

**BEFORE HEARING COMMISSIONERS
APPOINTED BY TARANAKI REGIONAL COUNCIL**

Consent No: 5262-3.0

UNDER THE Resource Management Act 1991 ("**Act**")

IN THE MATTER OF an application for resource consent discharge
emissions into the air from a free range poultry
farming operation

BETWEEN **AIRPORT FARM TRUSTEE LTD**

Applicant

AND **TARANAKI REGIONAL COUNCIL**

Consent authority

**MEMORANDUM OF COUNSEL ON BEHALF OF VARIOUS SUBMITTERS
(MCDONALDS, HIBELLS, BROWNS & POPPAS PEPPERS 2009 LTD)**

11 MARCH 2022

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MAY IT PLEASE THE COMMISSIONERS:

1. On 7 March 2022, the Commissioners framed certain questions and made directions (among other things), as follows:

Adopting a “real world” view: Is it *reasonably foreseeable* that area Q3E will be zoned as “live” residential A within the 8 year consent duration period suggested by NPDC?

Or if not, when is it reasonably foreseeable that the zoning will become live.

Should we regard reasonably foreseeable, as equating to more likely than not?

We invite Counsel for TRC and for the Applicant to address these question.

If Counsel for TRC wishes to make submissions on this point, these should be provided at the same time as any further evidence from TRC.

We do not invite any further submissions from other parties since the case law and planning provisions were well traversed at the hearing.

2. The submitters group is conscious that they were not invited to address the Commissioners on these matters, but have instructed that a short memorandum be filed addressing the issue, particularly raising an authority of which Counsel for the submitters group has become aware of. This is to assist the Commissioners, and is not considered to prejudice the Applicant or TRC as they will be able to respond if they wish (by 18 March 2022).
3. The question of how the assessment of future events was, to Counsel’s knowledge, most recently considered in the RMA context in the High Court decision in *RJ Davidson Family Trust v Marlborough District Council* [2017] NZRMA 227 (HC). The issue was not appealed to the Court of Appeal, and so does not feature in the more commonly referred to Court of Appeal decision *RJ Davidson Family Trust v Marlborough District Council* [2018] 3 NZLR 283 (CA). While the matter at issue was the risk of extinction of King Shags (or the exacerbation of that risk by granting consent to the mussel farm), rather than when planned rezoning is likely to occur, the principles explained by the High Court are relevant here. Justice Cull’s analysis is recorded in some detail from [111]-[133], concluding that the Environment Court’s approach was appropriate and describing that approach at [131]-[132] in particular as follows:

At [39] the Environment Court reiterated that facts must be proved “on the preponderance of the evidence”. Although this is a somewhat uncertain term, the Environment Court’s reference to “preponderance of evidence” simply describes the range of factual matters adduced for the assessment of the decision-maker. It is part of the assessment in reaching a decision on the balance of probabilities and was another way of describing the civil standard. There is no particular magic about its different title. The Court then adopted a likelihood scale for assessing the probabilities of future risks. That accords with the wording of the statute and is not in conflict with orthodox legal principles. The Court approached the assessment of the evidence before it and future prediction appropriately. The facts of what has occurred and has been scientifically observed was evidence, which was assessed on a balance of probability test.

In relation to future risk, the Court then considered the future risk on the evidence that was available to it and in its assessment took into account a significant relevant factor, namely the potential for the King Shag to be driven to extinction by the “accumulated and accumulative effects of mussel farms which are part of the environment in Beatrix Bay”. Although that was a low probability event, in the Court’s assessment, extinction was undoubtedly a significantly adverse effect which would be exacerbated, to a small extent, by the Trust’s proposal.

The Court predicted that the accumulative adverse effects could be serious. I note that the Court did not assess the risk as de minimus or as a remote possibility. There is no basis for this Court to interfere with the majority’s decision.

4. Applying the principles to the current case, it is respectfully submitted, in particular in respect of the Commissioners’ question about the “more likely than not” standard:
 - (a) Any past or current facts are to be proved on the balance of probabilities. For example, evidence as to what works NZTA has committed to, and is currently undertaking or is on its funded work programme, are to be proved on the balance of probabilities. In respect of same, attached is a copy of a recent NZTA Project Update received by Mr Doudunski on 1 March 2022 which discusses, at paragraphs 4 and 5, the De Havilland Road Roundabout updates – that being the new roundabout proposed on Airport Drive in the location shown to the Commissioner’s on their site visit to submitters’ properties by Mr Doudunski (as also discussed in Mr Doudunski’s evidence at the hearing).
 - (b) Any findings (or prediction) as to any future position, such as the timing of rezoning, is a matter of judgment to be made on the basis of the findings of fact that have been made. In other words, there is no standard of proof (to the balance of probabilities or otherwise) to be applied to a finding (or prediction) about a future position.

5. On the basis of the evidence of factual matters before the Commissioners, it will be evident that the submitters group consider that the Commissioners can appropriately, as a matter of judgment, proceed on the basis that area Q3E will be zoned as "live" Residential A within the next 4 years, rather than the 8 year term as suggested by NPDC.



11 March 2022

Scott Grieve

Counsel for the Submitters Group

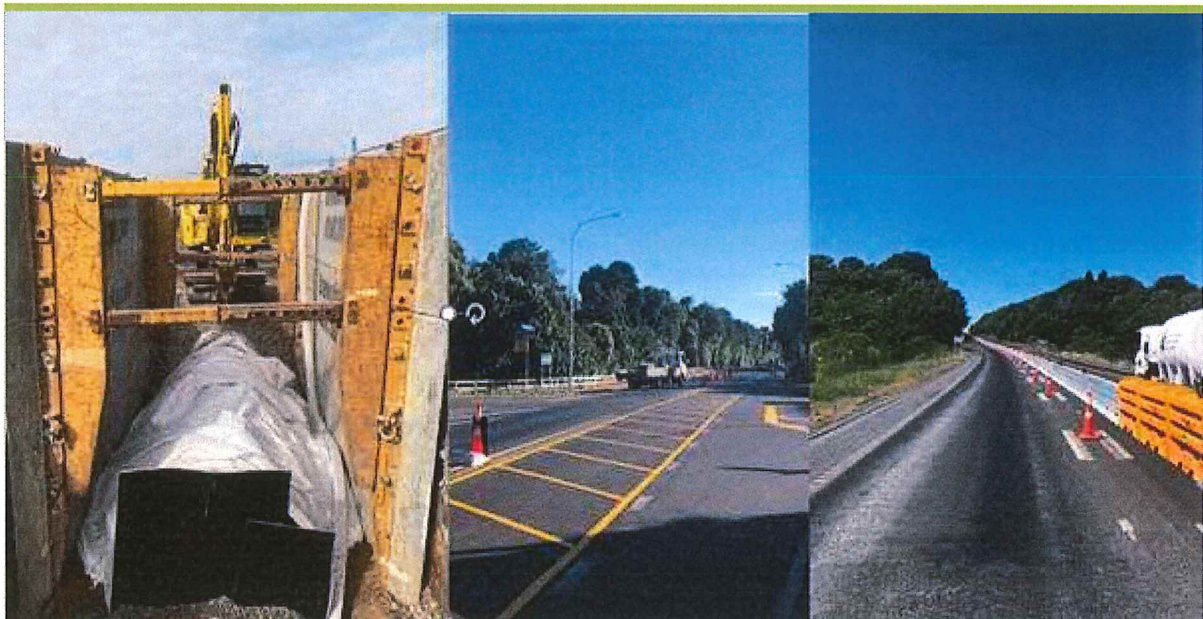
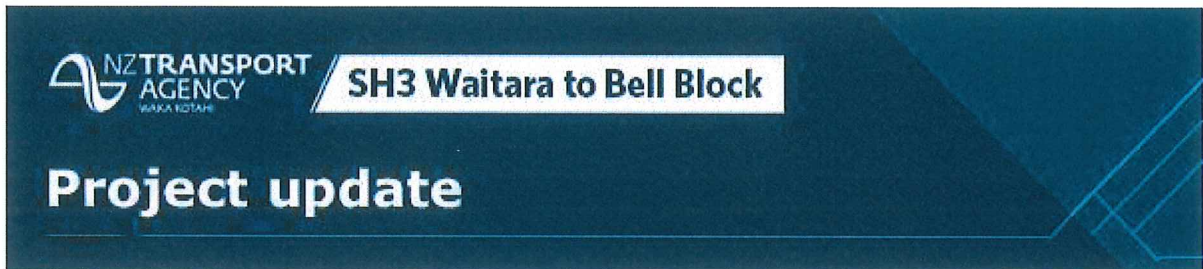


Image left shows a section of stormwater pipe installed on SH3, middle image shows new yellow 'no stopping lines' applied to SH3/Princess street intersection, right image shows barrier protection installed on SH3.

Kia ora

We're pleased to report that stormwater infrastructure works which began in January are progressing well and despite the recent bouts of bad weather the project is on track to be completed by June.

The 760m stormwater pipe will carry stormwater runoff from the future Princess Street Roundabout and address current flooding issues around Rahiri and Princess streets.

Design and consenting works will continue over the winter, with construction of the Princess Street Roundabout and underpass getting underway later in the year.

A trial embankment will also be constructed at the De Havilland Drive/SH3 intersection in Bell Block in April, using rock material from the stormwater excavations.

The trial embankment will provide information on how the ground reacts to weight, informing the design of the future De Havilland Road Roundabout.

The detour through Waitara for northbound light vehicles is operating well, thanks to the cooperation of the Waitara community, road users and the freight industry.

Now in place 24/7 to avoid confusion, the detour takes about six to 10 minutes depending on the time of day, around the same time as waiting at the lights on the highway.

Most are adhering to the traffic management in place, but crews have noticed a few light vehicles waiting at the lights with freight to travel north on SH3.

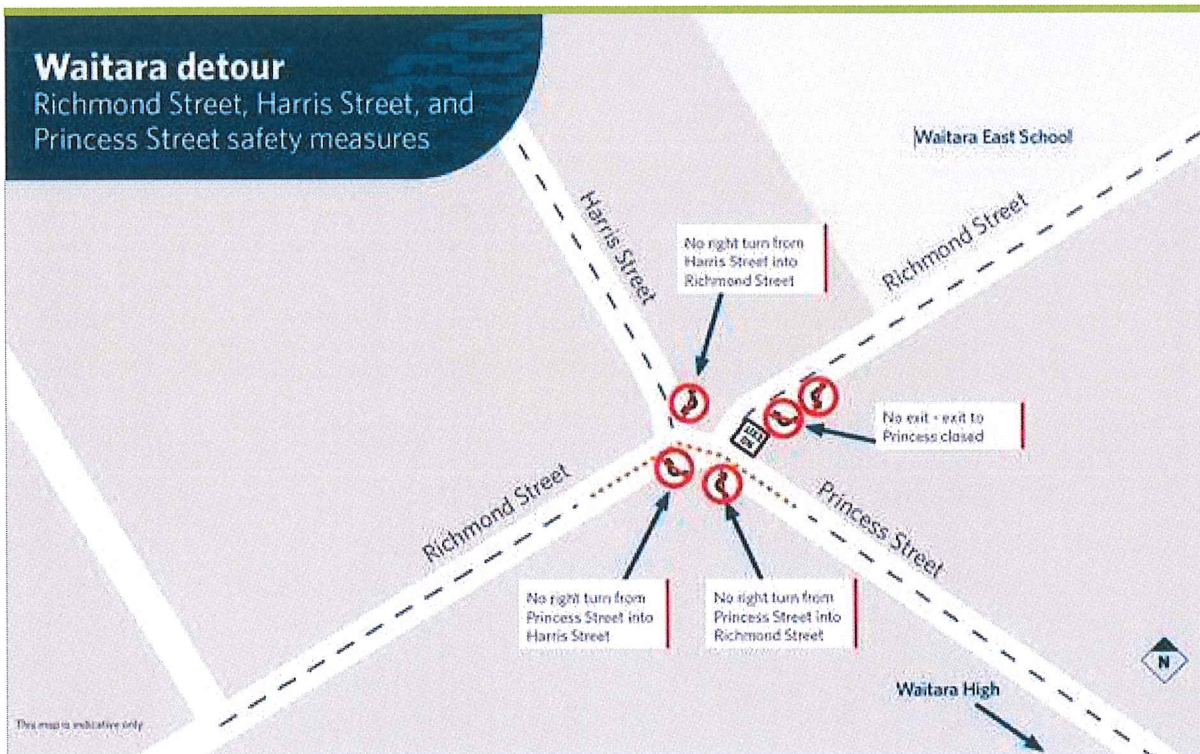
People driving light vehicles are reminded to please use the detour as the traffic lights cycle time is designed for the truck traffic flows and introducing cars creates delays.

Following consultation with local schools and businesses, a number of safety measures were put in place on the detour route prior to work starting, including temporary speed limits, flexible marker posts to separate traffic and pedestrian crossings.

Additional changes were made to the intersection at Richmond/Harris and Princess streets, as seen below, to make the area safer for Waitara High School and Waitara East Primary School students ahead of school going back.

We have also added hatched (no stopping) yellow lines to the SH3/Princess Street intersection in response to feedback from the community.

We appreciate the ongoing feedback and suggestions from the community which is helping us make the worksite and detour route as safe as possible.



Princess/Harris/Richmond street intersection changes.

What you can do to help keep everyone safe while the Waitara detour is in place

- Stick to the temporary speed limits and keep an eye out for people walking and cycling especially at the start and end of school.
- When out walking and cycling along the detour route, be aware of the increase in traffic and take extra care.
- Let your tamariki know there will be more cars on the road and encourage them to be extra careful and always cross at the dedicated crossing points.

- Report any issues or instances of poor driver behaviour to Waka Kotahi or NZ Police.

Comments, questions and complaints

The detour route is being managed by Waka Kotahi. To provide feedback, ask questions or report any issues about the detour route or the state highway please get in touch using the contact details below.

Phone: 0800 4 HIGHWAYS (0800 44 44 49)

Email: w2bb@nzta.govt.nz

Waka Kotahi thanks you for your patience while these important works are completed.

More information

For more information on the SH3 Waitara to Bell Block project, contact us at w2bb@nzta.govt.nz

Visit our website www.nzta.govt.nz/w2bb



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