The two core goals established by TTT are:
- (a) to reduce Auckland's GHG emissions by 50% by 2030 (against a 2016 baseline) and achieve net zero emissions by 2050; and
  - (b) to adapt to the impacts of climate change by ensuring Auckland plans for the changes it faces under the current emissions pathway.
- 3.79** TTT sets out goals, actions and roles in delivery across the full range of potential activities and actors, both public and private sector, under various topics. Eight priority action areas are identified: the natural environment, built environment, transport, economy, community and coast, food, Te Puāwaitanga ō te Tātai, and energy and industry. The priority action areas were selected to focus on the areas where Aucklanders can have the greatest impact to reduce emissions and adapt

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83 Tyler at [4.29] and [4.30]. TTT is at MT1-0511.

84 TTT, page 6 (MT1-0516).

85 Based on the evidence of Ms Tyler at [4.28] to [4.45].

to climate change. TTT explains that Auckland's emissions need to peak and then rapidly decline to move onto a decarbonisation pathway.

**3.80** As an input into TTT, emissions modelling was carried out using the CURB Tool (with some additional bespoke modelling to reflect the Auckland context).<sup>86</sup> CURB was developed by the World Bank, in partnership with C40 cities and others, to enable cities to model climate action using city specific data.

**3.81** As TTT noted, CURB uses generic variables and estimation of outcomes rather than projecting the impacts of specific investments or policies, for example construction of a rapid transit line or changes to land use policies.<sup>87</sup> This reflects that unlike the RLTP, the purpose of TTT is not to identify, and then prioritise, particular projects or investments (whether in the transport sector or others).<sup>88</sup>

**3.82** Mr Bunn gives a more detailed explanation of the differences between the CURB modelling and the Macro Strategic Model (**MSM**) modelling used for the purposes of the RLTP.<sup>89</sup> In summary:

(a) CURB is not a transport model. It does not “test” the results from potential interventions. Rather, its outputs directly reflect its input assumptions. These inputs assumed certain mode change and vehicle fleet electrification and efficiency improvements, and were determined based on what was needed to reach the transport sector’s share of the overall emissions reduction target;

(b) CURB is valuable because it identifies, at a very high level, the scale of change from key variables needed to reach a particular outcome. However, it does not identify which projects, services or other interventions can actually deliver the assumed change in key variables;

(c) The CURB results provide an indication of the kinds of shifts that would be required to achieve emission reduction targets,

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86 TTT, pages 43 (MT1-0553) and 51 (MT1-0561).

87 TTT, page 51 (MT1-0561).

88 Tyler at [4.35].

89 Bunn at [117] to [123].

but without constraints such as funding. CURB also involved more ambitious (as compared to MSM) assumptions for vehicle technology change (accounting for nearly 70% of the expected emissions reduction). However, the modelling used for the RLTP was more “real world”, showing the scale of changes expected from key interventions when operating within the constraints of the existing land use pattern, transport network and, in particular, funding availability.

**3.83** The CURB modelling was used to develop an “indicative emissions pathway” to achieving the goal of reducing net emissions by 50% by 2030.<sup>90</sup> This included modelled actions for bringing about the necessary emissions reductions. This modelling was to illustrate one possible way of meeting the challenge.

**3.84** This indicative pathway includes a modelled 64% reduction in transport emissions. The modelled actions that were used to develop this possible decarbonisation pathway included:

- (a) remote working and reduced trip lengths - around 10% of the emissions reduction;
- (b) a shift to public transport, walking and cycling – 14% emissions reduction;
- (c) switching to electric and zero emissions vehicles (passenger, commercial and freight) – 55% emissions reduction;
- (d) increasing fuel efficiency of vehicles; and
- (e) increasing transport orientated developments.<sup>91</sup>

**3.85** This list includes both matters over which the RLTP could have some influence, such as the shift to public transport, walking and cycling; and others (such as commercial and freight vehicles becoming zero emission, or wider increases in the fuel efficiency of vehicles) that are beyond the scope of the RLTP.

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90 TTT, page 51 (MT1-0561).

91 TTT, page 51 (MT1-0561).

**3.86** TTT then sets out a 'precautionary' adaptation approach for Auckland:<sup>92</sup>

We must plan for uncertainty, taking a precautionary approach and preparing for the impacts of a continued 'business as usual' emissions pathway.

This does not mean we are taking every adaptation pathway now.

...

Our plan takes a precautionary approach, preparing for the potential of a continued increase in greenhouse gas emissions.

The precautionary approach applies when a potentially serious risk exists alongside scientific uncertainty. This allows us to consider some risks as unacceptable not because their occurrence is probable, but because their consequences may be severe or irreversible.

This does not mean that we are reacting to a 3.5 degrees Celsius warmer world right now, but that we are planning and building resilience, so that we are ready if this happens.

Our approach to flexible planning and adaptation, in the face of uncertainty and changing conditions, is called dynamic adaptive policy pathways planning (DAPP).

**3.87** In relation to the transport priority on pages 81 to 87, TTT's goal is "a low carbon, safe transport system that delivers social, economic and health benefits for all". TTT states that the "highest priority is reducing emissions generated by light passenger vehicles and commercial vehicles, given these generate about 80 per cent of on road emissions". It notes that between 2009 and 2019, the amount and type of private travel undertaken remained relatively stable, but that Auckland's population increased by 220,000 during that period. It records the phenomenon of short vehicle trips undertaken by private vehicles, and a decrease over time in the number of persons per vehicle. Further, it notes that the slow uptake of fuel efficient vehicles had been affected by a lack of regulation influencing decision-making and the high purchase price of electric vehicles.

**3.88** Eight action areas are identified to deliver this priority area:

- change our travel options;
- improve public transport;
- use of bicycles and micro-mobility devices;
- improve walking infrastructure;
- shift to low or zero emissions vehicles;
- make heavy freight more efficient;

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92 TTT, pages 53 (MT1-0563) and 57 (MT1-0567).

- manage risks to transport network; and
- Te Puāwaitanga o te Tātai and transport.

**3.89** It also acknowledges that there needs to be significant changes to land use and growth to achieve the modelled transport emissions reduction pathway.

**3.90** TTT makes clear that to meet the climate goals everybody needs to act together: through individual action, collective action and partnerships.<sup>93</sup> Roles and partnerships are outlined for the Council group, central government, mana whenua, business, and individuals (among others). The actions various partners need to take are also specified. For example, the Council group is described as needing to ensure its regional systems support and drive transition, advocate for change, work in partnership across sectors, support communities and civil society in progressing climate action, demonstrate leadership within its own operations and activities and partner with mana whenua. As another example, central Government needs to set the national level context and put in place regulatory and policy drivers to shape a just transition to a carbon neutral and climate resilient future, invest in key areas, and provide national guidance to support the regulation and policy requirements.

**3.91** The scope of the specific roles is then described. For example, the Council is described as having a broad range of roles in the delivery of TTT, some are areas of direct control whereas others require leadership, advocacy and influence.<sup>94</sup>

**3.92** Finally, TTT includes an implementation plan which gives an overview of the actions within the plan, roles and timeframes.<sup>95</sup> For example, for the transport action "changing the way we travel", the lead for the sub-action of encouraging the use of public transport, walking and micro-mobility devices is specified as community and business. The Council's role is described as lever and influence and a number of partners are identified (AT, central Government, other government sector and Not For Profit

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93 TTT, page 117 (MT1-0627).

94 TTT, page 119 (MT1-0629).

95 Beginning on page 130 (MT1-0640).

Partners). For some action areas, the table sets out indicative targets aligned to the decarbonisation pathway (where modelled).

**3.93** TTT was adopted by the Council’s Environment and Climate Change Committee on 21 July 2020.<sup>96</sup>

#### **4. WHAT DOES THE GPS REQUIRE?**

**4.1** The GPS 2021 contains a range of considerations. In broad terms, it consists of:

- (a) Statements of Strategic Direction in Part 2, which are intended to provide guidance to those who are planning, assessing and making investment decisions in relation to the NTLF.<sup>97</sup> That content is expressed in aspirational and implicitly political terms;
- (b) Investment content in Part 3 which is generally more specific and directive. This includes the funding available, borrowing arrangements, and the identity and funding ranges of the activity classes.

**4.2** As noted, the GPS is not a legislative instrument. As a starting proposition there is no requirement for it to be interpreted by reference to the same legal principles as legislation. Plainly it should be read purposively to the extent that is possible in a document of this kind, and with an eye to ensuring consistency both internally within the document, and consistent with its external context. But it is not drafted or presented in a “legislation like” way. It is broad and relatively untechnical.

**4.3** Part 2 of the GPS consists of:

- (a) four ‘Strategic Priorities’: safety, better travel options, improving freight connections, and climate change;<sup>98</sup>
- (b) five key outcomes adopted from the Government’s “Transport Outcomes Framework”: inclusive access, healthy and safe

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<sup>96</sup> Tyler at [4.28].

<sup>97</sup> GPS, page 14 at [52] (JC1-0018).

<sup>98</sup> GPS, section 2.1, page 19, figure 1 (JC1-0017).

people, economic prosperity, resilience and security, and environmental sustainability;<sup>99</sup>

(c) each Strategic Priority has an identified “Primary Outcome” but also additional “Co-benefits” arising from other outcomes. So for example:

(i) in the case of the Safety Strategic Priority, the Primary Outcome is “Healthy and Safe People” and the Co-benefits are inclusive access, economic prosperity, and resilience and security;<sup>100</sup> and

(ii) in the case of the Climate Change Strategic Priority, the Primary Outcome is “Environmental Sustainability” and the Co-benefits are inclusive access, healthy and safe people, and resilience and security.<sup>101</sup>

(d) for each Strategic Priority:

(i) a high level statement of what will be delivered by 2031 (eg “a safer land transport network” and “reduced greenhouse gas emissions”);

(ii) “How to deliver these outcomes” – which in the case of the Strategic Priority Better Travel Options includes “Deliver ATAP”.<sup>102</sup>

(e) a graphic depicting how the Ministry of Transport (**MoT**) will monitor progress in achieving the GPS 2021 Strategic Priorities.

**4.4** The strategic priorities do not comprise results or a Ministerial statement of expectations. They are described as tools to “guide investment” towards identified outcomes.

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99 GPS, section 2.1, page 20, figure 2 (JC1-0018).

100 GPS, page 16 section 2.2 (JC1-0020).

101 GPS, page 22 section 2.5 (JC1-0026). Although it is anticipated that a move which makes active and micro modes more attractive will reduce GHG emissions, this is not a stated Co-benefit. See GPS at page 17 second column last bullet point (JC1-0021) and page 25 (JC1-0029).

102 GPS, page 19 second column, first bullet point (JC1-0024).

**4.5** Section 3 sets out the investment in land transport which the Government wishes to be used to deliver the Strategic Priorities. As noted, this is generally more directive in nature. This consists of:

- (a) an indication of the total funding by range likely to be in NLTF based on the Government's projected revenue;<sup>103</sup>
- (b) the Activity Class Framework.<sup>104</sup> This consists of eleven activity classes and the minimum and maximum funding available for each one.<sup>105</sup> Funding must be allocated by WK within these ranges.<sup>106</sup>
- (c) information on the specific Government Commitments (ATAP, LGWM, Road to Zero);<sup>107</sup>
- (d) information on the direct Crown Investments funded through appropriations.<sup>108</sup>
- (e) a statement of Ministerial Expectations<sup>109</sup> as to the important behaviours and actions required of WK to give effect to GPS 2021 (with more detail to follow in the annual letter of expectations). This includes an expectation that WK will help deliver ATAP and the other Government Commitments.<sup>110</sup>

**4.6** The GPS explains that the eleven Activity Classes:<sup>111</sup>

provide signals about the balance of investment across the GPS. Funding is divided into activity classes as a means of achieving the results specified in GPS 2021.

**4.7** The overall expectation is that transport investment decisions will seek value for money by being effective, efficient and aligning with the indicated strategic direction. As to value for money, the Government Commitments "shows where the Government deems alignment to the

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103 GPS, page 31 (JC1-0035).  
104 GPS, page 32 at [111] (JC1-0036).  
105 GPS, page 35 (JC1-0038).  
106 GPS, page 31 at [108] (JC1-0035).  
107 GPS, page 36 (JC1-0039).  
108 GPS, page 37 (JC1-0040).  
109 GPS, page 41 (JC1-0044) and following.  
110 GPS, page 41 at [148] (JC1-0044).  
111 GPS, page 32 at [119] (JC1-0036)



strategic priorities to be strongest”.<sup>112</sup> With that in mind, the Activity Classes are set both with respect to content and funding so as to enable the Government Commitments to be delivered.<sup>113</sup>

- 4.8** GPS 2021 is silent as to the weight to be given to the strategic priorities. While the GPS 2021 acknowledges that climate change is a particular challenge that the Government is working to tackle<sup>114</sup> it does not require that the “climate” strategic priority be given greater prominence or weight than the other strategic priorities.
- 4.9** Nor is there any basis upon which to infer or ‘read in” that the climate change strategic priority is pre-eminent.
- 4.10** First, if Minister Tywford had intended that to be the case, he could have said so in the GPS. He did not.<sup>115</sup>
- 4.11** Secondly, this would be inconsistent with the recognition on the face of the GPS that some projects which give effect to other strategic priorities may not result in a material reduction in GHG emissions. This is expressly recognised in the context of the Safety Strategic Priority and the Road to Zero Activity Class.
- 4.12** Further, such an interpretation would be inconsistent with the Activity Class Framework itself. The GPS sets minimum and maximum funding ranges for the various activity classes, and WK is required to allocate funding within that range.<sup>116</sup>
- 4.13** While many of the activity classes are directed at activities which it could be assumed will lead to a reduction in GHG emissions (for example Public Transport Infrastructure, Walking and Cycling Improvements, and Public Transport Services) that is not true of all activity classes. The GPS also requires funding to be allocated to State Highway Improvements, State Highway Maintenance, Local Road Improvements, and Local Road Maintenance. The activity classes to which most funding is allocated are,

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112 GPS, page 29 at [87] (JC1-0033).

113 GPS, page 36 at [130] (JC1-0039).

114 GPS, page 14 at [53] (JC1-0018).

115 The Government's position during ATAP (discussed below) indicated a high priority for supporting growth, including in greenfield locations such as Drury - see e.g. Bunn at [145] and [146].

116 Subject to certain limited exceptions which are not relevant here.

in descending order: State Highway Improvements, State Highway Maintenance, Road to Zero, Public Transport Infrastructure, and Local Road Maintenance.<sup>117</sup>

**4.14** The expert evidence adduced by the applicant criticises the RLTP for including activities such as state highway maintenance and local road maintenance.<sup>118</sup> But the reality is that this is what the GPS contemplates and expects in its setting of activity classes and funding ranges.

**4.15** It is also consistent with the statement in the GPS in the context of strategic direction that:<sup>119</sup>

A large proportion of land transport will continue to be focussed on maintaining the transport system at acceptable levels of service, taking account of the strategic priorities in GPS 2021.

**4.16** The obligations which the applicant seeks to impose on the RTC via the RLTP depend upon establishing that the climate change strategic priority has pre-eminence, ahead of the other strategic priorities. A cursory read of the GPS shows that this cannot be the case.

## **5. FACTUAL BACKGROUND**

### **Preparation of the RLTP**

**5.1** The process by which the RLTP was prepared is described in the evidence of Mr Bunn and Ms Chetwynd. The process itself is not in dispute, notwithstanding that in reply evidence witnesses for AAA, particularly Ms Ghanta, suggest that a different or better process could or should have been followed.

**5.2** Similarly, the process by which the Council's Planning Committee resolved to endorse the RLTP is described in the evidence of Ms Chetwynd and Ms Tyler. Again, it is not in dispute.

**5.3** However, the RLTP development process is *mischaracterised* in the applicant's submissions, most significantly through the assertion that all

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117 The upper figure in the funding range has been used. If the lower figure is used the "top five" remains the same, but Road to Zero has the highest allocation and Public transport infrastructure the lowest: GPS, page 35 (JC1-0038).

118 Metcalfe at [24]; All Aboard Submission on the draft RLTP at [35]-[36] (NJL1-99).

119 GPS, page 6 at [11] (JC1-0010).

significant decisions regarding the RLTP investment programme were taken before the RLTP was prepared, through the ATAP process.<sup>120</sup> This is incorrect: as explained below, ATAP was essentially the development phase of the RLTP, but the two processes were *overlapping*, rather than sequential. Appendix A to these submissions show the overlapping timeframes for three related processes: preparation and approval of the RLTP, development and agreement of ATAP, and the publication of the GPS.

**5.4** Mr Bunn describes how the starting point for development of the 2021 RLTP was the update or “refresh” of ATAP over the course of 2020 and 2021.<sup>121</sup>

**5.5** He describes the “Future Connect” project involving AT, Auckland Council, WK and the MoT, which summarised the objectives, problems and opportunities for development of Auckland’s transport network at a high level, as an input into upcoming ATAP/RLTP processes. The following objectives, based on the 2018 ATAP and RLTP objectives which in turn reflected the Auckland Plan and earlier GPS documents, were proposed by officials:<sup>122</sup>

- (a) Enabling and supporting Auckland’s growth and the quality compact urban approach;
- (b) Accelerating better travel choices for Aucklanders;
- (c) Better connecting people, places, goods and services;
- (d) Improving resilience and sustainability of the transport system;
- (e) Making Auckland’s transport system safe by eliminating harm to people.

**5.6** Mr Bunn explains that although ATAP was not a statutory document, its signatories expected it would have a close relationship with the statutory documents: inform and be consistent with the GPS; and once agreed, be

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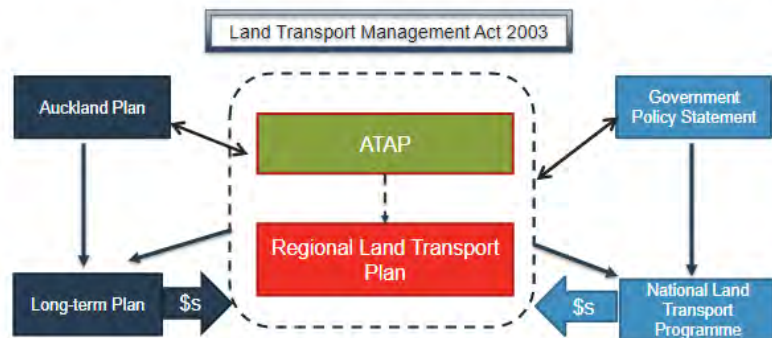
120 For example at [1.19(a)] of the applicant’s submissions.

121 Bunn at [21].

122 Bunn at [34].

reflected in the RLTP and the NLTP. ATAP's relationship with other parts of the land transport planning framework is shown in the following slide which was provided to the AT Board on 8 July 2020:<sup>123</sup>

## Strategic Context for 2021-31 RLTP



Expectation that 2020 ATAP Refresh will inform the statutory processes of each agency, including 2021 RLTP

**5.7** The purpose of the 2020 ATAP update, as set out in the terms of reference, was to “refresh the 2018 package in light of a number of emerging considerations”, which included:

- (a) the significant impacts of COVID-19 on Auckland Council and central government revenue streams, taking into account any economic stimulus packages announced by government within the timeframes of the ATAP 2020 update;
- (b) recent transport investment in Auckland through the NZUP;
- (c) climate change and mode shift as increasingly significant policy considerations for both Auckland Council and central government;
- (d) the need to provide direction for the upcoming round of statutory planning processes including the RLTP, Council's Long-term Plan (**LTP**), the GPS, and the NLTP.

<sup>123</sup> Bunn at [24].

- (e) emerging spatial priorities.<sup>124</sup>

**5.8** Formal ATAP development began with agreement of the 2020 Terms of Reference (**ToR**) in May 2020, in which ATAP's objectives were updated and finalised as follows:<sup>125</sup>

The prioritisation process is defined by the shared central government and Auckland Council objectives for transport in Auckland, which are:

- enabling and supporting Auckland's growth through a focus on intensification in brownfield areas and with some managed expansion into emerging greenfield areas
- accelerating better travel choices for Auckland
- better connecting people, places, goods and services
- improving the resilience and sustainability of the transport system, and significantly reducing the greenhouse gas emissions it generates
- making Auckland's transport system safe by eliminating harm to people
- ensuring value for money across Auckland's transport system through well targeted investment choices.

In addition to the objectives above, the focus of the update will be on climate change, mode shift, emerging brownfield and greenfield priorities, and post COVID-19 recovery. The update will also take into account broader priorities outlined in relevant statutory documents such as the Auckland Plan and the draft GPS.

**5.9** The draft 2021 GPS was published in March 2020. As explained by Mr Bunn, the main changes in the draft 2021 GPS compared to its 2018 predecessor were:<sup>126</sup>

- (a) a sharper focus on better travel options, which was consistent with ATAP's 'better travel choices' objective;
- (b) a much stronger focus on environmental outcomes, particularly greenhouse gas reductions; and
- (c) the addition of a new objective - improving freight connections.

**5.10** Mr Bunn's evidence describes the interrelationship of the draft 2021 GPS and ATAP, and consistency between them. This was reflected in the

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124 Bunn at [38].

125 See HB1-049.

126 Bunn at [44].

draft 2021 GPS noting that the Government “expected forthcoming NLTPs to meet investment expectations, including a \$16.3 billion commitment to ATAP”; and that the activity classes in the GPS had been set “to deliver the results the government wishes to see from ATAP”.<sup>127</sup>

**5.11** Advice confirming alignment between ATAP and GPS objectives was given to the AT Board on 20 July 2020. Mr Bunn explains that because the final 2021 GPS, published in September 2020, was materially unchanged from the draft, it did not warrant any change to the ATAP/RLTP objectives or process.<sup>128</sup>

**5.12** The following table sets out the agreed ATAP objectives alongside the equivalent strategic priority and primary outcome in the GPS:

ATAP OBJECTIVE <sup>129</sup>	GPS STRATEGIC PRIORITY	
	<i>Strategic priority</i>	<i>Primary outcome</i>
Enabling and supporting Auckland’s growth through a focus on intensification in brownfield areas and with some managed expansion into emerging greenfield areas		
Accelerating better travel choices for Auckland	Providing people with better travel options to access places for earning, learning, and participating in society.	The primary focus of this priority is to improve people’s transport choices in getting to places where they live, work and play, and to make sure our cities and towns have transport networks that are fit for purpose and fit for the future.
Better connecting people, places, goods and services	Improving freight connections to support economic development.	Well-designed transport corridors with efficient, reliable and resilient connections will support productive economic activity.
Improving the resilience and sustainability of the transport system, and significantly reducing the greenhouse gas emissions it generates	Transforming to a low carbon transport system that supports emissions reductions aligned with national commitments, while improving	Investment decisions will support the rapid transition to a low carbon transport system, and contribute to a resilient transport sector that reduces harmful emissions, giving effect to the emissions reduction target the Climate Change Commission recommended to

127 Bunn at [46].  
 128 Bunn at [49].  
 129 Bunn at [39]; Chetwynd at [77].

ATAP OBJECTIVE <sup>129</sup>	GPS STRATEGIC PRIORITY	
	<i>Strategic priority</i>	<i>Primary outcome</i>
	safety and inclusive access.	Cabinet until emissions budgets are released in 2021.
Making Auckland's transport system safe by eliminating harm to people	Developing a transport system where no-one is killed or seriously injured.	The primary focus of this priority is to develop a transport system that advances New Zealand's vision that no-one is killed or seriously injured while travelling. New Zealand roads will be made substantially safer.
Ensuring value for money across Auckland's transport system through well targeted investment choices		

**5.13** As the above table shows, there is very clear alignment between the ATAP objectives and GPS strategic priorities in relation to:<sup>130</sup>

- (a) reducing GHG emissions;
- (b) safety; and
- (c) providing better travel choices.

**5.14** While two of the ATAP objectives (“enabling and supporting Auckland’s growth” and “ensuring value for money”) do not have direct equivalents in the GPS, they do relate to the effectiveness and efficiency of the transport system.<sup>131</sup>

**5.15** Mr Bunn’s evidence describes the methodology for developing the ATAP/RLTP investment package as involving involved a number of workstreams. This included a “climate change” workstream to determine how a climate change lens could be applied to addressing ATAP projects; and a “prioritisation and evaluation” workstream which sought to identify and agree the existing (“baseline”) projects and programmes that should be included in the 2021 ATAP/RLTP.<sup>132</sup>

130 See also Chetwynd at [78].  
131 LTMA, sections 3 and 14(a)(ii).  
132 Bunn at [50].

**5.16** Mr Bunn describes how the baseline programme that was finally agreed, after a robust process of scrutiny by the participating agencies, included discretionary and non-discretionary components; and more specifically comprised the following elements:<sup>133</sup>

- (a) projects which were already committed, or which could not practically or legally be abandoned or altered;
- (b) operating costs, which were necessary for network maintenance and operations or public transport services, and therefore largely non-discretionary;
- (c) projects in the NZUP programme, which was funded by Crown allocations and not available for reallocation;
- (d) projects or programmes considered to be essential to meeting ATAP policy objectives – these were overwhelmingly related to safety, mode-shift and/or climate change objectives, such as the City Rail Link and its associated infrastructure, the Eastern Busway and key elements of the cycling programme; and
- (e) projects related to the renewals programme, which were necessary for longer-term operation of the entire transport network, and therefore met connectivity related objectives, in a way that also supported efficiency objectives through long-term value for money.

**5.17** The applicant's submissions mischaracterise this process as AT starting "from the flawed premise that 93% of the projects and programmes were mandatory, and that it had no choice but to include them in the investment programme".<sup>134</sup>

**5.18** Mr Bunn states in his evidence that baseline projects and programmes "*for practical purposes were mandatory, and therefore there was no realistic option but to include them in the programme*".<sup>135</sup> However, ATAP participants were clearly deciding what projects and programmes to

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133 Bunn at [67].

134 Applicant's submissions at [1.19(b)].

135 Bunn at [53(a)].



include within the baseline, and there can be no suggestion that when doing so, projects and programmes were not properly assessed against ATAP objectives and the GPS. Mr Bunn states at paragraphs 57 and 58 of his evidence:

The ATAP baseline work involved representatives from MoT, AT, Waka Kotahi-NZTA, Auckland Council and KiwiRail considering projects against a set of criteria, to determine whether they qualified as part of the baseline. Initially the baseline was limited to those projects that had a formal contract or agreement to undertake their relevant project phase – such as design or construction; and those projects with a formal political commitment to allocate specific funding – principally NZUP.

However, after some discussion, the criteria were widened to include programmes and projects that were regarded as 'essential' to achieving the ATAP policy objectives. For example, AT had a number of programmes, such as the safety programme, that were not 'committed' in the formal sense, but were nevertheless so important that it would not adequately achieve ATAP outcomes without them.

- 5.19** Each project or programme proposed for inclusion within the baseline was “tested” by the ATAP Working Group, with larger programme elements also going to the ATAP Governance Group.<sup>136</sup> The baseline was not resolved until after October 2020, by which time the updated GPS had been finalised.<sup>137</sup>
- 5.20** Mr Bunn describes how with the baseline programme agreed at \$29.5 billion, this left approximately \$1.8 billion of ‘discretionary funding’ potentially available for new projects and programmes, and existing projects and programmes which had been excluded from the baseline.<sup>138</sup>
- 5.21** Seven different “packages” of expenditure (including “Mode shift: ‘Public Transport’, ‘Growth: Drury’, and ‘Low Operational Expenditure’) were modelled using the MSM to forecast daily CO<sub>2</sub> emissions. The difference for daily total CO<sub>2</sub> emissions between the packages ranged from between 9,587,672 kg of CO<sub>2</sub> for the ‘Growth: Drury’ scenario and 9,623,512 kg for the ‘Low Opex’ scenario - a difference of 0.37%.<sup>139</sup>
- 5.22** The recommended package was briefed to the DDC on 24 November 2020 and endorsed by the CE Governance Group on 15 December 2020.<sup>140</sup>

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136 Bunn at [59].  
137 Bunn at [59].  
138 Bunn at [68].  
139 Bunn at [81] to [83].  
140 Bunn at [87].

**5.23** Mr Bunn also describes how, from late 2018, a number of scenarios were modelled to understand the broad type and scale of interventions that might be needed to achieve large scale reductions in transport tailpipe emissions.<sup>141</sup> Modelling runs were undertaken in early 2019 testing combinations of the following variables:

- (a) Increased petrol costs associated with increases in the Emissions Trading Scheme (**ETS**) carbon price (as forecast by the Productivity Commission);
- (b) Significantly more intensive land use than Auckland Council's baseline forecasts – i.e. 90% of growth occurring within existing urban limits rather than 70%;
- (c) An increase in public transport frequency to a bus / train / ferry every five minutes on all routes – to test the effect of major reductions in 'waiting time' which is a significant deterrent to public transport use;
- (d) Zero fares on public transport;
- (e) Road pricing, in the form of a 69 cents per kilometre charge for the use of motorways and main arterials during the peak periods.

**5.24** The modelling showed how, with the exception of pricing, individual interventions had only a limited effect on emissions. When all interventions together were modelled, the combined impact was forecast as a 6% reduction in emissions in 2028 compared to a scenario without the interventions - with the bulk of the change coming as a result of the road pricing intervention. With the interventions in place, total emissions were forecast to reduce by 1% between 2016 and 2028.<sup>142</sup>

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141 This modelling work was separate to ATAP and RLTP development although it influenced AT's thinking for those purposes.  
142 Bunn at [105].

- 5.25** Modelling undertaken by the OECD in 2019 and 2020 also reinforced AT's findings that aggressive road pricing schemes would be necessary to achieve large-scale short-term reductions in emissions.<sup>143</sup>
- 5.26** Mr Bunn also discusses further modelling undertaken in March 2021 to understand the emissions effect of a toll of \$1 per kilometre applying all day across the Auckland network, which would be a higher and more comprehensive charge than anything previously considered in Auckland. The intention was not to *propose* a pricing scheme, but instead to *understand* and then illustrate, in a simple way, the scale of the challenge in Auckland's context. The \$1 per kilometre scenario yielded a 50% reduction in vehicle kilometres travelled and a 43% reduction in CO<sub>2</sub> emissions compared to an unpriced scenario in 2031.<sup>144</sup>
- 5.27** Mr Bunn describes how the modelling illustrated the kind of impact which any demand management based intervention – such as road space removal, traffic calmed neighbourhoods or other behavioural change programmes - would need to have in order to reduce overall travel. It showed that to achieve a 40% reduction in emissions, a demand management intervention would need to have an effect equivalent to charging drivers \$1 per kilometre. The results of the modelling of the \$1 per kilometre charge were reported verbally to the RTC on 23 March 2021.<sup>145</sup>
- 5.28** A draft RLTP programme which was derived from ATAP was prepared and considered by the RTC at a workshop in late January 2021. At that workshop, the RTC agreed that the RTC Chair would write to the Mayor to propose that a set of smaller projects and programmes, which had to that point been omitted from the ATAP programme, be included. These included a \$100m increase to the Minor Improvements Programme, and a \$30m allocation to enable the purchase of electric ferries.<sup>146</sup>
- 5.29** Cabinet considered the ATAP programme on 22 February 2021.<sup>147</sup> The Cabinet paper covered the expected climate outcomes from the ATAP programme in detail, including the modelled emission results from the

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143 Bunn at [116].

144 Bunn at [125].

145 Bunn at [128].

146 Bunn at [142].

147 Bunn at [145].

ATAP programme along with the forecast impact of expected policy shifts, such as the clean car standard and biofuels mandate. Cabinet agreed to the programme, subject to amendments to the programme to increase funding for projects supporting housing.<sup>148</sup>

**5.30** Also on 22 February 2021, the Minister of Transport wrote to the Mayor of Auckland expressing strong support for the ATAP programme and highlighting its consistency with emissions reduction goals. The letter said:<sup>149</sup>

. . . the modelling shows that the proposed programme would result in a 13 percent decline in emissions per person over the next decade, achieved through a 91 percent increase in public transport trips and a 43 percent increase in walking and cycling trips. This shows that the proposed ATAP investments will offer Aucklanders better transport choices and that the package has a meaningful impact on emissions.

. . .

These decarbonisation measures are a positive start and for the first time, puts us on track to reduce transport sector emission in Auckland. However, more clearly needs to be done. It is important that the proposed ATAP package proceeds in order for a range of important investments that will give Aucklanders greater transport choice to proceed. Once the package is in place, I am keen to engage with Auckland Council and Auckland Transport further to consider initiatives that we can co-operate on to advance our shared ambition to decarbonise Auckland's transport system.

**5.31** Further discussions between the Minister and Mayor agreed a series of changes to the programme including those requested by the RTC.<sup>150</sup> As Mr Bunn explains, with these refinements complete, the agreed ATAP programme essentially became the draft RLTP programme.<sup>151</sup>

**5.32** The RTC received the draft RLTP on 23 February 2021. At a workshop on 25 February 2021, the RTC indicated that it was happy for the draft RLTP to go to the Planning Committee for endorsement.

**5.33** On 11 March 2021, the Council's Planning Committee unanimously endorsed ATAP and the draft RLTP for consultation.<sup>152</sup> The following day, 12 March 2021, the ATAP programme was formally announced by the Minister and Mayor.

**5.34** On 23 March 2021 the RTC approved the draft RLTP for consultation.<sup>153</sup>

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148 Bunn at [145].  
149 Bunn at [158] and [159].  
150 Bunn at [146].  
151 Bunn at [149].  
152 Bunn at [165].  
153 Bunn at [166].

- 5.35** Public consultation on the draft RLTP took place between 29 March and 2 May 2021 using the special consultative process.
- 5.36** The RTC deliberated on submissions, including the submission from AAA, in workshops on 10 May and 24 May 2021.<sup>154</sup>
- 5.37** The RTC recommended approval of the final RLTP to the AT Board on 18 June 2021.<sup>155</sup> The RTC specifically resolved that it was satisfied that the RLTP complied with the LTMA, including that it:
- (a) contributed to the purpose of the LTMA: and
  - (b) was consistent with the GPS.<sup>156</sup>
- 5.38** The Planning Committee endorsed the final RLTP on 24 June 2021.
- 5.39** The Board approved the RLTP on 28 June 2021.

#### *Assessment of projects and programmes*

- 5.40** AAA's submissions assert, incorrectly, that by "*its own admission Auckland Transport failed to assess any of the individual projects or programmes in the RLTP 2021 against the strategic priorities and indicators set out in the GPS 2021*".<sup>157</sup> They base that submission on a statement in AT's response to an official information request from Movement, a member organisation of the applicant, by letter dated 10 April 2021, which stated that:<sup>158</sup>

Auckland's draft RLTP has been prioritised against the objectives agreed by ATAP and is consistent with the indicative ATAP programme. Given that the ATAP programme has been agreed by Cabinet and Council we do not anticipate further assessment at a programme level against GPS indicators.

- 5.41** The reference to *further* assessment is explicable by reference to the timing of the letter (10 April 2021), by which time the draft RLTP had been

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154 Bunn at [168].

155 Bunn at [169].

156 Bunn at [176].

157 Applicant's submissions at [6.44(e)] and [5.31].

158 Letter from Auckland Transport to Christine Rose 8 April 2021 at 2 (NJL1-90).

prepared and was out for consultation. Moreover, the same letter earlier stated, in a passage not acknowledged by AAA:<sup>159</sup>

The ATAP objectives, set by the parties, were developed from both the GPS and Auckland Plan. These objectives are:

- making the transport system safe by eliminating harm to people,
  - accelerating better travel choices for Auckland
  - improving the environmental resilience and sustainability of the transport system and significantly reducing the greenhouse emissions it generates
  - better connecting people, places, goods and services
- enabling Auckland's growth through a focus on intensification in brownfields areas and with some managed expansion into emerging greenfields areas

ATAP 2021 agreed an indicative ten-year investment package to inform Auckland's RLTP. ATAP has been agreed by Cabinet and Auckland Council as being seen as delivering the best possible outcomes.

Auckland's draft RLTP is consistent with the ATAP package and therefore aligns with wider Government and Council objectives.

...

Auckland's draft RLTP has been prepared in alignment with ATAP 2021, which reflects the GPS.

**5.42** Mr Bunn's evidence is that each project and programme included in the ATAP and thereafter in the draft RLTP was individually assessed by the ATAP working group, based on evidence of project commitment, business case evidence or subject matter expert advice. Further, each was individually tested for climate impact using WK's RCAT assessment tool – as referred to in paragraph 24(a)(iii) of the section 14 Analysis.<sup>160</sup>

**5.43** As AAA's submissions note at paragraph 5.30, AAA was briefed on the ATAP package on 23 March 2021. The submissions refer to the briefing containing "*a table showing that nearly 40% of the budget was proposed to be spent on projects that would maintain or increase emissions, including road expansions, and renewals of the existing roading network*".

**5.44** With respect this description is somewhat misleading, as the table in question<sup>161</sup> showed how, using the RCAT to assess the emissions impact of different parts of the ATAP package, 60.5% of the package (RCAT

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159 Letter from Auckland Transport to Christine Rose 8 April 2021 at 1 (NJL1-89).

160 Bunn at [59] and [64]; RLTP Appendix 9 at [24(a)(iii)] (NJL2-1234). The results of the individual testing are summarised in the table at HB-100 to HB-102. RCAT (Rapid Climate Assessment Tool) is an emissions impact assessment approach, across 8 different categories of potential impact - with 1 to 3 being high-to-medium emissions reduction potential; 4 to 6 being medium-to-low emissions reduction potential; 7 being low to neutral emissions reduction potential and 8 being an emissions increase: see RCAT methodology at NJL1-0145.

161 NJL1-0075.

categories 1-6) was assessed as having either high to medium or medium to low emissions reduction potential; 31.4% of the package (RCAT category 7) was assessed as having low to neutral emissions reduction potential; and 8.3% of the package (RCAT category 8, roading expansion projects) was assessed as having the potential to increase emissions. All but one of the category 8 roading expansion projects were committed, or from central Government's NZUP (meaning they had to be included in the RLTP in due course). The largest single category of expenditure (29% of the ATAP package) was public transport opex.

**5.45** There is no basis in the LTMA, or the GPS itself, for the applicant's submission that programmes or projects had to be assessed individually and directly against GPS strategic priorities, before they were added to the draft programme. Neither the LTMA nor the GPS dictates the methodology for compiling the RLTP.<sup>162</sup>

**5.46** The legal requirement in section 14 of the LTMA was for the RTC, *before submitting the RLTP to AT for approval*, to be satisfied that it was consistent with the GPS. The RTC members<sup>163</sup> had had considerable oversight of, and direct and indirect input into, the development of ATAP and the RLTP. It is clear from the report to the RTC meeting of 18 June 2021, including the section 14 analysis, and the minutes of that meeting, that the RTC considered the contents of the RLTP and was satisfied as to its consistency with the GPS.<sup>164</sup>

## **6. FIRST GROUND OF REVIEW**

### **Approach to review**

**6.1** In *Hauraki Coromandel Climate Action Inc v Thames Coromandel District Council*, Palmer J said that decisions on climate change are subject to heightened scrutiny.<sup>165</sup> His Honour observed that: "The intensity of review

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162 The applicant's only support for its contention ([4.14] of its submissions) is [89] of the GPS (JC1-0033), but that paragraph's reference to "funding applicants" is clearly directed at the process under section 20 of the LTMA - when WK considers approval of particular activities or combinations of activities for funding from the NLTF. This decision does require an assessment of consistency with the GPS at the "activity or combination of activities" level. No such requirement is contained in section 14.

163 Through its constituent elements – members of AT's Design and Development Committee, WK and KiwiRail – as well as when meeting as the RTC.

164 Minutes of the 18 June 2021 RTC meeting (JC1-1085 to JC1-1091).

165 *Hauraki Coromandel Climate Action Inc v Thames Coromandel District Council* [2020] NZHC 3228, [2021] 3 NZLR 280 at [49].

of decisions about climate change by public decision makers is similar to that for fundamental human rights”.<sup>166</sup>

- 6.2** The applicant submits that “the nature and gravity of the challenge presented by climate change issues requires more expansive supervision by the Courts”.<sup>167</sup> The respondents make the following points in response.
- 6.3** First, Palmer J’s observations must be viewed in context. His Honour clarified that: “a label such as ‘heightened scrutiny’ does not add anything substantively different to what a court always does in conducting judicial review”.<sup>168</sup> Accordingly, nothing said in *Hauraki Coromandel Climate Action Inc* should change the way this Court approaches the legal analysis in this case.
- 6.4** Second, “heightened scrutiny” is not universally accepted. In particular, recent judgments of Cooke J have criticised the approach, considering “intensity of review” analysis to be a distraction from the central issue of whether the decision was made in accordance with the relevant legal limits.<sup>169</sup>
- 6.5** Those observations were subsequently developed in *New Zealand Council of Licensed Firearms Owners Incorporated v Minister of Police*, in which Cooke J noted that the complications involved in variable standard review and in identifying the standard or intensity to be applied in a particular case can lead a Court into error. In his Honour’s view, it distracts from the questions which are directed to the nature and extent of the power given to the decision maker and whether the decision maker has acted in accordance with that power together with any other requirements imposed by law.<sup>170</sup>

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166 *Hauraki Coromandel Climate Action Inc v Thames Coromandel District Council* [2020] NZHC 3228, [2021] 3 NZLR 280 at [50]–[51].

167 Applicant’s submissions at [6.20].

168 *Hauraki Coromandel Climate Action Inc v Thames Coromandel District Council* [2020] NZHC 3228, [2021] 3 NZLR 280 at [49].

169 *Patterson v District Court, Hutt Valley* [2020] NZHC 259 at [14]–[16]: “In every judicial review case the Court’s role is to review whether a decision is made in accordance with law. In all cases it does so in the same dispassionate way. The intensity with which it performs that task does not change. But the extent to which powers are substantively or procedurally controlled by legal limits varies considerably. It is in the nature and extent of legal controls that vary between cases, not the intensity with which the Court assesses compliance with them”.

170 *New Zealand Council of Licensed Firearms Owners Incorporated v Minister of Police* [2020] NZHC 1456 at [84]–[85].



**6.6** Third, and in any event, the challenged decisions in this case are not “climate change decisions”. *Hauraki Coromandel Climate Action Inc* concerned a decision not to adopt the local government leaders’ climate change declaration. By contrast, the statutory decisions in this case were land transport planning and funding decisions, accepting that those decisions would have implications in terms of GHG emissions. The RLTP is a land transport planning document. Accordingly, even if the Court were to accept the proposition that climate change decisions are subject to heightened scrutiny, this is not such a decision.

**6.7** To approach this case otherwise would mean that, in effect, the exercise of any statutory power which may have an indirect effect on GHG emissions or climate change would be subject to some form of additional scrutiny. That risks a significant expansion of the courts’ supervisory jurisdiction in review.

**6.8** Fourth, as Mallon J observed in *Thompson v Minister for Climate Change Issues*, while the courts have a role to play in reviewing Government action on climate, as they do for any Government action, appropriate deference is necessary on policy choices that extend beyond the Court’s constitutional limits:<sup>171</sup>

If a ground of review requires the Court to weigh public policies that are more appropriately weighed by those elected by the community it may be necessary for the Court to defer to the elected officials on constitutional grounds, and because the Court may not be well placed to undertake that weighting.

**6.9** Those comments are entirely apt. There is no objective legal criterion available to enable the court to determine the relative weight to be given to the GPS considerations (and the four strategic priorities in particular), and to determine whether the risks of climate change make it unreasonable for a particular decision (being adoption of the RLTP) to have been made. The Courts are not institutionally equipped to make such judgments.

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171 *Thompson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160 at [134].

## “Satisfied”

**6.10** Section 14 of the LTMA says that before submitting the RLTP for approval, the RTC must be “satisfied” that the RLTP:

- (a) contributes to the purpose of the LTMA;
- (b) is consistent with the GPS.

**6.11** “Satisfied” simply means that the RTC has made up its mind on the issue and come to an affirmative conclusion.<sup>172</sup> The fact that the RTC was so satisfied is not in issue. Rather, the applicant says that the RTC lacked “an adequate factual basis to be satisfied of the matter in question”.<sup>173</sup>

**6.12** That is a challenge to the factual basis for a decision and must be determined in accordance with the orthodox principles confirmed by the Supreme Court in *Bryson v Three Foot Six Ltd*:<sup>174</sup>

An ultimate conclusion of a fact-finding body can sometimes be so insupportable — so clearly untenable — as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs “in which there is no evidence to support the determination” or “one in which the evidence is inconsistent with and contradictory of the determination” or “one in which the true and only reasonable conclusion contradicts the determination”.

**6.13** The threshold for judicial intervention in factual issues is high. There are essentially two circumstances where it is permitted: where the decision-maker’s conclusion was “unsupported by *any* evidence”;<sup>175</sup> or where the decision was irrational.<sup>176</sup>

**6.14** In relation to the first circumstance, the Supreme Court has emphasised that a party “seeking to assert that there was no evidence to support a finding ... faces a very high hurdle” and that it is important that judges

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172 *R v White (David)* [1988] 1 NZLR 264, 268 (CA), applied in *New Zealand Transport Agency v Moradi* HC Auckland CIV-2009-404-2507, 26 November 2009. See also *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council* [2014] NZHC 2016, [2014] NZAR 1217 at [99].

173 Applicant’s submissions at [6.3].

174 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [26], applying *Edwards v Bairstow* [1956] AC 14 (HL); also applied in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [52]–[53].

175 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [27].

176 See explanation in *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [28], approved by the Court of Appeal in *C P Group Ltd v Auckland Council* [2021] NZCA 587 at [135].

“keep this firmly in mind”.<sup>177</sup> Identifying a factual error in the decision-making process is insufficient to warrant the Court’s wholesale intervention on the factual basis of a decision.<sup>178</sup>

It should also be understood that an error concerning a particular fact which is only one element in an overall factual finding, where there is support for that overall finding in other portions of the evidence, cannot be said to give rise to a finding on “no evidence”.

**6.15** All that is required of the respondents is to identify *some* evidence in support of the decision. Whether to accept that evidence or prefer it to other evidence (subject to irrationality) was a decision that Parliament allocated to the RTC.<sup>179</sup>

If there is some logically probative evidence or material before the Minister supporting the views adopted then it is within her power to accept that evidence, even if the Court on judicial review might itself have come to a different view on the evidence. This is simply a facet of the rule that the Court does not substitute its own determination for that of the decision-maker whose decision is being reviewed.

**6.16** As to the second circumstance, the test for irrationality is well-known, drawing from the established line of authorities following *Wednesbury*.<sup>180</sup> To give a recent articulation in a climate change context: “... a decision which is beyond the range of rational responses by different decision-makers to a given set of circumstances or information, or which is based upon flawed logic”.<sup>181</sup>

**6.17** The high threshold for judicial intervention in factual issues is a manifestation of the fundamental principle that judicial review is a means of ensuring that public bodies act within the limits of their legal powers, but it is not for the Court to intrude into the substantive merits. This is especially important when (as in this case) the merits involve the evaluation of political, social and economic choices which have been vested in the statutory decision-maker. As the Supreme Court said in *Unison Networks Ltd v Commerce Commission*:<sup>182</sup>

In this area the courts are concerned with identifying the legal limits of the power rather than assessing the merits of its exercise in any case. They must be careful to avoid crossing the line between those concepts.

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177 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [27].

178 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [28].

179 *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606 (HC) at 638 per Tipping J.

180 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

181 *Transport Action Network Limited v Secretary of State for Transport* [2021] EWHC 2095 at [13] (in the context of a similar UK challenge on climate change grounds to a decision by the Secretary of State for Transport to adopt a programme for the building or improvement of strategic roads).

182 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [54].

**6.18** The applicant relies upon *Discount Brands Ltd v Westfield (New Zealand) Ltd* for the proposition that the requirement to be “satisfied” is a “significant obligation” that demands “additional conviction and the need for some caution”.<sup>183</sup> That decision must be understood in its context. The Supreme Court emphasised that the term ‘satisfied’ was only used in the Resource Management Act 1991 in cases where there was a departure from a general approach, in that case to allow a decision to proceed without notification, thereby precluding the opportunity for public participation in the hearing or appeal of a resource consent application.<sup>184</sup> It was on account of these “significant consequences” that the Court rejected the usual approach that a decision-maker is only required to have before it “some material of probative value” to support its conclusion.<sup>185</sup>

**6.19** There are no appeal rights here. The decision to submit the RLTP was given to the RTC alone. There is no impetus for the Court to assume a quasi-appellate role, which is effectively what the Court did in *Discount Brands*. The context of the LTMA suggests that ‘satisfied’ should be given its usual meaning, as outlined above — an obligation in the nature of *Tameside*.<sup>186</sup>

**6.20** Applying the principles above, it is sufficient for a lawful decision that the conclusion reached by the RTC as decision-maker was a "permissible option",<sup>187</sup> or one that came within the "permissible field of judgment".<sup>188</sup> It is insufficient for an unlawful decision that the Court would have drawn a different inference on the facts or reached a different conclusion:<sup>189</sup>

The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.

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183 Applicant's submissions at [6.3], [6.11]–[6.14], citing *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [23] per Elias CJ.

184 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [21] and [24] per Elias CJ.

185 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [26].  
186 *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1977] AC 1014 (HL) at 1065 per Lord Diplock.

187 *Bryson v Three Foot Six Limited* [2005] NZSC 34 at [27], quoting *Piggott Brothers & Co Limited v Jackson* [1992] ICR 85 (CA) at 92.

188 *Vodafone New Zealand Limited v Telecom New Zealand Limited* [2011] NZSC 138 at [55], quoting *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Limited* [1993] 1 WLR 23 (HL) at 32-33.

189 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1064, per Lord Diplock.

**6.21** This approach was applied very recently in New Zealand in a challenge to an Order in Council made under the Epidemic Preparedness Act 2006. Such an order could only be made where the Minister was “satisfied” that certain circumstances existed (including that it was impossible or impracticable to comply with a statutory requirement because of the effects of the COVID-19 epidemic).<sup>190</sup> The statutory framing for the decision-making is therefore similar to that in the present case. The Court held that this framing “intended to reserve a field of judgment for the Minister.”<sup>191</sup> The Court referred to the “distinction between a decision maker’s correct identification and application of the relevant legal test, as opposed to the decision maker’s evaluation of the situation against the legal test”.<sup>192</sup> It held:<sup>193</sup>

The second cause of action advanced by IDEA Services fails to observe this important distinction made within the statutory text. That text does not impose objective legal preconditions on the exercise of the power. Instead it imposes requirements on the Minister. It is not open to me to assess, based on conflicting evidence, whether at the time the order was made the effects of an epidemic were, or were likely to be, such that the requirement in s 53(3) [the relevant statutory requirement] was impossible or impracticable to comply (or comply fully) with. Those are matters reserved for the Chief Executive and the Minister.

**6.22** Likewise, in the present case, section 14(a) of the LTMA does not establish objective criteria as a precondition to the RTC’s decision to submit the RLTP to AT’s Board. Instead, it reserves various matters for the RTC.

**6.23** The formulation in section 14 involves a number of concepts, all of which require evaluation by the RTC. The requirement to contribute to the purpose of the LTMA relates to the concepts of an “effective, “efficient” and “safe” land transport system.<sup>194</sup> Those concepts are within the expertise of the RTC. A degree of judgement will be required to evaluate whether a RLTP contributes to those objectives, and whether it is consistent with the GPS, which is a multifarious document.

**6.24** The RTC’s field of judgment is necessarily very wide, as it is required to form opinions based on its expertise. It is well recognised that expert bodies, such as the RTC, are afforded a degree of latitude when courts

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190 Epidemic Preparedness Act 2006, section 15(2).

191 *IDEA Services Limited v Attorney-General* [2022] NZHC 308 at [90].

192 *IDEA Services Limited v Attorney-General* [2022] NZHC 308 at [92].

193 *IDEA Services Limited v Attorney-General* [2022] NZHC 308 at [94].

194 LTMA, section 3.

are required to consider decisions within their area of expertise within the context of judicial review.<sup>195</sup>

- 6.25** The applicant alleges that the RTC breached section 14 of the LTMA because it was “not properly informed” or “had no proper or reasonable grounds to be satisfied” that the RLTP was consistent with the RLTP or contributed to the purpose of the LTMA.<sup>196</sup> The reasons why it was not properly informed are said to be “material inaccuracies, omissions and irrelevancies” in the material relied on.<sup>197</sup> The reasons why it had no proper or reasonable grounds to be satisfied are likewise based on alleged factual errors.<sup>198</sup> The challenge is therefore to the correctness of information relied on and conclusions reached by the RTC.
- 6.26** This is an invitation to the Court to consider the merits of the RTC’s decision rather than its legality. It should be resisted.<sup>199</sup>
- 6.27** There is no allegation that the RTC has misconceived or misunderstood the statutory test it was applying. In short, it asked itself the right question.<sup>200</sup> Rather, the only challenge is to the correctness or completeness of the information which it relied on, and the way in which it evaluated that material.

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195 *New Zealand Climate Science Action Group v NIWA* [2012] NZHC 2297; *Chorus Ltd v Commerce Commission* [2014] NZCA 440 at [109]–[112]; and *Major Electricity Users’ Group Inc v Electricity Commission* [2008] NZCA 536.

196 Statement of Claim at [69].

197 Statement of Claim at [70].

198 Statement of Claim at [71] to [74].

199 For a very recent example of the principle, see *MKD v Minister of Health* [2022] NZHC 67:

[57] Viewed in that way, the applicants’ challenge in the present case is of a very different order. Although it is also directed at the “lawfulness” of the provisional consent, the alleged illegality is said to lie in the factual contention that the Minister’s conclusion as to relative therapeutic value and potential risks of the paediatric vaccine was wrong, as a matter of science. It is only in the rarest of cases that this Court on review will engage with such a merits-based attack. As a matter of both law and logic, in a case where more than one view of the facts can reasonably be held, and the decision-maker has turned their mind to and applied the relevant statutory test, such a challenge cannot succeed.<sup>22</sup> A merits-based challenge will, in effect, only succeed if the impugned decision is demonstrably irrational.

[58] And here, the evidence filed by the respondents makes it clear beyond doubt that the Minister did apply the relevant statutory test and then made an assessment (based on all the expert information before him) that the therapeutic value of the paediatric vaccine outweighed the risk of injurious effect. Even accepting the expert qualifications of the applicants’ witnesses and that their contrary scientific views are arguable, there is nothing in their evidence to persuade me that it is arguable that the Minister made an error of fact of such moment that his conclusion was not one that was reasonably available to him...

200 *Secretary of State for Education and Science v Tameside Borough Council* [1977] AC 1014 (HL) at 1065 per Lord Diplock.

- 6.28** The applicant relies substantially upon post-facto expert evidence to ground its allegations of factual error. The RTC was entitled to rely on its own expert view. Judicial review, with its procedural limits on cross-examination, is not the appropriate forum for a contest of expert opinion. The courts have rightly resisted entertaining expert evidence that seeks to criticise the methodology adopted by a decision-maker.<sup>201</sup>
- 6.29** It is accepted that the RTC must have had information upon which to base its decision. The evidence shows that it had such information. Rather the applicant claims the information was incorrect, either because it was wrong or because it was incomplete. This is not accepted, but in any event, unless the applicant can show that the information was incapable of being rationally accepted by the RTC, the Court has no role enquiring into those allegations. The respondents say that in reality the applicant simply disagrees with the information relied upon by the RTC and its assessment of that information. It would have preferred that the RTC had based its decision on the perspectives it has put forward in consultation and in this proceeding. That is a challenge to the merits of the decision.

#### **Section 14 in the context of the purpose of the Act**

- 6.30** As submitted above, through amendments in 2013 the purpose of the LTMA and the core requirements of an RLTP were deliberately narrowed to exclude issues of sustainability and social and environmental considerations.<sup>202</sup>
- 6.31** Nevertheless, it is accepted that climate change considerations can be introduced into the LTMA's decision-making framework indirectly, via the GPS. In preparing the GPS the Minister must be satisfied that it contributes to the purpose of the LTMA,<sup>203</sup> however the content of the GPS is not limited to the matters set out in that purpose.<sup>204</sup> It was therefore open to the Minister to include policy content relating to emissions reduction as part of the GPS, as in fact occurred.

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201 Compare *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609, [2017] 2 NZLR 470 at [93]–[99].

202 See [3.6] to [3.12] above.

203 LTMA, section 67(1)(a).

204 LTMA, section 68.

## Consistent with the GPS

### *Meaning of “consistent with”*

- 6.32** The meaning of the term “consistent” is generally well understood, although it can have different shades of meaning in different contexts.<sup>205</sup> Synonyms might include ‘congruous’, ‘compatible’ or ‘aligns with’, but searching for a precise paraphrase is likely to be fruitless. As the courts have recognised, it is “a dangerous method of statutory interpretation to substitute words which the legislature has not in fact chosen”.<sup>206</sup>
- 6.33** More useful is considering the purpose of the obligation and the contrast with the language of the more stringent obligation on WK to “ensure” that the national land transport programme “gives effect to” the GPS.<sup>207</sup>
- 6.34** The GPS provisions were added to the LTMA by the Land Transport Management Amendment Act 2008. The purpose of the Bill which became that Act was to implement the recommendations of the *Next Steps Review of the Land Transport Sector*, which had found (amongst other matters) that central, regional, and local land transport plans were not fully aligned.<sup>208</sup> The Bill provided for “a government policy statement to set out the government’s planned investment and funding priorities for the next 3 to 6 years to provide more strategic guidance to the transport sector.”<sup>209</sup> On the Bill’s first reading, Harry Duynhoven (on behalf of the Minister of Transport) likewise described the GPS as “additional strategic guidance to the land transport sector”.<sup>210</sup>
- 6.35** The contrast with “give effect to” in section 19B confirms there is a deliberate hierarchy of standards. As the Supreme Court explained in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, “give effect to” is a stronger obligation than language involving consistency.<sup>211</sup>

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205 Compare *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1 at [10], considering the ‘previous consistent statement’ rule in s 35(1) of the Evidence Act 2006.

206 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) at 434 per Cooke P.

207 LTMA, section 19B(a)(iii).

208 Land Transport Management Amendment Bill (166-1), explanatory note page 2.

209 Land Transport Management Amendment Bill (166-1), explanatory note page 1.

210 Hansard (25 October 2007) 643 NZPD 12755.

211 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [75] per Elias CJ, McGrath, Glazebrook and Arnold JJ.



- 6.36** The term “consistent with” gives greater latitude and scope for judgment than the term “give effect to”. It is less prescriptive and can be satisfied in a greater variety of ways. Whereas WK (under section 19B of the LTMA) must be satisfied that the NLTP will give effect to the GPS, the RTC (under section 14) is only required to be satisfied that the RLTP is consistent with (i.e. compatible or aligned with) the GPS.
- 6.37** This interpretation makes sense given the regional focus of the RLTP, and its relatively limited practical effect, as compared to the national focus and effect of the NLTP. Each RLTP is simply one ingredient in the preparation of the NLTP and, as a funding document, is largely superseded by the NLTP when that document is adopted. For these purposes, it is important that the various RLTPs do not pull in opposite directions from each other, and Government policy as expressed in the GPS.
- 6.38** The NLTP, on the other hand, is the document which consolidates the investment programme nationally, and gives legal status to projects because they then qualify for the section 20 approval process. WK is in a position to take into account the GPS at a national level and produce an NLTP which positively delivers — gives effect to — the Government’s policy.
- 6.39** Given the multifaceted nature of the GPS, the requirement of consistency must mean that the RLTP is consistent with the GPS *overall*. It cannot mean absolute consistency on a sentence-by-sentence level, because the GPS itself cannot be read and understood in that granular way.
- 6.40** Further, it is the RLTP *as a whole* that must be consistent with the GPS. There is no basis in the legislation for the contention in some of the applicant’s evidence<sup>212</sup> that individual projects in the RLTP must be tested against the climate change strategic priority in the GPS, before they are included. (Nevertheless, as described above,<sup>213</sup> the projects were individually tested for their emissions reduction potential using RCAT.)

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212 Ghanta (in reply) at [36]-[38].  
213 Paragraph [5.42].

**6.41** The RTC has a broad discretion when it comes to considering whether it is satisfied that the RLTP *as a whole* is “consistent with” the GPS. In particular, the RTC is **not**:

- (a) obliged to adopt a particular approach or methodology in considering whether the RLTP is consistent with the GPS, including the climate change strategic priority;
- (b) required to include in the GPS only those activities or combinations of activities that are GHG neutral, or reduce GHG emissions, if the activities support other strategic priorities.

**6.42** The RTC was correct to conclude that the RLTP was consistent with the GPS. This consistency can be demonstrated in three ways:

- (a) in the selection of individual projects that were consistent with the ATAP objectives and GPS strategic priorities (within the constraints imposed by committed projects and the NZUP);
- (b) when the RLTP is assessed overall, on its own terms, against the strategic priorities (including the climate change strategic priority) in the GPS;
- (c) because the RLTP delivers ATAP, and the GPS says that it expects ATAP to be delivered through the LTMA land transport planning processes.

**6.43** The way in which the RTC considered the question of consistency with the GPS is transparent: it is in Appendix 9 to the RLTP itself. Although not obliged to proceed in this way, the RTC separately considered, in some detail, each of the four strategic priorities and explained why the RLTP was consistent with that outcome.<sup>214</sup>

**6.44** The applicant focuses almost exclusively on the climate change strategic priority. Consistent with the GPS being a strategic planning document

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214 It also considered both the individual projects included in the RLTP and the overall support for GPS outcomes achieved cumulatively by the projects.

and not a statute, the climate change policy position is expressed in various ways. The overall climate change priority is:<sup>215</sup>

Transforming to a low carbon transport system that supports emissions reductions aligned with national commitments, while improving safety and access.

**6.45** The primary outcome is:<sup>216</sup>

Investment decisions will support the rapid transition to a low carbon transport system, and contribute to a resilient transport sector that reduces harmful emissions, giving effect to the emissions reduction target the Climate Change Commission recommended to Cabinet until emissions budgets are released in 2021.

**6.46** The GPS does not establish or refer to a specific GHG emissions reduction target, either for the transport sector or for transport sector investment decisions. Indeed, there were (and are still) no specific emissions targets for the transport sector.<sup>217</sup> As the GPS says, the “national commitments” under the Paris Agreement are to reduce GHG emissions to 30% below 2005 levels by 2030, and under the Zero Carbon Act, the Government has set a target for New Zealand to be net zero carbon by 2050. But these are New Zealand-wide targets, across all sectors.

**6.47** The GPS recognises that the nature of transport investment decisions will have long-term implications for emissions, but places that in its broader context:<sup>218</sup>

The transition [to a low carbon system] will require combined approaches, with government, businesses, and communities all playing a part. The Government should lead because it has a range of tools available to reduce land transport emissions from regulations and standards to direct investment, urban planning requirements and incentive schemes.

**6.48** For this reason, the language of the GPS is for investment decisions to “support” or “contribute to” a transport system that reduces GHG emissions. These decisions are not expected, on their own, to achieve any particular GHG reduction target, but they should be a step in the right

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215 GPS at page 22 (JC1-0026).

216 GPS at page 22 (JC1-0026).

217 The GPS was published in September 2020. At that time the Climate Change Commission (**CCC**) had not made any emissions budget recommendations to the Government. The CCC issued its draft advice to the Government on 31 January 2021 which included overall emissions budgets (not at the sector level). The CCC’s final advice was released on 9 June 2021, again at an overall national level. The Government is due to respond to these recommendations by 31 May 2022.

218 GPS, page 23 at [69] (JC1-0027).

direction.<sup>219</sup> This recognises the polycentric nature of the issue and the fact that investment decisions cannot be considered in isolation from other factors impacting on emissions. It also recognises that the emissions reduction commitments referred to in the GPS are at a national level across all sectors and not at the regional transport level.<sup>220</sup>

- 6.49** Contrary to the applicant’s submissions, there is no standalone obligation to “give effect to” the emissions reduction target.<sup>221</sup> The language used in the GPS is “*giving* effect to” (emphasis added). That is not directive language.<sup>222</sup> Meeting the emissions reduction target is intended to be the consequence or outcome of the obligations to “support the rapid transition to a low carbon transport system” and “contribute to a resilient transport sector that reduces harmful emissions”. That again reflects that the emissions reduction commitments are national-level targets, and that a range of interventions will be necessary to achieve the overall emissions reduction.
- 6.50** The GPS does not specify or quantify the extent of the support or the contribution in any way. Those terms are minimally directive and allow a degree of flexibility. There must be *some* support and *some* contribution, but there is a spectrum of measures that could be consistent with those obligations. That makes sense, as it permits balancing of the climate change strategic priority with the other strategic priorities contained in the GPS.
- 6.51** The applicant’s submission that the strategic priorities in the GPS can never “pull in different directions” and do not require weighing up or trading off is misconceived.<sup>223</sup> The submission relies upon its evidence that the four strategic priorities *can* be delivered to by the same interventions.<sup>224</sup> The existence of *some* measures of that kind is beside the point. There will of course be many other measures that support one or two strategic objectives (possibly to a greater magnitude than the measures the applicant refers to) but are inconsistent with another of the

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219 In this regard, see the Ministry of Transport Green Paper Hīkina te Kohupara (HB1-130); Bunn at [189] to [198].

220 When adopting the NLTP, WK must give effect to the GPS and so the climate change implications of land transport emissions can be considered then, at a national level.

221 Applicant’s submissions at [1.8], [4.31(b)], [5.21] and [6.36].

222 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [129] per Elias CJ, McGrath, Glazebrook and Arnold JJ

223 Applicant’s submissions at [4.31(a)].

224 Applicant’s submissions at [4.17]–[4.22].

strategic objectives. The GPS does not require every measure to meet every strategic objective (for example, it provides for state highways improvements which may be less compatible with the climate change strategic priority; and walking and cycling improvements which may contribute little to the improving freight connections priority). Such a requirement would unduly narrow the range of options available to the RTC when preparing the RLTP.

**6.52** There is no basis for the applicant’s submission that, in order to be consistent with the GPS, the RLTP “had to make the greatest contribution it could to reducing transport emissions and meeting the Climate Change Commission’s target.”<sup>225</sup> That would impermissibly elevate the climate change strategic priority above the other GPS priorities and eliminate any room for trade-offs, balancing and discretionary judgement.

**6.53** The applicant accepts, as it must, that:<sup>226</sup>

- (a) investment in transport infrastructure and services is not the only available lever to reduce emissions (others include road pricing, parking management, and incentives to purchase low emissions vehicles); and
- (b) transport investment decisions will not, on their own, deliver the emissions reductions necessary to achieve national or Auckland GHG reduction targets, and there needs to be other policy measures as well.

**6.54** That being the case, in order to be able to make its case that the RLTP does not “do enough”, the applicant seeks to introduce into the GPS a qualitative requirement against which the RLTP’s contribution can be measured. This is its “greatest contribution it can make” test. But the GPS simply does not say that.

**6.55** The RTC was correct to conclude that the RLTP was consistent with the GPS, for the reasons given in Appendix 9 to the RLTP. In particular, the RLTP *does* support and contribute to a land transport system that reduces GHG emissions. Although consistency with the GPS is not

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225 Applicant’s submissions at [6.40].  
226 Applicant’s submissions at [6.39].

measured solely by reference to the climate change strategic priority or expected emissions reductions in particular, the RLTP estimated an expected emissions reduction of 5% between 2021 and 2031, which is the period of the RLTP. This is despite an estimated population increase in Auckland of 16% over that period.<sup>227</sup> It also was in sharp contrast to the large *increases* in transport-related GHG emissions in the immediately preceding period (11% between 2009 and 2018).<sup>228</sup>

- 6.56** The applicant criticises the RTC for taking into account in its modelling factors that are likely to affect GHG emissions apart from the investment decisions themselves, such as Government interventions.<sup>229</sup> But the RLTP is a *planning* exercise: it would be artificial to ignore all reasonably expected developments — both those which would reduce emissions (such as uptake in electric vehicle use), and those which would increase emissions (such as population increase). The analysis supporting the RLTP does this.
- 6.57** Consistency with the GPS did not require that RLTP investments, when considered in a vacuum i.e. in isolation from other relevant factors, would produce any particular level of emissions reduction. The only requirement is that the proposed investment package overall, and when considered in the real world, would support and contribute to a transport system that reduces GHG emissions, which the RLTP package does.
- 6.58** The RLTP's consistency with the GPS's strategic priorities is supported by the fact that the GPS itself says that the land transport planning process should deliver ATAP<sup>230</sup> (and the RLTP is derived from ATAP). The GPS would not have “endorsed” ATAP if it was considered to be inconsistent with the strategic priorities in the GPS.
- 6.59** The legal issue is whether it was reasonably open to RTC to conclude that the RLTP was consistent with the GPS (including in its support for emissions reductions). The issue is not whether the level of RLTP's support for transformation to a low carbon transport system was reasonable, or whether the RLTP could have done more in that regard.

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227 Report to the RTC (18 June 2021) at [49] (JC1-0374).  
228 RLTP at 35 (NJL2-1150).  
229 Applicant's submissions at [6.31].  
230 GPS at page 36 at [129] and [130] (JC1-0039).

In that respect, however, the RLTP explains why it was realistically unable to do more in this area given other constraints and requirements for a lawful RLTP. The applicant may disagree with those reasons, or discount the weight given to strategic priorities other than climate change, but the assessment was for the RTC alone to make.<sup>231</sup>

### **Consistency with other emissions reduction targets**

**6.60** There is no separate and freestanding requirement that the RLTP be consistent with New Zealand’s Nationally Determined Contribution under the Paris Agreement.<sup>232</sup> International obligations are not binding domestically unless and to the extent that they are incorporated into domestic law.<sup>233</sup> Here, the Zero Carbon Act does not establish any relevant domestic requirements. In any event, as the Paris Agreement has a GHG reduction target applying to New Zealand as a whole, it makes no sense to talk about the “consistency” of a regional document applying to one sector only.

**6.61** The relevant requirement is that the RTC be satisfied of consistency with the GPS. The GPS does refer variously to “national commitments” and CCC recommendations, but in the more meaningful context of decision-making which “supports” these aims. The RLTP is consistent in this area as addressed above.

**6.62** In relation to the allegation that the RLTP is “wholly inconsistent” with TTT:

(a) there is no legal requirement that the RLTP be consistent with TTT. TTT is an Auckland Council document prepared under the LGA and, as explained, the Council has no formal role or responsibilities in relation to land transport planning or RLTPs under the LTMA;

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231 And the RTC was not alone in reaching this conclusion. The ATAP Working Group, the ATAP chief executives and Cabinet all endorsed ATAP (and therefore the RLTP) within the GPS context.  
232 Statement of claim at [71(d)(i)].  
233 *New Zealand Air Line Pilots’ Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 280/281 and 285; *Te Heuheu Tukino v Aotea District Maori Land Board* [1939] NZLR 107 (SC and CA) at 120; *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 224.

- (b) consistency (or not) with TTT is not relevant to or determinative of consistency with the GPS, which has no relationship with TTT;
- (c) in any event, the RLTP is not inconsistent with TTT. This is fully explained in the submissions below on the second cause of action.<sup>234</sup> As correctly set out in the RLTP,<sup>235</sup> the 64% reduction in transport emissions is a modelled input into an indicative scenario rather than a target which must be met.

### **RLTP contributes to the purpose of the LTMA**

**6.63** The applicant's submissions on the alleged breach of section 14(a)(i) of the LTMA are brief. They simply say that an investment programme that fails to make any material reduction to transport emissions is plainly not in the public interest; will not deliver social, economic and cultural wellbeing; and cannot contribute to an effective, efficient and safe land transport system in the public interest.<sup>236</sup> There is no analysis of section 3 of the LTMA.

**6.64** The purpose of the LTMA in section 3 is "to contribute to an effective, efficient, and safe land transport system in the public interest". Three points of interpretation can be made:

- (a) "in the public interest" is not stand-alone but qualifies the preceding words "effective, efficient and safe". Therefore it is insufficient to simply allege, as the applicant does, that the RLTP is not in the public interest;
- (b) the statutory purpose makes no reference to social, economic or cultural wellbeing. These considerations are not relevant to the attributes of an "efficient" or "effective" land transport system, which as earlier submitted is viewed from a funding or public investment perspective;<sup>237</sup>

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234 At [7.63] to [7.69] below.

235 RLTP (as presented to the AT Board) at page 34 (JC1-1140).

236 Applicant's submissions at [6.75].

237 The section 14 analysis addressed these considerations because they are referred to in the GPS as relevant to the statutory purpose, but "without limiting the legal interpretation of these terms" - page 47 of the GPS.



(c) "safe" in this context means safe for the users of the transport system, in the sense that danger to them is minimised. "Safety" is distinct from "health". The allegation in the statement of claim<sup>238</sup> is that transport emissions give rise to air pollution and they cause climate change, but indirect health effects or, more broadly, the effects of climate change, are not issues of "safety". LTMA references to protecting or promoting public health and ensuring environmental sustainability were removed in 2013.

**6.65** As a matter of law, the applicant's allegation is unsustainable on a proper interpretation of section 3. In any event, the modelled impacts of the RLTP investment programme show a reduction in emissions. Even if "safe" could extend to safety in the way alleged, the 2021 RLTP contributes to a safer land transport system than presently exists.

**6.66** As above, the section 14(a) requirement is for the RTC to be satisfied that the RLTP contributes to purpose of the LTMA. The section 14 analysis (Appendix 9 to the RLTP) separately addresses each of the elements, including safety, over 2 pages. Again, the legislation vests this evaluation and analysis in the RTC. It was properly and conscientiously carried out, and the conclusion reached was not unreasonable. There is no scope for the Court's intervention.

**6.67** The section 14(a) analysis did not address air pollution or the effects of global warming but it did not need to as they are not safety issues. In any event, there is no evidence that the Auckland land transport system as envisaged by the RLTP creates a "safety" issue in relation to the effects of air pollution. Global warming was more specifically addressed elsewhere in the RLTP.

### **Alleged "fundamental misconceptions" in advice to RTC**

**6.68** The applicant says that the RTC was not properly informed, failed to take into account relevant considerations and/or took into account irrelevant considerations, in the various ways particularised in paragraph 70 of the statement of claim.

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238 Statement of claim at [14].

- 6.69** In the applicant's submissions, this list has been reduced to 3 alleged "fundamental misconceptions about transport planning and policy", relating to:
- (a) the impact of transport investments on emissions;
  - (b) the impact of road capacity on congestion and emissions; and
  - (c) the effect of road space reallocation on economic, social and cultural public interests.
- 6.70** For completeness, attached as Appendix B to these submissions is AT's response to each of the detailed allegations in paragraph 70 of the statement of claim.
- 6.71** These alleged "material inaccuracies" (statement of claim) or "fundamental misconceptions" (applicant's submissions) are a small part of the overall package of information which the RTC used, in its judgment, to make essentially policy decisions. There are literally thousands of pieces of information underpinning the advice to the RTC which, together with members' involvement throughout the entire process, formed the basis for its decision. The limits on the extent to which the court may permissibly entertain challenges to the correctness of matters of fact or opinion has already been outlined and is not repeated here.
- 6.72** Without prejudice to that general position, AT responds below to the 3 specific criticisms now pursued. In each case, the applicant has zeroed in on a statement in paragraph 31 of the section 14 analysis (in some cases paraphrasing it inaccurately in the statement of claim) and then filed evidence said to demonstrate that the statement was wrong. Paragraph 31 was essentially addressing the counterfactual as to why greater emissions reductions were not readily achievable; the bulk of the reasoning for consistency with the GPS had already been covered in the preceding paragraphs of the analysis, outlining the links between RLTP projects, expected outcomes and GPS strategic priorities.

**6.73** Each of the statements was made in the context set out in the opening words of the paragraph, namely:

Forecast emissions reductions are, however, likely to be less than the CCC's emission budget in its advice to the Government. Nevertheless, as required by the Primary Outcome the investment decisions as incorporated in the RLTP do contribute to and support this outcome. In addition, as the points below illustrate, there is little ability to further reduce overall emissions through RLTP direct investment in infrastructure and services.

*The impact of transport investments on emissions*

**6.74** The full statement is:

Fundamentally, investment in infrastructure or services only has a very minor impact on total emissions, whether positive or negative. Even the biggest projects may only account for changes in the order of one percent of total. Scenario testing as part of ATAP development, along with analysis of other scenarios as background to the Te Tāruke ā Tāwhiri (Auckland Climate Plan), shows that plausible changes to the programme are unlikely to yield materially different results. External variables such as demand associated with population growth or improvements in fleet efficiency have a much larger impact on total emissions.

**6.75** Mr Bunn gives further explanation for the statement and the reasoning which underlies it, in paragraphs 205 to 226 of his affidavit.<sup>239</sup> He says the statement was based on his involvement in or exposure to Auckland transport strategic planning exercises over a 10-year period. In his evidence he says “these demonstrate only a limited shift in emissions at a regional level when changing variables related to infrastructure”.<sup>240</sup> He substantiates the comment by reference to specific examples from the studies he was involved in or had access to.

**6.76** He also makes the important point that:<sup>241</sup>

The statement was also made in the context of the analysis of a ten-year transport programme within Auckland's existing network and land use. If we were working with a blank slate in terms of land use and transport network, or a time period of several decades (and associated budgets), there would be more scope for change. However, both the RLTP and the short term targets the applicant refers to are within 10 years, not 30 or 50.

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239 The applicant suggests, at paragraph 1.25(b) of its legal submissions, that Mr Bunn's opinion evidence should be treated with caution given his lack of independence. It cites no authority in support of that proposition. The Court of Appeal has held that an expert witness's opinion evidence is not rendered inadmissible because the witness is also a witness as to fact, or is associated with one of the parties (*Smith v Attorney-General* [2010] NZCA 258 at [40]). Mr Bunn stated at paragraph 12 of his affidavit that he was giving evidence in his capacity as an AT employee, but that nevertheless he had read and complied with the Code of Conduct for Expert Witnesses in relation to matters of expert opinion. There is no basis for treating that evidence “with caution”.

240 Bunn at [207].

241 Bunn at [208].

- 6.77** The applicant has filed evidence from experts disagreeing with Mr Bunn and the statement in the section 14 analysis.<sup>242</sup> Those views are obviously entitled to some respect. However, the fact that such contrary opinion exists does not make the AT analysis flawed. Mr Bunn accepts in his evidence that at a purely theoretical level, large roading projects can have an impact on emissions by inducing additional travel and more extensive land use patterns which then result in more fuel consumption and emissions. However, the RLTP was being prepared in the real, not a theoretical, world, and in the particular context of Auckland.<sup>243</sup>
- 6.78** As Mr Bunn explains in some detail in his evidence, the Auckland-specific modelling relied on supported the statement which was made in the section 14 analysis. Some of the witnesses for the applicant respond to this by criticising the MSM modelling itself.<sup>244</sup> This is impermissible. The statement of claim does not allege any error on the part of AT in the modelling approach which it took or relied on; indeed, the modelled GHG emissions reductions are relied on as part of the claim (for example, at paragraph 71(c)).
- 6.79** In any event, the applicant would need to go further than simply identifying deficiencies in the modelling which was used. To establish a legal claim, they would have to show that there was some other, presumably more appropriate, modelling which AT was required to use. It is notable that although they criticise the MSM modelling, none of the applicant's witnesses say what modelling ought to have been used instead. MSM remains the model used by key transport sector agencies, including the Crown, for analysis of major transport interventions including road pricing proposals and public transport projects, such as the Crown's recent light rail proposal.
- 6.80** Fundamentally, the response to this opinion evidence for the applicant, including the evidence from former contractors or employees of AT and Auckland Council, is simply this: they weren't doing the actual job of preparing Auckland's RLTP. Of course it would be open to different people to take different approaches: that is not denied. But the existence of alternative points of view does not mean that the advice given to AT

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242 In particular, from Mr Litman, Mr Chapman, Ms Metcalfe and Ms Ghanta.

243 Bunn at [225].

244 Litman in reply at [12] to [34]; Chapman in reply at [4] to [13]; Ghanta in reply at [51] to [58].

was “materially inaccurate” or based on a “fundamental misconception”, so as to vitiate the decision.

*The impact of road capacity on congestion and emissions*

**6.81** The statement in the section 14 analysis is:

It is not a given that roading projects will **automatically** lead to increased tailpipe emissions. For example, Penlink is likely to result in a net reduction in tailpipe emissions as it significantly shortens the connection to the North Shore and reduces congestion while managing demand through tolling. As an illustration, a modelling test for the 2031 year shows that removal of the Penlink and the full Mill Road project (as originally announced in the NZUP package) would lead to a very small (0.15%) increase in CO2 emissions due to an increase in total VKT and higher congestion [foot note: the test assumed that all other variables are held constant]. Remaining projects will also make important contributions to other objectives including safety, connectivity overall effectiveness and freight access – or may be multi-modal in nature.

**6.82** The statement of claim misleadingly paraphrases this, by omitting the highlighted word “automatically”.<sup>245</sup>

**6.83** The statement in the section 14 analysis was and is correct, as illustrated by the Penlink and Mill Road examples given. This is further explained in Mr Bunn’s evidence.<sup>246</sup> The applicant’s evidence does not contradict the statement in Mr Bunn’s evidence that the modelling relied on “raw VKT and congestion, and therefore emissions, increase when Penlink and Mill Road were removed from the RLTP package (all other elements held equal)”.<sup>247</sup>

**6.84** Instead of putting forward alternative data, the applicant’s witnesses again simply criticise (through evidence in reply) the MSM modelling upon which the AT conclusions were based. This is already addressed above.

**6.85** In addition, the applicant’s witnesses, echoing the misleading paraphrase in the statement of claim, criticise AT and the section 14 analysis, for a statement which was not in fact made – namely that roading projects do not increase emissions.

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245 Statement of Claim at [70(c)].

246 Bunn at [234] to [238].

247 Bunn at [236].

**6.86** To avoid any misconception on this issue, AT was not asserting in the section 14 analysis that roading projects do not increase emissions. It was making the more nuanced point that this is not inevitably the case, as demonstrated by the examples given.

**6.87** AAA's own evidence accepts that roading projects do not *automatically* lead to increased tailpipe emissions, as the section 14 analysis stated. For example, Mr Litman's primary evidence states:

Although some road projects such as rural road improvements may not increase vehicle travel or emissions, external research indicates that expanding congested urban highways generally does ..." (paragraph 34)

Although expanding congested roads may sometimes reduce per-kilometre emission rates, it generally increases total emissions ..." (paragraph 35)

*The effect of road space reallocation on economic, social and cultural public interests*

**6.88** Again, it is necessary to set out the full statement (and not the applicant's selective paraphrase) to appreciate what was being said:

General road space reallocation towards cycling and other sustainable modes has also been proposed by submitters as a way of addressing climate issues. This is already occurring as part of the wider cycling programme and projects such as Connected Communities that will provide for bus lanes, bus priority and cycling and safety improvements. As noted, there is no available funding for further reallocation. In practice, it is also likely that gains from deterring car travel through lane reallocation alone would be largely offset by the increase in emissions associated with increased congestion [footnote: For example, the Vehicle Emissions Prediction Model shows emissions per kilometre increase significantly as average traffic speeds get closer to zero – especially with heavy vehicles.] and diversion amongst the remaining traffic. Reallocation of general traffic lanes without additional effective alternatives (which cannot be funded) would also materially reduce the RLTP's contribution to LTMA objectives around effectiveness and economic, social and cultural public interests.

**6.89** The main point being made was that there was no available funding for further road space reallocation. This was challenged in the statement of claim,<sup>248</sup> and conclusively rebutted by Mr Bunn in his affidavit.<sup>249</sup> That claim is not pursued in the applicant's submissions.

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248 Statement of Claim at [70(e)].  
249 Bunn at [244] to [247].

- 6.90** The second point being made related to lane allocation *alone* i.e. without additional effective alternatives. This was because, as per the above, there was no further funding for alternatives.<sup>250</sup>
- 6.91** In its submissions,<sup>251</sup> the applicant says that Mr Bunn’s statement in his evidence about removing lanes but not reallocating them to other modes “misses the point” – because what was being proposed by submitters was reallocation. But that point was clearly answered: there was no available funding for reallocation.<sup>252</sup>
- 6.92** Mr Bunn’s evidence explains how the section 14 advice in relation to lane reallocation considered “reallocation of general traffic lanes without effective alternatives (which cannot be funded).”<sup>253</sup> By contrast Mr Litman, whose evidence is strongly in favour of reallocation of traffic general lanes, addresses funding only at the abstract level, without reference to the funding ranges for different activity classes set out in the GPS:<sup>254</sup>

The introduction to the RLTP records that it is a \$37 billion investment programme. Much of the budget is allocated to building new roads and renewing existing ones. Facilities for cycling and other sustainable modes tend to cost far less per passenger-kilometre or trip than facilities for car travel. I do not accept that further funding could not be allocated away from roading projects to road space reallocation projects, including protected cycleways.

- 6.93** This is not how activity classes under the GPS work. The GPS shows that the funding range for the “Walking and Cycling Improvements” activity class is \$95 - \$180m for the 2021/22 financial years, and similar for the next nine years. It may also be noted that Mr Litman refers to “much of the budget [being] allocated to building new roads”. As Mr Bunn points out, in fact 49% of the capital improvements programme in the RLTP is allocated to public transport, and 8% to walking and cycling,<sup>255</sup> while the overwhelming bulk of investment in highway capacity is already committed and in implementation.<sup>256</sup>

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250 Bunn at [255].  
 251 Applicant’s submissions at [6.66].  
 252 See Bunn at [256]. Reallocation is not simply barricading off a lane. Even the simplest project, such as changing an existing painted cycle lane to a protected cycle lane will cost at least \$1 million per kilometre; safe cycling infrastructure involving relocation of parking is in the order of \$5 million per kilometre; more complex projects: \$8 million per kilometre.  
 253 Bunn at [254] and [255].  
 254 Litman at [37].  
 255 Bunn at [155].  
 256 Bunn at [332].

- 6.94** As such, the applicant’s evidence about the merits or otherwise of road space reallocation (rather than lane removal) are not relevant to the alleged “material inaccuracy”.
- 6.95** Although not relevant to what the section 14 analysis actually said, on this point too the applicant misrepresents AT’s position as an absolute one – namely as opposed to reallocation of road space. However, as Mr Bunn’s evidence states there is no dispute over the broad principles that favour reallocation of road space to effective public transport and active modes projects.<sup>257</sup>
- 6.96** The relevant difference is over the effectiveness and economic, social and cultural impact of lane removal. Mr Bunn’s view is that large-scale lane removal would have a negative impact on the LTMA objectives around effectiveness and economic, social and cultural public interests – especially through a reduction in access to economic opportunities.<sup>258</sup> He presents a reasoned argument, based on relevant studies and modelling results, to support that view.<sup>259</sup>
- 6.97** Again, witnesses for the applicant disagree – which they are entitled to do. But these are matters of opinion and judgment rather than objectively determined fact. The Court is not in a position to determine an “answer” one way or the other and AT’s position as set out in the section 14 analysis was clearly one which it was rationally entitled to reach.

## **7. SECOND GROUND OF REVIEW – PLANNING COMMITTEE OF AUCKLAND COUNCIL**

- 7.1** The second cause of action challenges the decision of Auckland Council’s Planning Committee on 24 June 2021 to endorse the final 2021-2031 RLTP for submitting to the AT Board for final approval.<sup>260</sup>

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257 Bunn at [253] to [294].

258 Bunn at [291].

259 Bunn at [272] to [291].

260 Statement of claim at [58]: the exact wording of the resolution is at MT1-1111 and repeated at [7.16] below.



## Effect of Planning Committee's decision

- 7.2** As explained in the evidence of Ms Tyler and Ms Chetwynd,<sup>261</sup> since amendments to the LTMA in 2013, the Council has had no formal or legal decision-making role in relation to the RLTP, which is the statutory responsibility of the RTC and AT. As a result, Auckland Council is in the unique position among New Zealand local authorities of having no direct statutory role in developing the transport strategy for its region. At the same time, there is an obvious need for alignment between the RLTP and the Council's planning documents, and with the Council's strategy overall. The Council (and not AT) is also the Crown's partner in the ATAP process, and ATAP underpins the RLTP, as described above. This situation was described in the findings of an independent CCO review panel as "wrong in principle and at odds with the intent of Auckland's local government reforms".<sup>262</sup>
- 7.3** The practical solution to this anomaly (and which could avoid the need for legislative reform) was for the Council to have an oversight role in AT's development and adoption of the RLTP.<sup>263</sup> This role was carried out by the Council's Planning Committee. The Planning Committee was briefed at various key stages during the process including the initial RLTP direction-setting in accordance with ATAP, approval of the consultation draft of the RLTP, and receipt of public feedback. The Planning Committee also "endorsed" the RLTP before the Board's final decision.<sup>264</sup> At any point the Committee could raise issues or concerns for consideration by the RTC and/or AT.
- 7.4** This involvement of the Planning Committee, including its endorsement of the RLTP, could not (and did not) affect AT's (or the RTC's) statutory decision-making roles in relation to RLTP. It was a sensible arrangement to give the Council a voice in and visibility over the development of land transport policy, where the legislation had left a gap, but it was not legally required or of legal consequence.

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261 Tyler, at [3.10] to [3.19]; Chetwynd at [21].

262 Tyler at [3.17]; CCO Review findings at 4 (MT1-0008).

263 Tyler at [3.15].

264 An overview of the Planning Committee (and local board) involvement is set out at pages 20-21 of the 24 June 2021 report to the Planning Committee (MT1-1132).

## Planning Committee meeting on 24 June 2021

- 7.5** The Planning Committee meeting on 24 June 2021 is explained in detail in Ms Tyler's affidavit, and this summary is drawn from her evidence.<sup>265</sup>
- 7.6** The agenda for the meeting included a report entitled "entitled "2021-2031 Regional Land Transport Plan" (the **Report**), and copies of the final RLTP, the public feedback report, key submissions and phasing of the capital programme were included as attachments to the report. The Chairperson of AT, Adrienne Young-Cooper, and the Deputy Chairperson Wayne Donnelly spoke to the Committee in support of the item. A presentation was also provided by AT.<sup>266</sup>
- 7.7** The Report began by setting out the context within which the Planning Committee was being asked to endorse the RLTP. It outlined that the RLTP was the culmination of 15 months' work, combining the development of the ATAP 2021 refresh and the development of the RLTP. The Council and AT had collaborated to jointly develop the ATAP package with central government, and ATAP was the basis for developing the RLTP. Council and AT also worked jointly to align the RLTP with the Council's draft LTP.
- 7.8** The Report also explained the respective roles of Council and AT, specifically that:
- (a) the RTC and AT Board had the statutory roles of preparing and approving the RLTP; and
  - (b) the Council's Planning Committee had a non-statutory role to endorse the RLTP.
- 7.9** The Report noted that on 11 March 2021, the Planning Committee had endorsed the draft RLTP to proceed for consultation and requested that the Council and AT work jointly to develop a TERP for Auckland that would identify pathways to support the required transport emissions reductions reflected in TTT. The Planning Committee therefore regarded

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<sup>265</sup> Tyler at [5.9] to [5.31]. The agenda and minutes are at MT1-1108 and MT1-113 respectively.  
<sup>266</sup> The slides are at MT1-1410.

the RLTP and the TERP as working side-by-side to support the TTT's emission reductions targets.

- 7.10** The Planning Committee was advised that the RLTP before it was the most efficient transport package to advance the agreed objectives for the transport system, within the funding available and the large portion of the programme that was already committed or essential. The Report said that there was a significant allocation of funding to support improved access, mode shift, greenhouse gas reductions, investing in the Vision Zero approach to road safety - while ensuring an appropriate level of renewals.
- 7.11** The Report also made clear that while the RLTP advanced the Council's key objectives, including by improving the resilience and sustainability of the transport system and significantly reducing the greenhouse gas emissions it generated, in order for Auckland to successfully meet its challenges and realise its full potential, investment in infrastructure and services needed to run alongside significant policy and regulatory changes, including in the area of climate change.
- 7.12** The Planning Committee was advised about the implications of the RLTP not being approved by the AT Board, namely that the 2018 RLTP would remain in effect and that this would likely mean that the new activities (not included in the 2018 RLTP) would not be available for co-funding from WK; and that the ability to access the increase in funding required to deliver the activities continuing from 2018 RLTP may be affected.
- 7.13** The Report contained a climate impact statement.<sup>267</sup> It described the RLTP's key contribution to emissions reduction as being that the investment in infrastructure and services supported mode shift away from private vehicles and towards public transport and active modes. It also contributed through the electrification of public transport services, such as buses and trains. However, it acknowledged that the mode shift and public transport electrification provided through the RLTP were only two components of a broader set of measures that would be needed to reduce emissions. Other measures which could make a difference were primarily within central government's responsibility.

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267 As required by the Council's 11 June 2019 Climate Emergency Declaration: see Environment and Community Committee meeting minutes 11 June 2019 at 9 (MT1-0504).

**7.14** Together, the Report calculated that those measures were expected to reduce transport emissions by approximately 1% between 2016 and 2031 - despite Auckland's population being expected to grow by 22% over the same period. To that end, the Report advised that the RLTP contributed to the purpose of the LTMA, was consistent with the GPS priority area of climate change, and supported the implementation of actions identified in TTT.

**7.15** At the same time, the Report referred to other initiatives and contributors to support the emissions reductions in TTT:

- (a) the TERP, jointly developed by the Council and AT. According to the resolution relating to the TERP passed at the meeting (and which is discussed below), the TERP would have a very broad scope and go well beyond transport investment decisions;
- (b) accelerated uptake of low emissions vehicles such as electric vehicles, supported by central Government policy such as the Minister's announcement of the Clean Car package on 13 June 2021;
- (c) continued work with AT, the Council and central government under the umbrella of ATAP and The Congestion Question project,<sup>268</sup> to progress policy changes to take a whole of system approach to reducing greenhouse gas emissions from transport in Auckland.

**7.16** The Planning Committee passed resolutions as follows:<sup>269</sup>

- a) note that the final Regional Land Transport Plan 2021-2031 has been endorsed by the Regional Transport Committee and recommended to you for its endorsement.
- b) note the changes from the draft Regional Land Transport Plan reflected in the final Regional Land Transport Plan 2021-2031 as outlined in this report.
- c) endorse the final 2021-31 Regional Land Transport Plan for submitting to the Auckland Transport Board for final approval.

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268 A project established by the Government and Auckland Council in 2017 to investigate the introduction of pricing for demand management purposes in Auckland. While the project is still ongoing, in 2020 the project reported that congestion pricing could deliver benefits for Auckland in the form of reduced congestion, improvements in local air quality and reduction of greenhouse gas emissions.

269 Planning Committee meeting minutes 24 June 2021 at 4 (MT1-1111).

d) note Auckland Council's commitment to Te Tāruke-ā-Tāwhiri to halve emissions by 2030 requires further change to transport and land use policy and the mix of transport investment.

e) note that, as requested by the Planning Committee on 11 March, council and Auckland Transport staff are jointly developing a Transport Emissions Reduction Plan for Auckland that will identify the pathways to support the required emissions reductions reflected in Te Tāruke-ā-Tāwhiri, which includes:

- i) investigating the mix of future complementary transport investments that support emissions reduction;
- ii) investigating vehicle fleet and fuel decarbonisation;
- iii) investigating land transport pricing reform;
- iv) investigating urban growth management;
- v) investigating road space reallocation;
- vi) investigating behaviour change;
- vii) investigating addressing inequities arising from the impacts of decarbonisation,
- viii) reporting the approach to the Transport Emissions Reduction Plan for Auckland to Environment and Climate Change Committee and the Auckland Transport Board in August 2021 with a progress update by December 2021.

- 7.17** From these resolutions it is clear that the Planning Committee was not in any sense “making” the RLTP. In endorsing the RLTP on 24 June 2021, the Planning Committee was simply indicating the Council’s endorsement of the RLTP (which had been prepared by the RTC) as suitable for approval by AT’s Board. The Committee had received advice that the RLTP satisfied the statutory prerequisites for an RLTP.
- 7.18** It is clear from the agenda material provided to the Planning Committee at this (and previous) meetings, and from its resolution, that the Committee was alive to climate change issues and the implications of the RLTP for climate change. This included specific consideration of the RLTP in the context of the TTT and the emissions reductions in the TTT.
- 7.19** The Planning Committee resolved to endorse the RLTP (resolution (c)) while at the same time noting that “further” change to transport and land use policy and the mix of transport investment was needed in order to meet TTT’s commitment of halving emissions by 2030 (resolution (d)). Implicitly, it was deciding that the RLTP was a step in the right direction, but that more needed to be done in various areas (not just the RLTP area of transport investment). This is supported by resolution (e) and the reference to the development of a TERP, with its scope going well beyond transport infrastructure investment and including matters with the potential to have much greater impact such as land transport pricing.

**7.20** These resolutions are entirely consistent with what the RLTP and supporting report themselves said: namely, that the RLTP investment programme would contribute to a reduction in emissions (albeit a relatively modest one, given the constraints on what the RLTP could contain, as discussed earlier in these submissions); but that other levers and regulatory tools would also be needed to achieve the scale of reductions necessary to give effect to New Zealand’s commitments (and the targets in the TTT).

### **Claims against Planning Committee**

**7.21** The first claim against the Planning Committee repeats the claim (including particulars) against the RTC that it was not properly informed, failed to take into account relevant considerations and took into account irrelevant considerations.<sup>270</sup> This is already addressed above.<sup>271</sup>

**7.22** In addition, the applicant makes three claims based on the LGA. It alleges that the Planning Committee:

- (a) failed to have any or proper regard to the “mandatory requirements” in section 14 of the LGA;
- (b) breached section 77 of the LGA by failing to identify and assess all reasonably practicable options when making the decision;
- (c) breached section 80 of the LGA, by not identifying that the decision was significantly inconsistent with certain documents – the Local Government Leaders’ Climate Change Declaration, the Auckland Climate Change Emergency Declaration and the TTT – or the other matters required by section 80 if there is such an inconsistent decision.

### **Claim based on section 14 LGA (principles relating to local authorities)**

**7.23** The general scheme of the LGA is already addressed above.

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270 Statement of Claim at [78(a)] including cross-reference to [70] of the Statement of Claim.  
271 See above at [6.68] to [6.97].

- 7.24** Section 14 of the LGA lists a number of principles which councils must act in accordance with when exercising their statutory role. The principles are not enforceable requirements in their own right, but rather guide the council's exercise of powers and functions.<sup>272</sup> Section 14 itself recognises that the principles may conflict in some circumstances.<sup>273</sup>
- 7.25** Nor are the section 14 principles in the nature of mandatory relevant considerations, which must be taken into account whenever a decision is made. The applicants are wrong to describe section 14 as containing "mandatory requirements".
- 7.26** As such, the claim that the Planning Committee failed to have any or proper regard to these requirements is based on a legal misconception. There was no procedural requirement for the Council to have regard to the principles (although in a substantive sense the Council's decision must be in accordance with the principles).
- 7.27** In any event, the Council's decision was in accordance with these principles. The principles particularly relied on by the applicant are:<sup>274</sup>
- (a) "when making a decision, the local authority should take account of the interests of future as well as current communities";
  - (b) "in taking a sustainable development approach, a local authority should take into account the social, economic, and cultural well-being of people and communities, the need to maintain and enhance the quality of the environment, and the reasonably foreseeable needs of future generations".

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272 Counsel is not aware of any decision based on a breach of section 14 simpliciter. Kenneth Palmer (ed) *Local Government Law in New Zealand* (online looseleaf ed, Thomson Reuters) at [LG14.01] describes section 14 as containing statements of principle which may be useful in interpreting or applying other provisions in the Act, rather than quantifiable requirements. Dean Knight, "Democracy and the Consideration of Community Views: Obligation and Observance" in C Charters, Dean R Knight (Ed.), *We, The People(s): Participation in Governance* (Victoria University Press, Wellington, 2011) at 284 says "It is expected that [the Courts] will fence off these principles as being non-justiciable and point to the processes of political accountability as being the central control mechanism to enforce compliance."

273 In LGA section 14(2).

274 Respectively, sections 14(1)(c)(ii) and 14(1)(h) of the LGA. See [7.22] of the applicant's submissions.

**7.28** The decision to endorse the RLTP did not engage any of these principles. As submitted above, it is wrong to interpret this decision as endorsing the particular projects and programmes in the RLTP. The Council's involvement in the RLTP process, including the decision to endorse, was in accordance with the principle in section 14(1)(e) that a local authority should "actively seek to collaborate and co-operate with other local authorities and bodies [i.e. AT] to improve the effectiveness and efficiency with which it achieves its identified priorities and desired outcomes".

**7.29** That said, the resolution overall clearly took into account the interests of future communities and generations, as well as environmental sustainability. It did this by:

- (a) noting the Council's commitment to TTT, the centerpiece of which was the reduction of emissions for the benefit of future generations and for environmental well-being;
- (b) noting that this commitment would require further policy and investment changes;
- (c) referring to and anticipating the TERP, which again focused on emissions reductions for the benefit of future communities and generations, and environmental sustainability.

#### **Claim based on section 77 LGA (consideration of options)**

**7.30** Part 6 of the LGA sets out the general statutory obligations of local authorities in relation to all of their decision-making processes. Section 76 is the "leading provision"<sup>275</sup> and says:

- (1) Every decision made by a local authority must be made in accordance with such of the provisions of sections 77, 78, 80, 81, and 82 as are applicable.
- (2) Subsection (1) is subject, in relation to compliance with sections 77 and 78, to the judgments made by the local authority under section 79.

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275 *Wellington City Council v Minotaur Custodians Ltd* [2017] NZCA 302, [2017] 3 NZLR 464 at [32].



- (3) A local authority—
- (a) must ensure that, subject to subsection (2), its decision-making processes promote compliance with subsection (1); and
  - (b) in the case of a significant decision, must ensure, before the decision is made, that subsection (1) has been appropriately observed.

**7.31** Section 76 therefore sets two standards of performance. In respect of “significant decisions”, the local authority must *ensure* that the provisions contained in subs (1) have been “appropriately observed”. But where the matter is not “significant”, the standard is more aspirational: decision-making is only required to “promote compliance” with the provisions referred to in subs (1). Even that lower standard is subject to section 79.<sup>276</sup> It is submitted that the purely procedural decision to endorse the RLTP, where the Council had no formal statutory role, was not a “significant decision” in the section 76 sense.

**7.32** Section 77(1) says:

A local authority must, in the course of the decision-making process,—

- (a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
- (b) assess the options in terms of their advantages and disadvantages; and
- (c) if any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga.

**7.33** Section 77 is subject to section 79. Section 79 provides, in essence, that a local authority has a discretion as to compliance with section 77, largely

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<sup>276</sup> *Minotaur* at [33]. *Minotaur* is the leading authority on the nature of a local authority’s obligations under Part 6. *Minotaur* was a consultation case, i.e. it engaged sections 78 and 82 rather than section 77 (as in the present case). However, the Court’s general statements with respect to section 78 apply equally to section 77. Section 78 has also been amended since *Minotaur*, but not in a way which affects the validity of these statements.

based on the significance of the matter. The Court of Appeal in *Minotaur* says:<sup>277</sup>

Section 79 begins with the position that it is for the local authority to decide in its discretion how ss 77 and 78 are to be complied with — the fourth such restatement of that principle in pt 6.

**7.34** Of particular relevance to this case, section 79 says that:

- (a) the local authority has a discretion in relation to the extent to which different options are identified and assessed;
- (b) in exercising this discretion, and in addition to significance, the local authority must have regard to “the extent to which the nature of a decision, or the circumstances in which a decision is taken, allow the local authority scope and opportunity to consider a range of options.”

**7.35** There was no breach of section 79 in this case because:

- (a) The Committee’s options on 24 June 2021 were binary – to endorse or not.<sup>278</sup> The Committee had no power, either under the LTMA process for preparing the RLTP, or under its “oversight” role in respect of AT, to make or require changes to the RLTP. That would have detracted from the statutory role of the RTC and AT in relation to the RLTP;
- (b) It was not a practicable option (because it was not the Council’s decision to make) for the Planning Committee to amend the RLTP, or require the RTC to make changes to the draft RLTP prior to it going to the AT Board for approval;<sup>279</sup>
- (c) The suggestion at paragraph 7.21 of the applicants’ submissions that the Planning Committee should have required AT to make changes to the RLTP such as “to provide for further reallocation of road space, or to make change to the mix of transport investments” is with respect misplaced, insofar as

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277 *Wellington City Council v Minotaur Custodians Ltd* [2017] NZCA 302, [2017] 3 NZLR 464 at 41.  
278 Two Councillors did vote against, as recorded in the minutes at page 5 (MT1-1112).  
279 Tyler at [5.16].

would have involved the Committee stepping into the roles assigned to the RTC and AT under the LTMA;

- (d) Two available options were implicit in the recommendation to the Committee to endorse the RLTP for submission to AT's Board for final approval. Either the Committee could adopt that recommendation or not. The Committee passed the resolution but as noted, two Councillors did vote against;<sup>280</sup>
- (e) In terms of the considerations relevant to the exercise of the Council's discretion in section 79, the "nature of [the] decision", and "the circumstances in which [the] decision is taken" did not allow for the consideration of further options. Moreover, the Planning Committee Decision itself was not "significant". The RLTP is a significant document, but the Council's decision was not legally required and had no legal consequence;
- (f) At the very least it was within the reasonable discretion of the Council to conclude that its options did not include (as alleged) requiring AT to make changes to the RLTP.

### **Claim based on section 80 LGA (inconsistent decision)**

**7.36** Section 80 says:

#### **Identification of inconsistent decisions**

- (1) If a decision of a local authority is significantly inconsistent with, or is anticipated to have consequences that will be significantly inconsistent with, any policy adopted by the local authority or any plan required by this Act or any other enactment, the local authority must, when making the decision, clearly identify—
  - (a) the inconsistency; and
  - (b) the reasons for the inconsistency; and
  - (c) any intention of the local authority to amend the policy or plan to accommodate the decision.

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280 The minutes are at MT1-1111 and 1112.

**7.37** The applicant alleges that the Planning Committee decision was significantly inconsistent with the Local Government Leaders' Climate Change Declaration (the **Leaders' Declaration**), the Auckland Climate Change Emergency Declaration (the **Climate Emergency Declaration**) and the TTT (collectively, the **documents**). It says that the decision was in breach of section 80 and unlawful because when making the decision the Planning Committee did not identify the matters in subsection (1)(a), (b) and (c).

**7.38** The Council's position is that section 80 did not apply because:

- (a) the documents are not policies or plans covered by the section;
- (b) when the content of the documents is examined, it is clear that the Planning Committee's decision is not inconsistent, let alone significantly inconsistent, with any of them.

**7.39** In its section 80 arguments, the applicant is treating the content of the RLTP as if it is part of the Planning Committee's decision. If the Planning Committee itself was adopting the RLTP there may be room for such an argument.

**7.40** However, the Planning Committee decision was not a substantive decision, but only one to endorse the RLTP for approval by the Board. Inconsistency could only arise if there were a Council policy or plan which set out what it considered the RLTP should contain or the circumstances in which that endorsement would or would not be given – as that is the extent of the Council's decision. None of the documents relied on does that. Section 80 refers to the "consequences of the decision", but here the consequence of the Planning Committee decision is simply that when the AT Board came to decide whether to approve the RLTP it knew that the Council had endorsed it. The consequences are no broader than that.

#### *Section 80 in overview*

**7.41** Section 80 is an accountability provision. It requires the Council to identify when it is making decisions which are significantly inconsistent

with certain policies or plans, and to state its reasons for doing so and any intent to alter the plan or policy accordingly. Section 80 does not prevent inconsistent decisions, but it requires them to be acknowledged.<sup>281</sup> Indirectly this may also act as a discipline on the decision-making itself – so the decision-maker makes the inconsistent decision with “eyes wide open”.

**7.42** Section 80 does not apply to decisions which are inconsistent with *any* previous council statements or policy positions, but only ones which are significantly inconsistent with, or anticipated to have consequences that will be significantly inconsistent with “any policy adopted by the local authority or any plan required by this Act or any other enactment.” This introduces both a practical and a significance threshold:

- (a) only statutorily recognised policies or plans are covered (and not all plans or policies); and
- (b) the inconsistency with that plan or policy must be significant.

**7.43** A lower threshold would be unworkable, given the number and variety of such documents local authorities adopt, and would also require council “reporting” against low significance documents and minor inconsistencies.

*“Significantly inconsistent with”*

**7.44** Section 80 applies where there is significant inconsistency with “any policy adopted by the local authority or any plan required by this Act or any other enactment”.

**7.45** A decision is inconsistent with a policy or plan if it conflicts or is incompatible with what that plan or policy says i.e. what the local authority has previously stated (in the policy or plan) it will do or not do or how it will approach future decision-making on an issue.

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281 Contrast with a decision covered by LGA section 93, which cannot be made at all unless explicitly provided for in the long-term plan.

**7.46** However, for section 80 to apply, the Council must be departing from what it has previously said it will do. In order to satisfy the underlying accountability purpose, it is submitted that the decision (or the consequences of the decision), and the policy/plan statement, must be directly comparable i.e. an “apples and apples” comparison.

**7.47** In *Council of Social Services in Christchurch/Outautahi Inc v Christchurch City Council*,<sup>282</sup> a section 80 case cited in the applicant’s submissions, it was held that a decision by the Council to increase the rent it charged for social housing it owned by 24% was significantly inconsistent with the Council’s long-term plan (then known as the long-term council community plan). The Court analysed the inconsistency as follows:<sup>283</sup>

Applying the definitions of “*significance*” and “*significant*” in the Act it is difficult to avoid the conclusion that the decision of the Council to raise rents by 24% was significantly inconsistent with the Long-Term Community Plan. Whereas the Plan indicated the social housing operation would operate at a deficit, the 24% increase was expressly designed to avoid that situation and ensure that the operation was self-sustaining. Added to that, the projected operating cost for 2014/15 and 2015/16 did not give any indication that there would be a very substantial spike in the order of \$50 million. To the contrary, the figures for those years (\$17,209,000 and \$17,098,000 respectively) were only slightly above the preceding years.

**7.48** In summary, the relevant financial provisions in the LTP indicated that social housing would continue to be run at a deficit, and did not show the increased income resulting from the proposed rental increase. The decision to increase the rents on social housing was therefore inconsistent with what the LTP said on that same subject.

**7.49** In holding there was a “significant” inconsistency, the Court applied the definitions of “significance” and “significant” in the LGA. The judgment in *Outautahi* does not analyse why the inconsistent decision was said to be “significant” in these terms, but clearly a rental increase of 24% (the difference between what the LTP said and the proposed decision) was of high significance for the persons likely to particularly affected by the matter i.e. the social housing tenants.

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282 *Council of Social Services in Christchurch/Outautahi Inc v Christchurch City Council* [2009] 2 NZLR 123 (HC).

283 *Council of Social Services in Christchurch/Outautahi Inc v Christchurch City Council* [2009] 2 NZLR 123 (HC) at [103].

**7.50** Against the general background, we now address each of the documents relied on by the applicant. As indicated, the Council submits that section 80 does not apply, both because:

- (a) the document is not a policy or plan covered by the section; and
- (b) in any event, there was no inconsistency, let alone significant inconsistency, which engaged the section.

**7.51** The conclusion that section 80 does not apply does not of course mean that these documents are not important documents or statements – obviously they are. But they are not the statutorily required documents which Parliament intended the accountability requirement in section 80 to apply to, and the Planning Committee’s decision to endorse the RLTP is not inconsistent with the documents.

*Local Government Leaders’ Climate Change Declaration*

**7.52** Although pleaded in the statement of claim, the applicant does not assert in its submissions that section 80 was breached because the Planning Committee decision was significantly inconsistent with the Leaders’ Declaration. It is assumed that allegation is no longer pursued.

**7.53** That is an appropriate concession given that:

- (a) the Leaders’ Declaration was not signed by or on behalf of Auckland Council. The Mayor of Auckland did not have delegated authority to commit the Council to such positions, and there was no Council committee resolution authorising the Mayor to sign the declaration on behalf of the Council.<sup>284</sup> Given section 80(1)(c), it is implicit that the document must be one which the Council has control over, and can change if it chooses. The Council cannot change the Leaders’ Declaration;
- (b) the Leaders’ Declaration is not a policy or plan. The document is what it says it is – a declaration;

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284 Tyler at [4.9].

- (c) the Planning Committee's resolution to endorse the RLTP is not inconsistent with the Leaders' Declaration. The Leaders' Declaration says nothing about what an RLTP should contain, or what form of RLTP local authorities should prepare or approve. The commitments in the Leaders' Declaration relate to the development of action plans to reduce emissions and support resilience; working with communities to understand, prepare for or respond to climate change impacts; and to work with central government to deliver on national emissions reduction targets. None of these either expressly or impliedly relate to what the content of the RLTP prepared by AT should be.

### *Auckland Climate Emergency Declaration*

**7.54** The Climate Emergency Declaration is part of a resolution made by the Council's Environment and Community Committee on 11 June 2019.<sup>285</sup> The relevant part of the resolution, which includes the declaration itself, was an affirmation of the following statement:

Auckland Council recognises the importance of and urgent need to address climate change for the benefit of current and future generations:

- the science is irrefutable – climate change is already impacting ecosystems and communities around the world, with increasingly frequent and severe storms, floods and droughts; melting polar ice sheets; sea level rise and coastal inundation and erosion; and impacts on biodiversity including species loss and extinction.
- the Intergovernmental Panel on Climate Change's (IPCC) Special Report in October 2018 stated that we have twelve years to turn greenhouse gas emissions around to limit global warming to the Paris Agreement target of 1.5-degrees, or face an uncertain future. This requires 'rapid and far-reaching transitions in energy, land, urban and infrastructure (including transport and buildings), and industrial systems'
- everyone has a role to play in delivering the change required.

As such, Auckland Council declares a climate emergency and commits to:

- continue to robustly and visibly incorporate climate change considerations, in practical terms, into council work programmes and decisions
- continue to provide strong local government leadership in the face of climate change, including working with local and central government partners to ensure a collaborative response

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285 The minutes are at MT1-0496.



- continue to advocate strongly for greater central government leadership and action on climate change
- continue to increase the visibility of our climate change work
- continue to lead by example in monitoring and reducing council's greenhouse gas emissions
- include climate change impact statements on all committee reports
- requesting staff of council-controlled organisations to include climate change impact statements in their committee reports

**7.55** These are high-level “commitments” which relate to the way in which the Council will incorporate and reflect the climate emergency in its own actions and decision-making processes. In declaring the climate emergency, the Council did not make a commitment to meet or support any specific emissions reduction target. Further, as the Committee itself recognised as part of its resolution, a declaration of a “climate emergency” has no other inherent statutory or legal implications.<sup>286</sup>

**7.56** The Climate Emergency Declaration is not a policy or plan (much less one required by an enactment); rather, it is an essentially political statement made as part of a resolution. If section 80 could apply to such a statement (under the guise of it being a “policy”) then it must likewise apply to any authorised council statement in a resolution or otherwise which sets forth the Council’s position on an issue or a proposed course of conduct. This would make section 80 unworkable.

**7.57** In any event, the Planning Committee decision of 24 June 2021 is not inconsistent with the Climate Emergency Declaration. The applicant has not identified any specific commitment in the Climate Emergency Declaration with which that decision is inconsistent. The Committee’s specific resolution to endorse the RLTP was not inconsistent with the Declaration, as that endorsement is not contrary to anything the Council committed to in the declaration. When the Committee’s resolutions are viewed in their entirety, including resolution (d) with its reference to further change being needed to support the halving of emissions; and resolution (e) with its reference to the development of the TERP, it is clear the decision overall is a manifestation of the commitments in the declaration, in particular to provide leadership in the climate change area,

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286 Tyler at [4.26].

to incorporate climate change considerations into its decision-making, and to continue to increase the visibility of its climate change work.

*Te Tāruke-ā-Tāwhiri Auckland's Climate Plan*

- 7.58** The applicant's submissions assert "manifest inconsistency" between the RLTP and TTT.<sup>287</sup> The specific parts of the latter document cited are the goal to reduce Auckland's GHG emissions by 50% by 2030 (against a 2016 baseline), and the modelled 64% reduction in transport emissions.<sup>288</sup>
- 7.59** TTT is a plan: it is called Te Tāruke-ā-Tāwhiri Auckland's Climate Plan. However, it is a plan which was voluntarily prepared and adopted by the Council; it is not required by any enactment. While obviously a very important document, it is not one to which section 80 can potentially apply.<sup>289</sup>
- 7.60** More importantly, the Planning Committee decision is not inconsistent (let alone significantly inconsistent) with TTT. This is whether the decision is construed simply as the procedural decision to endorse the RLTP as an RLTP, or if it is construed (wrongly in our submission) as substantive endorsement of the investment package in the RLTP.
- 7.61** The TTT and RLTP are so different in their purpose, scope and focus that it is impossible to meaningfully compare them for "consistency", at least at a detailed or line-by-line basis.
- 7.62** TTT is a plan for Auckland, and not for Auckland Council or the Auckland Council group. It does not establish particular emissions reductions targets for sectors or organisations or persons; it is at a higher level than that. TTT has a significantly broader scope than the RLTP. It covers all sectors, not just transport. It covers all possible actions which may contribute to emissions reduction, and not just infrastructure investment. It covers all possible actors and not just central or local government. As explained above, the modelling used for TTT and the RLTP is not the same, because of the different methodology, assumptions and purpose

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287 Applicant's submissions at [7.16].

288 Applicant's submissions at [7.15].

289 Nor is TTT a policy, let alone a policy required under an enactment.

of the document, and the modelling results are not directly comparable. TTT's indicative pathway which includes a 64% reduction from the transport sector is illustrative only: TTT was not requiring such a reduction to occur or stating that as Council policy. There is nothing in TTT which requires any future Council decisions to be made in a particular way.

**7.63** At a “stand back” level, where the documents could perhaps be compared in a very broad way, they are entirely consistent. They both set out that significant changes will be needed in many areas in order to reduce emissions from the transport sector. TTT does not prioritise or emphasise change to land transport investments in particular: see for example, the priority action areas on page 82 and the transport indicators on page 86,<sup>290</sup> which are not primarily land transport investment issues and do not refer to the RLTP.

**7.64** It is notable that the only reference to the RLTP in TTT is on page 128 as follows:<sup>291</sup>

The Auckland Transport Alignment Project (ATAP), which is being updated in 2020, reflects the joint transport investment priorities – including climate change – of Auckland Council and central government. The draft Government Policy Statement (GPS) on Land Transport for 2021 includes climate change as a strategic priority. The Regional Land Transport Plan for Auckland (2021-2031), which will set out the region's land transport objectives, policies, and measures for the next ten years, is being developed to be consistent with ATAP and the GPS.

**7.65** Therefore, TTT itself says the RLTP (which will be consistent with ATAP and the GPS) will be consistent with the Council's climate change priorities. TTT is also acknowledging that the climate change considerations underpinning TTT will be incorporated into the RLTP through the GPS climate change strategic priority. TTT is not itself requiring more of the RLTP.

**7.66** TTT does **not** contain any statement requiring the RLTP to achieve any specified reduction in GHGs, whether expressed in percentage or absolute terms. It leaves open the amount of “heavy lifting” the RLTP will do to reduce transport sector emissions.

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290 TTT at pages 82 (MT1-0592), 86 (MT1-0596) and 87 (MT1-0597).  
291 TTT, page 128 (MT1-0638).

**7.67** The applicant alleges that the Planning Committee expressly recognised the inconsistency between the RLTP and TTT.<sup>292</sup> This is not correct. In endorsing the RLTP, the Planning Committee also resolved that “further” change to transport and land use policy and the mix of transport investment was needed in order to meet TTT’s commitment of halving emissions by 2030. In doing so, the Planning Committee was recognising that the RLTP could not, by itself, deliver the emissions reduction targets, and that “further” changes would also be necessary. In using the word “further”, however, the Planning Committee was saying that the RLTP also contained changes which would assist in that regard. The Committee was well aware of TTT, and could have decided not to endorse the RLTP if it considered it was inconsistent. It did not do so.

**7.68** To the extent that the RLTP may have implications for the Council’s commitment in the TTT to halve emissions by 2030, the Planning Committee also resolved that Council and AT staff would jointly develop a TERP for Auckland to identify the pathways to support the required emissions reductions, and this work is ongoing.

**7.69** Viewing the resolutions together, the Planning Committee considered that the RLTP, together with the “further” changes to transport and land use policy and investment, and the forthcoming TERP work, would all pull in the same direction of helping to achieve the reductions target in TTT. As such, there was no inconsistency.

**7.70** The applicant’s submissions, rather than focus on the discussion of TTT in the report that went to the Planning Committee meeting on 24 June 2021, or on the committee’s resolutions, rely on correspondence earlier in the RLTP development process (February and March 2021) to suggest that councillors were concerned about the extent of GHG reductions that would be achieved under the draft RLTP as it then stood.<sup>293</sup> In response:

- (a) That some Councillors were “uncomfortable” with the extent to which ATAP “supports improved climate change and cycling outcomes” (as recorded in an AT presentation to the RTC on February 2021),<sup>294</sup> is of no legal consequence. This is

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292 Statement of claim at [80].

293 Applicant’s submissions at [7.17], citing [5.29] earlier in the submissions.

294 Applicant’s submissions at [5.29(b)].

consistent with the Planning Committee on 11 March 2021, at the same time as endorsing the draft RLTP to proceed for consultation, requesting that the Council and AT work jointly to develop a TERP for Auckland that would identify pathways to support the required transport emissions reductions reflected in TTT;

- (b) Concerns raised in correspondence from the Mayor and councillors over aspects of AT's performance, particularly in the delivery of cycleway infrastructure,<sup>295</sup> are self-evidently not the same as a concern that the draft RLTP was inconsistent with TTT.

**7.71** Section 80(1)(c) envisages that any inconsistency is such that a change to the policy or plan must or can be made to "accommodate" it. However, no changes to the TTT were needed (or even possible) to accommodate the Planning Committee's decision to endorse the RLTP. That decision did not affect in any way the Council's Climate Plan for Auckland, which remains unchanged. The two can co-exist without any conflict at all.

**7.72** AAA's submissions are also critical of the Council's "failure" to file affidavits from any members of the Planning Committee.<sup>296</sup> No inferences can or should be drawn from that. The resolutions passed by the Planning Committee speak for themselves.<sup>297</sup> The minutes show that two councillors requested that their dissenting votes be recorded, but rightly AAA makes no point out of this. Ms Tyler, who authorised the report to the Planning Committee meeting of 24 June 2021, fully explains the decisions and the information upon which the Committee made its decision, in her affidavit.

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295 Applicant's submissions at [5.29(e) and (f)]

296 Applicant's submissions at [1.25(a)], [5.29] and [7.17].

297 The Court may draw a negative inference about an unexplained absence of a witness who the Court would have expected the party to call, but only where the evidence of that witness would explain or elucidate a particular matter that is required to be explained or elucidated: *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA) at [153(b)]. Here evidence from individual committee members is inappropriate, as individual committee members cannot speak for the committee which collectively made the decision. In any event, the applicant has not identified any matters "missing" from Ms Tyler's evidence in respect of the Planning Committee's decision that requires explanation.

## **Auckland Council's affirmative defence**

- 7.73** Auckland Council's statement of defence (at paragraph 80) pleads that the Planning Committee Decision was not amenable to judicial review under the Judicial Review Procedure Act 2016 (**JRPA**) because it was not the exercise, refusal to exercise or purported exercise of a "statutory power" as that term is defined in section 5 of the JRPA.
- 7.74** The applicant's submissions at paragraph 7.2 assert that the Planning Committee Decision was one of the Council "*in the exercise of statutory powers and functions under the LGA and/or the LGACA*". They do not identify what LGA or LGACA functions or power were being exercised: nor acknowledge that under section 45 of the LGACA, AT (rather than the Council) has the function of preparing the RLTP for Auckland in accordance with the LTMA. Nor do they explain how the Planning Committee Decision prescribed or affected rights, powers etc as required in order to fall within the "statutory power of decision" definition.
- 7.75** Nevertheless, the Council no longer seeks to take the jurisdictional point that judicial review of the Council's decision is not available in principle.

## **8. THIRD GROUND OF REVIEW – AT BOARD**

- 8.1** The claim against the Board is based on the same alleged errors made by the RTC. AT accordingly repeats the submissions above in relation to the first cause of action.
- 8.2** In addition, the applicant alleges that the Board acted contrary to its statutory purpose in section 39 of the LGACA, which is "to contribute to an effective, efficient and safe Auckland land transport system in the public interest".
- 8.3** Section 39 is a purpose provision, and cannot be breached as such. In any event:
- (a) it uses the same wording as in section 3 of the LTMA which is already applied to the decision via section 15(a)(i) of the LTMA,

which is the governing provision in the case of adoption of the RLTP;

- (b) section 39 cannot enlarge obligations (whatever they are) which already apply under the LTMA;
- (c) to the extent the obligations are the same, then the earlier submissions in relation to section 14(a)(i) are repeated here.

## **9. RELIEF**

**9.1** If the Court finds any material legal errors in the decisions of the RTC or the AT Board that is best addressed by making an appropriate declaration and providing guidance for its future decision-making.

**9.2** The applicant also seeks orders setting aside the RTC and AT Board decisions, and for a new RLTP for Auckland to be prepared and approved. This relief should be refused, given the significant (and to some extent unknown) consequences of quashing. The applicant asserts that there is no issue of prejudice to third parties,<sup>298</sup> however that is clearly not the case.

**9.3** As explained in the submissions above on the land transport planning framework, and in the evidence of Ms Chetwynd,<sup>299</sup> the RLTP as a funding document is effectively a “bid” for projects to be included in the NLTP. It has therefore already been superseded by the 2021-2024 NLTP, which was approved and released by WK on 7 September 2021.<sup>300</sup> In preparing that NLTP, WK was required to take into account all RLTPs, including the Auckland RLTP. The NLTP contains a comprehensive investment package for Auckland, drawn from the Auckland RLTP.<sup>301</sup>

**9.4** Setting aside the Auckland RLTP would therefore have potentially significant consequences for the subsequent stages in the land transport planning and funding process, and give rise to uncertainty about decisions made in reliance on the validity of the RLTP. This includes the

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298 Applicant's submissions at [9.6].  
299 Chetwynd at [32] to [38], [68] to [70] and [96] to [9]7.  
300 Chetwynd at [97].  
301 Pages 66 to 73 of the NLTP (JC1-1304 to JC1-1311).

NLTP, but also NLTF funding decisions made by WK under section 20 of the LTMA based on the NLTP, and projects and programmes that are already underway.

- 9.5** The LTMA contains a process for varying an RLTP during its 6 year life.<sup>302</sup> This process could be followed to make any necessary changes to the RLTP as a consequence of a declaration made by this Court, without jeopardising whatever has already happened since the RLTP was approved.
- 9.6** In relation to the claim against the Council, the Council accepts that if the Court finds it to have erred, the primary relief sought in respect of the Planning Committee's decision (a declaration that the Committee acted unlawfully) is appropriate. No further orders are required.

**DATED** at Auckland this 13<sup>th</sup> day of April 2022



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V L Heine QC / P M S McNamara  
Counsel for the Respondents

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302 LTMA, section 18D.



## APPENDIX A – TIMELINES FOR RLTP, ATAP and GPS

	RLTP 2021	ATAP 2021	GPS 2021
2019	<p><i>Late 2019</i> Preparation of project 'long list' by AT<sup>303</sup></p>		
		<p><i>29 January 2020</i> NZUP announced<sup>304</sup></p>	
	<p><i>February 2020</i> Development of RLTP objectives begins (as Future Connect)<sup>305</sup></p>	<p><i>February 2020</i> Logic mapping process begins<sup>306</sup></p>	
			<p><i>19 March 2020</i> Draft 2021 GPS published<sup>307</sup></p>
			<p><i>11 May 2020</i> Auckland Council submits on the draft GPS<sup>308</sup></p>
2020		<p><i>14 May 2020</i> Auckland Council endorses ATAP Terms of Reference<sup>309</sup></p>	
		<p><i>May 2020</i> Terms of Reference agreed<sup>310</sup></p>	
		<p><i>20 July 2020</i> Advice to AT Board regarding ATAP and GPS consistency<sup>311</sup></p>	
	<p><i>12 August 2020</i> AT Board workshop on ATAP/RLTP<sup>312</sup></p>	<p><i>12 August 2021</i> AT Board workshop on ATAP/ RLTP</p>	
			<p><i>3 September 2020</i> GPS 2021 published<sup>313</sup></p>

303 Bunn at [69].

304 Chetwynd at [57].

305 Bunn at [32], [34]-[36].

306 Bunn at [32], [34]-[36].

307 Draft GPS 2021 (NJL2-0089).

308 Auckland Council submission on the draft GPS 2021 (NJL2-0176).

309 Emergency Committee Agenda 14 May 2020 (NJL2-0187).

310 Bunn at [37]; ATAP Terms of Reference 2020 Update (HB1-049).

311 Bunn at [49]; Presentation to the AT Board 20 July 2020 (HB1-055).

312 Presentation to the AT Board 12 August 2020 (NJL2-0217).

313 GPS (JC1-0005).

	RLTP 2021	ATAP 2021	GPS 2021
2020	<p>15 September 2020 Briefing to the RTC about the process for developing the RLTP<sup>314</sup></p>	<p>15 September 2020 Briefing to the RTC about the development of the ATAP baseline</p>	
	<p>14 October 2020 Finance and Performance Committee Workshop on development of ATAP and RLTP<sup>316</sup></p>	<p>October 2020 ATAP working group undertakes prioritisation process and package development<sup>315</sup></p> <p>14 October 2020 Finance and Performance Committee Workshop on development of ATAP and RLTP</p>	
	<p>29 October 2020 RTC decides on RLTP strategic objectives<sup>318</sup></p>	<p>23 October 2020 DDC confirms principles to guide ATAP discussions<sup>317</sup></p>	
	<p>12 December 2020 AT briefing to Planning Committee on ATAP/the RLTP<sup>319</sup></p>	<p>12 December 2020 AT briefing to Planning Committee on ATAP/the RLTP</p>	
	<p>15 December 2020 Recommended ATAP package endorsed by the CE Governance Group<sup>320</sup></p>		
2021	<p>Late January 2021 Draft RLTP presented to the RTC. RTC agrees to write to the Mayor to propose additional projects to be included in ATAP<sup>321</sup></p>		
	<p>15 February 2021 AT presents to Local Board chairs on the RLTP<sup>322</sup></p>		

314 Bunn at [132]-[133]; Chetwynd at [87]; Report to the RTC 15 September 2020 (JC1-0064).  
315 Bunn at [71]-[88].  
316 Planning Committee Agenda (24 June 2021) RLTP report at [68] (MT1-1132); Presentation to the Finance and Performance Committee (NJL2-0296).  
317 Bunn at [135]; Presentation to the DDC 23 October 2020 (NJL2-339).  
318 Chetwynd at [87]; Report to the RTC 29 October 2020 (JC1-0074).  
319 Bunn at [139]; Planning Committee Agenda (24 June 2021) RLTP report at [68] (MT1-1132).  
320 Bunn at [87].  
321 Bunn at [141].  
322 Planning Committee Agenda (24 June 2021) RLTP report at [69] (MT1-1133).

	RLTP 2021	ATAP 2021	GPS 2021
2021	<p>22 February 2021 Chair and Deputy Chair of the RTC receive a draft of the RLTP<sup>323</sup></p> <p>23 February 2021 RTC receives a draft of the RLTP<sup>325</sup></p> <p>23 March 2021 RTC approves RLTP for consultation<sup>329</sup></p> <p>29 March 2021 Consultation on the draft RLTP begins<sup>330</sup></p> <p>2 May 2021 Consultation on the draft RLTP ends<sup>331</sup></p> <p>10 and 24 May 2021 RTC deliberates on submissions on the RLTP<sup>332</sup></p> <p>18 June 2021 RTC recommends the RLTP for approval by the Board<sup>333</sup></p> <p>24 June 2021 Planning Committee endorses the RLTP<sup>334</sup></p> <p>28 June 2021 AT Board approves the RLTP<sup>335</sup></p>	<p>22 February 2021 Cabinet considers ATAP and Minister of Transport writes to the Mayor of Auckland<sup>324</sup></p> <p>4 March 2021 Minister and Mayor agree on changes to the ATAP programme<sup>326</sup></p> <p>8 March 2021 Cabinet approves the final ATAP programme<sup>327</sup></p> <p>12 March 2021 ATAP announced<sup>328</sup></p>	

- 323 Bunn at [162].
- 324 Bunn at [145] and [158]; ATAP 2021-2031 Cabinet Paper (HB1-113); Letter to Mayor Goff from Hon. Michael Wood (HB1-128).
- 325 Bunn at [162]; Chetwynd at [89].
- 326 Bunn at [146].
- 327 Bunn at [161].
- 328 Bunn at [165]; ATAP 2021-2031 Investment Programme (NJL2-0470).
- 329 Chetwynd at [88]; JC1-0084.
- 330 Chetwynd at [90]; Bunn at [168].
- 331 Chetwynd at [90]; Bunn at [168].
- 332 Chetwynd at [91]; Presentations to the RTC (JC1-0254 and JC1-0287); Bunn at [168].
- 333 Chetwynd at [90]; Bunn at [168].
- 334 Bunn at [180]; Tyler at [5.9]; Planning Committee Agenda 24 June 2021 (MT1-1113); Planning Committee Minutes 24 June 2021 (MT1-1108).
- 335 Chetwynd at [95]; Bunn at [182]; AT Board Report 28 June 2021 (JC1-1092); and AT Board Meeting Minutes 28 June 2021 (JC1-1230).

## APPENDIX B – ALLEGATIONS IN PARAGRAPH 70 OF THE STATEMENT OF CLAIM

Subject matter	Claim	AT’s response
(a) Impact of investment in infrastructure and transport services on emissions	<p>“They wrongly advised the RTC that investment in infrastructure or services only has a very minor impact on total emissions. In fact, investment in infrastructure and transport services is a key factor in transport emissions.”</p> <p>Claim of material inaccuracy</p>	<ul style="list-style-type: none"> <li>• paraphrase inaccurate;</li> <li>• question of opinion/assessment, not incontrovertible fact;</li> <li>• statement in section 14 analysis not inaccurate;<sup>336</sup></li> <li>• staff’s advice (based on scenario testing as part of ATAP) was that investment in infrastructure has only a very minor impact (positive or negative) on emissions and that external variables such as demand associated with population growth or improvements in fleet efficiency have a much larger impact on total emissions.<sup>337</sup></li> </ul>
(b) Possibility of changes to RLTP which would reduce emissions	<p>“They wrongly advised the RTC that no plausible changes could be made to the RLTP programme that would yield materially different results. In fact, as recognised in the Planning Committee’s resolution of 24 June 2021 (pleaded at paragraph 58 above), changes to the mix of transport investment in the RLTP that result in a reduction of emissions could (and should) have been made.”</p> <p>Claim of material inaccuracy</p>	<ul style="list-style-type: none"> <li>• paraphrase inaccurate;</li> <li>• question of opinion/assessment, not incontrovertible fact;</li> <li>• statement in section 14 analysis not inaccurate;<sup>338</sup></li> <li>• advice was that scenario testing as part of ATAP and analysis of other scenarios as background to TTT showed that plausible changes to the programme were unlikely to yield materially different results;<sup>339</sup></li> <li>• Planning Committee’s resolution of 24 June 2021 did not recognise that changes to the mix of transport investments in the RLTP could and should have been made.<sup>340</sup></li> </ul>
(c) Effect of roading projects on emissions	<p>“They wrongly advised the RTC that roading projects do not increase emissions. In fact, increased road capacity generates more traffic over time because it encourages</p>	<ul style="list-style-type: none"> <li>• paraphrase inaccurate;</li> <li>• question of opinion/assessment, not incontrovertible fact;</li> </ul>

336 Bunn at [211]-[225].

337 RLTP Appendix 9 (as presented to the RTC on 18 June 2021) at [31], first bullet point (JC1-0495); Bunn at [211]-[225]. See also the 2016 ATAP Interim Report (HB1-291).

338 Bunn at [211]-[225].

339 RLTP Appendix 9 (as presented to the RTC on 18 June 2021) at [31], first bullet point (JC1-0495); Bunn at [227]-[231].

340 Minutes of 24 June 2021 Planning Committee meeting, item 8 (MT1-1111).

Subject matter	Claim	AT's response
	<p>driving and enables car-dependent development (a phenomenon known as “induced demand”).”</p> <p>Claim of material inaccuracy</p>	<ul style="list-style-type: none"> <li>statement in section 14 analysis not inaccurate;<sup>341</sup></li> <li>advice was that it was not a given that roading projects would automatically lead to increased tailpipe emissions. For example, Penlink was likely to result in a net reduction in tailpipe emissions as it would significantly shorten the connection to the North Shore and reduce congestion while managing demand.<sup>342</sup></li> </ul>
(d) Effect of Penlink and Mill Hill on emissions	<p>“They wrongly advised the RTC that the Penlink and Mill Road highway projects would together have decreased carbon dioxide emissions by 2031. In fact, those projects would have increased carbon dioxide emissions.”</p> <p>Claim of material inaccuracy</p>	<ul style="list-style-type: none"> <li>paraphrase inaccurate;</li> <li>question of opinion/assessment, not incontrovertible fact;</li> <li>statement in section 14 analysis not inaccurate;<sup>343</sup></li> <li>advice was that modelling test for 2031 year showed that removal of the Penlink and the full Mill Road project (as originally announced in the NZUP package) would lead to a very small (0.15%) increase in CO<sub>2</sub> emissions due to an increase in total VKT and higher congestion.<sup>344</sup></li> <li>advice also noted that remaining roading projects would make important contributions to other objectives including safety, connectivity overall effectiveness and freight access, or may be multi-modal in nature.<sup>345</sup></li> </ul>
(e) Availability of funding to reallocate general road space to sustainable modes	<p>“They wrongly advised the RTC that there is no available funding to provide further reallocation of general road space towards cycling and other sustainable modes. On the contrary:</p> <p>(i) Around \$2.1 billion of the total funding available under the RLTP is discretionary;</p>	<ul style="list-style-type: none"> <li>paraphrase inaccurate;</li> <li>question of opinion/assessment, not incontrovertible fact;</li> <li>statement in Analysis not inaccurate;<sup>346</sup></li> <li>advice was that with the possible exception of a Crown allocation to complete the City Centre to Māngere light rail project, no further funding appeared likely for additional sustainable modes. This was because assumed funding from the NLTP was already at the \$16.3 billion allocation set out in</li> </ul>

341 Bunn at [232]-[243].

342 RLTP Appendix 9 (as presented to the RTC on 18 June 2021) at [31], fourth bullet point (JC1-0495).

343 Bunn at [232]-[243].

344 RLTP Appendix 9 (as presented to the RTC on 18 June 2021) at [31], fourth bullet point (JC1-0495).

345 RLTP Appendix 9 (as presented to the RTC on 18 June 2021) at [31], fourth bullet point (JC1-0495).

346 Bunn at [244]-[252].

Subject matter	Claim	AT's response
	<p>(ii) The renewals budget in the RLTP can (and should) be used to fund the reallocation of road space towards sustainable modes;</p> <p>(iii) Reallocation of road space can (and should) be delivered as part of other projects that are planned under the RLTP without affecting the available budget; and</p> <p>(iv) Auckland Transport made a choice not to allocate further funding for, and not to reallocate further road space towards, sustainable modes in the RLTP.”</p> <p>Claim of material inaccuracy</p>	<p>the GPS. Council funding for additional public transport services was also limited, and smaller than desirable;<sup>347</sup></p> <ul style="list-style-type: none"> <li>advice also said that there was limited practical scope to relocate elements of the programme from roading projects to further increase investment in public transport and active modes. This was because the bulk of major roading projects included in the RLTP were either committed or included in the NZUP programme, which could not be altered by the RTC;<sup>348</sup></li> <li>further, road space reallocation towards cycling and other sustainable modes was already occurring as part of the wider cycling programme and projects such as Connected Communities that would provide for bus lanes, bus priority and cycling and safety improvements. There was no available funding for further reallocation.<sup>349</sup></li> </ul>
(f) Effect of lane reallocation on emissions	<p>“They wrongly advised the RTC that gains from deterring car travel through lane reallocation would be offset by increased emissions and congestion. In fact, reallocating road space to other modes would reduce emissions and congestion.”</p> <p>Claim of material inaccuracy</p>	<ul style="list-style-type: none"> <li>paraphrase inaccurate;</li> <li>question of opinion/assessment, not incontrovertible fact;</li> <li>statement in section 14 analysis not inaccurate;<sup>350</sup></li> <li>advice was that it was likely that gains from deterring car travel through lane reallocation alone would be largely offset by the increase in emissions associated with increased congestion and diversion amongst the remaining traffic. Reallocation of general traffic lanes without additional effective alternatives (which cannot be funded) would also materially reduce the RLTP's contribution to LTMA objectives around effectiveness and economic, social and cultural public interests.<sup>351</sup></li> </ul>

347 RLTP Appendix 9 (as presented to the RTC on 18 June 2021) at [31], second bullet point (JC1-0495).

348 RLTP Appendix 9 (as presented to the RTC on 18 June 2021) at [31], third bullet point (JC1-0495).

349 RLTP Appendix 9 (as presented to the RTC on 18 June 2021) at [31], fifth bullet point (JC1-0495).

350 Bunn at [253]-[294].

351 RLTP Appendix 9 (as presented to the RTC on 18 June 2021) at [31], fifth bullet point (JC1-0495).

	Subject matter	Claim	AT's response
(g)	Effect of road space reallocation on contributing to LTMA purpose	<p>“They wrongly advised the RTC that reallocating road space without additional effective alternatives would materially reduce the RLTP’s contribution to the objectives of the LTMA in respect of effectiveness and economic, social and cultural public interests. In fact, reallocating road space to other modes would itself provide effective alternatives, promote safety, and contribute to the purpose of the LTMA.”</p> <p>Claim of material inaccuracy</p>	<ul style="list-style-type: none"> <li>• paraphrase inaccurate;</li> <li>• question of opinion/assessment, not incontrovertible fact;</li> <li>• statement in section 14 analysis not inaccurate;<sup>352</sup></li> <li>• advice was that reallocation of general traffic lanes without additional effective alternatives (which could not be funded) would also materially reduce the RLTP’s contribution to LTMA objectives around effectiveness and economic, social and cultural public interests.<sup>353</sup></li> </ul>
(h)	Consideration of environmental wellbeing	<p>“They purported to explain to the RTC how the RLTP supports economic, social and cultural wellbeing, but they made no mention of environmental wellbeing, the adverse impacts that the RLTP would have on environmental wellbeing, and the importance of environmental wellbeing for economic, social and cultural wellbeing.”</p> <p>Claim of failure to take into account relevant consideration</p>	<ul style="list-style-type: none"> <li>• not a mandatory relevant consideration. No mention of "environmental wellbeing" in the LTMA provisions relating to the development of an RLTP (however definition of “public interest” in GPS includes reference to environmental wellbeing);</li> <li>• in any event both the AT Staff Report and the section 14 analysis considered environmental wellbeing.<sup>354</sup></li> </ul>
(i)	Advising decision-makers of modelled emissions impact of 6% between 2016 and 2031	<p>“They failed to draw the RTC’s attention to Auckland Transport’s modelling of the expected emissions impacts of the RLTP programme itself (as distinct from the impacts of anticipated improvements in vehicle efficiency and planned government interventions), being a 6% increase in emissions between 2016 and 2031.”</p>	<ul style="list-style-type: none"> <li>• NB: not a claim that the 6% figure was wrong;</li> <li>• 6% figure was brought to RTC’s attention;<sup>355</sup></li> <li>• but unnecessary to do so. RTC was advised of modelled emissions outcomes from the RLTP investment programme in the appropriate context of all known likely significant emissions reductions initiatives, including government</li> </ul>

352 Bunn at [264]-[267].

353 RLTP Appendix 9 (as presented to the RTC on 18 June 2021) at [31], fifth bullet point (JC1-0495).

354 Report to the RTC (18 June 2021) at [37] (JC1-0372) and [56] (JC1-0376); RLTP Appendix 9 (as presented to the RTC on 18 June 2021) at [6(iv)(a)] (JC1-0493).

355 Report to the RTC (18 June 2021) at Attachment 3: see JC1-0705, JC1-0721, JC1-0729, JC1-0730, JC1-0753, JC1-0754, JC1-0825, JC1-0827, JC1-0857, JC1-0889, JC1-1063.

Subject matter	Claim	AT's response
	<p>In essence a claim of failure to take into account relevant consideration (because not brought to decision-maker's attention)</p>	<p>initiatives. The "pure" RLTP programme impacts were not relevant.<sup>356</sup></p> <ul style="list-style-type: none"> <li>also the 2016 to 2031 impacts were not as relevant as the 2021-2031 estimated impacts (advised to the RTC), as this was the lifetime of the RLTP.<sup>357</sup></li> </ul>
(j) Advising decision-makers of expected increase in vehicle kilometres travelled and no per capita reduction between 2016 and 2031	<p>"They failed to draw the RTC's attention to Auckland Transport's modelling that vehicle kilometres travelled are expected to increase under the RLTP in line with expected population growth of 22% between 2016 and 2031, with no material reduction in per capita vehicle kilometres travelled."</p> <p>In essence a claim of failure to take into account relevant consideration (because not brought to decision-maker's attention)</p>	<ul style="list-style-type: none"> <li>allegation incorrect;</li> <li>RTC was made aware of relevant modelling of expected vehicle kilometres travelled or per capita vehicle kilometres travelled over the period between 2016 and 2031 – the AT Staff Report included the draft RLTP which contained this information.<sup>358</sup></li> </ul>
(k) Relevance of ATAP to consistency with GPS 2021	<p>"They wrongly advised the RTC that consistency between the RLTP and GPS 2021 could be inferred from the fact that the RLTP was derived from the Auckland Transport Alignment Programme. In fact, that was wholly irrelevant to the RTC's assessment of consistency between the RLTP and GPS 2021."</p> <p>Claim of material inaccuracy</p>	<ul style="list-style-type: none"> <li>allegation incorrect – RTC did not base conclusion of consistency on such an inference.</li> <li>content of ATAP was not irrelevant to the issue of consistency between the RLTP and the GPS;</li> <li>statement in the section 14 analysis (para 40) was that RLTP investment programme was directly aligned to ATAP and achieved the same results and therefore Cabinet and other agency support for ATAP was consistent with the conclusion that the RLTP is consistent with the GPS.<sup>359</sup> However, it went on to say that the RLTP was consistent in any event.<sup>360</sup></li> </ul>

356 Bunn at [299]-[301]; RLTP (as presented to the RTC on 18 June 2021) at 79 (JC1-0456).

357 Report to the RTC (18 June 2021) at [49] (JC1-0374).

358 RLTP (as presented to the RTC on 18 June 2021) at 77-78 (JC1-0454).

359 RLTP Appendix 9 (as presented to the RTC on 18 June 2021) at [40] (JC1-0496).

360 RLTP Appendix 9 (as presented to the RTC on 18 June 2021) at [48] (JC1-0497).



Subject matter	Claim	AT's response
<p>(l) Binary choice between approving new RLTP and continuing existing 2018 RLTP</p>	<p>“They wrongly presented the RTC with a binary choice between approving the RLTP (as prepared) and the existing 2018 Auckland Regional Land Transport Plan remaining in effect (with alleged consequent impacts on Auckland Transport’s activities and access to funds). In fact, the RTC could (and should) have requested amendments to the RLTP before submitting it for approval.”</p> <p>Claim of material inaccuracy or perhaps irrelevant consideration</p>	<ul style="list-style-type: none"> <li>• allegation incorrect;</li> <li>• RTC knew of its ability to modify but in addition they wanted to know about the implications of not recommending approval of RLTP to Board, which advice it received;</li> <li>• RTC was not given a binary choice – they were aware that amendments could be made (and indeed were made) to proposed RLTP before submitting for Board approval.<sup>361</sup></li> </ul>

361 Bunn at [171]-[173] and [306]-[308].