# Lysaght v Whakatāne District Council

High Court Tauranga CIV-2020-470-55; CIV-2020-470-71; [2021] NZHC 68
12 November 2020; 10 February 2021
Whata J

*Judicial review — Non-notified grant of consent by District Council — Service station on Māori roadway — State highway — Whether Council erred in law or procedurally when granting consent without notifying affected persons — "Affected person" — Assessment of activity's adverse effects — Effect of median strip — Unreasonableness — Legitimate expectation — Status of iwi under Resource Management Act 1991 — Pedestrian safety — Resource Management Act 1991, ss 36A, 36A(1)(c), 95, 95E, 95E(1), 95E(2) and 104C(1)(b).*

These were applications for judicial review in respect of the non-notified grant of a consent by Whakatāne District Council (the Council) for a service station located on a Māori roadway (the Roadway). The proposed service station was to be located in a Light Industrial Zone. A station was a permitted activity in that zone, however, a restricted discretionary consent was required in terms of road access pursuant to r 13.2.2.1 of the Operative Whakatāne District Plan (the District Plan).

The resource consent applicant, Gulati Enterprises Ltd (Gulati), was one of the owners of the Māori Roadway. Other occupiers of land adjacent to the Roadway, Ian and Adrianne Lysaght (the Lysaghts) and two whānau of Ngāti Awa, complained that they were directly affected by the proposed activity that required, among other things, physical modification to the Māori Roadway. They also complained that these modifications and the proposed service station, adversely affected their use and enjoyment of the Māori Roadway.

Te Rūnanga o Ngāti Awa (TRONA) claimed that it was an affected person, too, because it was the mandated iwi authority and kaitiaki in respect of tāonga tuku iho, including whenua Māori. TRONA complained it was told its written approval would be sought and that the Council would seek its input before making any notification or consent decisions. It claimed that this gave rise to a legitimate expectation of ongoing engagement prior to any final decision being made. However, in breach of that expectation, the Council granted the consent without engaging with them as promised. The issue, therefore, was whether the Council erred in law or procedurally when granting the consent for the service station without notifying the Lysaghts or otherwise engaging with TRONA.

The Lysaghts argued that:

(a) The Council failed to have regard to the effects of the median strip to be located on the State Highway, which among other things would have adverse effects in terms of accessibility to Lysaght Developments' offices.
(b) The decision was unreasonable in so far as the owners of the Māori road were not considered to be affected persons.

(c) The Council erred as a matter of law in determining that there would be no adversely affected parties on the basis of the mitigation proposed, which was reliant on both third party land and approval in order to proceed.

TRONA challenges the Council's decision not to notify on two primary grounds:

(a) breach of a legitimate expectation of engagement with TRONA prior to any final decision being made; and
(b) unreasonableness.

Two main issues arose out of argument relating to legitimate expectation:

(a) whether TRONA had a legitimate expectation of ongoing consultation or engagement prior to the decision not to notify being made; and
(b) whether TRONA was an affected person.

**Held**: (setting aside the decision to grant consent)

(1) The median strip was a permitted activity and could be built at any time with the approval of NZTA. It was therefore available to the Council, pursuant to s 95E(2) of the Resource Management Act 1991 (RMA), to disregard the effects of the median barrier on the owners of the Roadway. Median barriers on State Highways were invariably a realistic prospect. The fact that it might have been required to mitigate traffic effects of what was, but for the Roadway width, a permitted activity reinforced the conclusion that it was always a realistic prospect. Furthermore, from the information supplied by the parties, it was clear that both NZTA and the Council envisaged a median barrier at some time in the future (see [48], [49]).

(2) Save in respect of pedestrian effects, it was clear that the consenting officers gave careful consideration to whether the Lysaghts would be adversely affected by the proposal activity, to each of the criteria and to the fact that the Roadway modifications would affect the Lysaghts as landowners. It was also clearly evident that the consenting officers had adequate information upon which to base their findings that the pleaded effects of the proposed activity on the Lysaghts, in terms of the safe and efficient use of the Roadway, were less than minor. The conclusion as to the low level of the effects on the Lysaghts in terms of safe and efficient vehicular use of the Roadway was plainly available to the Council (see [68]).

(3) There was no requirement for agreement to be reached with the Lysaghts and the consent did not otherwise purport to derogate from (or deprecate) the Lysaghts' existing property or consented rights. Quite the reverse, the required roadworks were expressly framed as a condition precedent to the operation of the station, which carried no implication that the Lysaghts had to agree to or otherwise implement the proposed mitigation works. Rather, it placed the entire burden on Gulati to either obtain the Lysaghts' agreement or otherwise obtain lawful authority to undertake the requisite roadworks (see [76]).

(4) The Council made unambiguous commitments and TRONA's reliance on each of these commitments was legitimate. TRONA was the recognised iwi authority in respect of the area subject to the application and the Council routinely engaged with TRONA on consent applications. The commitments to keep TRONA in the loop and to discuss the application before a final decision was made was something within the power of the Council to honour. But, the Council's discretion was confined to those matters listed at r 13.4.7 of the District Plan. Save in respect of pedestrian effects, the consenting officers thoroughly addressed those matters and nothing in the material provided by TRONA suggested that the findings made by the consenting officers were unreasonable or that further engagement with TRONA would have brought about a materially different result (see [92], [94], [99]).

(5) The restricted discretionary activity criteria related to localised effects only in respect of the safe and efficient use of a roadway. While that roadway was whenua Māori, and TRONA performed an important kaitiaki and management role in respect of land still in Ngāti Awa's hands, localised traffic effects did not appear to have been

identified as a matter of iwi level concern either in the Environmental Management Plan or the District Plan. TRONA's dealings with the Council on the application appeared to be as representative of the affected whānau, rather than as a directly affected person. While effects on individual members of an iwi might not be such as to trigger affected person status for the iwi as a whole, the role of iwi authorities, as representative of all iwi members, remained important in terms of the effective discharge of the Act's obligations to iwi Māori. Furthermore, a significant localised effect on, say, whenua Māori might well have iwi level significance, triggering affected person status for an iwi authority (see [105], [106]).

(6) On the information available to the Council, it was unreasonable to conclude that the effects (including potential effects) on pedestrians was less than minor. Other obvious measures could have been considered, including signage, traffic-calming measures or road markings designed to mitigate the risk of conflict with pedestrian movements. All of this emphasised the unreasonableness of the decision to proceed without affected party approvals from the residential neighbours (see [111]).

**Cases mentioned in judgment**

*Aley v North Shore City Council* (1998) 4 ELRNZ 227 (HC).

*Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323, [2001] NZRMA 481, (2001) 7 ELRNZ 193 (CA).

*Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629, [1983] 2 All ER 346 (PC).

*Auckland Council v Wendco (NZ) Ltd* [2017] NZSC 113, [2017] 1 NZLR 1008.

*Bayley v Manukau City Council* [1999] 1 NZLR 568, [1998] NZRMA 513, (1998) 4 ELRNZ 461 (CA).

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

*Campbell v Southland District Council* PT Wellington W114/94, 14 December 1994.

*Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

*Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137.

*Dart River Safaris Ltd v Kemp* [2000] NZRMA 440 (HC).

*Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

*Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, [1955] 3 All ER 48 (HL).

*Ennor v Auckland Council* [2018] NZHC 2598, [2019] NZRMA 150.

*Entick v Carrington* (1765) 19 State Tr 1029 (KB).

*Envirofume Ltd v Bay of Plenty Regional Council* [2017] NZEnvC 12, [2017] NZRMA 419.

*Far North District Council v Te Runanga-A-Iwi O Ngati Kahu* [2013] NZCA 221.

*Gabler v Queenstown Lakes District Council* [2017] NZHC 2086, (2017) 20 ELRNZ 76.

*Grampian Regional Council v City of Aberdeen* (1983) P & CR 633.

*MacLaurin v Hexton Holdings Ltd* [2008] NZCA 570.

*McGrath v Accident Compensation Corporation* [2011] NZSC 77, [2011] 3 NZLR 733.

*McMillan v Queenstown Lakes District Council* [2017] NZHC 3148, [2019] NZRMA 256, (2017) 20 ELRNZ 606.

*Nash v Queenstown Lakes District Council* [2015] NZHC 1041.

*Northcote Mainstreet Inc v North Shore City Council* [2006] NZHC 1, [2006] NZRMA 137.

*Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA).

*Pring v Wanganui District Council* (1999) 5 ELRNZ 464 (CA).

*Queenstown Airport Corporation v Queenstown Lakes District Council* [2013] NZHC 2347.

*Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424, (2006) 12 ELRNZ 299 (CA).

*Ravensdown Growing Media Ltd v Southland Regional Council* EnvC C194/2000, 5 December 2000.
*Residential Management Ltd v Papatoetoe City Council* PT A62/86, 29 July 1986.
*Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council* HC Wellington CIV-2007-485-635.
*Seafield Farm (HB) Ltd v Hastings District Council* [2018] NZHC 1980, (2018) 20 ELRNZ 746.
*Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473, [2001] NZRMA 503, (2001) 17 ELRNZ 126 (CA).
*Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556, (2004) 10 ELRNZ 254 (HC).

## Applications

These were applications for judicial review in respect of the non-notified grant of a consent by Whakatāne District Council for a service station located on a Māori roadway under the Resource Management Act 1991.

*M Williams* for the applicant in CIV-2020-470-55.

*M Wikaira* and *K Tarawhiti* for the applicant in CIV-2020-470-71.

*A Green* and *R Smith* for the first respondent.

*V Hamm* and *T Conder* for the second respondent.

**Whata J.**

*Introduction*

**[1]** These are applications for judicial review in respect of the non-notified grant of a consent by Whakatāne District Council (the Council) for a service station located on a Māori roadway (the Roadway). The resource consent applicant, Gulati Enterprises Ltd (Gulati), is one of the owners of the Māori Roadway. Other occupiers of land adjacent to the Roadway, Ian and Adrianne Lysaght and two whānau of Ngāti Awa, complain that they are directly affected by the proposed activity which requires, among other things, physical modification to the Māori Roadway. They also complain that these modifications and the proposed service station, adversely affects their use and enjoyment of the Māori Roadway.

**[2]** Te Rūnanga o Ngāti Awa (TRONA) claims that it is an affected person, too, because it is the mandated iwi authority and kaitiaki in respect of tāonga tuku iho, including whenua Māori. TRONA complains it was told its written approval would be sought and that the Council would seek its input before making any notification or consent decisions. It claims that this gave rise to a legitimate expectation of ongoing engagement prior to any final decision being made. However, in breach of that expectation, the Council granted the consent without engaging with them as promised.

**[3]** I must therefore resolve whether the Council erred in law or procedurally when granting the consent for the service station without notifying the Lysaghts or otherwise engaging with TRONA.

*Framework for notification assessment*

**[4]** Consent authorities must notify "affected persons" of resource consent applications.[1] Section 95E(1) states that "a person is an affected person if the consent authority decides that the activity's adverse effects on the person are

1 Section 95B(8) of the Resource Management Act 1991 (RMA).

minor or more than minor (but not less than minor)."[2]"Less than minor" means an effect insignificant in the "overall context" and so limited that it is objectively acceptable and reasonable in the receiving environment and to potentially affected persons.[3] The exercise of discretion not to notify bears on natural justice considerations: a party who is not notified of an application is precluded from having input into the decision.[4] Therefore, decisions not to notify a potentially affected person attract close scrutiny on judicial review where the court is required to assess whether, as here, a decision was open to the decision maker on the basis of adequate information before it.[5] The effects must, however, be environmental effects,[6] though this includes effects on people and communities.[7] An "effect" also includes any cumulative effect which arises over time and any potential effect of high probability and any potential effect of low probability which has a high potential impact.[8] However, where an activity is a restricted discretionary activity, only those effects of those parts of the activity subject to restricted discretionary assessment are relevant.[9]

**[5]** The proposed service station is to be located in a Light Industrial Zone. A station is a permitted activity in that zone, however, a restricted discretionary consent is required in terms of road access pursuant to r 13.2.2.1 of the Operative Whakatāne District Plan (the District Plan).[10] That rule states:

> **13.2.2 Roads and Property Access (excluding State Highway)**
>
> 13.2.2.1 Any new road or accessway shall be designed, constructed and located to accommodate the volume and type of traffic likely to use it in a safe and efficient manner.

**[6]** Rule 13.2.2.2 then relevantly provides that:

> 13.2.2.2 Compliance with the following standards shall satisfy Rule 13.2.2.1. Non-compliance with these standards shall be considered a Restricted Discretionary activity:
>
> a. Roads and accessways shall be designed to meet the design standards set out in Appendix 13.7.5. Widths shall be selected to ensure that adequate movement lanes, footpaths, berms, and batters

---

2 Section 95E.

3 As stated by Davidson J in *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086, (2017) 20 ELRNZ 76 at [94]. See also *McMillan v Queenstown Lakes District Council* [2017] NZHC 3148, [2019] NZRMA 256, (2017) 20 ELRNZ 606 at [12]–[14] and *Ennor v Auckland Council* [2018] NZHC 2598, [2019] NZRMA 150 at [9].

4 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [25], [26] and [116].

5 *Pring v Wanganui District Council* (1999) 5 ELRNZ 464 (CA) at 523; *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 4, at [116]; *Auckland Council v Wendco (NZ) Ltd* [2017] NZSC 113, [2017] 1 NZLR 1008 at [37], though I note also observation by the majority in *Auckland Council v Wendco (NZ) Ltd* at [47] that it is arguable a "less exacting standard" should now be adopted.

6 *Seafield Farm (HB) Ltd v Hastings District Council* [2018] NZHC 1980, (2018) 20 ELRNZ 746 at [61] citing *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 4, at [109].

7 Section 2 of the RMA.

8 Section 3 of the RMA.

9 Section 95E(2)(b). See also *Auckland Council v Wendco (NZ) Ltd*, above n 5, at [6].

10 Ms Hamm briefly noted in oral argument that it was not accepted by Gulati that r 13.2.2.1 was necessarily triggered because that rule applied only to new roads or accessways. However, this argument was not pursued in any depth before me so I say no more about it.

> can be provided to retain amenity values (including landscaping) and enable utility services to be provided safely and in economical and accessible locations;
>
> …

**[7]** Appendix 13.7.5 refers to road design standards for land use and area types. The effect of categorisation pursuant to Appendix 13.7.5 meant that the Māori Roadway, with an access width of only 10 m was considered noncompliant with r 13.2.2.2a. The Council assessed the minimum width required is 18 m. This assessment was not disputed before me.

**[8]** Rule 13.4.7 then specifies criteria against which the application for consent in respect of this noncompliance with r 13.2.2.2 had to be assessed, namely:

> **13.4.7 Roads and Property Access excluding State Highway (see Rules in 13.2.2) …**
>
> 13.4.7.1 Council shall restrict its discretion to:
>
> a. traffic volumes and traffic mix relative to existing and future patterns, access, parking and loading on-site;
> b. pedestrian and cyclist safety;
> c. construction traffic volumes, traffic mix and hours of operation;
> d. the ability of the site to accommodate the traffic anticipated and the nature of the adjacent roading pattern, including the position of the road in the roading hierarchy;
> e. formation of the road or access;
> f. the total land area proposed to be used for access, parking and loading in the Rural Plains Zone; and
> g. aspects of the proposal that could compromise the safety and convenience of pedestrians as well as individual and cumulative adverse effects associated with traffic movements.

**[9]** The stated objective of the "Roads and Property Access" r 13.2.2.1 is to ensure that a road or accessway is "designed, constructed and located to accommodate the volume and type of traffic likely to use it in a safe and efficient manner". Rule 13.4.7 then provides the criteria for assessing whether the road or property access can adequately meet this objective. As a consequence of this, the Council had to decide whether the potential effects of the modified Roadway on the Lysaghts and the two resident whānau would be minor or more than minor in terms of the safe and efficient use of the Roadway, having specific regard to the r 13.4.7.1 criteria.

*Background*

**[10]** On 27 September 2019, Gulati lodged an application for resource consent for a 24-hour, seven-day-a-week unmanned service station at 46A[11] State Highway 30 (the Application)—as noted a Light Industrial zoned site under the District Plan. The activity for which consent is sought is fully described below at [31]. Gulati had purchased the site from the Lysaghts on 2 August 2019.

---

11 The Consent Decision and the Joint Decision Report both refer to "46A" whereas the submissions of Gulati and TRONA refer to "46D".

**[11]** The Māori Roadway is jointly owned by Gulati, the Te Peeti and Walter Wharewera Family Trust (The Wharewera Trust), the estate of Maria Hii (the Hii Estate) and Ian and Adrianne Lysaght.[12] Lysaght Developments' principal office is accessed via the Māori Roadway. The land blocks held by the Wharewera Trust and the Hii Estate are Māori freehold land, being Lots 28B, No 3C, No 2A and 2B, Pariah of Rangitaiki respectively. The blocks are currently used for residential activity. I refer to these as the whānau blocks. The current traffic volumes are very low as the Roadway serves only two dwellings and Lysaght Developments' office.

**[12]** The zoning of the Māori Roadway and the blocks served by it is complicated. As noted above, the Application site and the sites abutting the Roadway are zoned Light Industrial. However, the District Plan also expressly enables additional residential development of the two whānau blocks.

**[13]** The Application was accompanied by a traffic report prepared by Mr Ian Constable, dated 17 September 2019. The report refers and appears directed to compliance with r 13.2.6 which addresses requirements for access directly from the State Highway. No consideration was given to compliance with r 13.2.2.1 in this report. This assessment identifies that the proposed fuel facility will generate 90 trips per hour (tph) at the site accesses and notes that the service station will not have a noticeable effect on traffic flow along the road or road capacity. I assume here that reference in the report to the "road" is a reference to the State Highway. The report refers to access via the "common driveway" and vehicles turning left into the common driveway will be assisted by a deceleration lane already provided by the highway. It also notes that vehicles will not be able to turn right into or out of the common driveway.

**[14]** The processing of the Application was initially assigned to Steve Tuck (a Council officer), and a planning consultancy, Sigma. A preliminary notification assessment was completed by Mr Tuck who thought at that time the other owners of the Roadway were affected persons for the purpose of s 95E of the RMA. The applicant was also advised, on 9 October 2019, to obtain written approvals from the Roadway owners.

**[15]** On 16 December 2019, Ms Lorelle Barry (a Sigma consultant) advised Gulati's consultant, Ms Grace Burman, that the proposed no-right-turn caused by a proposed kerbed median placed an undue restriction on the use of the Roadway and that their consent was thus required. On 17 December 2019, Mr Constable provided advice to Ms Burman that the prevention of the right turn movements would not "unduly impede accessibility to any property off the driveway, because there are viable alternatives available". He also suggested that it is possible the New Zealand Transport Authority (NZTA) would require the kerbed median anyway, in time. It appears this report was sent to the Council on 7 January 2020.

**[16]** File notes of subsequent discussions between Ms Barry and Ms Laura Swan, (a Senior Planner at the Council), reveal that there was some disquiet about not treating the other Roadway owners as potentially affected persons, with Ms Swan noting:

---

12 See *Wharewera v Lysaght—Rangitaiki 28B 3C211—Roadway* [2006] Māori Appellate Court MB 11 (2006 APPEAL 113).

> … I struggle to see how you can say that a party who has a legal interest as an "owner" and is also a user (with no alternative access) is not potentially affected by this proposed use.
>
> …
>
> To me the effect / issue for the other Roadway users is more basic and fundamental than the no right turn issue. Quite simply, there is a significant increase (90tph) plus heavy vehicles on that Roadway

**[17]** These views were conveyed to Ms Burman on 13 January 2020, with the conclusion that, overall, there was a legitimate effect on the owners and that their affected party approvals were required. There were also exchanges between them about the activity status of the proposal. This culminated in an internal consensus that r 13.2.2.2 applies and the Application is to be assessed by reference to the criteria at r 13.4.7.1. This outcome is conveyed to Ms Burman on 13 February 2020 by Ms Ann Nicholas.

**[18]** Ms Burman responded the following day with an assessment against the matters outline in r 13.4.7.1, including the following observations (in summary):

> *Traffic volumes and traffic mix relative to existing and future patterns, access, parking and loading on-site*
>
> (a) The activity will generate a maximum flow up to 90tph. Users turning right will be able to cross the State Highway using a local roundabout and the design of the roadway is proposed to be upgraded to ensure a safe and efficient access for all users.
>
> *Pedestrian and cyclist safety*
>
> (b) There are no pedestrian links parallel to this road. NZTA and the transportation engineer has not raised any concerns regarding cyclist safety.
>
> *Construction traffic volumes, traffic mix, and hours of operation*
>
> (c) A construction management plan will be provided.
>
> *Ability of site to accommodate the traffic anticipated and the nature of the adjacent roading pattern, including the position of the road in the roading hierarchy*
>
> (d) The proposed activity will not affect the adjacent roading pattern or roading hierarchy.
>
> *Formation of the road access*
>
> (e) The applicant proposed to upgrade the access to cater for all vehicles entering the site.
>
> *Aspects of the proposal that could compromise the safety and convenience of pedestrians as well as individual and cumulative adverse effects associated with traffic movements*
>
> (f) There are no pedestrian links parallel to the road and the area is not a pedestrian environment, therefore it is not anticipated the proposal will have any effect on pedestrians.

**[19]** Ms Nicholas responded on 27 February 2020, noting her ongoing concern about the traffic impact assessments. She referred to, among other things, the lack of assessment of existing and future traffic patterns and the interaction between existing and future patterns, as well as the effect of trucks which will not be able to keep to the left-hand side. Mr Burman replied, referring to the following traffic advice:

> The roadway will be widened as part of the proposal to accommodate large vehicles. While it is true that very large vehicles will need to swing wide when left turning into the roadway from the highway, the number of these vehicles will be comparatively low. In the event that a large truck enters at the same time as another vehicle is exiting, then the truck will wait in the left turn slip lane until the exiting

vehicle has departed. This will not cause an obstruction to any other vehicle on the highway or roadway, and will not cause a traffic safety issue. NZTA has accepted that this will occur. There will be no vehicles right turning into the roadway because NZTA has required a kerbed median be provided on the highway to physically prevent right turning.

Thus I conclude that other vehicles using the roadway will not be unduly affected by vehicles turning into the roadway.

**[20]** Ms Nicholas, however, remained concerned about the effect of the entrance to the service station on existing and potential future vehicle movements along the Māori Roadway and, on 30 March 2020, Ms Nicholas relayed the following concerns to Ms Burman:

As you are aware, the Maori Roadway is a private road which falls under the definition of an Accessway. As an Accessway the requirements of the Whakatane District Plan must be complied with or consent obtained. While NZTA has provided approval for the interface and access to the State Highway, Council's Reading Team has reviewed the access from the State Highway into the Maori Roadway and from the Roadway to the site. This review has identified that there are aspects which will not enable safe and efficient access for heavy vehicles along the roadway and which will create unacceptable conflict with other users of the Roadway.

…

The key requirement to address is provision for the largest class of heavy vehicle to turn safely into the service station site without crossing road centrelines, edgelines or kerbs. You have advised (2 March 2020) that the maximum capacity of the truck stop is 8–12 trucks refuelling per hour but the expected demand is 4–6 trucks per hour of which 2–3 will be multi-rig trucks and 2–3 will be rigid trucks. No figure is given for frequency of fuel delivery trucks.

The plans provided as part of the application show that trucks must cross the centre line of the roadway to get into the northern entrance to the service station site (as below). From a road safety perspective it is not acceptable for a design to require an unsafe manoeuvre: the heavy vehicle road code requires drivers of heavy vehicles, when making a left turn into a side road, to enter the side road as close to the kerb as possible, remain in the left lane throughout the turn manoeuvre and finish in the left lane of the side road.

**[21]** Ms Burman provided Mr Constable's response to these matters on 6 April 2020. In that report, he states most relevantly:

I have previously advised the existing and predicted future traffic flows that the roadway will cater for, and concluded that the only potential for conflicts to occur will be between very large truck rigs left turning into the roadway from the highway, and vehicles exiting from the roadway to the highway. Existing traffic flows using the roadway are presently negligible, based on observation at the site and the fact that it provides access only to two residential properties and a small commercial building.

I have also predicted the fuel facility will generate 2 or 3 entering large truck rigs per hour, and that 4 vehicles per hour could exit from future industrial properties also accessed off the roadway (total up to 8 trips per hour, the other 4 being entering trips). The latter flows are derived from known travel characteristics at industrial sites and take into consideration the likely floor areas of any future development on those sites, allowing for required parking, access, any landscaping and the like within those sites.

Based on these flows it can be calculated that there is a 1% probability that a multi-rig truck accessing the fuel facility will be present on that part of the roadway adjacent to the fuel facility site at any given time. There is a 0.01% probability that a multi-rig truck and any other opposing vehicle will be on that part of the roadway simultaneously, at any given time. This is a very small incidence where a conflict

> could occur between a large multi-rig truck and an opposing vehicle, and hence my conclusion that the operational and safety effects of the fuel facility as proposed will be negligible.
>
> Clearly, the traffic flows (neither existing nor future) do not warrant a median island at the entry to the roadway. Such islands are commonly not provided at intersections on the transport network which provide access to commercial or industrial land. The roadway behaves like a local road cul-de-sac road, and the fact that very large vehicles will occasionally cross the centreline when turning into it should not be considered to be unusual.

**[22]** He adds:

> Thus the heavy vehicle road code anticipates that sometimes, heavy vehicles must swing wide when turning at intersections, and that drivers are required to be aware of other traffic nearby when doing so.
>
> The trafficable width of the roadway is presently about 7m where vehicles turn into it from the highway. This is quite narrow for an access to industrial zoned land where truck movements are expected to be generated, and the kerbs at the intersection with the highway presently require all trucks, even rigid trucks, to cross the centreline when turning into the roadway. If the fuel facility proceeds then the roadway at its entry would be widened considerably to accommodate large truck rigs that the development will generate. This will provide a benefit to the other lots served by the roadway because more width will be available for heavy vehicles associated with any future industrial development to turn into the roadway without unduly obstructing exiting vehicles, a situation that cannot presently occur.

**[23]** This report appears to have appeased Ms Nicholas and the Council's roading team.

**[24]** The reasons for both the decision to proceed on a non-notified basis and to grant the consent are set out in a Joint Decision Report dated 23 April 2020. These are summarised below. On 1 July 2020, the Lysaghts filed an application for judicial review of the Notification Decision. On 3 August 2020, TRONA filed an application for judicial review of the Notification Decision.
*TRONA engagement*

**[25]** On 7 October 2019, a copy of the Application was sent to TRONA by Melvene Surtees (LIM and Planning Consents Co-Ordinator at the Council) via email. In that email, she states

> Please note that engagement by the applicant with TRONA was requested by Council in earlier (returned application). Current application will be placed on-hold for written approvals, including TRONA.

**[26]** Ms Leonie Te Aorangi Simpson, Manahautū (Chief Executive) of TRONA, deposes that given the Council's statement that the Application was on hold and that written approvals would be required from TRONA, it did not respond or provide comment, instead waiting to be engaged by the Consent applicant. Mr Tuck also considered that consultation with TRONA was necessary to ensure that the effects of proposed earthworks were properly assessed, and he sent a request for further information from the applicant in respect of cultural effects on 10 October 2019.

**[27]** There was then a meeting between Ms Michal Rahera Akurangi, Taiao Manager of TRONA, and members of the Council's transportation department at which they were asked about the Application. The matters discussed are recorded in an email sent to Ms Nicholas on 15 January 2020, including the following:

> [Michal Akurangi] advised that the neighbouring properties are concerned about the development for a number of reasons (traffic impacts on their currently quiet street, security, disturbance from a 24hr operation etc) and they have not yet been consulted with by the applicant. Ngati Awa are currently opposing the development …

**[28]** That note also records:

> AGREED: to keep each other in the loop as the application progresses.

**[29]** There was another meeting on 12 March 2020, including Ms Akurangi, Ms Swan, a Ms Rebecca Hart and Jaymie Wardlaw (Consents Policy Planner). Ms Akurangi reiterated TRONA's concerns, including access related issues associated with shared use of the Roadway, specifically that the two residential properties and the vehicles associated with the proposed service station would both be using the Roadway. At the same meeting, Ms Swan advised that the proposed service station required a restricted discretionary consent (not a discretionary consent as previously thought). Legal advice which said that the owners were not automatically affected persons was also mentioned.

**[30]** Nevertheless, Ms Swan agreed to provide a timeline and record of the information provided to TRONA about the Application and to confirm Ms Nicholas' position in writing. Mr Michael Ross Avery (Manager, Resource Consents, at the Council) also deposes in his evidence that "… it was agreed that Council and Te Rūnanga would meet again to discuss the Application, specifically the planning situation and the recommendation of the draft notification report." As he also deposed, not long after the meeting the first COVID-19 lockdown occurred and the follow-up never happened.

*The joint decisions report (the Report)*

**[31]** The Report produced by Ms Nicholas describes relevant aspects of the proposal as follows:

> **2.0 PROPOSAL**
>
> 2.1 The application as lodged seeks resource consent to develop a 24-hour, 7 day, unmanned service station with 4 dispensers and a truck stop, as follows:
>
> - Two 60,000 litres underground fuel storage tanks (60,000L 91 petrol and a split tank with 25,000L 98 petrol and 35,000 L diesel).
> - Four light vehicle refuelling dispensers.
> - One truck refuelling dispenser.
> - A 6.8m-high "Mobil" identification sign.
>
> …
>
> 2.2 Site access is proposed to be provided from SH30 via the Maori Roadway. Two new vehicle crossings are located on the western boundary of the lot to facilitate this. Other physical works are also proposed within the Maori Roadway to facilitate access. Egress is proposed to be provided by way of a new vehicle crossing to SH30 at the south-east corner of the site. No-right-turn rules will be imposed for traffic entering SH30 from the Maori Roadway and at the site egress.
>
> 2.3 The applicant proposes to install a median strip within the New Zealand Transport Agency (NZTA) SH30 corridor for a distance of approximately 150m from the western end of the existing median leading to the SH30/Keepa Road roundabout. The new median will therefore extend past the Maori Roadway to approximately halfway

> along the frontage of the property to the west, being Lot 27 DP 326716. A deceleration lane is also proposed. The proposed site layout and access/egress arrangements are shown on the application plans T01 Rev C, GA03 Rev E and GA05 Rev F…

**[32]** The Report records that written approval was obtained from the NZTA on 9 October 2019, that the Council's request for the written approvals from other landowners of the Māori Roadway was not accepted by the applicant and that, having received legal advice, written approvals were not required.

**[33]** While the written approvals of other owners were not sought, the Report identifies matters of potential concern were identified by the roading team at the Council, including most relevantly the following:

> …
> Concerns about the public safety were identified as heavy vehicles must cross the centreline of the Roadway when turning from the State highway. [Their] comments [were] that this would not enable safe and efficient access for heavy vehicles along the roadway and will create unacceptable conflict with other users of the Roadway. This was communicated to the applicant on 30 March and a written response was provided on 6 April, followed by a meeting between the engineers and the applicant on 14 April. Conditions were agreed as a consequence. An amended plan was provided by the applicant on 20 April and accepted by Council Manager Transportation on 22 April 2020.

**[34]** As to the site and its location, the report notes:

> 3.4 Adjacent sites are zoned Light Industrial and are used for a mix of residential (two lots to the north of the site on the Māori Roadway) and industrial purposes. The property on the western corner of the Māori Roadway and State Highway is an office. The large site to the east is vacant industrial land. WDC has recently received a subdivision application to subdivide this land to create individual light industrial lots. To the north of the Māori Roadway is Te Hokowhitu A Tu Marae, which has a separate access and does not utilise the Māori Roadway. The Coastlands suburb lies further to the north and the commercial centre of The Hub is located to the south across SH30. SH30 leads into the Whakatāne urban area from the roundabout and links to Tauranga and Rotorua to the west.

**[35]** The Report sets out the relevant rules and activity status which I have addressed above. The Report then discusses the relevant matters for consideration regarding the proposed non-compliance with the roadway width and later considers the effects of the non-compliant accessway in terms of the matters listed in r 13.4.7. The Report notes:

> **Effects of the Non-Compliant Accessway Width**
>
> 6.10 The matters to which the [Whakatāne District Plan] restricts discretion are listed in 13.4.7 as follows. These are the only matters which council can consider in making their assessment:
>
> - *Traffic volumes and traffic mix relative to existing and future patterns, access, parking and loading on-site;*
>
> 6.11 The effects on the state highway, the intersection with State Highway 30, and the wider roading network have been addressed through the Transportation Assessment provided as part of the application with further information provided by the applicant between 14 February and 2 March 2020. These effects have been concluded to be less than minor.
>
> 6.12 In relation to the traffic flow and existing and future traffic patterns within the Māori Roadway, the applicant provided additional evaluation on

28 February 2020 highlighting the low traffic generated by existing activities which future use for industrial purposes would increase from 1-2 trips per hour (tph) to 8tph. Additional information was requested to review the potential conflict between safe pedestrian access and service station traffic, including in particular heavy vehicles turning into the roadway, with the need to cross into the opposing traffic lane and then enter the service station from the roadway. This was provided on 6 April 2020 and an amended plan provided to Council on 20 April 2020.

6.13 The additional information has been reviewed by Council's Transportation team. The Council is now satisfied that the amended design provides appropriately for safe access for all users of the roadway and into the site from the roadway. It will minimise the potential effects on other sites served by the Māori Roadway and the potential conflict arising from vehicles crossing the roadway to enter the service station. The assessment provided by Traffic Solutions Ltd (dated 6 April 2020, page 3) identified that there were potential benefits for future users of the roadway arising from the upgrade, as follows:

> "*The trafficable width of the roadway is presently about 7m where vehicles turn into it from the highway. This is quite narrow for an access to industrial zoned land where truck movements are expected to be generated, and the kerbs at the intersection with the highway presently require all trucks, even rigid trucks, to across the centreline when turning into the roadway. If the fuel facility proceeds then the roadway at its entry will be widened to provide a benefit to the other lots served by the roadway because more width will be available for heavy vehicles associated with any future industrial development to turn into the roadway without unduly obstructing existing vehicles, a situation that cannot presently occur.*"

6.14 The upgrade will therefore provide appropriately for future industrial use of sites served by the roadway. There will be some change in effects for those living on or served by the roadway, but the level of changes are not unreasonable or unanticipated since the land was subdivided in 1999 (24.3.98.130) and zoned for industrial use. In addition, the applicant has demonstrated that large trucks can still practically manoeuvre within the 10m width, albeit utilising the full width, and two-way traffic movements are possible. The proposal and technical non-compliance with width does not change the overall type and volume of traffic anticipated and legally able to use the roadway now and in the future, based on the zoning of the land. The scale of adverse effects is therefore concluded to be generally acceptable and less than minor as a result of the non-compliant width.

- *Pedestrian and cyclist safety;*

6.15 There is currently limited pedestrian and bicycle movement along the Māori Roadway and State Highway 30 and the service station activity is not expected to change demand or use as there is no retail component that could attract pedestrians or cyclists. However, future development may lead to increased movement of people and cycles to and along the roadway. Therefore, provision has been made in the amended design (provided on 20 April 2020) for a footpath along the eastern side of the roadway (western side of the site) to provide for pedestrian and cyclist safety in the future).

- *Construction, traffic volumes, traffic mix and hours of operation;*

6.16 Construction traffic will be subject to compliance with conditions to minimise the potential adverse effect on the roadway and other road users. As such, any adverse effects will be temporary and less than minor.

- *The ability of the site to accommodate the traffic anticipated and the nature of the adjacent roading pattern, including the position of the road in the roading hierarchy;*

6.17 The site is served by the Māori Roadway and State Highway 30. The Transportation Report and consultation with NZTA identify that the state highway and wider network will not be adversely affected by the anticipated traffic generated by the service station. Further evaluation provided on 28 February and 6 April 2020 also supported the ability of the roadway to accommodate the traffic between the state highway and the service station.

- *Formation of the road or access;*

6.18 Council standards will be complied with and conditions are recommended.

- *The total land area proposed to be used for access, parking and loading in the Rural Plains Zone;*

6.19 Not applicable.

- *Aspects of the proposal that could compromise the safety and convenience of pedestrians as well as individual and cumulative adverse effects associated with traffic movements.*

6.20 The evaluation relates to the under width roadway and the effect on both these aspects has been evaluated above.

6.21 The upgrade works to the intersection of the state highway and the roadway, including the deceleration lane and widening, are expected to be compatible and support further development of the other light industrial land served by the roadway and may avoid the need for further works in the future by subsequent developers. This could in turn facilitate development of the land, as anticipated by the District Plan. Whilst not a consideration for the notification decision, these positive effects may be considered as part of the substantive decision under S104 of the RMA.

**Positive Effects**

6.22 The inclusion of a service station on the approach to the urban area provides a facility not currently available for those travelling to Whakatāne.

**Conclusion regarding scale of effects**

6.23 Overall, the effects of the proposal on the environment are considered to be less than minor overall.

6.24 The effects of the proposal have been considered in relation to adjacent properties, particularly those at 46B and 46D State Highway 30 which are used for residential purposes, but are zoned Light Industrial. The service station itself would be a permitted activity if the roadway was 8m wider to meet the access standard. The aspects such as noise, lighting, and traffic generation are compliant with the permitted activity standard and on-going compliance can be required through conditions. Therefore, although the relationship may not be favourable for the existing residential activities, there are no rules in the WDP through which more rigorous standards can be imposed.

**[36]** The Report then turns to the notification assessment and decision:

7.4 No persons or parties are considered to be affected persons under s 95E because:

- Sections 95E (2)(a), (b) and (c) do not apply as there are no rules, national environment standards or statutory acknowledgements relevant to this application.
- The main change to the environment and, in particular, for adjacent landowners and occupiers is the establishment of the service station itself, which is a permitted activity in the zone. The non-compliance with the width of the Maori Roadway and the sign will only result in effects that are less than minor. As such, no parties are considered to be affected.

- Whether or not the applicant requires approval to carry out physical works on the roadway from other owners is a separate legal property law issue. It is not a RMA consideration. This has been confirmed by legal advice.
- Recommendations are adopted as conditions of consent to ensure that any appropriate mitigation is implemented and service requirements are met.

7.5 Based on the reasons outlined above, I have concluded that the potential adverse effects resulting from the proposed application on the environment and on adjoining properties or other parties will be less than minor. Therefore, limited notification is not required.

**[37]** The Report therefore recommends consent be granted subject to conditions, which include the following condition precedent:

4. Before the service station operation can commence on the site, the consent holder shall:
   a. Complete all road upgrade works on the roadway (PT Allot 28B3C2B Rangataiki Parish) and State Highway 30 in accordance with the Consent Holder's Traffic Impact Assessment prepared by Traffic Solutions Ltd dated 17 September 2019 and the road pavement assessment in condition 3(a) above;
   b. Ensure that the road upgrade works referred to in Condition 4(a) that are undertaken within the roadway (PT Allot 28B3C2B Rangataiki Parish) have been undertaken in accordance with Council's Engineering Code of Practice and condition 5 below and are certified by the General Manager Planning and Infrastructure.

**[38]** Conditions dealing specifically with safety and use concerns are also imposed, including the following:

6. The consent holder shall ensure that the upgrade of the roadway (PT Allot 28B3C2B Rangataiki Parish) as shown on Plan GA05 revision G and amended on Traffic Solutions Ltd Drawing No 976/1 'Fuel facility at 46A State Highway 30 Whakatane Roadway Modifications' complies with the following requirements:

   …

   b. Design for a swept path in and out of the side road for a 22m long combination heavy vehicle;

      …

   f. A footpath shall be formed and constructed on the eastern side of the roadway (PT Allot 28B3C2B Rangataiki Parish), within the site where necessary, and shall comply with Clause 3.1.2.1 (Table 3.1—Urban Road Requirements) and Clause 3.1.10 (Footpath) of the Council's Engineering Code of Practice and Item 13.7.5 and 13.7.6 of Operative District Plan. The concrete footpath must have a minimum width of 1.5m, thickness of 100mm and a minimum crushing strength of 20MPa at 28 days. The footpath shall be available for use by the general public at any time.

   …

**[39]** The Report then states the reasons for the decision including the following finding:

13.1 …

- The adverse effects of the non-compliant width of the roadway will be less than minor. The roadway can accommodate the anticipated type and mix of traffic safely and the mix of traffic is consistent with that expected given the light industrial zoning of the site and surrounding land.

*Evidence*

**[40]** Evidence was provided by:

(a) Mr Lysaght, Mr Timothy Peter Fergusson (Consultant Planner) and Mr Gary Black (Traffic Engineer) for the Lysaghts;

(b) Ms Leonie Te Aorangi Simpson (Chief Executive Officer) and Ms Michal Rahera Akurangi (Manager Taiao) for TRONA;

(c) Mr Michael Ross Avery (Manager, Resource Consent Division), Ms Ann Nicholas (Consultant Planner), Ms Laura Swan (Senior Planner), and Mr Alastair James Black (Traffic Engineer) for the Council; and

(d) Mr Pranav Gulati, Ms Grace Burman-Buchan (Consultant Planner) and Mr Ian Constable (Traffic Engineer) for Gulati.

**[41]** The evidence provides accounts of the background to the Application and the decisions, the reasons for and against notification, and interpretations of the District Plan. It has informed my account of the background and I refer to it where relevant in other parts of the judgment. Evidence was also filed late on the issue of TRONA's representative status. To the extent necessary, I grant leave to file that evidence as it cogently responds to a matter raised by the Council in submissions.

*Jurisdiction*

**[42]** Judicial review is not an opportunity to revisit the merits of a decision made by a Council to proceed on a non-notified basis or to grant a consent.[13] An applicant for review must identify an error of law, failure to have regard to a relevant consideration, regard to an irrelevancy, unreasonableness or procedural unfairness. Overall, the objective of the review process is to secure both legality and substantive fairness. To this end, I must examine the Council's decisions and reasons to ensure that the statutory discretion conferred by s 95E was exercised lawfully and fairly.[14]

*The Lysaghts' review*

**[43]** The Lysaghts seek to judicially review the grant of the resource consent for the following reasons:

(a) The Council failed to have regard to the effects of the median strip to be located on the State Highway.

(b) The decision was unreasonable in so far as the owners of the Māori road were not considered to be affected persons.

(c) The Council erred as a matter of law in determining that there would be no adversely affected parties on the basis of the mitigation proposed, which was reliant on both third party land and approval in order to proceed.

**[44]** I turn now to examine these claims.

*Median strip*

**[45]** Mr Williams, for the Lysaghts, submits:

(a) The proposed median strip will have adverse effects in terms of accessibility to Lysaght Developments' offices.

---

13 *Ennor v Auckland Council* [2018] NZHC 2598, [2019] NZRMA 150 at [30].

14 *McGrath v Accident Compensation Corporation* [2011] NZSC 77, [2011] 3 NZLR 733 at [31].

(b) It was wrong to exclude consideration of the median strip and this was the position of the Council officers up and until very close to the end of the assessment process.
(c) If the median strip was not a relevant matter or did not disclose a relevant effect, then no condition could be imposed in respect of it. Pursuant to s 104C(1)(b), a consent authority must only consider those matters over which it has restricted the exercise of its discretion in its plan or proposed plan.
(d) The median strip cannot be deemed to be part of the existing environment or part of the permitted planning environment because there was no suggestion until the application and the offer by the applicant to build the median strip that it was considered something that might occur.
(e) The Council itself noted that it would prefer not to have the median strip constructed in advance of a full study of the needs of the area as a whole.
(f) The construction of the median strip is fanciful but for the application.
(g) Therefore, the effects of that median barrier on the Roadway owners should have been taken into account when assessing the adverse effects, pursuant to r 13.4.7.1.

*Assessment*

**[46]** I can address this claim briefly. Section 95E states that:

> (2) The consent authority, in assessing an activity's adverse effects on a person for the purpose of this section,—
>
> (a) may disregard an adverse effect of the activity on the person if a rule or a national environmental standard permits an activity with that effect; ….

**[47]** This section gives effect to a longstanding permitted baseline principle of environmental law, namely that the appropriate comparison of the activity for which consent is sought is with what either is being lawfully done on the land or could be done as of right.[15] As stated by the Court of Appeal in *Arrigato Investments Ltd v Auckland Regional Council*, if an activity permitted by a plan will create some adverse effect on the environment, that adverse effect does not count, and only other or further adverse effects emanating from the proposal under consideration are brought to account.[16] Furthermore, as the Court of Appeal in *Queenstown Lakes District Council v Hawthorn Estate Ltd* also explained: "… the word 'environment' embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan."[17] Section 95E(2), however, makes the application of the permitted baseline principle discretionary rather than mandatory.[18] As noted by Clifford J in *Nash v*

---

15 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323, [2001] NZRMA 481, (2001) 7 ELRNZ 193 (CA) at [27], citing *Bayley v Manukau City Council* (1998) 4 ELRNZ 461 (CA), *Aley v North Shore City Council* (1998) 4 ELRNZ 227 (HC) and *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473, [2001] NZRMA 503, (2001) 17 ELRNZ 126 (CA).

16 *Arrigato Investments Ltd v Auckland Regional Council*, above n 15, at 205.

17 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424, (2006) 12 ELRNZ 299 (CA) at [84].

18 *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu* [2013] NZCA 221 at [94].

*Queenstown Lakes District Council*, the Council might, for example, consider permitted development to be fanciful.[19] Ultimately, the relevant environment must be assessed in a realistic and factually-grounded way.[20]

**[48]** Returning to the present context, the median strip is a permitted activity and may be built at any time with the approval of NZTA. It was therefore available to the Council, pursuant to s 95E(2), to disregard the effects of the median barrier on the owners of the Roadway. Nothing in evidence suggests that the Council's decision to disregard those effects was otherwise unreasonable. On the contrary, while not expressly addressed in the Joint Decisions Report, correspondence between the Council and NZTA records that the Council's transportation team accepted that installation of the median barrier was appropriate but would have preferred to have delayed its installation pending the completion of a study. The response given by Rob Campbell of the NZTA is also recorded. It provides compelling justification for the requirement for a median strip:

> … I suspect the problem will be about timing, we have limited time frame to respond to the applicant and we can't wait for the study to be completed. If we don't include the median now we can't turn back the clock if the study doesn't recommend the changes Martin thinks it will, and the physical changes may still be 1–2 years away anyway. For us to support the facility it has to be safe the day it opens, not some unspecified date in the future.

**[49]** I also reject the submission that the median barrier was fanciful but for the proposed activity. Median barriers on State Highways are invariably a realistic prospect. There was no expert traffic evidence to suggest otherwise.[21] The fact that it may have been required to mitigate traffic effects of what is, but for the Roadway width, a permitted activity reinforces the conclusion that it was always a realistic prospect. Furthermore, from the information supplied by the parties, it is clear that both NZTA and the Council envisaged a median barrier at some time in the future.

**[50]** Finally, on this issue, I reject Mr Williams' curious argument that if the median barrier is not a relevant consideration or does not give rise to relevant effects, then no condition could be imposed in respect of it. The function of the condition is not to mitigate the effects of the median barrier, but to mitigate the adverse safety effects arising from right-hand turning traffic seeking to access the service station.

**[51]** This claim is therefore dismissed.

*Unreasonableness*

**[52]** The Lysaghts claim that the decision to proceed non-notified was unreasonable for multiple, overlapping reasons, namely:

(a) The finding that the need for physical works to be carried out on the private Roadway was not a relevant RMA matter was wrong in law.

---

19 *Nash v Queenstown Lakes District Council* [2015] NZHC 1041 at [64].

20 *Arrigato Investments Ltd v Auckland Regional Council*, above n 15, at 207.

21 Mr Fergusson (a consultant planner) gave evidence that the communications between the parties show that the median barrier was required as a mitigation measure and therefore within the scope of r13.4.7.1. But that conflates the requirement to mitigate the effects of a non-compliant activity, and the activity status of the mitigation measure itself. The effects of the mitigation measure remain to be considered within the permitted baseline, though the Council retained a discretion at s 95E to consider those effects.

(b) There was no rational basis upon the information relied on by the Council to determine that there would be no adversely affected parties because:
   (i) the traffic reports and Council assumed that the other land served by the Roadway could be developed for industrial purposes;
   (ii) the traffic reports assumed that any commercial or industrial use of the service station site would necessitate an extended kerbed median strip; and
   (iii) the December 2019 traffic report did not conclude that the effects of the median strip would be less than minor on owners and occupiers served by the Roadway, but instead said the median strip would not unduly impede accessibility.

(c) No reasonable conclusion could be reached on the information available to the Council that the following pleaded effects on the Lysaghts were not less than minor, because:
   (i) vehicles travelling to and from Lysaght Developments' offices will not be able to turn right into or out of the Roadway;
   (ii) vehicles leaving Lysaght Developments' offices will be confronted by large multi-rig trucks crossing the centre line at unknown times, at a frequency of two to three trucks per hour;
   (iii) the Lysaghts, as owners of the Roadway, will be directly affected by the physical works to the Roadway; and
   (iv) there may need to be kerb realignments to the Lysaghts' land.

**[53]** For the reasons set out above, the effects of the median strip are not relevant, and I say nothing more about them. The prospect of kerb realignment to the Lysaghts' land has also been dispelled by counsel for the Council—it does not form part of the consent and the Council has no intention of taking the Lysaghts' land.

**[54]** At its core, the Lysaghts' complaint is that they are directly affected by the proposed modification works and by the marked increase in traffic on their Roadway. They complain it cannot be reasonable that their views, as directly affected landowners, were not obtained on how and to what extent the Gulati proposal affects them, especially given (among other things) the inevitable potential for conflict between large multi-rig trucks and vehicles exiting Lysaght Developments' premises. They also say the Council erroneously assumed that the affected Lots will be fully developed for Light Industrial purposes, and that the road widening will be beneficial for such future industrial use. Mr Williams referred to these as the future development and benefit assumptions. The prospect of physical works on their land, as suggested in plans filed with the applications, is also a matter of considerable concern to them. The documented views of the consenting officers and assisting consultants that they were affected persons until late in the process is also highlighted in support of their claim.

**[55]** The Council and Gulati respond that, after careful consideration, the consenting officer assessed the likely effects of the proposed Roadway modification in light of the restricted discretionary criteria at r 13.4.7 and found the effects on the Lysaghts and the other owners of the Roadway would be less than minor. This was based on sound independent traffic assessments, together with oversight of the Council's transportation division. They also submit that the Lysaghts' property rights and the physical impacts on their

property (that is, their interest in the Roadway) are not relevant considerations as they are not relevant "environmental effects" for the purpose of s 95E. Ms Hamm, for Gulati, also submitted that the effects of the service station are permitted effects and that only the potential for conflict with trucks crossing the centre line might be a relevant effect.

**[56]** Before moving to my assessment of reasonableness, it is helpful to address three preliminary issues:

(a) whether the physical impacts on the private roadway were relevant;
(b) whether the traffic effects generated by the proposed service station are permitted effects and only the effects of the road widening are relevant effects; and
(c) whether the Council wrongly assumed that the other land adjacent to the Roadway could generate similar types and levels of traffic to the proposed station and that the widening would be beneficial because of the potential future traffic use associated with industrial activity.

*Physical impacts and property rights*

**[57]** As Lang J said in *Northcote Mainstreet Inc v North Shore City Council*:[22]

> Persons are generally likely to be adversely affected by a proposed activity because they live or carry on an activity on land that is proximate to the proposed activity. Eligibility will, however, only extend to persons who are adversely affected in an environmental sense.

**[58]** As noted above, "environment" includes land and people, and "effect" includes effects on people. A direct effect on a person's quiet enjoyment of their land is therefore plainly an effect on the environment. Where such an effect is a relevant consideration under the applicable planning instrument, it must be taken into account. In the present case, the consenting officer proceeded on the basis that "whether or not the applicant requires approval to carry out physical works on the Roadway from other owners is a separate property issue. It is not an RMA consideration."[23] That observation is correct in so far as the RMA is not concerned with the protection or enforcement of property rights per se and a resource consent does not authorise infringement of those property rights.[24]

**[59]** But the observation does not work in reverse: the fact that the works may only occur with the approval of a third party property owner is not a reason to ignore otherwise relevant effects on that owner. In the absence of written approval, consenting officers must discipline themselves to the task of assessing the effects authorised by the proposed resource consent, because by granting consent the Council is sanctioning those environmental effects on that person. Failure to do so would invite a perverse approach to the assessment of effects; that is, to afford greater environmental protection to persons who do not own directly affected land than to those who do. Consenting officers must also be alive to the fact that where, as here, directly affected land owners (or occupiers) will experience the potential impacts more closely and more deeply than a person whose property is only indirectly

---

22 *Northcote Mainstreet Inc v North Shore City Council* [2006] NZHC 1, [2006] NZRMA 137 at [188].

23 Joint Decisions Report at 7.4.

24 See *MacLaurin v Hexton Holdings Ltd* [2008] NZCA 570 at [47], a case helpfully cited by Ms Hamm.

affected, by simple dint of the fact that it is their land subject to the activity. In this regard, it is apt to recall that common law property rights reflect important values of privacy, personal freedom and integrity.[25] The common law torts of trespass, nuisance and the emergent privacy torts reflect the central importance of property rights and the values that underpin them. It is the impact on these values, also protected by the RMA under the rubric of sustainable management, that brings heightened significance to the assessment of effects on directly affected property owners.

**[60]** Returning to the present case, I am satisfied the Council has not erred in this respect. The consenting officers were plainly cognisant of the significance of the fact that the Roadway owners were directly affected. They sought written approvals of those landowners until they were satisfied that the relevant adverse effects on those landowners were less than minor. They also imposed a condition requiring the completion of the roadworks in advance of the service station operating. The effect of this is to either require the Lysaghts' approval or a court order to undertake the works.

**[61]** Furthermore, I do not consider that the physical impacts on the Roadway were a relevant consideration in any event. As explained above, the Application had to be assessed by reference only to the restricted discretionary criteria at r 13.4.7.2 and these criteria are directed to the achievement of the objective at r 13.2.2.1, namely:

> Any new road or accessway shall be designed, constructed and located to accommodate the volume and type of traffic likely to use it in a safe and efficient manner.

**[62]** While the physical works are necessary to achieve a compliant design, the physical impacts of those works on the Roadway are not relevant to the safe and efficient use of the Roadway and therefore are not relevant effects in this case.[26]

*Permitted effects*

**[63]** Rules 13.4.7.2 and 13.2.2.1, properly construed, are irreconcilable with the submission that the traffic effects of the service station are permitted effects and therefore irrelevant. The scale and nature of the traffic to be generated by proposed and likely future activities are directly relevant to the assessment of the effects because any new road or accessway must be designed, constructed and located to accommodate that traffic. In this sense, while a service station is a permitted activity, the Roadway must be designed, constructed and located to accommodate the traffic generated by the service station and other traffic likely to use the road in a safe and efficient manner. Accordingly, the traffic effects of the service station are not "permitted" effects to be disregarded. On the contrary, they are effects that must be taken into account when designing and constructing a new roadway or accessway, or as here, when modifying it to accommodate additional and likely future traffic.

*Future environment and benefit assumptions*

**[64]** Mr Williams' claim that the Council's future development and benefits assumptions were wrong misapprehends the evaluative task that needed to be undertaken by the Council in terms of r 13.4.7. The Council was required to

---

25 *Entick v Carrington* (1765) 19 State Tr 1029 (KB).

26 I accept the capacity to undertake the relevant mitigatory works is a relevant consideration and I return to the significance of property rights and third party agreement below.

assess whether the Roadway could accommodate traffic likely to use the Roadway in the future (per r 13.4.7.1). It was therefore reasonable, indeed mandatory, for the Council to identify the overall type and volume of traffic anticipated and legally able to use the Roadway now and in the future, having regard to the zoning of the land.[27] Furthermore, the Council's finding that the road widening will be beneficial in terms of accommodating future use was therefore inoffensive.

**[65]** In this regard, subject to what I have to say about pedestrian usage below in relation to the TRONA claims, I detect no error in the Council's assessment of the existing and future environment. The Joint Report accurately describes the existing environment, including the existing office and residential activity and the assessment of likely future use allows for the potential uptake of industrially zoned land (see [34]–[35] above). Furthermore, while the Lysaghts or the two whānau may presently have no intention to develop their site with Light Industrial activity, when considering issues of safety and efficiency as mandated by r 13.2.2.1, it was not unreasonable for the Council to assume, given the underlying Light Industrial zoning, that much more intensive use of the Roadway may occur and thus needed to be accommodated.

*Assessment of reasonableness*

**[66]** Turning then to the wider assessment of reasonableness, it is common ground that the Council's finding the Lysaghts are not affected persons will be unreasonable if it is not supported by adequate information, or if on the available information, the "only true and reasonable conclusion contradicts that finding".[28]

**[67]** I have much empathy for the Lysaghts. The Roadway is presently a quiet road. They enjoy easy access and egress to and from their site and to and from the State Highway. The proposed service station will significantly increase the volume of traffic on the Roadway (up to about 90 movements per hour), inevitably causing some inconvenience to the Lysaghts and raises the potential for conflict with large multi-rig trucks that must cross the centre line when turning into the Roadway. They are therefore directly affected by the proposed activity, both in terms of the physical effects of the modification to the Roadway and the effects of increased traffic flow caused by the service station. It is easy to see why they consider their views should have been obtained.

**[68]** However, as I have explained, the central evaluative issue for the Council was whether the owners of the Roadway and the occupiers of the Lots adjacent to the Roadway (including the Lysaghts) would be "adversely affected" by the proposed activity, in terms of safe and efficient use of the Roadway, to a minor or more than minor degree, having regard to the criteria at 13.4.7. In this regard, save in respect of pedestrian effects, it is clear from the Joint Report and the background information that the consenting officers gave careful consideration to this issue, to each of the criteria and to the fact that the Roadway modifications would affect the Lysaghts as landowners. It is

---

27 Mr Williams conceded in oral argument that the opinion of his consultant planner that the plan only enabled residential activity on whanau blocks as of right was incorrect.

28 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [26] citing Lord Radcliffe's judgment in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 36, [1955] 3 All ER 48 (HL).

also clearly evident to me that the consenting officers had adequate information upon which to base their findings that the pleaded effects of the proposed activity on the Lysaghts, in terms of the safe and efficient use of the Roadway, were less than minor. That information is referred to above at [13]–[22]. It shows, among other things, that the level of likely traffic movement is broadly what might be expected in a Light Industrial zone and that the probability of conflict between a vehicle exiting the Roadway and a heavy vehicle is exceedingly small: about 0.01 percent. The conclusion as to the low level of the effects on the Lysaghts in terms of safe and efficient vehicular use of the Roadway was plainly available to the Council. I am fortified in this view given the absence of any evidence from an independent expert to the contrary.

**[69]** Accordingly, I can identify no basis on grounds of unreasonableness to disturb the Council's findings in terms of the effects pleaded by the Lysaghts. I note for completeness that Mr Lysaght also referred to effects that were not specifically pleaded, including for example potential effects of heavy vehicle movements in close proximity to children. I address those potential effects in the context of the TRONA proceeding.

*Reliance on third party land*

**[70]** The Lysaghts claim the Council was wrong to impose conditions that relied on third party approvals. More specifically, Mr Williams submitted that the Council acted ultra vires by approving a resource consent application on the basis of road modification work that would involve and or infringe a third party's property rights. He contended it is well established under the RMA that a resource consent condition which infringes third party rights or requires the consent of the third party is invalid.[29] The purported grant of consent was therefore flawed on its face because it requires third party approval for the mitigation. Mr Williams also submitted that it simply does not make resource management sense to impose conditions requiring a range of physical works to a road resource without involving the owners of that resource and that was the view adopted by the Council officers, at least until the point at which the legal advice was received.

**[71]** Mr Green responds that the Council's consideration was limited to environmental effects and that effects on property rights per se is not a relevant consideration for the purpose of s 95E. He further submits that, while Mr Williams is not wrong when he contends that a condition that requires third party consent is invalid, the courts have long accepted that conditions outside an applicant's control can be imposed provided they are worded as a "condition precedent".[30]

*Assessment*

**[72]** As stated by Panckhurst J in *Dart River Safaris Ltd v Kemp*:[31]

> [18] Notwithstanding the breadth of the discretion conferred upon consent authorities by s 108(1), it is well-established that the power to impose conditions is limited by common law principles. To be valid, a condition

---

29 Citing *Campbell v Southland District Council* PT Wellington W114/94, 14 December 1994; *Dart River Safaris Ltd v Kemp* [2000] NZRMA 440 (HC).

30 Citing *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556, (2004) 10 ELRNZ 254 (HC).

31 Above n 29.

> must be for a resource management purpose, not an ulterior one; must fairly and reasonably relate to the activity authorised by the relevant consent; and must not be unreasonable—*Bletchley Developments Ltd v Palmerston North City Council (No 1)* [1995] NZRMA 337 (PT), a decision of the then Planning Tribunal. Moreover, there is also a line of cases which establish that a condition upon a resource consent which requires the agreement of a third party is ultra vires: *Robert Holt & Sons Ltd v Napier City Council* (1977) NZTPA 132.
>
> Another subset comprises cases which establish that a condition imposed on a new consent cannot negate the resource consent of a third party: *Medical Officer of Health v Canterbury Regional Council* [1995] NZRMA 49 (PT).

**[73]** The facts in *Dart River Safaris Ltd v Kemp* are illustrative of the application of these principles. In that case, Mr Kemp operated two jet boat trips per day on the Dart River. An informal arrangement had been reached with Dart River Safaris Ltd (DRSL), another operator, about the timing of their respective operations. Mr Kemp then sought consent to increase the number of trips to 10 per day. The Queenstown Lakes District Council declined consent, but on appeal the Environment Court approved the grant of consent subject to a condition requiring the parties (including DRSL) "to file an agreed draft operating memorandum" dealing with safety matters. It also imposed a condition, noting that "failing agreement any party may refer the setting of an operating memorandum back to the Court."[32]

**[74]** DRSL appealed on the basis that a condition could not be imposed requiring it to reach agreement in derogation of its existing consented rights. The High Court agreed and declared the first condition, requiring an agreed draft operating memorandum, to be invalid to the extent that it is expressed in obligatory terms.[33] Justice Panckhurst stated:

> [27] Regardless of the merits of the situation, the fact remains that DRSL has legal rights by virtue of its resource consent. I do not accept that such rights may be deprecated because they are not founded in land law. They remain rights which may not be denied or eroded by imposition of another person's resource consent. …

**[75]** However, in *Westfield (New Zealand) Ltd v Hamilton City Council*, Fisher J identified a distinction between conditions that require an applicant to bring about a result which is not within the applicant's power, for example, to construct a new roundabout, and a condition that stipulates that the development should not proceed until an event has occurred (that is, after the roundabout is constructed).[34] Fisher J stated the position in this way:[35]

> [55] Conditions attached to a consent will usually be regarded as unreasonable if incapable of performance. A classic example was consent to erect additional dwellings subject to a condition requiring access via a 4.8 metre wide strip when access to the Applicant's property was in fact possible only through an existing strip with a width of only 3.7 metres …

---

32 At [12].
33 At [27].
34 *Westfield (New Zealand) Ltd v Hamilton City Council*, above n 30, at [60].
35 Citing *Residential Management Ltd v Papatoetoe City Council* PT A62/86, 29 July 1986; *Ravensdown Growing Media Ltd v Southland Regional Council* EnvC C194/2000, 5 December 2000; and *Grampian Regional Council v City of Aberdeen* (1983) P & CR 633 (HL) at 636.

> [56] On the other hand, a condition precedent which defers the opportunity for the Applicant to embark upon the activity until a third party carries out some independent activity is not invalid. There is nothing objectionable, for example, in granting planning permission subject to a condition that the development is not to proceed until a particular highway has been closed, even though the closing of the highway may not lie within the powers of the developer.

**[76]** In the present case, there is no requirement for agreement to be reached with the Lysaghts and the consent does not otherwise purport to derogate from (or deprecate) the Lysaghts' existing property or consented rights. Quite the reverse, the required roadworks are expressly framed as a condition precedent to the operation of the station, which carries no implication that the Lysaghts must agree to or otherwise implement the proposed mitigation works. Rather, it places the entire burden on Gulati to either obtain the Lysaghts' agreement or otherwise obtain lawful authority to undertake the requisite roadworks. In this respect, the condition is a paradigm example of a valid condition precedent referred to by Fisher J in *Westfield (New Zealand) Ltd v Hamilton City Council*.

**[77]** Mr Williams sought to distinguish the *Westfield (New Zealand) Ltd v Hamilton City Council* condition precedent on the basis that the present condition related to private land, not public land or public works. But that is a distinction without consequence because, as I have said, Gulati must obtain the Lysaghts' agreement or otherwise obtain lawful authority to undertake the roadworks. In the result, the Lysaghts' property rights, including to the use and enjoyment of the Roadway, remain unaffected until that agreement or the requisite court order has been obtained.

**[78]** Given the foregoing, this claim is also dismissed.

*TRONA's claim*

**[79]** TRONA challenges the Council's decision not to notify on two primary grounds:

(a) breach of a legitimate expectation of engagement with TRONA prior to any final decision being made; and
(b) unreasonableness.

*Legitimate expectation*

**[80]** In support of its legitimate expectation claim, Ms Wikaira, for TRONA, makes the following contentions:

(a) As the recognised iwi authority and kaitiaki for Ngāti Awa, TRONA plays a representative and facilitative role in respect of the interests of Ngāti Awa whānau, hapu and iwi, including those Ngāti Awa Māori Roadway Landowners.
(b) The Court may find that TRONA is an indirectly affected party by virtue of its representative position for a directly affected party; in this case, the two landowner whānau.
(c) TRONA had a legitimate expectation that the representations made to it by the Council regarding engagement on the Application, appearing in accordance with the process TRONA had established with the Council regarding all consenting matters within the Ngāti Awa rohe, would be followed and maintained.
(d) Representations relied upon include the following:
    (i) On 7 October 2019 email advice by the Council that:

> ….. engagement by the applicant with TRONA was requested by Council in earlier (returned application). Current application will be placed on-hold for written approvals, including TRONA

(ii) In January 2020, record of a meeting that:

> AGREED: to keep each other in the loop as the application progresses.

(iii) In March 2020, it was agreed that Council and Te Rūnanga would meet again to discuss the Application, specifically the planning situation and the recommendation of the draft notification report.[36]

(e) TRONA was instead, like the Ngāti Awa landowners, shut out of the process.

**[81]** TRONA also relies on its Environmental Management Plan (EMP) which had been lodged with all relevant local authorities within the rohe of Ngāti Awa in December 2019. Ms Wikaira submits that the mandatory relevance of iwi management plans at every stage of the planning process has been recognised by the Environment Court.[37] The following references in the EMP are also said to affirm the role of TRONA in those processes:

> **RMA Planning Documents—Statutory Recognition**
>
> Sections 61, 66 and 74 of the RMA require Council to take into account this Plan when preparing or changing regional policy statements and district plans.
>
> Policy IW 4B of the Bay of Plenty Regional Policy Statement also seeks to "ensure that iwi and hapū resource management plans are taken into account in resource management decision making processes."
>
> We consider 'taking into account' to mean that our Plan has been read; has been acknowledged and has made a tangible difference within the planning process, including Council's decision-making process.
>
> …
>
> Resource consent decision making
>
> Policy IW 4B of the Bay of Plenty Regional Policy Statement seeks to "ensure that iwi and hapū resource management plans are taken into account in resource management decision making processes." This policy clearly applies to resource consent processes.
>
> We consider 'taking into account' to mean that our Plan has been reviewed; acknowledged within recommendation reports and has made a tangible difference within the consent process, including Council's decision and/or condition(s) of consent.

**[82]** The following cross-references to the Regional Policy Statement were also emphasised: …

| **EMP Reference** | **Cross-reference** |
|---|---|
| Policy 6.2.1 | Work with the TRONA Taiao Unit regarding plans, bylaws or strategies relating to, or affecting, freshwater (including stormwater and wastewater). This is to:<br>a. identify ways in which the development of Māori Land can be enabled, to give effect to **Policy IW 1B** of the Regional Policy Statement relating to the use and development of Māori Land. |

36 As confirmed by Mr Avery for the Council.

37 Citing *Envirofume Ltd v Bay of Plenty Regional Council* [2017] NZEnvC 12, [2017] NZRMA 419.

| | |
|---|---|
| Policy 6.2.1 | Work with the TRONA Taiao Unit to determine how, in practice Ngāti Awa values, interests and intergenerational knowledge is to be recognised within land use planning. This includes:<br>a. integrating kaitiakitanga into statutory management of ancestral taonga and natural resources within the Ngāti Awa rohe.<br>b. identifying ways in which the development of Māori Land can be enabled, to give effect to **Policy IW 1B** of the Regional Policy Statement relating to the use and development of Māori Land. |

**[83]** Counsel also refers to Chapter 2, which contains the objectives and policies that provide a strategic framework for the Whakatāne District Plan, noting in particular:

> 2.5.1. Council will work with tangata whenua to identify and formalise appropriate consultation processes, for example through Iwi Management Plans, memorandums of understanding and other agreements, the use of iwi and hapū contact databases, and spatial information systems.
>
> …

**[84]** In addition, counsel cites the following excerpt from a Guideline Note produced by the Bay of Plenty Regional Council in June 2019, entitled "Taking account of iwi planning documents":

> Iwi/hapū planning documents are key instruments Council staff should refer to when preparing or changing a plan, developing policy or considering a resource consent application. Iwi/hapū planning documents are a portal into the aspirations of the iwi/hapū.
>
> Some of the new generation iwi/hapū plans specifically identify areas or sites of cultural significance, and present resource management objectives, policies and methods for the preservation and restoration of land and waterways. The core legislative requirement "take into account" is derived from the Resource Management Act 1991 … however as iwi/hapū values and their associations with the environment are generally presented in these are generally presented in these documents they can be a useful resource for other areas of Council business and relationships. They will help staff with their considerations of RMA Part 2 matters relating to Māori including RMA s 6(e), s 7(a) and s 8 and will contribute to a broader understanding of concepts and wording.

**[85]** The Council does not accept that TRONA is an affected person. Referring to *Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council*, it submits that to be an "affected person" under s 95E a person must be specifically affected by an activity.[38] Something more than a general interest in the application is required and that to extend the definition of "affected persons" to interest groups and representative parties would render the notification process an onerous undertaking and in some cases a matter of guess work. In written submissions, Mr Green, for the Council, also noted that there is no evidence that the owners wished to be represented by TRONA, but that gap was filled by subsequent evidence.

---

38 Citing *Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council* HC Wellington CIV-2007-485-635 at [124] and [125].

**[86]** The Council also rejects the legitimate expectation claim, submitting that:

(a) Any expectation must be as to process, not substance.

(b) TRONA had not shown that the Council had made a clear and unambiguous undertaking that it would consult TRONA—noting that while TRONA was advised it would be consulted in October 2019, the Council communicated its position in March 2020 and the likelihood of non-notification.

(c) Reliance on the October representation was unreasonable. In particular, TRONA's continued reliance on the October email—without regard to subsequent advice—was simply not reasonable, and it was on notice that it was likely the application would proceed without notification.

(d) If a legitimate expectation is made out, relief should be declined because its decision to proceed on a non-notified basis was otherwise lawful and reasonable and the Council was not otherwise under an obligation to consult.

**[87]** Gulati adopts the Council's position on legitimate expectation and says further that if TRONA's submission is accepted, and the Council refused to proceed on a non-notified basis because of a commitment to consult TRONA, then it will have unlawfully fettered its discretion. The starting point is said to be that the Council has a discretion to consult under s 36A(c) but there is no power to order consultation to occur and that this Court should defer to the Council's decision in this regard. Ms Hamm also submits that TRONA is effectively asking the Council to adhere to a policy that it should consult with it on every application, but that is not a policy of the Council and nor, in any event, is that a policy that the Council has a power to set. That is, while the Council could choose to set a policy for how a decision around consultation is made, it cannot set a policy that mandates consultation in every case. Finally, Ms Hamm submitted that no policy or agreement to consult can fetter an otherwise lawful and reasonable exercise of power to notify at s 95E.

**[88]** In reply, Ms Wikaira refuted suggestions that the discussion at the March meeting would have made clear that that the earlier representation as to process were repudiated. She says that TRONA had been engaged in a process of ongoing consultation and, to the extent that the proposal was discussed, it was expressly left open that there would be further discussion about it, including further provision of information. It is submitted that none of this diminished the significance of the earlier representation and therefore, the legitimate expectation that the Application would not be processed without either their approval or further involvement.

*Issues*

**[89]** Two main issues arise out of argument relating to legitimate expectation:

(a) whether TRONA had a legitimate expectation of ongoing consultation or engagement prior to the decision not to notify being made; and

(b) whether TRONA is an affected person.

*Did TRONA have a legitimate expectation?*

**[90]** I propose to address these issues separately as they engage distinct legal concepts and principles. Dealing first with the claim based on legitimate expectation, as stated by the Privy Council in *Attorney-General (Hong Kong)*

*v Ng Yuen Shiu*, when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as it does not interfere with its statutory duty.[39] As Mr Green submitted, the doctrine of legitimate expectation involves a three-stage inquiry:[40]

(a) First, establishing the nature of the commitment made by the public authority, whether by some promise or settled practice or policy.
(b) Second, determining whether reliance on the representation is legitimate.
(c) Third, deciding what remedy, if any, should be provided if a legitimate expectation is established.

**[91]** I am satisfied that the Council made the following unambiguous commitments:

(a) in October 2019, that the application would be placed on hold for written approvals, including from TRONA;
(b) in January 2020, that TRONA would be kept in the loop; and
(c) in March 2020, that the Council would meet with TRONA again to discuss the Application.

**[92]** I am also satisfied TRONA's reliance on each of these commitments was legitimate. TRONA is the recognised iwi authority in respect of the area subject to the application and the Council routinely engages with TRONA on consent applications. The representations were made by officers of the Council who enjoyed ostensible authority to make those representations. The fact TRONA was told in March 2020 that the Application was likely to proceed on a non-notified basis did not devalue the commitment to engage further with TRONA in a particular way. Moreover, why would TRONA assume that the Council would mislead them about these commitments or their value to TRONA as meaningful commitments to engage? In this regard, Mr Avery's apology on behalf of the Council for its breach of the March commitment was properly made.

**[93]** The central remaining issue is whether the failure to honour these commitments gives rise to relief. I agree with Mr Green that none of the commitments could sustain an expectation that the Application would be notified to the landowners or TRONA as such a commitment would have unlawfully fettered the s 95 discretion. I also consider that first commitment, in October 2019, to place the Application on hold pending written approvals always had a limited life and always left open the possibility that if written approval could not be obtained, the Application might still be processed on a non-notified basis, as clearly mandated by s 95E. Therefore, the apparent failure to honour this commitment does not give rise to relief.

**[94]** However, the commitments to keep TRONA in the loop and to discuss the Application before a final decision was made was something within the power of the Council to honour. Whether that commitment was an undertaking to consult or to simply engage further, there is nothing in the legislative scheme or the facts of this case that precluded the performance of that commitment. On the contrary, the legislative scheme recognises that iwi

---

39 *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629, [1983] 2 All ER 346 at 351 (PC).

40 Referring to *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 at [125]–[127].

authorities have a special status under the RMA, which is replete with provisions directed to ensuring engagement with iwi authorities. For example, the Act envisages iwi authorities may have a role in the joint performance of a Council's function, power or duty under the Act,[41] or pursuant to Mana Whakahono a Rohe (iwi participation agreements),[42] or at a most basic level, as kaitiaki.

**[95]** Regional Councils must also take into account any relevant planning document recognised by an iwi authority when settling its regional policy statement and regional plan,[43] and the regional policy statement must state the resource management issues of significance to iwi authorities in the region.[44] A regional plan must then give effect to a regional policy statement.[45] The preparation, change and review of policy statements and plans then envisages active engagement with iwi authorities:

(a) A proposed planning instrument must be prepared in accordance with any applicable Mana Whakahono a Rohe.[46]

(b) A local authority may comply with the requirement to consult with tangata whenua through iwi authorities.[47]

(c) A local authority must provide a copy of the relevant draft planning instrument to iwi authorities consulted and have particular regard to any advice received on a draft proposed policy statement or plan.[48]

**[96]** Against this background and clear legislative policy of iwi engagement, the commitment made by the Council to engage with TRONA on a matter relating to the management of Māori land, and potentially affecting the use and enjoyment of Māori land, was understandable and TRONA's corresponding expectation of ongoing meaningful engagement was legitimate.

**[97]** It is necessary, however, to address Ms Hamm's submission that any undertaking to consult with TRONA would have been unlawful, relying for that purpose on s 36A, which provides:

> **36A No duty under this Act to consult about resource consent applications and notices of requirement**
>
> (1) The following apply to an applicant for a resource consent and the local authority:
>
> (a) neither has a duty under this Act to consult any person about the application; and
>
> (b) each must comply with a duty under any other enactment to consult any person about the application; and
>
> (c) each may consult any person about the application.
>
> (2) This section applies to a notice of requirement issued under any of sections 168, 168A, 189, and 189A by a requiring authority or a heritage protection authority, as if—
>
> (a) the notice were an application for a resource consent; and
>
> (b) the authority were an applicant.

---

41 Section 36B.
42 See part 5, sub-part 2, dealing with standards, policy statements and plans.
43 Sections 61(2A) and 66(2A).
44 Section 62(1)(b).
45 Section 65(6).
46 Schedule 1, part 1, s 1A.
47 Schedule 1, part 1, s 3.
48 Schedule 1, part 1, s 4A.

**[98]** As acknowledged by Ms Hamm, and as is evident from the plain wording of s 36(1)(c), a Council "may consult with any person about the application". While the Act does not impose a statutory duty to consult, a Council may, in the exercise of its discretion to do so, make a commitment to consult or otherwise involve an iwi authority in the decision-making processes. Provided that commitment is not a disenabling fetter on the Council's statutory discretion, in this case pursuant to s 95E, there is no issue of ultra vires consultation.[49]

**[99]** But this analysis does bring into focus the nature of relief, if any, for the breach of TRONA's legitimate expectation. The commitment to further engagement is not a statutory obligation to consult, breach of which automatically gives rise to reviewable illegality. Rather, the breach must have had some material consequence for the s 95E decision making process. In this regard, TRONA's primary complaint is that it was not given a proper opportunity to convey the full potential effects of the proposal on the whānau landowners. But, as I have already explained, the Council's discretion was confined to those matters listed at 13.4.7. Save in respect of pedestrian effects, the consenting officers thoroughly addressed those matters and nothing in the material provided by TRONA suggests to me that the findings made by the consenting officers were unreasonable or that further engagement with TRONA would have brought about a materially different result.

**[100]** However, for reasons I explain below, further engagement with TRONA may have materially affected the Council's approach to pedestrian effects—this was plainly a key issue for the whānau. TRONA's legitimate expectation claim is successful to that extent. The issue of relief is addressed below.

*Is TRONA an affected person?*

**[101]** The Council's claim that TRONA or iwi authorities can never be an "affected person" is not concordant with the plain meaning of "affected person", having regard to context and purpose.[50]"Person" includes "the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporated."[51]"Iwi authority" means "the authority which represents an iwi and is recognised by the iwi as having authority to do so".[52] Iwi are bodies of persons and iwi authorities are the corporate persona of the iwi. Having regard to the special status of iwi authorities described above, I am satisfied that an iwi authority may qualify as an "affected person", particularly in relation to matters of environmental concern set out in TRONA's EMP.

**[102]** Mr Green's reference to *Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council* is thus misplaced. Justice Simon France said in that case, "The fact that several … members of the community with such focussed but general concerns band together cannot, of itself, provide the necessary 'application specific' interest".[53] He also stated that if that were not so, the task on decision makers would be made far too

---

49 See *Queenstown Airport Corporation v Queenstown Lakes District Council* [2013] NZHC 2347 at [106], citing *Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA).

50 As required by s 5 of the Interpretation Act 1999. See also *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [24].

51 Section 2 of the RMA.

52 Section 2 of the RMA.

53 Above n 38, at [124].

onerous, could become guesswork or could only be resolved by notifying a standard list of general interest bodies.[54] But iwi authorities are required by statute to be known to the Council,[55] as are the matters of environmental importance to them.…[56] They are nothing like the general interest body referred to by Simon France J.

**[103]** TRONA's claim to being an affected person in every case is too ambitious however. For the reasons I have stated, iwi authorities have a special status under the RMA, but whether an iwi authority is an "affected person" will depend on the facts of each case and in particular whether the iwi authority (as representative corporate persona of the iwi as a whole—in this case, ngā uri o ngā hapū o Ngāti Awa) is adversely affected, in an environment sense, by a proposed activity in a minor or more than minor way. Iwi planning documents will play an important informative role in this regard, because they will identify the matters of iwi level environmental concern that might, if engaged by an application, trigger affected person status. Whether an iwi authority qualifies as an "affected person" will also be subject to the usual statutory refinements, including the power to disregard permitted effects and exclusionary effect of restricted discretionary criteria.

**[104]** But, while that starting point is tolerably clear, there are other complexities associated with affected person status of iwi authorities which preclude a comprehensive statement of law about the affected person status of iwi authorities. For example, the respective positions of iwi, hapū and whānau must be considered, and when in accordance with tikanga Māori, affected person status should be afforded to them all or individually or some other combination. Furthermore, as Elias CJ said in *Discount Brands Ltd v Westfield (New Zealand) Ltd*, people and communities order their lives under District Plans and they are the frame through which a resource consent has to be assessed.[57] The extent to which an iwi authority is a potentially affected person must be informed by this frame, including any relevant objective and policies that might apply. With those important caveats in mind, I turn to assess TRONA's status in this case.

**[105]** TRONA had to show a potentially relevant adverse effect on the iwi which is minor or more than minor. That was always going to be difficult on the effects in issue in this case. The restricted discretionary activity criteria relate to localised effects only in respect of the safe and efficient use of a roadway. While that roadway is whenua Māori, and TRONA performs an important kaitiaki and management role in respect of land still in Ngāti Awa's hands, localised traffic effects do not appear to have been identified as a matter of iwi level concern either in the EMP or the District Plan.[58] In this regard, I also note that TRONA's dealings with the Council on the application appeared to be as representative of the affected whānau, rather than as a directly affected person. While it remains open to TRONA to show that it is an affected person in other cases involving assessments of traffic effects, on the limited

---

54 At [125].
55 Section 35A.
56 See discussion above at [93].
57 *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 4, at [10].
58 Argument and evidence on these aspects was sparse. I have attached as an appendix to this judgment the references to s 95E in the EMP, together with a section dealing with Statutory Acknowledgments. As can be seen, localised traffic effects are not identified as matters of iwi level concern that might attract "affected person" status.

information before me, I am unable to find that TRONA is an "affected person" in this case for the purpose of s 95E.

**[106]** For clarity, nothing I say here should be taken as suggesting that engagement with TRONA was wrong or that localised effects will never give rise to affected person status to iwi authorities. As I have said, iwi authorities have a special status under the RMA, and their involvement at all levels of the resource management process is expressly envisaged, whether formally via joint management agreements or informally as a matter of sound and responsible resource management practice. While effects on individual members of an iwi may not be such as to trigger affected person status for the iwi as a whole, the role of iwi authorities, as representative of all iwi members, remains important in terms of the effective discharge of the Act's obligations to iwi Māori. Furthermore, a significant localised effect on, say, whenua Māori may well have iwi level significance, triggering affected person status for an iwi authority.

*Unreasonableness*

**[107]** I turn now to TRONA's claim that the decision was unreasonable. It relies in major part on the Lysaghts' claim, which I have dismissed. But the submissions, evidence and oral argument (including that on behalf of Mr Lysaght) has brought to my attention that only sparse consideration was given to the potential effects of the increased traffic usage on local resident pedestrians. Significantly, I could find no expert consideration given to the potential for conflict between vehicular traffic and the use of the Roadway by the resident or visiting children.[59] There are only cursory references about potential pedestrian—vehicular conflict or what mitigation measures have been adopted to mitigate the effects of such conflict. That is a major oversight given the proximity of the access to the service station to the two local residences.

**[108]** The owners of the residential properties adjacent to the Roadway plainly have a legitimate interest in securing a pedestrian safety. The introduction of 90 vehicle movements per hour, including very large vehicles, on what has always been a quiet road, should have been more carefully assessed in terms of the potential for conflict with existing and future pedestrian use of or near to the Roadway, and in particular use by children who reside immediately adjacent, or in close proximity, to the access to the service station. As noted above, "effect" includes an effect of low probability and high potential impact. While conflict between a large or small vehicle and a child may be a matter of low probability, the impact could be catastrophic.

**[109]** In this regard, to his credit, Mr Gulati in his further affidavit acknowledged the importance of child safety. Referring to a meeting and correspondence with Jake Wharewera which took place after the grant of consent, Mr Gulati had this to say:

---

59 Mr Alistair Black (traffic expert for the Council) opined that the requirement for a footpath was excessive given the private ownership of the Roadway, small number of lots served and the nature of the proposed station. No mention is made of the presence of children at the residences. He does, however, refer to the probability of fatality or injury in the event of a vehicle-vehicle collision at a speed of 30 per cent or less (10 per cent). He does not comment on the probability of fatality or injury in the event of a vehicle-pedestrian collision.

> During our meeting, [the Wharewera whānau] emphasised that their concerns were about the safety of the kids at their property. We agreed that safety of the kids was also our first priority. They advised they would be happy if instead of the 1.8 wooden fence being installed, I would install a 2m concrete fence.
>
> Taking the kids safety into account I advised them we would install that also an automatic gate, because their safety was important to us as well.

**[110]** A letter is also produced, confirming agreement to install a concrete wall and automatic gate at the property at 46B State Highway 30, Coastlands, Whakatāne, conditional on written approval to undertake the works and the service station going ahead.

**[111]** Moreover, it is unsatisfactory that closer consideration was not given to the residential nature of the existing and future environment as two of the four blocks accessing the Roadway are currently in residential use and enabled for further residential intensification. In this regard, while the underlying zoning is Light Industrial, r 13.2.2.2 makes further intensive use of the Roadway of the kind envisaged by the service station a restricted discretionary activity, with pedestrian safety identified as a matter for evaluation. I am therefore satisfied that, on the information available to the Council, it was unreasonable to conclude that the effects (including potential effects) on pedestrians was less than minor. The types of proposals set out in Mr Gulati's affidavit exemplify the type of proposals that should have been considered as part of the application process. It is not for me to ascertain the full suite of conditions that might have been imposed to provide for pedestrian safety in what is presently (in substantial part) a quiet residential enclave. But other obvious measures could have been considered, including signage, traffic-calming measures or road markings designed to mitigate the risk of conflict with pedestrian movements. All of this emphasises the unreasonableness of the decision to proceed without affected party approvals from the residential neighbours.

*Relief*

**[112]** I am satisfied that the breach of the commitment to engage with TRONA prior to the final decision and the failure to reasonably assess the potential for conflict between the increased vehicular usage and the local resident pedestrians, including young children who reside at or travel to the whānau blocks, means that the decision to grant consent without notification must be set aside. However, I am not satisfied that the Application must be notified or that there are affected persons for the purpose of s 95E. That is a matter properly to be reconsidered in light of my judgment.

*Outcome*

**[113]** The Lysaghts' claim is dismissed, though I acknowledge that the issue of pedestrian conflict was raised by Mr Lysaght in his evidence and Mr Williams provided considerable assistance to me in terms of the full assessment of reasonableness in an RMA context.

**[114]** TRONA's legitimate expectation and unreasonableness claims are successful in part, but only in one key respect: the consenting officers did not adequately or reasonably assess the potential for conflict between the increased traffic use and local resident pedestrian use of or near to the Roadway; including, in particular, use by children who reside immediately adjacent, or in close proximity, to the service station.

**[115]** Accordingly, I set aside the decision to grant the consent on a non-notified basis. I also direct that the Council reconsider the decision to proceed on a non-notified basis in light of my judgment.

**[116]** The parties may file memoranda on costs, no longer than five pages in length, if they cannot be agreed.

## APPENDIX[60]

| Reference | Policy | Target audience |
|---|---|---|
| **Policy 6.1.4** | TRONA consider themselves an affected party under Section 95E of the RMA for all resource consent applications:<br><br>**a** within, adjacent to, or impacting directly our statutory acknowledgement areas.<br>**b** to take or transfer surface water within our rohe.<br>**c** to take or transfer groundwater within our rohe.<br>**d** to discharge contaminants to water or to land, in circumstances where it may enter water. | BOPRC; All district councils; Consent applicants |
| **Policy 6.2.4** | TRONA consider themselves an affected party under Section 95E of the RMA for all resource consent applications:<br><br>within, adjacent to, or impacting directly our statutory acknowledgement areas.<br>**a** to discharge contaminants to land.<br>**b** relating to contaminated soils.<br>**c** relating to earthworks, particularly within 100m of a marae, or Cultural Heritage Site (scheduled in a District Plan or within the NZ Archaeological Association database). | BOPRC; All district councils; Consent applicants |
| **Policy 6.3.2** | TRONA consider themselves an affected party under Section 95E of the RMA for any resource consent application within our rohe:<br><br>to take and use geothermal water/fluid, heat or energy. applications to discharge geothermal fluid to land or water. | BOPRC |

60 The policies in this table are reproduced as they appear in TRONA'S EMP.

| | | |
|---|---|---|
| **Policy 6.4.3** | TRONA consider themselves an affected party under Section 95E of the RMA for all resource consent applications:<br><br>within, adjacent to, or impacting directly our statutory acknowledgement areas. relating to the occupation and use of coastal space.<br><br>relating to structures in the coastal marine area. relating to earthworks, particularly within 100m of a marae, or Cultural Heritage Site (scheduled in a District Plan or within the NZ Archaeological Association database). | BOPRC; All district councils; Consent applicants |
| **Policy 6.7.4** | TRONA consider themselves an affected party under Section 95E of the RMA for any resource consent application with our rohe for mineral extraction from land, rivers and streams, coastal areas and geothermal resources. | BOPRC |
| **Implications of Statutory Acknowledgement Areas**, at 11.7 | This protocol replicates the consultation requirements from our Deed of Settlement and Sections 40-47 of the Ngāti Claims Settlement Act 2005. In particular:<br><br>…<br><br>Councils must have regard to the statutory acknowledgement when deciding whether we are an 'affected person' to a consent application.<br><br>… | |

*Reported by:* Rachel Marr, *Barrister and Solicitor*