BEFORE A BOARD OF INQUIRY
EAST WEST LINK PROJECT

UNDER

of the Resource Management Act 1991 (RMA)

AND

IN THE MATTER

of notices of requirement for designation and resource consent applications by the New Zealand Transport Agency for the East West Link Project (the Project)

MEMORANDUM ON BEHALF OF AUCKLAND COUNCIL REGARDING HERITAGE CONDITIONS

1 September 2017

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INTRODUCTION

NZTA’s draft designation conditions address Historic Heritage matters. The proposed conditions manage effects on historic heritage through Accidental Discovery Protocols (ADP), the Heritage Management Plan (HMP), and a conservation plan for the Aotea Scout Hall. As currently drafted, the proposed designation conditions purport to address matters that may also (eventually) be covered by any Authority granted under the Heritage New Zealand Pouhere Taonga Act 2014 (HNZPTA).

Auckland Council (Council) does not consider that the grant of an Authority under the HNZPTA should exclude the management under the RMA of matters that may also be covered by an Authority, and that this approach is not appropriate.

The Council proposes amendments to the historic heritage designation conditions for the reasons addressed in this memorandum.

BACKGROUND

On 7 August 2017, the Board sought clarification from the Council on the differences between the Resource Management Act 1991 (RMA) and the HNZPTA, and the relationship between the Council and Heritage New Zealand Pouhere Taonga (HNZPT), with respect to managing historic heritage under those Acts.

This particular issue arose during the presentation by (and cross-examination of) Ms Myfanwy Eaves, the Council’s expert historic heritage witness on 7 August 2017.

HNZPT can grant an Authority to modify or destroy an archaeological site, while the Board may confirm a designation (or grant resource consent) for activities that may impact on the historic heritage values of a scheduled place. Very simply, having one (either an Authority under the HNZPTA, or a designation (or resource consent) to undertake particular activities) does not necessarily override any requirement to obtain the other.

1 There are no scheduled or recorded archaeological sites in the Project’s footprint.
2 Or, alternatively, a designation may be obtained for land use activities. In this case the heritage conditions at issue (HH.1 – HH.4) are designation conditions.
3. **THE COUNCIL’S SUBMISSIONS**

**Introduction**

3.1 There is no debate that the activities to be authorised by the NZTA’s proposed designation could potentially have adverse effects on archaeology, and historic heritage more generally. Accordingly, conditions are proposed by the NZTA to manage these adverse effects.

3.2 However, as currently worded, draft conditions HH.1, HH.2 and HH.3(c) and (e) provide that any “activities and areas” that are subject to an Authority under the HNZPTA, are not subject to the designation conditions (and therefore not subject to management under the RMA nor any oversight by the Council).³

3.3 Heritage matters are managed differently under the RMA and HNZPTA. In our submission, making the proposed designation conditions referred to above subject to HNZPT decision-making and processes is not appropriate, for the following reasons.

**The RMA – assessing and managing effects on “historic heritage”**

3.4 The Board, when considering a requirement for a designation must, subject to the Part 2 of the RMA, consider the requirement’s effects on the environment, having particular regard to a number of matters, including any relevant provisions of the Auckland Unitary Plan (Operative in Part) (AUP(OiP)).⁴ The activities associated with NZTA’s proposed designations (and resource consents) will have effects on the environment, which need to be managed appropriately through conditions.

3.5 Under Part 2 of the RMA, section 6(f) provides for the protection of historic heritage from inappropriate subdivision, use and development as a matter of national importance. “Historic heritage” is defined under the RMA, and its definition includes “archaeological sites.”⁵ The control of effects on “historic heritage” is a relevant RMA matter and the protection of historic heritage under section 6(f) requires all decision-makers to recognise and provide for historic heritage in their decision-making (where relevant).

3.6 In terms of the RMA, the long-term protection and management of historic heritage (including archaeological sites) is provided for irrespective of age, in

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³ Note proposed condition HH.4(b) which requires the HMP to include areas covered by an Authority.
⁴ Section 171(1) of the RMA. Similar obligations apply in relation to the assessment of resource consent applications under section 104 of the RMA.
⁵ “Archaeological site” is not defined under the RMA. “Archaeological site” in the AUP(OiP) has the same meaning as in HNZPTA.
accordance with section 6(f) of the RMA.⁶ There is nothing in the RMA excluding its application to activities that might be the subject of an Authority granted under the HNZPTA.

**The HNZPTA – managing activities in relation to pre-1900 archaeology**

3.7 Under the HNZPTA, an Authority must be obtained from HNZPT to modify or destroy an archaeological site (whether or not that site is recorded on the New Zealand Heritage List/Rārangi Kōrero).⁷ The HNZPT’s decision on an application for an Authority is subject to the requirements of the HNZPTA.

3.8 The HNZPTA defines an "archaeological site" as:

(a) any place in New Zealand, including any building or structure (or part of a building or structure), that—

(i) was associated with human activity that occurred before 1900 or is the site of the wreck of any vessel where the wreck occurred before 1900; and

(ii) provides or may provide, through investigation by archaeological methods, evidence relating to the history of New Zealand; and

(b) includes a site for which a declaration is made under section 43(1)

3.9 "Archaeological site" as defined in the HNZPTA includes buildings or structures that are associated with human activity before 1900. There is no pre-1900 threshold under the RMA definition of "historic heritage". Therefore, an "archaeological site" under the HNZPTA is also "historic heritage" under the RMA.

**The Gordon decision**

3.10 There is nothing in either the RMA or the HNZPTA that makes one statute subject to the other, nor does one operate to the exclusion of the other. This is confirmed by case law.

3.11 In *Gordon v Auckland Council*,⁸ the Environment Court considered an appeal against the Council’s proposed scheduling of land owned by the appellants as a historic heritage site in the Council’s district plan.

3.12 The Court dismissed the Gordons’ appeal and responded to legal submissions relating to the interface between the RMA and the (then) Historic Places Act 1993, stating that:⁹

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⁶ Noting that, apart from section 6(f), sections 6(e), 7(a) and 5 also generate the potential need to manage effects on the values associated with heritage sites.
⁷ See for example section 44 of the HNZPTA.
⁹ Ibid, at [20].
As a matter of legal interpretation, we cannot agree with Ms Fisher's further propositions on the interface between the RMA and the Historic Places Act. It is common for approvals to be required under more than one statute. As Mr Lanning points out dual approvals are required under, for example, the Reserves Act 1977 and the Conservation Act 1987, as well as the RMA. The two statutes we are concerned with run in parallel, and both deal with issues of heritage protection. One does not operate to the exclusion of the other.

(Emphasis added)

3.13 Therefore, the grant of an Authority under the HNZPTA does not exclude the consideration (and management) of those same historic heritage matters under the RMA.

3.14 The RMA and the HNZPTA operate in parallel. It is usual to include advice notes in resource consents that inform consent holders of the necessity to also obtain approvals, consents, permissions and authorities under other legislation. This often includes an advice note that a consent holder may also require an Authority under the HNZPTA, and the Council similarly proposes such an advice note in the NZTA’s draft conditions.

The AUP(OiP)

3.15 As discussed above, there are two statutory regimes controlling activities that may affect known and unknown archaeological sites. The prospect of this was noted by the Independent Hearings Panel during the proposed Auckland Unitary Plan hearings:10

The accidental discovery rules, together with the management regime administered by Heritage New Zealand, effectively manage the unforeseen.

... The Panel considers that this is a situation where duplication cannot be avoided. Restricted discretionary activity status applies only to those “archaeological sites or features identified as subject to additional archaeological rules in Schedule 11.1”. There is the potential for invasive archaeological investigations to adversely affect the primary features of an historic heritage place that are not also archaeological sites or features. For this reason, it is fair to require resource consent to be obtained in addition to an authority to modify under section 56 of the Heritage New Zealand Pouhere Taonga Act 2014.

(Emphasis added)

3.16 The AUP(OiP) provides:11

In addition to the requirements of this Plan, the Heritage New Zealand Pouhere Taonga Act 2014 requires an authority to be obtained from Heritage New Zealand to modify or destroy any

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10 See the IHP Hearings Report on Topic 31 (Historic Heritage), page 7.
11 See D17.1 Background.
archaeological site meeting the criteria set out in that Act, **whether or not it is recorded or scheduled.**

(Emphasis added)

3.17 The Historic Heritage overlay in the Auckland Unitary Plan (Operative in Part) (AUP(OiP)) manages effects on scheduled historic heritage places and areas. Within the Historic Heritage overlay, archaeological investigations (that are not permitted) affecting the primary features of scheduled historic heritage places (or within their extent of place) require restricted discretionary consent.\(^\text{12}\)

3.18 The NZTA’s proposed works do not affect any scheduled archaeological sites. Nevertheless the works have the potential to affect unknown historic heritage. The NZTA is proposing designation conditions to address these potential effects.

**The Accidental Discovery rule**

3.19 The AUP(OiP) also includes an Accidental Discovery rule (ADR) relating to land disturbance activities (both regional and district) where the accidental discovery of "sensitive material" may occur.\(^\text{13}\) “Sensitive material” is defined within the ADR, but does not include the broader definition of "historic heritage."\(^\text{14}\) The ADR provides:

> Despite any other rule in this Plan permitting earthworks or land disturbance or any activity associated with earthworks or land disturbance, in the event of discovery of sensitive material which is not expressly provided for by any resource consent or other statutory authority, the standards and procedures set out in this rule must apply.

3.20 The ADR sets out the process to be undertaken by the owner of the site or the consent holder in terms of ceasing work, securing the area in question, informing the relevant authorities, and enabling an inspection of the site before recommencing work. It also requires any Authorities under the HNZPTA to be obtained, where necessary.

3.21 The ADR is a "standard" that acts as a 'default' where land disturbances are permitted activities, or where a resource consent or statutory authority (such as a designation) does not expressly include an ADP.

3.22 Under proposed condition HH.2, the Project’s designation conditions state that an ADP will be prepared, and that it shall be consistent with the ADR in the AUP(OiP). However, the issue is whether this ADP should still apply if an Authority is granted.

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\(^{12}\) See D17.4.2 (A25) of the AUP(OiP).

\(^{13}\) See E11.6.1 and E12.6.1 in the AUP(OiP).

\(^{14}\) "Sensitive material" means: human remains and kōiwi; an archaeological site; a Māori cultural artefact/taonga tuturu; a protected New Zealand object as defined in the Protected Objects Act 1975 (including any fossil or sub-fossil); evidence of contaminated land (such as discoloration, vapours, asbestos, separate phase hydrocarbons, landfill material or significant odour); or a lava cave greater than 1m in diameter on any axis.
3.23 NZTA is seeking designations, and resource consents with an overall non-complying activity status. Accordingly, as noted above, the Board must ensure that effects on the environment, including effects on historic heritage, are adequately managed. It is difficult to ascertain how the ADR applies in this context. It does not, however, in our submission necessarily require any RMA controls (ie designation conditions) to ‘drop away’ where an Authority may have been granted. In this regard we note that the ADR (and the ADP) require a broad range of actions including engagement with Mana Whenua, even when an Authority may not be required.

3.24 It is important to ensure that these requirements will not 'drop away' in the event an Authority is granted (because there is no certainty as to what controls the Authority may contain). Moreover, it is important to ensure that historic heritage (both pre and post 1900) is managed in a comprehensive and integrated basis (which is envisaged in the HMP, under conditions HH.3 and HH.4). Excluding "activities and areas" covered by an Authority puts this at risk.

3.25 Conflicts are unlikely to arise between the requirements of the RMA conditions and an Authority. However, in any event, it needs to be clear that there are dual roles and functions of the Council and HNZPT to ensure the appropriate protection and management of historic heritage and archaeological sites.

3.26 As a result, we do not consider it appropriate that the grant of an Authority means that the activities and areas subject to that Authority are exempt from the designation conditions.

4. THE COUNCIL'S PROPOSED AMENDMENTS TO THE HISTORIC HERITAGE CONDITIONS

4.1 The Council proposes amendments to the designation conditions to respond to the matters addressed above, and these are attached as Appendix 1. The effect of these proposed amendments ensures that heritage matters under the RMA are addressed, and separates the Authority process as it relates to the HNZPTA.

4.2 The Council proposes deletions to conditions HH.1, HH.2, HH.3(c) and HH.3(e) to clarify that any historic heritage matters that are already subject to an Authority, are also subject to management through these conditions. The Council also proposes amendments to the advice note to refer to the HNZPTA and the requirements that are necessary under that Act.

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15 For example, should it be regarded as part of the "permitted baseline"? Also, do what extent does it limit the conditions that can be imposed, given that it is a "standard"?

16 E11.6.1(3)(f)(vi) and E12.6.1(3)(f)(vi) of the AUP(OiP).
4.3 The Council also proposes minor clarifying amendments to HH.3 and HH.4 (relating to the HMP, which addresses historic heritage matters, and not just "sensitive material"), and a new HH.4A relating to the provision of historic heritage reports to the Council.

5. CONCLUSION

5.1 The HNZPTA does not 'trump' historic heritage matters under the RMA, rather these statutes can (and should) work "in tandem" as Ms Eaves stated during the hearing. Ultimately, the Council wants to ensure that any activities relating to NZTA's Project avoid, mitigate and remedy any adverse impacts on historic heritage.

5.2 The Council proposes amendments to the draft designation conditions to ensure that any matters that may be addressed by the grant of an Authority from HNZPT, are also addressed through the historic heritage conditions and are able to be properly managed by both the Council and HNZPT, in accordance with their respective statutory functions and obligations.

5.3 It is submitted that the Council's proposed amendments (including its additional minor changes) are appropriate, better achieve the purpose of the RMA and better reflect and describe the inter-relationship between and the dual nature of, the RMA and the HNZPTA.

Dated at Auckland this 1st day of September 2017

G C Lanning / W E Bell
On behalf of Auckland Council

17 Summary of Evidence of Myfanwy Eaves at [3](a), see also the Hearing Transcript, Day 24, 7 August 2017 at pages 3193 (line 45) and 3194 (line 44).
## Appendix 1

### Auckland Council's summary of requested changes to the Historic Heritage designation conditions

Council's proposed deletions are shown **struckthrough** and insertions shown **underlined**

<table>
<thead>
<tr>
<th>Condition Ref</th>
<th>Change/Response</th>
<th>AC Comment</th>
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<tr>
<td>HH.1</td>
<td>Where the Requiring Authority holds an Archaeological Authority for pre-1900 archaeological sites under the Heritage New Zealand Pouhere Taonga Act 2014, the designation conditions set out below shall not apply to the activities authorized by the Archaeological Authority.</td>
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<td>HH.2</td>
<td>For activities and areas of the Project not covered by an Archaeological Authority, the Requiring Authority shall prepare an Accidental Discovery Protocol for any accidental archaeological discoveries which occur during Construction Works.</td>
<td>Suggest that E.11.6.1 is moved to, or cross referenced in the Resource Consent conditions (RC or E conditions) as it is a regional rule</td>
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<td>The Accidental Discovery Protocol shall be prepared in consultation with the Mana Whenua Group and modified to reflect the site specific Project detail.</td>
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<td>The Accidental Discovery Protocol shall be implemented throughout the Construction Works.</td>
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<td>HH.3</td>
<td>(a) Prior to Commencement of Construction, the Requiring Authority shall prepare and implement a <strong>Heritage Management Plan</strong> (HMP).</td>
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<td>(b) The purpose of the HMP is to identify procedures and practices to be adopted to protect, as far as reasonably practicable, historic heritage and remedy and mitigate any residual effects.</td>
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<td>(c) The HMP will be prepared for the management of historic heritage, excluding any matters areas covered by an Archaeological Authority granted by HNZPT.</td>
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(d) The HMP shall be provided to the Manager prior to Commencement of Construction.

The HMP shall be implemented throughout Construction Works, other than where the conditions of an Archaeological Authority obtained under the Heritage New Zealand Pouhere Taonga Act 2014, or the archaeological works plans or site instructions approved under that Authority, require otherwise.

HH.4

The HMP shall be prepared by a suitably qualified person(s) in consultation with Auckland Council, HNZPT and Mana Whenua, and shall identify:

(a) Known historic heritage within the designation boundary;

(b) Any pre-1900 areas covered by an Archaeological Authority archaeological sites in accordance with authorities under the Heritage New Zealand Pouhere Taonga Act 2014;

(c) Roles and responsibilities and contact details of personnel and/or relevant agencies (including but not limited to Auckland Council, New Zealand Police, Heritage New Zealand Pouhere Taonga, and mana whenua representatives) involved with historic heritage matters including surveys, and monitoring of conditions;

(d) Methods for identifying, avoiding, protecting and/or minimising effects on historic heritage during construction where practicable in line with international best practice (for example the fencing off of archaeologically sensitive areas to protect them from damage during construction, and including construction methods that minimise vibration);

(e) Details for recording and salvage prior to removal of the historic concrete railway bridge and tunnel located adjacent to Onehunga Harbour Road. The recording and salvage shall be aligned, as appropriate, with the Salvage and Conservation Heritage Plan for the proposed removal of the Qld 1875/1915 Māngere Bridge (being part of a separate works project planned by the NZ Transport Agency);

(f) Training requirements for contractors and subcontractors on historic heritage areas/features within the designation boundary and any accidental discovery protocols. The training shall be undertaken under the guidance of a suitably qualified person and representatives of the Mana Whenua Group;
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<td>(g)</td>
<td>Cultural inductions for site/places of importance to Mana Whenua; and</td>
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<td>(h)</td>
<td>Proposed methodology for assessing the condition of historic heritage, condition and the means to mitigate any adverse effects (if any) on the built heritage features listed in Condition HH.5, including allocation of resources and the timeframe for implementing the proposed methodology in accordance with Heritage New Zealand guideline AGS 1A: Investigation and Recording of Buildings and Standing Structures for assessing and recording built heritage dated 4 July 2014 (or any subsequent revision); and</td>
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<tr>
<td>(i)</td>
<td>Proposed methodology for documentation of post-1900 historic heritage exposed during construction and the recording of these sites in the Auckland Council Cultural Heritage Inventory (<a href="http://www.chi.net/Home.aspx">www.chi.net/Home.aspx</a>). Site records shall be updated by the Suitably Qualified Person within 20 working days of the completion of on-site earthworks.</td>
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**HH.4A**

Electronic copies of all historic heritage reports relating to historic heritage investigations (evaluation, excavation and monitoring etc.), including interim reports, shall be submitted by the HH expert to the Manager and to the Auckland Council Cultural Heritage Inventory as soon as they are produced.

**Advice note:**

*The archaeological requirements of the Project shall be undertaken in compliance with any conditions of an archaeological authority issued by HNZPT under the Heritage New Zealand Pouhere Taonga Act 2014.*

*The Requiring Authority shall seek advice from a Suitably Qualified Person in advance of any Site Investigations or Enabling Works on the potential need for an Archaeological Authority under the Heritage New Zealand Pouhere Taonga Act 2014 for those works. If the Suitably Qualified Person identifies that an Archaeological Authority may be required, the Requiring Authority shall engage with Heritage New Zealand.*

Heritage New Zealand Pouhere Taonga Act 2014

The Heritage New Zealand Pouhere Taonga Act 2014 (hereafter referred to as the Act)
provides for the identification, protection, preservation and conservation of the historic and cultural heritage of New Zealand. All archaeological sites are protected by the provisions of the Act (section 42). It is unlawful to modify, damage or destroy an archaeological site without prior authority from Heritage New Zealand Pouhere Taonga. An Authority is required whether or not the land on which an archaeological site may be present is designated, a resource or building consent has been granted, or the activity is permitted under Unitary, District or Regional Plans.

According to the Act (section 6) archaeological site means, subject to section 42(3) –

a) any place in New Zealand, including any building or structure (or part of a building or structure), that –

i. was associated with human activity that occurred before 1900 or is the site of the wreck of any vessel where the wreck occurred before 1900; and

ii. provides or may provide, through investigation by archaeological methods, evidence relating to the history of New Zealand; and

b) includes a site for which a declaration is made under section 43(1)

It is the responsibility of the Requiring Authority to consult with Heritage New Zealand Pouhere Taonga about the requirements of the Act and to obtain the necessary Authorities under the Act should these become necessary, as a result of any activity associated with the consented proposals.

For information please contact the Heritage New Zealand Pouhere Taonga Northern Regional Archaeologist – 09 307 0413 / archaeologistMN@historic.org.nz