

Under the COVID-19 Recovery (Fast-track Consenting) Act 2000

Port Marlborough New Zealand Limited

Applicant

and

KiwiRail Holdings Limited

Applicant

and

Marlborough District Council

Applicant

**Memorandum of counsel for responding to request for
information in relation to LP-14 Waitohi Picton Ferry
Precinct Redevelopment under COVID-19 Recovery (Fast-
track Consenting) Act 2020**

16 March 2021

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Introduction

1. On the 2 March 2021, the Waitohi Picton Ferry Precinct Redevelopment Expert Consenting Panel (**Panel**) directed the Environmental Protection Authority (**EPA**), to request further information under clause 25 of Schedule 6 of the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**CRA**), relating to the Waitohi Picton Ferry Precinct Redevelopment consent application (the **Project**).
2. The Project is a joint initiative between Port Marlborough New Zealand Limited (**PMNZ**) and KiwiRail Holdings Limited (**KiwiRail**) alongside the Marlborough District Council (**MDC**) and these parties (together, the **Applicants**) respond to the Panel's request for further information in the following memorandum.
3. PMNZ and KiwiRail acknowledge and recognise MDC has multiple functions and roles including as a joint applicant for this Project, an asset owner, and regulatory responsibilities under the Resource Management Act 1991 (**RMA**). This memorandum is lodged on behalf of PMNZ and KiwiRail.

Summary

4. PMNZ and KiwiRail submit that:
 - (a) There is a deemed water permit under the RMA to divert water from the Waitohi Lagoon into the Picton Harbour, and for associated works including the culvert.
 - (b) The deemed permit expires on 1 October 2026.
 - (c) The re-consenting of the water diversion will be progressed through a separate application in due course. The Panel cannot require the present application to be amended to address the water diversion, as this is not related to the effects of the Project and is outside scope.
 - (d) Questions about ownership and who pays for any upgrade of the culvert are not matters relevant to the Panel's assessment of the application.

- (e) In any event, the status of the culvert is not a matter which the Panel can properly rely upon as a basis to decline consent.

Background

5. The Panel has noted the limits of its jurisdiction relating to consent conditions through *Waitakere CC v Estate Homes Ltd* (**Estate Homes**) and that this can only be relaxed by agreement using the *Augier v Secretary of State for the Environment* (**Augier**) principle.
6. The Supreme Court in *Estate Homes* held that:¹
- “the application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development”.
7. In the context of s 108 of the RMA, the limit on the scope of the broadly expressed discretion to impose conditions is simply that the council must ensure that conditions it imposes are not unrelated to the relevant activity.
8. However, as provided by s 108AA(1)(a) of the RMA, a condition can be imposed on a consent if the applicant for the resource consent agrees to the condition.
9. In *Augier* the Court stated that if an applicant gives an undertaking and, relying on that undertaking, the local authority grants planning consent subject to a condition in terms broad enough to embrace the undertaking, the applicant cannot say later that there is no power to require compliance with the undertaking.²
10. The scope of the *Augier* principle is narrow and is not to be engaged unless there is a clear and unequivocal undertaking intended to be

¹ *Waitakere CC v Estate Homes Ltd* [2007] NZRMA 137 (SC) at [66].

² *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD) at 226-227.

relied on. The Court is not entitled, and has no jurisdiction, to impose a condition in the absence of an undertaking to that standard.³

Specific Information Requested

Are the culvert works agreed to be within the Estate Homes principle; or are they instead connected to adequacy of the 1970 (and any later) water drainage infrastructural works together with concerns about climate change effects, sea level rise, storm surges, and expansion of urban developments in Picton since 1970?

11. Following recent correspondence from MDC about this issue, investigation of Council's Smart Maps website disclosed the existence of an early authorisation to divert water. It is further apparent there is now a deemed permit to divert water from the Waitohi Lagoon into the Picton Harbour, and for associated works including the culvert.⁴ A new permit will need to be obtained before 1 October 2026. Further details are provided below in light of MDC's response to the Panel's questions.
12. The Project will not exacerbate any existing capacity issues associated with the culvert. However, the culvert does cross the Project area and works may be undertaken on the culvert.
13. The application seeks approval to upgrade the culvert as follows:
 - (a) raising the roof of the box culvert; and/or
 - (b) reinforcing the vertical walls and roof of the culvert.
14. Option (a) provides for the increase in capacity of the culvert, should it be decided to undertake that work during the construction period of the project. Option (b) provides for reinforcement, should that be necessary to provide for the changes to the land loadings above.
15. Importantly, there is no requirement to increase the capacity of the culvert to address the impacts of the Project (either on the culvert itself or on Picton more generally).

³ *Frasers Papamoa Ltd v Tauranga CC* [2010] 2 NZLR 202, (2009) 15 ELRNZ 279 (HC).

⁴ See the purpose, location, and condition (l) of the water right attached at paragraph [24] below.

If the applicants are expected to have any financial responsibility for the culvert expansion, sole or shared with Marlborough District Council, is that put forward by them on an Augier basis?

16. For the reasons above, PMNZ and KiwiRail consider *Estate Homes* applies only to the limited works that may be required to strengthen the roof and/or walls. Any broader culvert expansion or capacity upgrade works are not within the scope of this Project. PMNZ and KiwiRail are unwilling to incur cost to rectify an existing issue that will not be exacerbated by the Project works on an Augier basis, in the context of this application.

If the works are instead to be undertaken solely by the council or its water company (or both), is the most that is required of the applicants, is that they co-operate with the infrastructure proponents subject to not jeopardising their own project? Is more detail required for conditions than that? If so, what do the parties propose?

17. If MDC has a desire to otherwise upgrade the capacity or improve the form of the culvert, PMNZ and KiwiRail are willing to work with MDC to realise that opportunity during the course of construction, but any such upgrade is not required to address any effects caused by the Project.
18. PMNZ and KiwiRail consider no more detail for conditions is required on the basis that culvert upgrade works are not part of the Project. The application provides a means to enable increased capacity as an option, but does not require it. To the extent that the works provided for may occur, they will be sufficiently managed by the construction management conditions.

Do the conditions need to spell out what infrastructure upgrade is intended? If so, is the suggested 500mm raising of the culvert heights sufficient? Why not the 750mm that was considered? Would even that be sufficient? What would be the impacts on the above-ground rail and transport infrastructure be? Would features of the concept plans change above-ground?

19. The Project involves the complete reconfiguration of the rail yard and car parking areas that are located above the Waitohi Culvert. Strengthening of the culvert may be necessary to provide adequate

load support for the works and activities above it. In the event that the Waitohi Culvert is upgraded beyond these strengthening works to increase capacity, as outlined in the resource consent application the roof of the culvert may be raised.

20. The option for raising the roof of the culvert has been provided to enable the use of the Project works as an opportunity to increase the capacity of the existing culvert.
21. Specific conditions setting out the details of the culvert upgrade works are considered unnecessary. If a decision is made to increase the capacity of the culvert by raising the roof of the culvert, then the amount of the height increase will need to take account of the required grade for the railway line above the roof and the required ballast depth, as well as the structural constraints of the existing culvert. Setting a required height which the culvert roof must achieve could unnecessarily constrain the design, or equally it may not be achievable.
22. While specific conditions are not considered necessary, the Applicants have made the following amendments to Condition 1.2 in Part A: General Condition (to be provided to the Panel on Wednesday 17th March 2021) that relate to the final design of the culvert:
 - (a) Condition 1.2 (a) has been amended to include reference to the culvert to ensure that the final design for the culvert is included in the plans provided to Council under this condition; and
 - (b) An advice note has been included that states that any alteration undertaken to the Waitohi Culvert shall be designed and certified by a chartered engineer to Council Code of Practice requirements.
23. In addition, the construction related conditions and management plans will address the general works in and around the culvert.

Response to Marlborough District Council's Position

24. MDC has provided PMNZ and KiwiRail with a copy of its response in relation to the questions raised above. MDC considers that:

- (a) The culvert is not consented as the deemed permit expired.
 - (b) The application needs to be amended to address the upgrade of the culvert.
 - (c) In light of the above, it is premature to address conditions relating to the culvert.
25. PMNZ and KiwiRail acknowledge the importance of the culvert to MDC. In the event the capacity of the culvert is to be increased then PMNZ and KiwiRail recognise it would be logical to do this at the same time as the Project. As noted above, the application provides increased capacity for the culvert as an option, but does not require it.

The culvert is consented and the deemed permit has not expired

26. In response, PMNZ and KiwiRail attach a copy of the water right pursuant to s 23 of the Water and Soil Conservation Act 1967 (**WSCA**) dated 5 March 1970 (the **Water Right**). In summary, the Water Right:
- (a) was issued by the National Water and Soil Conservation Authority to the Marlborough Harbour Board for a period of 10 years from 25 February 1970, and thereafter at the pleasure of the Regional Water Board;
 - (b) was issued for the purpose of “reclamation of the Waitohi Lagoon for use as railway yards, marshalling areas and access to Cook Strait ferry terminals”;
 - (c) recorded under the heading “Location of” the additional description of “diverting water --- Waitohi Lagoon to Picton Harbour (1) Waitohi Stream (2) Kent St. drain (3) Cemetery creek (4) Minor catchments”; and
 - (d) included at condition (l) express acknowledgement of associated construction works including the culvert: "The design and maintenance of any works relating to the right must be to a standard adequate to meet the conditions of the right so that neither the works nor the exercise of the right is likely to cause damage to any property or injury to any person".

27. As noted above, the Water Right was issued for a period of 10 years from 25 February 1970, and thereafter at the pleasure of the Regional Water Board.
28. The WSCA did not prescribe rules as to the expiry or cancellation of a water right. These were in practice deferred to terms or conditions imposed by the Authority or Board as the case may be. For example, s 23 simply provided that each application “shall be referred by the Minister to the Authority for consideration and decision”. Section 21(3) similarly provided that the Regional Water Board could grant a right to the applicant “on such terms as it may specify”.
29. Condition (j) of the Water Right provided that the Authority could cancel the right if in the Authority’s opinion the right was not being diligently and beneficially exercised. There is no suggestion that this right was not being properly exercised, no evidence of any such cancellation, and MDC does not purport to have identified records of any such cancellation in its RFI response.
30. PMNZ and KiwiRail confirm that their investigations to date have not disclosed any indication or communication that the Water Right was cancelled.
31. We note that the MDC website entry for the Water Right states “Expiry Date: 25 Feb 1980”. However, there is nothing to suggest that the website entry is anything more than a recital of the terms stated on the “Water Right Summary Sheet” cover page of the Water Right, which is an abridged, incomplete, and unauthoritative summary of the Water Right.
32. Accordingly, we consider on the evidence available that the Water Right was in force at the commencement of the RMA.
33. Section 386(1) of the RMA provides that every right granted under s 21(3) of the WSCA, or deemed to be so granted under s 58(1) of the Water and Soil Conservation Amendment Act 1988,⁵ (an “existing

⁵ This Act repealed s 23 of the WSCA and provided that every existing right granted under s 23 shall be deemed to have been granted under s 21(3) of the WSCA by the Regional Water Board within whose water region the water concerned is situated.

right”) that is in force immediately before 1 October 1991, shall be deemed to be a water permit, if it authorises something that would otherwise contravene section 14.⁶

34. Section 386(2) provides that where a permit arising from an existing right would, but for that subsection, not expire by the 35th anniversary of 1 October 1991, the permit shall be deemed to include a condition to the effect that it finally expires on 1 October 2026 (i.e. the 35th anniversary of the commencement of the RMA). Section 386(6) goes on to provide that the holder of a permit resulting from an existing authority may, in order to replace that permit, apply at any time under Part 6 (resource consents) for another permit for the same activity.
35. In any event, even if the deemed permit had expired then PMNZ and KiwiRail consider that the lack of consent for the existing water diversion is not caused by, or related to the effects of, this Project and is a matter that is outside the scope of the application.

The Application does not need to be amended to address the upgrade of the Culvert

36. On the 15 January 2021 the EPA was satisfied that the application complied with clause 3(1) of Schedule 6 of the CRA, and that the EPA was required to provide the consent application to the panel appointed to determine the application.
37. The re-consenting of the water diversion will be progressed through a separate application in due course. The re-consenting is not related to the effects of this Project and so the current application need not be amended to address it.
38. MDC has made statements about the ownership of different units of the culvert. PMNZ and KiwiRail note that ownership of the culvert, and who is the holder of the deemed permit are factually complex issues and not

⁶ It is granted under the RMA on the same conditions (including those set out in any enactment whether or not repealed or revoked by the RMA) by the appropriate consent authority; and the provisions of the RMA shall apply accordingly.

as clear cut as implied by MDC. Regardless, issues relating to ownership and who pays for any upgrade of the culvert are not RMA matters that are relevant to the Panel's assessment of the application.

39. The status of the culvert is not a matter upon which the Panel can decline consent. For listed projects, the Panel's ability to decline a consent application is restricted to two specific grounds. These are where a Panel considers that granting the consent would be inconsistent (with or without conditions) with:⁷
- (a) Any national policy statement, including a New Zealand coastal policy statement; or
 - (b) Section 6 of the CRA, which requires all persons exercising powers under it to act in a manner that is consistent with the principles of the Treaty of Waitangi (the Treaty) and Treaty settlements
40. Clause 34(2) of Schedule 6 CRA reiterates that a panel must grant a resource consent for a listed project if neither of the grounds described above apply.



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Dated 16 March 2021

⁷ Clause 34(1), Schedule 6.