# Appendix 4: Legal Advice re NZDF Designation and Scope of Decision Making Power

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# Memo

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| **DATE:** | 18 March 2022 |
| **TO:** | Justine Ashley |
| **FROM:** | Paul Rogers |
| **CLIENT:** | Selwyn District Council |
| **OUR MATTER:** | 03877\435 |
| **SUBJECT:** | **NZDF DESIGNATION- PDP SUBMISSION SEEKING AMENDMENTS- SCOPE OF DECISION MAKING POWER.** |

**QUESTION:**

1 Does Council have the ability to impose a new condition or alter an existing condition on a designation, that is proposed to be rolled over from the operative district plan into the proposed district plan, and which is subject to the submissions requesting that this occurs?

**ANSWER:**

2 Yes.

**DISCUSSION**

3 You have confirmed NZDF acting as a requiring authority held a designation in the ODP for the West Melton rifle range. You have also confirmed that prior to notification of the PDP SDC consulted with NZDF as to what it wishes to do in relation to the designated West Melton rifle range. In response NZES confirmed it wishes to have that designation 'rolled over' into the PDP with no change.

4 The PDP was duly notified including the 'rolled over' West Melton rifle range designation. That designation attracted submissions.

5 Where no submissions are received then clause 9(3) of schedule 1 RMA applies. That clause reads;

> "*nothing in this clause shall allow the territorial authority to make a recommendation or decision in respect of any existing designations…. That are included without modification and on which no submissions are received.*"

6 Given there have been submissions section 171 RMA applies. That section directs what a territorial authority or in this case duly appointed independent commissioners should consider when considering a requirement, (a designation). Section 171(1) states:

> *When considering a requirement and any submissions received,* a *territorial authority must, subject to Part 2 of the RMA, consider the effects on the environment of allowing the requirement, having particular regard to*:

*a. any relevant provisions of –*

*i. a national policy statement;*

*ii. a New Zealand coastal policy statement;*

*iii. a regional policy statement or proposed regional policy statement;*

*iv. a plan or proposed plan; and*

*b. whether adequate consideration has been given to alternative sites, routes or methods or undertaking the work if –*

*i. the requiring authority does not have an interest in the land sufficient for undertaking the work; or*

*ii. it is likely that the work will have a significant adverse effect on the environment; and*

*c. whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and*

*d. any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.*

7 The Board of Inquiry decision[1] on the NZTA notice of requirement (designation) for what is commonly referred to as the "Basin Reserve Project" along with the subsequent appeal by NZTA to the High Court following the Board's decision are the leading decisions on the interpretation and application of section 171.

8 The Board's decision gives clear direction on the correct approach to applying section 171. While discussing the correct approach to applying s171 is moving beyond your core question we consider these views might be of assistance.

## Subject to Part 2

9 When interpreting the words '*subject to Part 2'* in section 171, the Board explained that this requirement means that the directions in Part 2 are given paramountcy and are overriding in the event of conflict.

10 The Board went on to state that the Part 2 directions apply to both the evaluation of specific environmental effects and the overall evaluation in the final analysis:

[170] *The focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. The import of this is that the purpose, policy and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement. Paramount in this regard is section 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.*

[1] *Final Report and decision of the Board of Inquiry into the Basin Bridge Proposal* Ministry for the Environment, Board of Inquiry, August 2014 at [199].

11 The Board also referred to the comment of the Privy Council in *McGuire v Hastings District Council*[2] which we restate for clarity as to the procedure in the event of conflict: between Act provisions;

*Note that section 171 is expressly made subject to Part 2, which includes sections 6, 7, and 8. This means that the directions in the latter sections have to be considered as well as those in section 171 and indeed override them in the event of conflict.*

12 The Board discussed how to apply section 171 as follows:

*[175] What is required (subject to consideration of the King Salmon decision, which we address next) is a consideration of the effects on the environment of allowing the requirement having particular regard to the matters set out in sub-sections (a) – (d). This means that the matters in (a) – (d) need to be considered to the extent that our finding on these matters are to be heeded (or borne in mind) when considering our findings on the effects on the environment.*

13 When considering whether *King Salmon* altered the approach to Part 2, the Board concluded that as *King Salmon* considered a plan change, that different statutory tests applied.

14 The Board went on to say that:

*[187] Accordingly, we do not understand King Salmon as rejecting, or materially altering, the need for us to finally determine a designation (such as the one before us) in accordance with the established framework we have already outlined. Indeed, we do not consider we would be complying with the statutory requirement that our assessment of the Transport Agency's designation be subject to Part 2, if we failed to ultimately determine that designation by reference to Part 2, and undertake an overall judgement in accordance with Section 5. We would require very clear and explicit guidance before being persuaded we must now depart from this very specific Parliamentary direction.*

## Meaning of the words "having particular regard to"

15 Section 171(1) requires decision makers to consider the effects on the environment of the project enabled by the designation, subject to Part 2 and *having particular regard to* the matters set out in sub-sections (a)-(d).

16 The obligation to assess effects with respect to designations under section 171(1) is expressed in "*subtly different language from the equivalent obligation arising with respect to resource consents under Section 104(1)*."[3] The Board explained this difference as[4]

[2] *McGuire v Hastings District Council* (2002) 8 ELRNZ

[3] *Final Report and decision of the Board of Inquiry into the Basin Bridge Proposal* Ministry for the Environment, Board of Inquiry, August 2014 at [193].

[4] *Final Report and decision of the Board of Inquiry into the Basin Bridge Proposal* Ministry for the Environment, Board of Inquiry, August 2014 at [193].

*[193]Specifically, Section 171(1) requires consideration of the effects on the environment having particular regard to the matters in sub-sections (a) – (d). Whereas under Section 104(1), the activity's actual and potential effects are instead listed as one of the matters to which a decision maker must have regard, alongside those in Section 104(1) (b) and (c). Both Sections 104(1) and 171(1) though, are subject to Part 2.*

*[194] However, we do not consider that difference in wording requires a substantively different approach to considering effects on the environment arising from designations as that for determining consent applications…*

*….. [195] Thus Section 171(1) does not give any of the matters listed in sub-sections (a)-(d) any primacy or additional importance in assessing the project's effects on the environment. Nor can the effects of a designation somehow be lessened, or made more acceptable, by having particular regard to the matters in sub-sections (a) and (d), as the Transport Agency sought to establish. Indeed, the Act's definitions of effect and environment do not vary depending on whether they arise in the context of a designation or resource consent.*

*[196] Rather, Section 171(1) provides the context for our effects assessment, which must be informed as appropriate by the matters listed in sub-sections (a) – (d). We must make our own judgement on each matter on the evidence, and in all the circumstances. Having done so, we must then finally determine the Transport Agency's designation in accordance with Part 2.*

## The Order of applying section 171 matters

17 Section 171(1) does not list the matters in (a) – (d) in a hierarchy for consideration. None of the matters are given any primacy or additional importance in assessing the project's effects on the environment.

18 Section 171 (1) provides the context for an effects assessment. In order to complete this assessment, we recommend adopting the approach taken in *Basin Bridge*. This involves an effects assessment first, prior to considering the section 171(1) (b) matters.

## The Relevant Environment and Permitted Baseline

19 Before considering effects on the environment decision makers will need to first understand both the relevant environment on which the designations effects would occur and the scope of potential effects that can validly be taken into account for the purposes of that assessment.

20 We also note that the assessment of the relevant environment and the application of the permitted baseline are two distinct exercises, undertaken for different reasons. The purpose of assessing the existing and future state of the environment is to determine the nature of the receiving environment on which an activities effects would occur.



PGR-038777-436-1-V2 

21 As noted in the *Queenstown Lakes District Council v Hawthorn Estate Limited*[5] the purpose of the permitted baseline analysis is to isolate, and make a relevant, effects of activities on the environment that are permitted by the district plan, or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application.

22 The Environment Court in *Beadle v Minister of Corrections*[6] in the absence of submissions to the contrary, accepted that it could apply the permitted baseline to both designations and regional resource consents.

23 Decision makers are not mandatorily required by either case law or statute to do so. However if they do apply a permitted baseline they can do so only to discount the designations relevant adverse effects, not its positive benefits[7]

## Section 171 (1) (b) –adequate consideration of alternatives

**24** In considering whether an assessment of alternatives is adequate, the Environment Court has said that the question is "*whether or not the decision was reached arbitrarily*"[8]. Rather than looking at whether all alternatives were considered and whether the outcome was the best option, the Court is limited to the process that the authority undertook.

25 Where the requiring authority does not have an interest in the land or if there are potentially significant effects arising from the work proposed then alternative sites, routes or methods must be considered.

26 This is explained by Justice Whata in Queenstown Airport Corporation Limited:

*[121] The section presupposes where private land will be affected by a designation, adequate consideration of alternative sites not involving private land must be undertaken by the requiring authority. Furthermore, the measure of adequacy will depend on the extent of the land affected by the designation. The greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will need to be.*

27 The Board considered that Justice Whata's comments applied further than solely in the instance where the land was privately owned, stating:

*[1087] In this case, the extent of private land subject to the proposed designation is not significant. However, as we have said, the Transport Agency acknowledged (and our assessment confirms) that the work would be likely to have a significant adverse effect on the environment. While Justice Whata's comments applied to the impact on private land, the same logic must apply to the extent of the Project's adverse effects. The measure of adequacy of the*

[5] [2006] NZRMA 424(CA),at [65]-[66]
[6] A74/02(EC),at [991]
[7] See Rodney DC V Eyres [200] NZRMA 1 (HC).
[8] *Sustainable Matata v Bay of Plenty Regional Council* [2015] NZEnvC 50 at [167]

*consideration of alternatives will depend on the impact on the environment of adverse effects.*

28 The Board went on to describe the assessment of adequate sites as:

*[1090] Subsection 1(b) requires a judgement on whether an adequate process has been followed, including an assessment of what consideration has been adopted. The enquiry is not into whether the best alternative has been chosen. It is not incumbent on a requiring authority to demonstrate that it has considered all possible alternatives or that it has selected the best of all available alternatives. Rather, it is for the requiring authority to establish an appropriate range of alternatives and properly consider them.*
*[1091] The Environment Court and the MacKays to Peka Board of Inquiry have also referred to and adopted the following summary of the principles derived from case law that apply to the interpretation of Section 171(1)(b), as accepted by the North Island Grid Upgrade Project Board of Inquiry:*
*a) The focus is on the process, not the outcome: whether the requiring authority has made sufficient investigations of alternatives to satisfy itself of the alternatives proposed, rather than acting arbitrarily, or giving only cursory consideration to alternatives. Adequate consideration does not mean exhaustive or meticulous consideration…*

29 This means commissioners need to determine whether any process of assessment of alternatives is adequate. However a finding that the alternatives assessment is inadequate this does not automatically mean a decline for the designation.

30 However, if the requiring authority has not given adequate consideration to alternatives, that might undermine its evaluation of effects, or whether the designation and works are, in fact, *reasonably necessary*.

## Section 171 (1) (c) Reasonably necessary for achieving the objectives

31 The threshold of "*reasonably necessary*" has been described as falling between expedient or desirable on the one hand, and essential on the other[9].

32 Whata J highlighted the fact that elevating the top end of the threshold to essential or that the "*best*" site be selected is beyond the requirement of "*reasonably necessary*". He said that to "*elevate the threshold test to "best" site would depart from the everyday usage of the phrase "reasonably necessary" and significantly limit the capacity of requiring authorities to achieve the sustainable management purpose*", and further that if this was Parliament's intention then express language to that effect would be employed.[10]

33 Reasonably necessary is driven by the context of the particular designation being considered to fall somewhere in the middle in the spectrum of desirable to

[9] *Gavin Wallace v Auckland Council* [2012] NZENvC 120; *Final Report and decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project* Ministry for the Environment, Board of Inquiry, 4 September 2009 at [51]; *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [19].
[10] Queenstown Airport Corporation Limited v Queenstown Lakes District Council [2013] NZHC 2347 at [96].

essential, in other words it is proportionate to the circumstances of the particular case.

34 The correct approach to be taken is an assessment of whether the work, and the designation, proposed are reasonably necessary to achieve the requiring authority's objectives, as opposed to an assessment of the necessity of those objectives. The Environment Court has also held that a territorial authority may consider the extent of land that would be affected by the designation in having particular regard to whether the designation is reasonably necessary.[11]

## Overall Judgement

35 Once all preceding steps have been completed, commissioners must then make a judgement whether to recommend to the requiring authority to confirm, modify or cancel the designation.

36 This means considering all the findings of the section 171 (a) – (d) assessment and making a final evaluation as to whether confirming the designation would meet the single purpose of the RMA set out in section 5, which is to promote the sustainable management of natural and physical resources.

37 The commissioners will be guided in this overall judgement by the overarching matters set out in Part 2 of the Act. In the event of conflict, the directions in Part 2 override the directions in section 171. Sections 6 and 7 inform and assist the purpose as set out in section 5 of Part 2, being factors in the overall balancing.

38 Following this framework, the commissioners can then complete an evaluative judgment on which of the options under section 171(2) (a)-(d) for the designation would better serve the purpose of the RMA as defined in section 5.

[11] *Bungalo Holdings Ltd v North Shore City Council* EnvC A052; *Auckland Volcanic Cones Society Inc v Transit NZ Ltd* [2003] NZRMA 54/01.