

# **Review of Infrastructure Contract Arrangements**


**Waitakere City Council / Auckland Council –  
Northern Strategic Growth Area (NorSGA) –  
Massey North - Westgate**

**Dated: April 2012**

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## 1 Executive summary

- 1.1 In October 2011 Auckland Council instructed us to undertake a review of the arrangements reached between the former Waitakere City Council / Auckland Council and NZRPG Management Limited and its associated companies (collectively, **NZRPG**), in relation to infrastructure and other works in the Westgate/ Massey North area. Our review was conducted under the auspices of Auckland Council General Counsel Wendy Brandon and followed the confidential resolution of the Regional Development and Operations Committee of 20 October 2011. We have concluded as follows.

- 1.3 Our conclusions are as follows.

- 1.4 The complicated matrix of arrangements between the former Waitakere City Council/ Auckland Council and NZRPG was the product of an innovative public-private engagement over a prolonged period, motivated by the Council's desire to ensure important public infrastructure and urban planning outcomes. These outcomes could not have been achieved or imposed through the usual legislative and planning regimen.
- 1.5 Arrangements of this nature between Auckland Council and major landowners will become increasingly important in the coming years as the ambitious vision proposed in the draft Auckland plan is implemented. In our view, such public-private partnerships are an appropriate and lawful engagement of Council, with the capacity to deliver both certainty to developers/landowners and greater control to Council.
- 1.6 Through the arrangements with NZRPG, the former Waitakere City Council (and now Auckland Council) achieved reasonable value, both in a financial sense and with respect to service of the public good. In particular, the delivery risk of much of the infrastructure works was transferred to NZRPG by Works Development Agreements concluded in October-November 2010. However we recommend that the Auckland Council continues to ensure that the earthworks contracts with NZRPG are transparent and that cross-subsidisation of costs between entities related to NZRPG does not occur in circumstances that could lead to additional Auckland Council costs.
- 1.7 The successful development of the Westgate/Massey North area, in line with the Auckland Council's vision, rests largely with the implementation of the existing agreements. This in turn will require a strong working relationship between NZRPG and the Council.
- 1.8 While Council decision-making processes and procurement methods did not always follow best practice, in general the principles governing legality and probity were observed. Our view is that, [REDACTED] the departures that occurred do not require Auckland Council to take specific action at this point.



- 1.10 We remind Auckland Council that it cannot rely indefinitely on the consultation undertaken in relation to the shift in the Metropolitan Urban Limit, Waitakere Plan Change 15, and the Waitakere Long Term Council Community Plan 2009-2019. It is likely that significant decisions on Westgate in the future will require public consultation.
- 1.11 Likewise, we advise Auckland Council to continue to seek opportunities to put aspects of future Westgate works out to contestable public tender where this is contractually feasible.
- 1.12 On the materials we reviewed, we did not find any evidence of misfeasance on the part of Waitakere or Auckland Council officers.

## 2 Definitions

2.1 We use the following terms and phrases in this report, defined as follows:

**2009 Waitakere DC Policy** means *Waitakere City Council Development and Financial Contributions Policy* adopted as part of the Waitakere's LTCCP for the 10 year period 2009/2019

**A & R** means A & R Earthmovers Limited

**AMP** means AMP NZ Property Development Limited & AMP Capital Investors (NZ) Limited

**ARC** means Auckland Regional Council

**ARGS** means Auckland Regional Growth Strategy

**ARPS** means Auckland Regional Policy Statement

**ARTA** means Auckland Regional Transport Agency

**ATA** means the Auckland Transition Agency

**Auckland** and **Auckland Council** mean the integrated Auckland Council that came into existence on 1 November 2010

**Cannuck** means Cannuck Holdings Limited

**CDP** means Comprehensive Development Plan

**CSA 1** means Cost Sharing Agreement No 1

**CSA 2** means Cost Sharing Agreement No 2

**Darroch** means Darroch Valuations Limited

**Development contributions arrangement** means the arrangement entered into between Waitakere and NZRPG regarding development contributions on 27-28 October 2010

**IFA** means Infrastructure Funding Agreement

**ITA** means Integrated Transport Assessment

**Recommendation Report** means Joint Auckland Regional Policy Statement and District Plan Changes Hearings Panel Recommendation Report

**Kedgley interests** means the interests of Kedgley Investments Limited

**LDA** means Line Deviation Agreement

**LGA 2002** means Local Government Act 2002

**LGAAA** means Local Government (Auckland) Amendment Act 2004

**LTCCP** means Waitakere Long Term Council Community Plan

**Midgley interests** means the interests of IB, GA and IE Midgley

**MOU** means Memorandum of Understanding

**MUL** means Metropolitan Urban Limit

**NorSGA** means the Northern Strategic Growth Area

**NUDC** means NorSGA Urban Development Committee

**NZRPG** means, depending on the context, any one or more of the following related companies: NZRPG Management Limited, Cannuck Holdings Limited, Westgate Properties Limited, Western Compass Properties WDA 1 Limited, Western Compass Properties WDA 4 Limited, Western Compass Properties WDA 5 Limited

**NZTA** means New Zealand Transport Agency

**Panel** means Joint ARPS and District Plan Changes Hearings Panel

**PC 13** means Plan Change 13 (Hobsonville Airbase)

**PC 14** means Plan Change 14 (Hobsonville Village)

**PC 15** means Plan Change 15 (Westgate / Massey North)

**Precincts A and B** means Precincts A and B of the Massey North Town Centre Special Area

**Procurement Manual** means the *Auckland Council Procurement Manual* released on 1 November 2010

**Procurement Procedures** means Waitakere City Council's *Procurement Procedures* document released on various dates

**Project Leadership Team** means the project leadership team established under WDAs 1, 4 and 5, and comprising a minimum of four members appointed by Auckland Council, Auckland Transport, Watercare Services Limited and NZRPG.

**Reorganisation Act** means Local Government (Tamaki Makaurau Reorganisation) Act 2009

**Reorganisation** means the reorganisation of Auckland's local government on 1 November 2010

**Transitional Provisions Act** means Local Government (Auckland Transitional Provisions) Act 2010

**Transpower** means Transpower New Zealand Limited

**TUSC** means Tool for Urban Sustainability Code of Practice

**Waitakere** means the former Waitakere City Council



**Watercare** means Watercare Services Ltd

**WDA 1** means Works Development Agreement No 1

**WDA 2** means Works Development Agreement No 2

**WDA 3** means Works Development Agreement No 3

**WDA 4** means Works Development Agreement No 4

**WDA 5** means Works Development Agreement No 5

**Westgate** means the Massey North / Westgate development zone encompassed within Plan Change 15

**WPL** means Westgate Properties Limited



### 3 Method and basis of report

#### Our instructions

- 3.1 On 14 October 2011 Auckland Council approached us to undertake a confidential review of the arrangements reached between the former Waitakere City Council / Auckland Council and NZRPG Management Limited and its associated companies, Cannuck Holdings Limited and Westgate Properties Limited (together, **NZRPG**), in relation to infrastructure and other works in the Westgate / Massey North development zone encompassed within Plan Change 15 (**Westgate**).
- 3.2 We received our terms of reference from General Counsel Wendy Brandon by letter of 21 October 2011 and our review was conducted under the auspices of General Counsel. The review followed the confidential resolution of the Regional Development and Operations Committee of 20 October 2011.
- 3.3 Our legal and factual review has focused on whether contracts were awarded and administered in a sufficiently accountable, transparent, and fair manner in fulfilment of Council's public law duties, with appropriate contractual disciplines around price and terms, and whether there is any evidence of misfeasance.
- [REDACTED]
- [REDACTED]

#### Accuracy of information

- 3.6 This report reviews and comments on the information made available to Meredith Connell by the Council.
- 3.7 We have assumed the accuracy of all information supplied to Meredith Connell and have not undertaken independent verification. However, we note points where our independent enquiries or analyses have highlighted inaccuracies or discrepancies.
- 3.8 We have assumed that the Council has provided Meredith Connell with the information relating to the NorSGA area that is material to the completion of this report. Our report is limited to the information supplied or the information that has been elicited from our direct enquiries. This report may be subject to qualification or modification as a result of the non-disclosure of information of which Meredith Connell is not, or could not reasonably be expected to be, aware.
- 3.9 We have limited our report to those matters that appear to us to be material.



## 4 The context to the Westgate arrangements

- 4.1 The development of the Northern Strategic Growth Area (**NorSGA**) spans approximately 30 years in general concept and 10 years in specific focus. It is one of the current Auckland Future Vision Committee's five key regional strategic transformation projects<sup>1</sup> and is divided into three stages: Stage One involving Hobsonville Airbase (PC 13), Hobsonville Village (PC 14), and Westgate / Massey North (PC 15); Stage Two relating to the Whenuapai Industrial and Trig Road areas; and Stage Three at Scott's Point and Redhills.
- 4.2 The three stages interact and together form a development "package" in the north-western region of what is now the Auckland super city. Stage One, being this report's focus, is detailed throughout. Stage Two is intended to be zoned for large footprint business uses together with smaller areas of residential and other businesses and services. Its development is projected beyond 2015. Stage Three involves residential development post 2021.
- 4.3 Central drivers underpinning the development included stimulating economic growth and job creation to mitigate the effects of workers commuting away from the dormitory suburbs of, in particular, West Harbour, Massey, and Hobsonville. At April 2011, some 60% of workers left Waitakere City for work.<sup>2</sup> Massey was characterised by the Waitakere City Council (**Waitakere**) in 2008 as having "steep topography, inadequate infrastructure for a community of its size, poor urban layout and street design, sprawling boundaries, an increasingly transient population, and relatively few community networks and local employment opportunities."<sup>3</sup> The development would use land to complement the motorway connecting Waitakere and the North Shore.
- 4.4 Also driving the development, or at least one of its catalysts, was section 3(b) of the Local Government (Auckland) Amendment Act 2004 (**LGAAA**), which required councils within the Auckland region to "change the policy statement and plans prepared under the Resource Management Act 1991 to integrate the land transport and land use provisions and make those provisions consistent with the Auckland Regional Growth Strategy." Such requirement provided a stimulus to begin urbanisation of NorSGA. Through the submissions of Waitakere, the Auckland Regional Council (**ARC**) extended the metropolitan urban limit (**MUL**) in northern areas. This resulted in three changes to the Waitakere City District Plan, namely Plan Changes 13, 14 and 15.
- 4.5 Turning now to the more specific NorSGA project, this project was formulated in three parts:
- (a) The Westgate / Massey North Town Centre and associated infrastructure (Waitakere Plan Change 15);

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<sup>1</sup> The other four key regional strategic transformation projects are Silverdale North, New Lynn, Tamaki Transformation, and Flat Bush (Auckland Future Vision Committee resolution of 5 April 2011).

<sup>2</sup> Auckland Council, *NorSGA Briefing: Massey North, Hobsonville Corridor, Hobsonville Point*, 26 April 2011. Presentation to the Upper Harbour Local Board on 26 April 2011, accessible at: <http://www.aucklandcouncil.govt.nz/SiteCollectionDocuments/aboutcouncil/localboards/upperharbour/localboard/meetings/upperharbourlbminattnorsga20110426.pdf>.

<sup>3</sup> Agenda – NorSGA Urban Development Committee, 18 August 2008, p 9, para 3.



- (b) A new village centre and employment park at Hobsonville (Waitakere Plan Change 14); and
- (c) The creation of a new community and marine industry precinct at Hobsonville Point (Waitakere Plan Change 13).

4.6 The NorSGA Stage One development, as a sub-set of the broader three-stage development, is significant in scale. Plan Changes 13, 14, and 15 involve 435 hectares; 15,000 to 20,000 new jobs; 5,500 new homes; and other features including a new town centre (see below), schools, community facilities, open spaces, roads, and improved transport links.<sup>4</sup> The projected GDP increase at September 2009 was \$500 million per annum at 2021 and \$1 billion per annum at 2051.<sup>5</sup> The first retail development was modelled to open in early 2013 together with the town square and library.

4.7 In relation to land as zoned at September 2009, the *Northern Strategic Growth Area – Waitakere City: Overview Report for the Auckland Transition Agency* records the following projected benefits:<sup>6</sup>

Area	Hectares	New jobs	New homes
Westgate – Massey North (Plan Change 15)	157	8,700	1,700
Hobsonville Airbase (Plan Change 13)	167	2,000	3,000
Hobsonville Village (Plan Change 14)	111	4,000	100
Totals	435	14,700	4,800

**Waitakere’s intentions**

- 4.8 The earliest arrangement we have reviewed is a Memorandum of Understanding between Waitakere and IMF Westland Limited dated 2 July 2004 (**MOU**). IMF Westland later changed its name to NZRPG Management Limited. The MOU notes that companies related to NZRPG Management Limited have an interest in the existing Westgate Centre, and also own the adjacent land, and that the parties have a common interest in delivering a new city centre at Westgate that accords with Waitakere’s and the ARC’s strategies for the region.
- 4.9 The MOU therefore records the parties’ intention to adopt a collaborative approach to the realignment of the MUL and changes to the District Plan to achieve a desirable urban outcome consistent with Waitakere’s policies and objectives.
- 4.10 On 31 March 2005, in accordance with the deadline established by s 39 of the LGAAA, both Plan Change 15 and Change 7 to the Auckland Regional Policy Statement (**ARPS**) (extending

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<sup>4</sup> Auckland Council’s website: <http://www.aucklandcouncil.govt.nz/EN/AboutCouncil/CouncilProjects/northwesttransformation/Pages/home.aspx>

<sup>5</sup> *Northern Strategic Growth Area – Waitakere City: Overview Report for the Auckland Transition Agency*, September 2009, inside cover.

<sup>6</sup> *Northern Strategic Growth Area – Waitakere City: Overview Report for the Auckland Transition Agency*, September 2009, inside cover.

- the MUL) were publicly notified and submissions invited. As might be expected, a large number of submissions were received, in support of, and in opposition to, aspects of PC 15.
- 4.11 With the notification of PC 15 and Change 7 to the ARPS (extending the MUL), the focus of the parties to the MOU (effectively Waitakere and NZRPG) changed to complying with the requirements of PC 15 on the one hand, and reaching agreement on infrastructure funding on the other.
- 4.12 In the meantime Waitakere had committed itself (in its Long Term Council Community Plan (LTCCP)) to a public amenity and infrastructure investment programme which allowed total funding of \$315 million, that sum being provisioned in the 2009/2019 LTCCP. However, the largest component of that budget related to PC 15 (Westgate) where \$205 million was allocated. Ultimately, the works required for much of the roading network, stormwater system and other infrastructure works in Precincts A and B and elsewhere in PC 15, came under the umbrella of one party, NZRPG, through an infrastructure funding agreement and works development agreements.

### Evolution of PC 15

- 4.13 The plan change process is a public one and the origins and development of PC 15 are able to be traced by anyone without restriction. It is not our purpose to provide a full exposition of PC 15 here, but rather to illustrate the ways in which the plan change process impinged on the relationship between the Council and NZRPG, and, to a lesser extent, the Midgley interests.
- 4.14 We understand that the notification of PC 15 took place against a background of major policy initiatives regarding growth as it affected the Auckland region as a whole, and the northwest of Auckland in particular. Specifically, a Memorandum of Understanding signed by the Regional Growth Forum members committed each council to the effective implementation of the Auckland Regional Growth Strategy (ARGS) and its growth concept, by ensuring that growth planning was appropriately resourced and by requiring councils to enter into sector-based agreements as a method of implementing the ARGS. Four geographic sectors were identified in the ARGS, and issues for the northern and western sectors were combined in the Northern and Western Sectors Agreement of October 2001. The signatories to this agreement included North Shore City Council, Rodney District Council, Waitakere and the Auckland Regional Council, and we understand that the agreement mooted a town centre and major employment area situated at Massey North.
- 4.15 Other planning initiatives forming part of the backdrop to PC 15 included Proposed Changes 6 and 7 to the ARPS, and, of more immediate impact, the Totara Creek Integrated Catchment Management Plan. In addition, we understand that transport audits of the plan change were carried out both before and after notification.
- 4.16 PC 15 encompasses an area of some 156 hectares and includes both the existing Westgate shopping centre land and a large area of land on the northern side of what was then SH 16. Under PC 15, the plan change area is essentially divided into two Special Areas: the Massey North Employment Special Area, and the Massey North Town Centre Special Area. In its turn, the Town Centre Special Area is divided into five precincts, A, B, C, D and E. In addition, a number of different activity zones straddle the precinct boundaries.

- 4.17 As notified, PC 15 located the town centre within Precinct A, on land owned by NZRPG.
- 4.18 Following the notification of PC 15 on 31 March 2005, a large number of submissions were received. The task of summarising the submissions fell to the ARC, and the summarised submissions were then examined and commented on in the planners' report to the Joint ARPS and District Plan Changes Hearings Panel. The planners also made recommendations to the Panel as to the manner with which each of the submissions should be dealt.
- 4.19 The Joint ARPS and District Plan Changes Hearings Panel (**Panel**) was appointed by the Councils of the Auckland region under the provisions of the LGAAA, and comprised representatives from the various Councils, the ARC, and two independent commissioners. We understand that there were only two Waitakere representatives on the Panel of eight.
- 4.20 The Panel's Recommendation Report (**Recommendation Report**) notes on page 2 that: "The LGAAA mandates that all councils in the Auckland Region integrate their land transport and land use provisions and ensure that these are consistent with the ARGS, give effect to its Growth Concept and contribute to the land transport and land use matters specified in Schedule 5 (ss 39 & 40 of the LGAAA). This is, in effect, the purpose of Plan Change 15."
- 4.21 The Recommendation Report records a large number of submissions in support of PC 15, these submissions being supported in general by IMF Westland Limited (the predecessor to NZRPG). By contrast, IB, GE, and IE Midgley (**Midgley interests**) are recorded as submitting that PC 15 should be deleted in its entirety. Our review of the Recommendation Report indicated that NZRPG's submissions, while naturally intended to advance NZRPG's commercial interest, were nonetheless put forward in a positive and constructive manner, with a number of them being accepted in part or in a modified form by the Panel. NZRPG's submissions were opposed in their entirety by the Midgley interests.
- 4.22 As well as opposing NZRPG's submissions, the Midgley interests supported submissions by AMP NZ Property Development Limited & AMP Capital Investors (NZ) Limited (**AMP**), and made direct submissions as well. Those submissions essentially sought the relocation of the town centre to the Midgley-owned land.
- 4.23 The Midgley interests' submissions on location of the Town Centre are summarised in section 5.13 of the Recommendation Report. Essentially the submission is that the plan should be amended by substituting Precinct C for Precinct A, so that the town centre would be on Precinct C – being the land owned by the Midgley interests.
- 4.24 In response to these submissions, and others seeking the relocation of the town centre (principally from AMP), the Panel pointed out that development of the Massey North Urban Concept Plan involved the consideration of a number of alternative locations for the town centre as a whole, and the location of the mainstreet and core retail area within the town centre. The Panel cited a number of workshop documents dating from 2002 as relevant background material to the consideration of these submissions.
- 4.25 With particular reference to the submissions made on behalf of the Midgley interests, the Panel pointed to the reports by Urbanism + and Patrick Partners, which assessed four options for the location of the town centre. Those reports concluded that Option 1 (essentially the Midgley interests' proposal) was the least favourable, and that Option 4 (the PC 15 option) was the most favourable. In rejecting the Midgley interests' submissions, the Panel further

- cited the unsuitable topography of Precinct C and the decreased integration with the existing Westgate centre that would result from moving the town centre to the proposed alternative location.
- 4.26 AMP's submissions on location were rejected by the Panel for similar reasons, with the Panel noting that the town centre location promoted by AMP was similar to Option 1 and therefore the least favourable option.
- 4.27 It is noteworthy that with respect to transport, some submissions critical of the plan were received from the major players, including Land Transport New Zealand, Auckland Regional Transport Authority (ARTA), ARC and Transit, now New Zealand Transport Agency (NZTA) (see section 5.6 of the Recommendation Report). The Recommendation Report however notes at page 33 the undertaking of an Integrated Transport Assessment (ITA) since notification, in consultation with ARTA and Transit, and that ARTA and Transit were generally satisfied with the ITA.
- 4.28 The Recommendation Report recommends that the Massey North Urban Concept Plan be updated to show the revised roading network as per the ITA, with an indication as to which of those roads were the key roads and intersections (page 39). In addition, the Recommendation Report recommends in section 9 (General Infrastructure Provision) that the key elements of the roading network be clearly distinguished with a notation to the effect that these are intended to become public roads. It appears that these recommendations set the principal roading pattern for the town centre and adjacent land.

#### **Waitakere regulatory processes – PC 15 and the Comprehensive Development Plan**

- 4.29 The recommendations of the Panel were issued on 28 May 2007, and were adopted as a decision of Waitakere on 20 June 2007. Appeals to the Environment Court followed, including an appeal by the Midgley interests lodged on 13 September 2007.
- 4.30 In the meantime, Waitakere and NZRPG had little choice but to develop their plans for the town centre on the basis of PC 15 as adopted by Waitakere, on the basis that, notwithstanding the appeals, the general form and extent of the Massey North town centre was settled from the date the ARC issued its decision to extend the MUL (31 July 2007). This is on the basis that none of the appeals on either PC 15 or Change 7 to the ARPS (the MUL) challenged the establishment of the Massey North Town Centre Special Area or the establishment of the town centre in precinct A. The appeals from the decision version of PC 15 were largely confined to Precincts C and E, and did not challenge the establishment of the town centre, and associated core retail activities, in Precincts A and B.
- 4.31 Thus, overall, the rules and associated objectives and policies for Precincts A and B could have been treated as operative under section 19 of the Resource Management Act when Waitakere made its principal decisions to enter into the IFA during the course of 2009.
- 4.32 It is important to continue to bear in mind at this point that by that stage Precincts A and B (being the Town Centre and associated core activities) overwhelmingly consisted of land either owned or controlled by NZRPG.
- 4.33 As early as 11 October 2007 a report to Waitakere's City Development Panel noted that the purpose of the Westgate / Massey North work stream was to "deliver the vision of Council as

- represented in the plan change. This includes coordination of interface with developers and land owners, coordination of communications, management of the CDP processes.”
- 4.34 We understand that NZRPG’s comprehensive development plan (CDP) for Precinct A was discussed extensively with Council’s planners during the latter part of 2008 and early part of 2009. The minutes of a meeting of the NorSGA Urban Development Committee (NUDC) on 13 October 2008 record that NZRPG provided a presentation to the meeting updating the committee on the draft CDP.
- 4.35 Further evidence that the Council was closely following the evolution of the CDP occurs in the confidential report to the Council dated 26 November 2008, in which the author notes: “For some years, the Council has pursued a desired urban form for the centre that focussed on creating a ‘town’ rather than a ‘mall’, with active street frontages and civic amenities, rather than an enclosed format. These desired ingredients are central to the provisions of PC 15 to the Waitakere District Plan. NZRPG have embraced these strategic objectives in their proposed comprehensive development plan for the site.”
- 4.36 A CDP for Precinct A was ultimately lodged for consent on 25 March 2009, with limited notification on 15 February 2010, and consent granted by independent commissioners on 8 September 2010. On 30 September 2010 the Midgley interests lodged an appeal against the CDP consent, and a Consent Order settling this appeal was issued by the Environment Court on 6 September 2011.
- 4.37 Our review indicates that the commercial discussions between the Council and NZRPG in relation to the entry into an infrastructure funding agreement proceeded against the backdrop of the CDP application, rather than the other way round. For example, in the confidential report to the Council dated 7 April 2009, the author states: “An important step currently underway is for Council to view the content of NZRPG’s CDP application for the Massey North town centre before deciding how to progress with the IFA negotiations.” The report notes that: “Council’s position revolves around getting key road, infrastructure and community use land but elements such as the developer funding road construction, achieving the appropriate urban form, ownership and use of ‘Cross Street (east)’ and other community infrastructure and management arrangements are all under consideration.”
- 4.38 Thus, the CDP and the infrastructure funding agreement that was eventually reached with NZRPG in 2009 (IFA) necessarily impinged on each other in various respects. The CDP was an important contextual element to the IFA, and the contractual arrangements in the IFA had the effect of binding NZRPG to deliver parts of the CDP.





## 5 Chronological table of major events and actions

5.1 The following table depicts what we consider to be the major events in relation to the development of Westgate.

Date	Major event / action taken	Relevant documents (description and date)	Notes / comments
2 July 2004	MOU signed	MOU between IMF Westland Limited and Waitakere dated 2 July 2004.	IMF Westland Limited has changed its name and is now NZRPG Management Limited.
20 June 2007	Waitakere adopts recommendations of the Panel with respect to PC 15	Recommendation Report of the Joint Hearings Panel – Massey North – Proposed Plan Change 15, dated 28 May 2007.	Contains the recommendations of the Panel to Waitakere on submissions made during the course of hearings on PC 15.
31 July 2007	ARC issues its decision report on the extension of the MUL	Decision Report of the Auckland Regional Council Regarding Proposed Change 7 to the Auckland Regional Policy Statement, dated 31 July 2007.	This extended the MUL to include the area covered by NorSGA.
4 November 2008	NZRPG writes to Waitakere suggesting terms for the purchase of roads by Waitakere	Letter from Mark Gunton to Graeme Campbell dated 4 November 2008.	
26 November 2008	Resolution of the Council	Resolution 2002/2008 - Infrastructure Assets Within the Plan Change 15 Area.	Authorises the CEO to negotiate the purchase of roads and other infrastructure assets within the Massey North Town Centre Special Area.
22 December 2008	Valuation issued for PC 15 areas	Valuation Report: Plan Change 15, Westgate, Waitakere City. Prepared by Darroch Valuations Limited, 22 December 2008.	Relates to possible areas of land to be purchased from NZRPG / Kedgley.
2 February 2009	Valuation issued for Main Street, Westgate Shopping Centre	Valuation Report: Main Street (Section 3) Westgate Shopping Centre, Waitakere City. Prepared by Darrochs, 2 February 2009.	
23 February 2009	Resolution of the Long Term Council Community Plan and Annual Plan Committee	Resolution 178/2009 – NZRPG Infrastructure Funding Agreement Within the Plan Change 15 Area.	Relates to the entering into an IFA with NZRPG.

Date	Major event / action taken	Relevant documents (description and date)	Notes / comments
7 April 2009	Resolution of the Council	Resolution 511/2009 – Purchase of Land at Westgate.	Authorises the purchase of Westgate Street.
7 May 2009	Resolution of the Council	Resolution 698/2009 - Purchase of Core Assets Within Plan Change 15.	Further authorises entry into an IFA with NZRPG.
8 May 2009	Agreement for sale and purchase for Westgate Street signed	Agreement for sale and purchase between Westgate Properties Limited, Waitakere City Council, New Zealand Retail Property Group Management Limited, and Cannuck Holdings Limited.	Agreement for purchase of Westgate Street. Includes a form of pedestrian easement and a form of encumbrance. The party "New Zealand Retail Group Management Limited" appears to have been mistakenly inserted for NZRPG Management Limited.
16 July 2009	Full payment made for Westgate Street	Letter from Maurice Heiatt (delivered by hand).	
7 September 2009	Resolution of the Finance and Operational Performance Committee	Resolution 1538/2009 – Massey North Town Centre Assets.	Authorises the CEO to sign the attached IFA.
17 November 2009	Auckland Transition Agency confirmation received for entry into IFA	Letter from Mark Ford and Grant Taylor (Auckland Transition Agency) dated 17 November 2010.	Confirms decision to ( <i>inter alia</i> ) enter into IFA.
22 February 2010	IFA signed	Infrastructure Funding Agreement between Cannuck Holdings Limited, NZRPG Management Limited, and Waitakere City Council dated 22 February 2010.	Waitakere agreed to complete certain infrastructure, town square, library, pay for town square and other land, and contribute to cost of roads. NZRPG would transfer certain roads to the Council, be responsible for design and construction of roads, transfer town square, library and other land to Council and sign a memorandum of encumbrance to protect urban design outcomes.
30 June 2010	Resolution of the Council	Resolution – Plan Change 15 – Authority to Negotiate Infrastructure Contracts.	Relates to the WDAs and the LDA.



Date	Major event / action taken	Relevant documents (description and date)	Notes / comments
29 September 2010	Resolution of the Council	Resolution 1420/2010 – NORSGA Transpower Line Deviation Agreement.	Authorises the CEO to enter into the LDA and WDA 2.
6 October 2010	Resolution of the Council	Resolution 1460/2010 – Plan Change 15 – Infrastructure Contracts.	Authorises the CEO to enter into WDAs 1, 4 & 5.
22 October 2010	WDAs 1, 4 & 5 signed	Works Development Agreements 1, 4 and 5 between Waitakere and NZRPG Management Limited, dated 22 October 2010.	
27-28 October 2010	Waitakere CEO and NZRPG make arrangement regarding development contributions in relation to Precincts A & B and Garelja land.	Letters (2) from NZRPG to Waitakere dated 27 October 2010, response letters (2) from Waitakere CEO to NZRPG dated 28 October 2010.	
28 October 2010	WDA 2 signed	Works Development Agreement 2 between Waitakere and NZRPG Management Limited, dated 28 October 2010.	This agreement provided for NZRPG to pay nothing towards the [REDACTED] of Transpower's undergrounding costs and [REDACTED] of the balance.
28 October 2010	CSA 1 signed	Cost Sharing Agreement No 1 between Waitakere, NZRPG Management Limited and Cannuck Holdings Limited.	Allocates responsibility between NZRPG and Waitakere in relation to acquiring land, obtaining consents, design and construction.
29 October 2010	LDA signed	Line Deviation Agreement between Transpower New Zealand Limited and Waitakere dated 29 October 2010.	Transpower was obliged, at Waitakere's cost, to underground the 110kV transmission line passing over much of the development land.
29 October 2010	ATA confirmation received for entry into LDA	Letter from Mark Ford and Grant Taylor (Auckland Transition Agency) dated 17 November 2010.	Confirms decision to enter into LDA.
29 October 2010	CSA 2 signed	Cost Sharing Agreement No 1 between Waitakere, NZRPG Management Limited and Cannuck Holdings Limited.	Allocates responsibility for consultancy and landscaping costs between NZRPG and Waitakere.



Date	Major event / action taken	Relevant documents (description and date)	Notes / comments
29 November 2010	WDAs 1, 2, 4 & 5 and CSAs 1 and 2 re-signed by Auckland Council	<p>Works Development Agreements 1, 4 and 5 between Auckland Council and NZRPG Management Limited, dated 29 November 2010;</p> <p>Works Development Agreement 2 between Auckland Council, NZRPG Management Limited and Cannuck Holdings Limited, dated 29 November 2010;</p> <p>Cost Sharing Agreements 1 and 2 between Auckland Council, NZRPG Management Limited and Cannuck Holdings Limited dated 29 November 2010.</p>	

## 6 Opinion on key points

### General remarks

- 6.1 We have reviewed the interrelated arrangements between the Waitakere City and Auckland Councils and NZRPG Management Limited and its associated companies, including Cannuck Holdings Limited (**Cannuck**) (collectively, **NZRPG**). As part of this review, we have taken into account the Westgate town centre's status as a component of the wider NorSGA development.
- 6.2 For the reasons set out in section 4, the parameters of the Westgate town centre, and of Westgate as an urban growth node, were largely determined by the requirements of the Local Government (Auckland) Amendment Act 2004, the associated extension of the MUL and the final form of Plan Change 15 (**PC 15**). The pattern of land ownership in PC 15 left Waitakere with little realistic alternative but to enter into overarching arrangements with NZRPG. NZRPG included Cannuck, the entity that owned or leased the majority of the land comprising Precincts A and B, which were to become the focus for the town centre.
- 6.3 The position of NZRPG within a wider development is particularly relevant to considerations of value obtained by Council. An innovative approach was required, given the sheer scale and complexity of the interrelating arrangements and the overlay of the public good. There was a need for a concerted and coordinated approach to local needs by the developer and Council. This feature of Westgate distinguishes it from more discrete developments, which can produce a patchwork of unrelated local subdivisions and developments. In order to achieve its vision for the town centre, Waitakere looked to assert control over the development to an extent greater than possible under its legislative powers. We consider that this was a legitimate and appropriate course by the Council.
- 6.4 Waitakere effectively had the following options to develop the Westgate/Massey North Town Centre.
- (a) Option 1: do nothing and leave it to the landowner to instigate development of the town centre land.
  - (b) Option 2: purchase all the essential road and infrastructure land and put the road and infrastructure works out to public tender.
  - (c) Option 3: enter into an agreement with the key landowner to achieve the optimum result for both parties.
- 6.5 Waitakere adopted Option 3. A disadvantage of this option was that it brought about greater complexities with respect to Council's compliance with the usual requirements of legality and probity. But its important potential advantages included the following.
- (a) The promotion of developer buy-in and certainty of outcomes.
  - (b) An ability to deliver essential roading and other public assets such as the town square and library.

- (c) A possible reduction of cash consideration payable by the Council through providing non-cash benefits to the developer.
  - (d) An ability to trade the developer's eligibility for development contribution credits for other benefits including non-cash benefits.
  - (e) The potential for Council's betterment claim to result in land for roads being acquired for nil consideration.
  - (f) The ability to avoid the risk that the developer would undertake a subdivision that might not include creation of a public roading network.
  - (g) The avoidance of delays resulting from a compulsory acquisition process.
  - (h) The availability of synergies and cost savings through the dovetailing of works by the Council and developer.
  - (i) Leverage available to Council as a provider of capital.
  - (j) The transfer to NZRPG of risk relating to the delivery of infrastructure works.
- 6.6 The constellation of agreements executed between Council and NZRPG was essentially aimed at giving effect to Option 3. Developments of this nature can be achieved by agreements with a common purpose, despite the competing priorities of the parties. Such public/private partnerships are not unique and historically have been efficient methods to secure objectives of local authorities that cannot be achieved by the use of legislative provisions alone.

#### **Memorandum of Understanding (July 2004)**

- 6.7 The first significant arrangement between Waitakere and NZRPG (then IMF Westland Ltd) was the Memorandum of Understanding (MOU) entered into in July 2004. The MOU was effectively a non-binding statement of intent to work together, and it arguably established a platform of expectations for the parties. It influenced the arrangements that followed and was invoked by NZRPG from time to time.
- 6.8 The MOU outlined, in broad terms, the objectives of the parties, the key principles and the areas of co-operation. The document reflects the visions of the parties at a very early stage when it was not possible to delve into specifics.
- 6.9 The MOU may be briefly summarised as follows.
- (a) The MOU set out the following objectives.
    - (i) Determining and agreeing a vision for the Westgate City Centre.
    - (ii) Determining and agreeing a structure, resources, responsibilities and programme necessary to prepare a concept plan.
    - (iii) Preparing the necessary detailed works to expedite a District Plan change and incorporation of the NorSGA area within an expanded metropolitan urban limit.

- (iv) Assisting with development of Westgate as a vibrant and visually attractive town centre.
  - (v) Providing a framework for possible costs sharing of public infrastructure.
  - (vi) Strengthening the relationship with NZRPG and providing a forum to facilitate a cooperative approach to the ARC in advocating for approval of the concept and expansion of the metropolitan urban limit.
- (b) The MOU established the following key principles.
- (i) Each party to provide adequate resources to achieve the objectives.
  - (ii) Recognising the independence of both parties and their separate responsibilities.
- (c) Key areas of co-operation were identified in the MOU as strategic planning, information sharing, advocacy, infrastructure facility and building development, consultation and strategic analysis to promote the metropolitan urban limit change.

6.10 We do not consider it necessary to conduct an in-depth analysis of the MOU's value or compliance with principles of legality or probity. This is because the MOU did not commit the parties to anything, did not procure property, goods, or services and was surpassed by the many legally binding agreements between Waitakere and NZRPG that followed.

#### **Purchase of Westgate Street (May 2009)**

6.11 The agreement by Waitakere to purchase Westgate Street from Westgate Properties Limited (WPL) was executed on 8 May 2009.

6.12 In summary, the Westgate Street purchase agreement provided as follows.

- (a) Waitakere acquired Westgate Street for roading purposes together with pedestrian easements and easements to convey and drain water, drain sewage and convey communication and computer media.
- (b) In turn, Waitakere agreed to pay NZRPG [REDACTED] plus GST for the vesting of the road and easements in the council, [REDACTED] plus GST being paid following mortgagees' consents to the agreement, with the balance of [REDACTED] payable 10 working days after registration of the compensation certificate, approval of the survey office plan and execution by NZRPG of a memorandum of encumbrance.
- (c) Waitakere also obtained agreement from NZRPG that it would not oppose the taking of land by Waitakere for a library and Waitakere was granted a memorandum of encumbrance to secure a range of urban design outcomes in respect of the town square, piazza and the land surrounding the piazza.

6.13 We conclude that the Westgate Street purchase agreement represented a good commercial outcome for Waitakere. The purchase price of \$[REDACTED] was \$[REDACTED] below Waitakere's funding limit as resolved by that Council on 7 April 2009 (Resolution 511/2009, "Purchase of road land at Westgate"), and was a cost supported by a valuation by Darroch. Darroch valued the land without improvements at \$[REDACTED], with estimates for the value of the

improvements being respectively \$ [REDACTED] (Council) and \$ [REDACTED] (NZRPG). According to the figures before the Council, therefore, Westgate Street had a value somewhere between \$ [REDACTED] and \$ [REDACTED].

- 6.14 Further, the Westgate Street purchase agreement contained provisions that would help achieve desired community outcomes. These included the agreement from NZRPG that it would not oppose the taking of land for a library and a memorandum of encumbrance to secure a range of design outcomes for the town square, piazza and surrounding land.
- 6.15 While the executed agreement to purchase Westgate Street did not accomplish all of Waitakere's aims (the goal that no further roads would intersect with the new road without the Council's approval was not achieved), it materially conformed with the objectives of Waitakere's governing body and its negotiating instructions to the Waitakere CEO as contained in Resolution 511/2009, "Purchase of road land at Westgate." These instructions included an element of negotiation discretion and relevantly provided: "... to negotiate and conclude an agreement to purchase under the Public Works Act 1981 the land shown ... for road upon terms which, subject to the outcome of negotiations, achieve the following outcomes ..."
- 6.16 We consider that the agreement to purchase Westgate Street was accordingly to within the CEO's delegated powers. A negotiated contract was the only means of effecting the purchase of this strategically located land and thus no significant public procurement issues arise.
- 6.17 The Waitakere CEO decided in July 2009 to waive a breach of NZRPG's obligations under the agreement in relation to obtaining mortgagee consent to the agreement and registration of the memorandum of encumbrance concerning urban design. We consider that it was legally open to the CEO to give the waiver, given that the four requirements of the Waitakere governing body's resolution 511/2009 were silent on the provision of an encumbrance and, in any event, there was the anticipated flexibility and discretionary component of the terms being "subject to the outcome of negotiation." In this sense, we do not consider that, in granting the waiver, the CEO acted beyond the scope of her authority as delegated by Resolution 511/2009. Nor did the result of the waiver run counter to what Waitakere's Governing Body agreed to in relation to the sale and purchase of Westgate Street. We also consider that the CEO was fully informed of the consequences of the waiver and of alternatives open via a memorandum from Dennis Sheard dated 27 May 2009.
- 6.18 In a technical sense, we consider that the decision to waive a breach of NZRPG's obligations under the agreement to purchase Westgate Street required confirmation from the Auckland Transition Agency (ATA), and this confirmation was not obtained. However, in our view Waitakere's failure to seek ATA confirmation was substantively justifiable on the basis that there was no significant prejudice, constraint, or negative impact on the incoming Auckland Council as a result of the waiver.<sup>7</sup> Thus, we assess the risk of a challenge to the arrangement on the basis of lack of ATA confirmation of the waiver as very low.

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<sup>7</sup> The criteria of no significant prejudice, constraint, or negative impact on the incoming Auckland Council are drawn from s 31(1)(b) of the Local Government (Tamaki Makaurau Reorganisation) Act 2009. In summary, where the s 31(1)(b) criteria apply to a decision made in the transition period of 25 May 2009 and 31 October 2010, the decision must go before the ATA for written confirmation or the decision is void and of no effect: ss 31(6) and 31(7). By letter of 29 June 2009 confirming Waitakere's decision to adopt the LTCCP 2009/2019 ATA notified Waitakere, pursuant to s 20 of the Reorganisation Act, that any decision relating to the "wider NorSGA project" would be a decision to which s 31(1)(b) may apply and must be referred to it for confirmation.



- 6.19 We conclude that the Westgate Street purchase does not raise significant concerns as to value, legality or probity.

### The Infrastructure Funding Agreement (February 2010)

- 6.20 The Infrastructure Funding Agreement (IFA) was an agreement between Waitakere and NZRPG for the purchase and construction of roads, land and other infrastructure within PC 15, both on and off NZRPG's land. The works are largely to be completed by June 2012. The agreement was entered into on 22 February 2010 after a lengthy negotiation period that reflected a sustained effort by Waitakere to achieve its strategic goals for the Westgate town centre.

- 6.21 In summary, the IFA provided as follows.

- (a) Waitakere agreed with NZRPG to:

- (i) Complete certain identified infrastructure (road widenings, stormwater ponds and roads);
- (ii) Provide water supply and wastewater services to the boundary of NZRPG's land;
- (iii) Design and construct the town square and library;
- (iv) Acquire the land coloured green on the Massey North Urban Concept Plan;
- (v) Comply with certain timelines for completing the above actions (generally 30 June 2012);
- (vi) Use best endeavours to conclude agreements with affected landowners;
- (vii) Reimburse NZRPG for the cost incurred by it in providing services greater than those that would have been required for its own development purposes;
- (viii) Meet the full cost of certain water supply and wastewater networks;
- (ix) Pay \$ [REDACTED] plus GST for the town square, library site and community park;
- (x) At the election of NZRPG, pay \$ [REDACTED] plus GST for the purchase of NZRPG's interest in the non-road open space;
- (xi) Contribute a total of \$ [REDACTED] towards the construction cost of roads and associated services and apply progress payments as construction of the roads was completed, including provision for a retention of \$ [REDACTED].

- (b) NZRPG agreed with Waitakere to:

- (i) Transfer the "black" roads and certain "brown" roads on the plans to Waitakere under the Public Works Act 1981 for nil consideration<sup>8</sup>;

<sup>8</sup> The "black" and "brown" roads under the IFA were identified on a plan provided to the Council, the black roads being described as core roads and the brown roads as non-core roads. Initially it was proposed

- (ii) Accept responsibility for design and construction of roads and services within the road land with best endeavours to complete the work by 30 June 2012;
  - (iii) Install all usual services;
  - (iv) Transfer the town square, library site, community park, non-riparian open space to Waitakere under ss 17 and 34 of the Public Works Act 1981;
  - (v) Amend the memorandum of encumbrance entered into by the parties as part of the Westgate Street purchase to incorporate certain urban design outcomes.
- (c) It is relevant to note that the works to be carried out by NZRPG were on the Cannuck land and the Kedgley land, with the relevant land ultimately to vest in the Council under the provisions of the Public Works Act. Certain roading, stormwater and other infrastructure works to be carried out by Waitakere were on surrounding land not belonging to NZRPG, and also to be acquired under the Public Works Act.
- 6.22 In terms of value obtained by Waitakere through the IFA, it must be noted from the outset that Waitakere acquired the important “black” and “brown” roads for nil consideration. Waitakere also acquired assets other than the roads for considerably less than a valuation by registered land valuer Darroch Valuations Limited (**Darroch**), the Council officers’ estimate, and Waitakere’s budget. In the 10 months or so from NZRPG’s initial proposal of the IFA to Waitakere’s final approval of the agreement, we consider that Waitakere made substantial gains. Those gains can be seen in relation to the amounts to be expended, security of performance, the payment regime and the achievement of planning and urban design objectives. Compared to land purchase agreements concluded with other landowners, the IFA with NZRPG appears to have delivered Waitakere a superior financial result.
- 6.23 The IFA was also valuable from NZRPG’s perspective as it committed Waitakere to carry out works that would ultimately benefit NZRPG. It provided certainty for NZRPG’s commercial development, notwithstanding that its terms might be viewed as not as favourable to NZRPG as those concluded with other land owners.
- 6.24 In terms of legality, our view is that the IFA materially conformed with Waitakere’s objectives and negotiating instructions to the CEO, as stated in its governing body and committee resolutions.<sup>9</sup>
- 6.25 In a technical sense, certain amendments made after the last draft of the IFA was approved on 7 September 2009 by the Finance and Operational Committee via Resolution 1538/2009, (“Massey North town centre assets,”) should have been put before the governing body or committee for approval, given the CEO’s reporting requirements.<sup>10</sup> However these

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that the Council would pay for the black roads and seek to acquire the brown roads for nil consideration, but ultimately the Council acquired both the black and brown roads for nil consideration.

<sup>9</sup> Council resolutions central to the IFA include: Council resolution 2002/2008 of 26 November 2008 “Infrastructure within the Plan Change 15 area”; Long Term Council Community Plan and Annual Plan Committee resolution 178/2009 of 23 February 2009 “NZRPG Infrastructure Funding Agreement within the Plan Change 15 area”; Council resolution 698/2009 of 7 May 2009 “Purchase of core assets within Plan Change 15”; and Finance and Operational Committee Resolution 1538/2009 of 7 September 2009 “Massey North town centre assets”.

<sup>10</sup> Amendments drawn to the attention of the CEO prior to signing were:

- (i) The correction of a minor drafting error (an incorrect reference in clause 10(b) to clause 17, corrected to a reference to clause 15); and

amendments either significantly favoured the Council or were minor drafting matters. We consider that the risk of a challenge on the basis that the final draft did not appear before the governing body or a committee, is very low.

- 6.26 Similarly, the version of the IFA confirmed by the ATA on 17 November 2009 did not contain the same final stage amendments discussed above. The IFA was presented to the ATA for confirmation by letter from the CEO dated 15 September 2009. The ATA had before it resolution 1538/2009 of the Finance and Operational Performance Committee approving the terms of the draft IFA and its associated report, as well as the 7 May 2009 report to Waitakere, and resolution 698/2009 receiving the 7 May 2009 report.
- 6.27 While there is a technical argument that a further ATA confirmation of the amendments was required, in a pragmatic sense none of the amendments could have produced prejudice to, significant constraint of, or negative impact on the incoming Auckland Council in a manner that substantively justified ATA involvement.<sup>11</sup> We consider that the risk of challenge to the IFA on the basis of the absence of ATA confirmation of the final amendments is very low. This is all the more so given that NZRPG and Waitakere agreed to the changes.
- 6.28 By the IFA, Waitakere contracted NZRPG to construct roads and associated services on land acquired from Cannuck for that purpose. It was open to Waitakere under its governing procurement principles not to put the construction of these roads and associated services out to public tender and to instead negotiate a contract with a sole provider, NZRPG. This conclusion takes into account the strategic value to Waitakere of the relevant roads and the relationship with NZRPG, efficiencies in cost, time and certainty that derived from using NZRPG to construct the roads and a variety of other appropriate public considerations, including that procurement was unlikely to have been achieved through the market. While we lack information on some aspects of the form of the procurement decision, we have concluded that in substance Waitakere complied with its own procurement policies in entering the IFA.

### **Works Development Agreements 1, 4, and 5 (October - November 2010)**

- 6.29 Works Development Agreements (WDAs) 1, 4, and 5 are a series of agreements between (now) Auckland Council and NZRPG under which NZRPG agreed to carry out various works that Waitakere had agreed to deliver under the IFA. The agreements were originally negotiated between NZRPG and Waitakere in 2010 and executed by the Waitakere CEO on 22 October 2010. It was necessary for them to be re-executed by the Auckland Council and this occurred on 29 November 2010.
- 6.30 WDA 1 may be briefly summarised as follows.

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- (ii) Amendment of the terms of payment, so that instead of making a payment of \$ [REDACTED] on SO plan approval and \$ [REDACTED] on commencement of work, the Council was to make progress payments as construction of the roads was completed.

Further amendments revealed by our review were:

- (i) An additional sentence was added to cl 20 providing flexibility of configuration for the library site;
- (ii) In clause 22 the words “the purposes of a community building and public open space” were replaced with “recreation and community development purposes”; and
- (ii) In clause 27 the words “unconditional by way of compensation” were inserted, apparently to cure an ellipsis in that clause.

<sup>11</sup> The reader is referred to earlier footnote 17 on the genesis of the principles regarding ATA confirmation that we refer to here.

- (a) Under WDA 1, NZRPG is required to carry out on behalf of Waitakere, but at Waitakere's cost, works within land owned by the Garelja family interests including:
- (i) The construction of the extension of the spine road (Tahi Road);
  - (ii) The construction of the intersections at each end of "Garelja road";
  - (iii) 3 waters reticulation and services within the formed roads;
  - (iv) Construction of stormwater ponds 2 and 3;
  - (v) Development of open space and landscaping associated with those roads and ponds.
- (b) The total amount payable by Waitakere for all works covered by WDA 1 was originally estimated at \$ [REDACTED]. However, as no detailed design works had been completed at this point, the estimated costs were to be revised at the detailed design and letting of tender stages and if needed as a result of the presence of unsuitable materials. The actual costs payable are on a progress payments basis when approved by Waitakere's quantity surveyor.
- (c) It is relevant to note that although the agreement was executed between NZRPG and Waitakere, the works are to be carried out over the land of third parties, principally the Garelja family interests.

6.31 WDA 4 may be summarised as follows.

- (a) Under WDA 4, NZRPG is required to undertake on behalf of Waitakere but at Waitakere's cost:
- (i) The construction of Northside Drive;
  - (ii) 3 waters reticulation and services associated with the roads;
  - (iii) Construction of stormwater ponds 6 and 7;
  - (iv) Development of open space and landscaping associated with the roads and ponds.
- (b) The total amount payable by the Council for the works was estimated at \$ [REDACTED]. As with WDA1, the estimated costs are to be revised at the detailed design and letting of tender stages and if needed as a result of the presence of unsuitable materials. The actual costs are payable by way of progress payments approved by Waitakere's quantity surveyor.
- (c) Again, it is worth noting that although the parties to WDA 4 were NZRPG and Waitakere, the works are being conducted on land owned by third parties.

6.32 WDA 5 may be summarised as follows.

- (a) Under WDA 5, NZRPG was required to carry out on behalf of the Council and at the Council's cost, the enabling earthworks and bulk in-ground works for the following:

- (i) The town square / piazza / shared space;
  - (ii) The town park;
  - (iii) Certain parts of the riparian margin area;
  - (iv) The buffer zone between the riparian margin and the road and precinct edge, in Precincts A and B.
- (b) The amount payable by Waitakere for all works covered by WDA 5 was originally estimated by Waitakere's quantity surveyor at \$[REDACTED]. The process for revising the estimated costs follows that as set out for the previous WDAs.
- 6.33 Under the WDAs, the Council pays the legitimate and actual costs of the works NZRPG is contracted to deliver with no upper cap. Council is therefore potentially exposed to any additional cost, should the works cost more than the original estimates. However, the corollary of this is that the Council pays less if the works cost less. Under the WDAs, NZRPG is disqualified from extracting a profit or margin (other than its [REDACTED]% fee as discussed below), and this is made robust by an open book provision in the contracts giving the Council access to any document relating to Council works costs. Further, NZRPG's claims for payment must include a breakdown of Council works costs with supporting information. There are potentially further incentives for NZRPG to save costs given that the agreement contains a cost saving provision, which provides that if the parties agree to vary the agreement to implement a cost saving initiative, the Council is entitled to [REDACTED]% of the resultant savings. This is particularly relevant to savings to be made from carrying out earthworks jointly over NZRPG and non-NZRPG land.
- 6.34 We note that the cost savings provisions were potentially undermined somewhat by the open book policy applying only to NZRPG and not its sub-contractors, particularly in the situation where NZRPG's contracted earthmover, A & R Earthmovers Limited (A & R), was, and arguably still is a company, related to NZRPG Management Limited.
- 6.35 Specifically, NZRPG and its earthmoving contractor could have agreed on a price for the earthworks, which, while in line with the cost estimates in the WDAs, would be more than the earthworks may cost if they were carried out so as to maximise efficiencies over the whole site. As the Council would not have had access to the earthmoving contractor's books, it may have experienced difficulty in challenging such a situation, or even knowing that it was occurring. We have identified this as a risk given the close relationship between NZRPG Management Limited and A & R. Although the two companies do not have common shareholding, they have common directorships, and a company belonging to the A & R sole director holds 28% of the shares of NZRPG Management Limited.
- 6.36 However, the safeguards put in place by the Auckland Council project team since the local government reorganisation on 1 November 2010 have ensured both greater transparency and a more robust procurement policy in respect of both NZRPG's head contractor and the sub-contractors. Essentially, the Auckland project team negotiated a number of conditions to be attached to the appointment of A & R as both head contractor and earthworks contractor. The principal condition was that A & R was required to provide evidence of non-price attributes acceptable to the Council. Other conditions included:
- (a) A tendering process for the subtrades, with a pool of three nominated subcontractors for each aspect of the works;

- (b) An open book review of the contract with A & R and of the proposed subcontracts, to be undertaken by the Council's quantity surveyor, WT Partnership; and
- (c) Agreement that the WDA works were to be completed by A & R on the basis that cut to fill earthmoving efficiencies across the site (including the IFA works) would be achieved.
- 6.37 The WDAs provide for an ■% fee payable by the Council to NZRPG. We do not consider that this ■% fee was a management fee, but rather a margin payable to NZRPG for its assumption of the delivery risk in relation to the works covered by the contracts. The risks in a project of this size are significant and the Council was obtaining other benefits such as ■% of any agreed cost savings. Such a fee is not unreasonable taking into account the benefits to the Council, risks to NZRPG, and fees charged by providers of similar turnkey-type arrangements.
- 6.38 Our view is that WDAs 1, 4 and 5 do a reasonable job of distributing ordinary contractual risks between the parties. The single greatest advantage that the WDAs provide to the Council is the effective transfer to NZRPG of the delivery risk associated with the majority of the works for which the Council was responsible under the IFA. As a result, the Council cannot be held liable by NZRPG for non-performance of its obligations under the IFA (at least in relation to those works in WDAs 1 and 4). We note that the deadline for completion of most of these works is 30 June 2012, and thus the transfer of this risk to NZRPG is very significant.
- 6.39 Auckland Council has also negotiated improvements to Council's security of performance. Each of the WDAs provides for a bond to be payable, and these have been provided by the ANZ National Bank Limited, in accordance with the requirements in the WDAs (specifically, a \$■ bond for each of WDA 1 and WDA 4, and a \$■ bond for WDA 5). In addition, the Council has step in rights under the agreements. Payments are made on a progress basis, thus limiting the Council's losses on a default by NZRPG and enabling an exercise of the Council's step in rights.
- 6.40 Further important perceived value to the Council in contracting with NZRPG through the WDAs includes the works being performed on a single site for health and safety purposes (excepting works on land controlled by the Midgley interests), time and cost savings from the coordination and integration of onsite works such as cutting and filling operations, NZRPG's independent drivers to deliver the works on time, economies of scale in the sourcing of labour and materials and reduced administration costs.
- 6.41 Turning to issues of legality, there were significant amendments made to WDAs 1, 4 and 5 between approval by the Waitakere governing body on 6 October 2010<sup>12</sup> and the final version signed by the Waitakere CEO on 22 October 2010. The most significant amendments made after 6 October 2010 were the insertion of the ■% "management fee" to be paid to NZRPG, the annexing of quantity surveyors WT Partnership's cost estimates, and the cost saving provision. Our conclusion, however, is that the executed provisions adequately conformed with the Waitakere governing body's resolution and instructions and were within the discretion delegated to the Waitakere CEO on 6 October 2010 to finalise the contracts. Further, the amendments either favoured the Council or were part of a broader contractual balancing of benefits and risks.
- 6.42 WDAs 1, 4, and 5 were of a nature that required ATA confirmation, and that confirmation was not obtained. Waitakere's decision to enter the agreements was therefore void and of no

<sup>12</sup> Council resolution 1460/2010, "Plan Change 15 – Infrastructure contracts," 6 October 2010.

effect pursuant to s 31(7) of the Local Government (Tamaki Makaurau Reorganisation) Act 2009 (**Reorganisation Act**). As a result, it was necessary for the arrangement to be adopted by the Auckland Council. The arrangements were re-signed by Auckland Council (through its CEO) on 29 November 2010, and we consider that the Auckland CEO was fully and fairly apprised of the agreements' provisions. Simpson Grierson provided the CEO of Auckland Council two sets of briefing papers dated 8 and 19 November 2010 which, *inter alia*, summarised the agreements as had been executed by the Waitakere CEO.<sup>13</sup> Our conclusion is that it was open to the Auckland CEO, in signing these agreements, to rely on the prior process of Waitakere City Council, without the need to place the agreements before the governing body of the Auckland Council.<sup>14</sup>

- 6.43 We consider that the Auckland CEO's re-signing of WDAs 1, 4 and 5 on 29 November 2010 cured the difficulties that were presented by the absence of ATA confirmation. WDAs 1, 4 and 5 were adopted by Auckland Council, and became valid and enforceable as such.
- 6.44 We conclude that Waitakere did not use best practice in measuring WDAs 1, 4 and 5 against its usual procurement policy.<sup>15</sup> The decision to enter into the arrangements without going to a public and contestable tender<sup>16</sup> in circumstances where there could have been other competitive providers of the services purchased was not best practice and possibly presents some exposure to the Auckland Council. However, we consider that this decision was nonetheless open to Waitakere and did involve a considered justification for exclusion of the option of competitive procurement.
- 6.45 In particular we have concluded that it was open to Waitakere to adopt a negotiated contract mode of procurement with the sole or preferred provider NZRPG in relation to WDAs 1, 4, and 5.

<sup>13</sup> "Massey North Development (Plan Change 15) Briefing Note for Auckland Council," 8 November 2010 and "Massey NorthTown Centre – Documents for execution by Chief Executive," 19 November 2010.

<sup>14</sup> In our view, Auckland Council was entitled to rely on the actions of Waitakere as if these were its own actions by virtue of s 35(1)(h) of the Reorganisation Act, which had just been repealed, but which relevantly provided:

**35 Dissolution of existing local authorities**

- (1) On 1 November 2010, each existing local authority is dissolved and—[...]  
 (h) anything done, or omitted to be done, or that is to be done, by, or in relation to, each existing local authority [...] must be treated as having been done, or having been omitted to be done, or to be done, by, or in relation to, the Auckland Council;

Section 35(2) went on to preserve the status of decisions or anything done or omitted to be done before the transition:

- (2) To avoid doubt, the dissolution of an existing local authority does not, of itself, affect any of the following matters: [...]  
 (a) any decision made, or anything done or omitted to be done, by the existing local authority in relation to the performance of the authority's functions and duties or the exercise of its powers under any enactment.

As to the repeal of the Reorganisation Act on 1 November 2010, we rely on section 17 of the Interpretation Act 1999, which provides that the repeal of an Act does not affect "the validity, invalidity, effect, or consequences of anything done or suffered" or "the previous operation of the enactment or anything done or suffered under".

Accordingly we take the view that, at 1 November 2010, the prior decisions, actions, and omissions of Waitakere City Council essentially became those of Auckland Council.

<sup>15</sup> Waitakere's governing procurement manual was entitled *Procurement Procedures* and was variously dated June 2007, 11 August 2009, 19 August 2009, and 30 November 2009.

<sup>16</sup> Council resolution 1460/2010, "Plan Change 15 – Infrastructure contracts," 6 October 2010.

- (a) This procurement mode arguably helped secure cost savings (in relation to coordination of on-site works and economies of scale) and it was more efficient to deal with one entity in terms of contractor administration, control of works and a single site. There was an increasing degree of urgency with the completion deadline for the work covered by the WDAs being 30 June 2012. We understand that utilisation of the 2010/2011 and 2011/2012 construction seasons was vital to reaching that deadline and an extensive tendering process could potentially have lost the summer 2010/2011 season.
- (b) More broadly, Waitakere saw non-price benefits to its ongoing relational contractual arrangements with NZRPG. By structuring its arrangements with NZRPG to secure control over development of the Westgate town centre, Waitakere was able to minimise the risk of outcomes inconsistent with its vision and the public good.
- (c) Factors pointing away from entering into a negotiated contract with NZRPG included that NZRPG was not the only potential provider of the construction services procured in WDAs 1, 4, and 5. Contracting with NZRPG in relation to the WDAs works could be seen to have created an extra layer of service provider, given that Waitakere could have contracted directly with another head contractor and the absence of early consideration of NZRPG's margin of █% made the rationale of cost savings less robust. On a broader level, the more agreements Waitakere and NZRPG entered into, the more all-encompassing Waitakere's relationship with NZRPG became.
- (d) However, we do not consider that these latter factors are sufficient to mean that Waitakere could not justify its decision to contract the WDA works by negotiated contract with NZRPG. Overall, the points considered by Waitakere conform to Waitakere's *Procurement Procedures* best practice directive of having due regard for the total costs and benefits of an arrangement and its contribution to the outcomes the entity is trying to achieve.<sup>17</sup>
- (e) There is also an argument that, had Waitakere held a competitive tendering process, it is likely to have resulted in Waitakere contracting with NZRPG in any event. In this context, WDAs 1, 4, and 5 as negotiated may well have been more commercially advantageous.<sup>18</sup>

6.46 With respect to Auckland Council, it relied on the procurement assessment by Waitakere (as it was entitled to do) when adopting the WDAs 1, 4 and 5. The relevant Auckland Council document in force at the time was the *Auckland Council Procurement Manual* released on 1 November 2010. Under this Manual, we consider that best practice would have been for Auckland Council to have expressly recorded its decision to deviate from the default mode of competitive tender in relation to WDAs 1, 4 and 5 in a Procurement Plan that clearly outlined the process that was being followed and the reasons for the deviation. The Plan would have

<sup>17</sup> *Procurement Procedures*, Section 2: Policies and Principles, 11 August 2009, p 2 – 1.

<sup>18</sup> On 20 February 2012 Auckland Transport communicated to us concerns relating to procurement and the WDAs. In summary, these centred around the contention that WDAs 1, 4, and 5 had effectively passed procurement to the developer who had selected a single supplier as the main contractor, leading to limited competition between sub-contractors to perform the roading works and concerns relating to value for money and impartiality in decision-making. In our view, these are valid and practical concerns. However, looking at the overall project and the drivers for the Council as outlined above, our view is that it was open to the Council to conclude that no other contractor was as uniquely placed as NZRPG to deliver the works sought and to accordingly enter into a negotiated contract with NZRPG.



been signed off by the Procurement Manager and the relevant Holder of Delegated Financial Authority.<sup>19</sup>

- 6.47 The Auckland Council has subsequently addressed and remedied many issues relating to competitive assessment and pricing of the subcontractors under WDAs 1, 4 and 5, as noted above. We do not recommend reversal or refinement of the decision to enter WDAs 1, 4 and 5 and we regard the overall risk of successful challenge to these arrangements as low.

### **The Line Deviation Agreement and Works Development Agreement 2 (October - November 2010)**

- 6.48 The Line Deviation Agreement (LDA) manages the relationship between the Council and Transpower in relation to the undergrounding of Transpower's lines in Precincts A and B of Westgate. The LDA was signed by Waitakere and Transpower on 29 October 2010 after having received ATA confirmation on 18 October 2010.
- 6.49 Works Development Agreement 2 is an associated agreement between Waitakere and NZRPG, which shares the Council costs of this undergrounding between the Council and NZRPG. WDA 2 was initially signed by Waitakere on 28 October 2010 but did not receive ATA confirmation. The final form of WDA 2 was signed by Auckland Council and is dated 29 November 2010.
- 6.50 The LDA obliged Transpower to proceed with the undergrounding of the 110kV transmission line, entirely at the cost of Waitakere but with certain protections in place to compensate for Waitakere being forced by circumstances to enter into an agreement otherwise entirely on Transpower's terms. Under the agreement Waitakere was obliged to pay the actual cost of the undergrounding as it was incurred, including Transpower's internal costs budgeted at \$ [REDACTED] and external contractors/suppliers costs budgeted at \$ [REDACTED].
- 6.51 As the LDA imposed significant financial obligations on Waitakere in respect of the undergrounding costs, many of which would be for the benefit of NZRPG, WDA 2 set out the arrangements under which NZRPG would reimburse Waitakere. These were the costs for which Waitakere was liable to Transpower under the LDA.
- (a) Under WDA 2, Waitakere would pay the first [REDACTED] incurred in undergrounding Transpower's lines under the LDA, with NZRPG paying [REDACTED]% and Waitakere [REDACTED]% of any further costs.
- (b) As security for these obligations, Waitakere had a right of set-off in respect of any monies owing by NZRPG to it and NZRPG was to use its best endeavours to put in place a first ranking security.
- 6.52 In analysing the LDA it is critical to bear in mind that Transpower was not obliged to underground the lines and, being effectively the sole provider, it could dictate the terms of the LDA as it pleased. Further, Waitakere was obligated to accept full liability under the LDA as Transpower would only contract with the Council (and not with NZRPG). Despite this difficult bargaining position, our review indicates that the Council had some success in extracting concessions from Transpower aimed primarily at minimising risk to the Council. Thus, in our view Council did not "give away" value under the LDA.

<sup>19</sup> *Auckland Council Procurement Manual*, 1 November 2010, Policy, p. 6 – 2.

- 6.53 We consider that Waitakere also achieved a reasonable result in terms of value under WDA 2. Under that arrangement, NZRPG was liable not just for a portion of the Council's direct and actual costs but also for a proportion of project costs relating to the undergrounding, which were broader. WDA 2 provides two mechanisms as security for payment of NZRPG's liability to the Council: a right of set off and a mortgage over the defined development land. [REDACTED]
- [REDACTED]
- With respect to the cost division, we note that it was initially proposed by NZRPG that the Council would pay the full costs of the undergrounding. In our view it is thus a reasonable result for Council that NZRPG is liable for [REDACTED]% of the costs (after the first \$[REDACTED]).<sup>20</sup>
- 6.54 We have no substantive legality concerns with respect to the LDA and WDA 2. The Waitakere CEO's entry into the LDA and WDA 2 was consistent with the Waitakere governing body resolutions and within the CEO's discretion as delegated. Although one of the figures for the Council's financial commitment under WDA 2 was misstated in a report to the Waitakere governing body dated 29 September 2010,<sup>21</sup> we do not consider that this presents a material difficulty. This is because the CEO was delegated the power to enter the agreement in general without constraint as to the details of the cost division.<sup>22</sup> In any event, we understand that the present estimate of total costs under the LDA (\$[REDACTED]) is such that Council's share is not materially different to that stated in the 29 September 2010 report.
- 6.55 The LDA was confirmed by ATA on 18 October 2010 and is therefore valid. Although WDA 2 was signed by the Waitakere CEO on 28 October 2010, it did not obtain ATA confirmation and was accordingly void and of no effect as at 1 November 2010 pursuant to s 31(7) of the Reorganisation Act. However, this issue was resolved when WDA 2 was re-signed by the CEO of Auckland Council on 29 November 2010. In our view, the Auckland Council was entitled to rely on steps taken by its predecessor Waitakere in relation to WDA 2<sup>23</sup> and was fully and fairly apprised of the arrangement's provisions, given the briefing materials it was provided by Simpson Grierson dated 8 and 19 November 2010.<sup>24</sup> We therefore conclude that it was open to the Auckland CEO to sign WDA 2 and that it is an enforceable agreement.
- 6.56 We do not consider that the LDA or WDA 2 raise issues of compliance with procurement policy. For the LDA, it was necessary for Waitakere to negotiate a contract for undergrounding services with the sole provider Transpower and there was no opportunity for a competitive tender. WDA 2 was simply a cost sharing agreement and no issues of procurement arise.

<sup>20</sup> We further note that this initial \$[REDACTED] payable by Council has in any event been almost completely counterbalanced by the notional payment to the Council of the Kedgley interests' share of the undergrounding costs as part of the consideration for the Council's freehold interest in the Kedgley road and non-road land. (The Kedgley land is in Precincts A and B and is leased by NZRPG.) This notional payment made under the agreement entered into between the Council and the Kedgley interests on 26 October 2009 amounted to \$[REDACTED]. The net effect of this transaction is that the Council receives a \$[REDACTED] contribution to its share of the undergrounding costs, which almost completely eclipses the Council's \$[REDACTED] liability in relation to the undergrounding established under WDA 2.

<sup>21</sup> Report to Council, "NorSGA Transpower Line Deviation Agreement," 29 September 2010.

<sup>22</sup> Council resolution 1420/2010, "NorSGA Transpower Line Deviation Agreement," 29 and 30 September 2010.

<sup>23</sup> This is for the reasons set out earlier at footnote 28.

<sup>24</sup> "Massey North Development (Plan Change 15) Briefing Note for Auckland Council," 8 November 2010 and "Massey NorthTown Centre – Documents for execution by Chief Executive," 19 November 2010.



Reorganisation Act. We understand that in November 2010 the Auckland CEO had delegations from ATA to enter into contracts autonomously for goods or services of up to \$10 million independently of Council.<sup>26</sup> We consider it unlikely that CSA 1 or, more importantly, CSA 2 will generate financial commitments for the Auckland Council of greater than \$10 million, which sum falls within the allocated funding for PC 15. On this basis, the Auckland CEO had the delegated authority to enter into CSA 1 and 2. Thus, we conclude that CSAs 1 and 2, as signed by Auckland Council, are enforceable agreements.

- 6.64 We consider that, while Waitakere did not follow best practice in relation to the execution of CSAs 1 and 2 (possibly because of time pressures around the reorganisation of Auckland's local government), because that both parties (Council and NZRPG) executed the agreements the risk of a challenge to the agreements' legality is low.
- 6.65 CSA 2 may not have been compliant with Waitakere or Auckland's procurement policies. This is because, under CSA 2 Council agrees to pay for goods and services yet to be procured by another entity and without any obvious competitive considerations. It is difficult to assess this further without additional information as to CSA 2's intended application. We have been advised by Council officers that CSA 2 does not appear to be causing difficulties as to compliance with Council procurement policy, but we do recommend that its operation is clarified. CSA 1 does not invite a procurement analysis as it did not of itself generate the procurement of goods or services.

### Transparency of decision making and public consultation

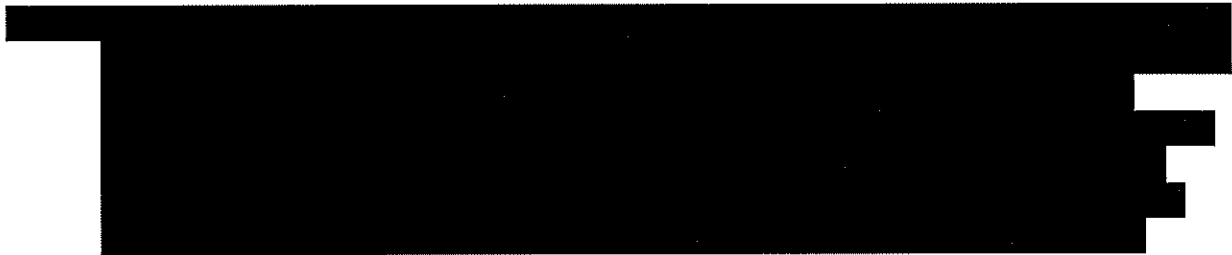
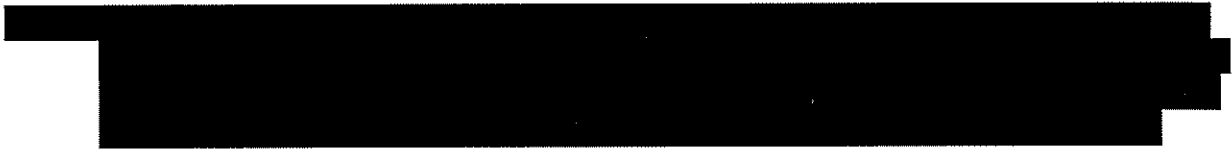
- 6.66 The issue of whether Waitakere's decision-making in relation to the arrangements with NZRPG was sufficiently transparent and publicly accountable was raised with us. We examine this issue largely through analysis of the IFA, because we consider that entry into the IFA was Waitakere's primary point of commitment to NZRPG. The other key agreements cascaded from the IFA and were designed to achieve the same vision and developments.
- 6.67 Our conclusion is that there was adequate consultation, public participation, and transparent decision making by Waitakere in relation to the subject matter of the IFA and its associated agreements. This is irrespective of whether any particular decision technically required treatment as a "significant" decision under the Local Government Act 2002 (LGA 2002) and/or invited use of the special consultative procedure elaborated in Part 6 of that Act.<sup>27</sup> The material issues relating to Waitakere's entry into the IFA and its associated agreements were the subject of comprehensive consultation through the processes involved in the extension of the MUL, PC 15, and LTCCP 2009/2019 (as outlined in section 4 of this report). We do not perceive that there would have been justified additional benefit by Waitakere engaging in further consultation in relation to its entry into the IFA and related agreements and we do not consider that Waitakere was obliged to follow the special consultative procedure under the LGA 2002 in connection with this. We do however make recommendations in section 7 below on public consultation by the Auckland Council going forward.

<sup>26</sup> We understand that, as of November 2010, the Auckland CEO held powers delegated to him by the ATA that included autonomously entering into contracts for goods or services of up to \$10 million value without the involvement of the Council. We understand that Auckland Council had not acted to limit the CEO's powers as of November 2010, but later limited the CEO's delegation for autonomous financial commitments to \$7.5 million.<sup>26</sup>

<sup>27</sup> See in particular s 83 of the LGA 2002.



6.68 There were a number of resolutions and reports relating to the negotiation of arrangements with NZRPG that were withheld from the public, and Waitakere conducted meetings concerned with those negotiations in sessions that were closed to the public. We have concluded that these decisions to withhold what would otherwise be publically available official information under s 2 of the Local Government Official Information and Meetings Act 1987 (LGOIMA),<sup>28</sup> and to close meetings to the public, were made for reasons justified under LGOIMA. Those reasons centre around the permitted grounds for withholding information in s 7 of LGOIMA of maintaining legal professional privilege and enabling Waitakere to carry on, without prejudice or disadvantage, commercial negotiations.



**Special or favourable treatment of NZRPG**

6.73 Allegations have been made that NZRPG received special or favourable treatment, particularly in relation to Waitakere’s consideration of NZRPG’s financial status and vulnerability. We conclude that this reflects an over-simplified view of the arrangements between NZRPG and Waitakere and Auckland Councils. We conclude that the risk of judicial review being successfully invoked on this ground is minimal.

<sup>28</sup> LGOIMA relevantly defines “official information” as “any information held by a local authority” and the exceptions to this in the Act do not apply here.

<sup>29</sup>



- 6.74 Our view is that, taking into account the breadth and depth of the relationship between Waitakere and NZRPG, the treatment of the latter was justifiable. Once the MUL and PC 15 were adopted, NZRPG was the major landowner uniquely placed to enter into arrangements with Waitakere for the long term achievement of the Council’s goals for the Westgate town centre. NZRPG’s financial situation was a relevant and appropriate consideration for the Council because it was directly linked to the Council’s own financial and urban planning-related risk. We also note that in a number of cases other parties were offered arrangements more advantageous than NZRPG.
- 6.75 Our review of the record, including in particular reports annexed to meeting agendas, indicates that Waitakere took into account relevant considerations and generally did not err into irrelevant considerations when considering its arrangements with NZRPG. Thus, we conclude that the Council’s treatment of NZRPG did not indicate predisposition but rather informed and rational choices.

**Development contributions**

- 6.76 By way of exchange of letters dated 27 and 28 October 2010, NZRPG and the CEO of Waitakere entered into an arrangement as to the payment of development contributions for NZRPG’s land (Precincts A and B) and the Garelja land. The rationale appears to have been to provide certainty to NZRPG and to bind the Council to the development contribution rates in the then current Waitakere development contributions policy. The arrangement also involved an agreement by Waitakere to grant NZRPG a remission of approximately \$[redacted] in development contributions, seemingly to reflect Council’s estimated [redacted] % interest in infrastructure at Westgate.
- 6.77 There were four requests made by NZRPG by letter: three in respect of Precincts A and B and the Garelja land, and an additional request in relation to Precincts A and B alone. The requests, the stated policy basis, and the response of the CEO can be summarised in the following table (all references are to the 2009 Waitakere Development Contributions Policy<sup>30</sup>):

Request	In relation to	Stated policy basis in Waitakere 2009 Development Contributions Policy	Sought by NZRPG (27 October 2010)	Granted by Waitakere CEO (28 October 2010)

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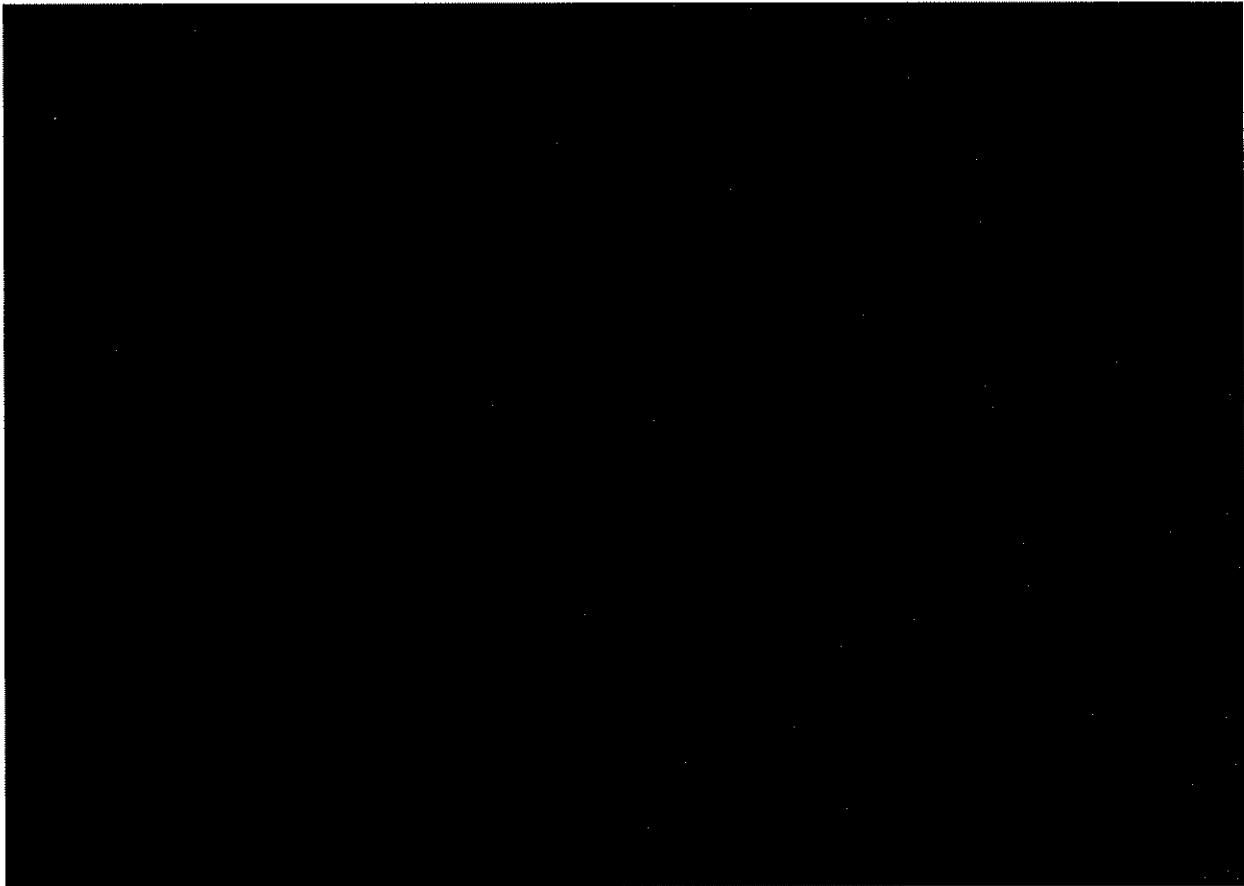
<sup>30</sup> Waitakere City Council Development and Financial Contributions Policy adopted as part of the Waitakere’s LTCCP for the 10 year period 2009/2019.



Request	In relation to	Stated policy basis in Waitakere 2009 Development Contributions Policy	Sought by NZRPG (27 October 2010)	Granted by Waitakere CEO (28 October 2010)
Postponement	Precincts A&B Garelja Land	Clause 27(A)	Postponement of the time for payment of contributions until the uplifting of a Code Compliance Certificate, or 24 months post the uplifting of the building consent, whichever is the earlier.	Postponement in accordance with clause 27(A), on the terms and conditions as set out in NZRPG's letter.
Remissions under TUSC (Tool for Urban Sustainability Code of Practice)	Precincts A&B Garelja Land	Clause 27(C)	NZRPG "will make application" for remission under clause 27(C) upon achieving a 40% TUSC rating, "or any lower remission commensurate with a lower TUSC rating improvement as the Policy provides".	Remissions under TUSC in accordance with Policy 27(C)(i-v) on the terms and conditions as set out in NZRPG's letter.
Maximum limit (cap)	Precincts A&B Garelja Land	None stated	A maximum limit on development contributions assessable "to provide certainty to development outcomes", "in accordance with" an attached schedule (which was the schedule from the 2009 Waitakere DC policy).	A maximum limit on development contributions assessable to provide certainty to development outcomes, on the terms and conditions as set out in NZRPG's letter.



Request	In relation to	Stated policy basis in Waitakere 2009 Development Contributions Policy	Sought by NZRPG (27 October 2010)	Granted by Waitakere CEO (28 October 2010)
Offset of \$ [REDACTED]	Precincts A&B	Clause 29	"In order to equitably reflect Council's contribution (agreed at [REDACTED]%) to the external fees and charges incurred by NZRPG to obtain the CDP, and commensurate Resource Consents required to deliver the public infrastructure, NZRPG applies for a remission of development contributions payable of \$ [REDACTED] plus any GST applicable."	The offset of development contributions in accordance with clause 29, on the terms and conditions as set out in NZRPG's letter.







### Absence of misfeasance

- 6.83 We consider that concerns with the Waitakere and Auckland Council arrangements with NZRPG are not of such a character or magnitude as to engage realistic considerations of misfeasance.
- 6.84 We have not found any evidence that any Waitakere (or Auckland Council) officers engaged in misfeasance. In particular, we have identified no evidence of the following types of conduct.
- (a) Fraud or misappropriation of Council funds.
  - (b) Inappropriate concessions being made by officers.
  - (c) Officers personally benefitting from or receiving bribes in relation to arrangements.
  - (d) Officers failing to perform their duties.
  - (e) Officers actually intending to transgress the limits of their power or being reckless as to this, such as to create an appreciable risk of an action for misfeasance in a public office.

### Conclusion

- 6.85 Having considered the suite of arrangements which reflect, and now dictate, the Council's involvement in the Westgate/Massey North area, we believe the Council obtained reasonable value.
- 6.86 While there will always be arguments that certain construction aspects of the arrangements should have been the subject of a public and contestable tender, the Council, through opting to work with the major landowner NZRPG, achieved considerable collateral benefits. In considering value, the costs to the Council appear to be related to those available at market and the benefits include delivery of urban design and planning outcomes that were unlikely to have been obtained through the traditional legislative and district plan controls alone.
- 6.87 Importantly, the risks associated with the delivery of works that the Council contracted to provide under the IFA have been shifted to NZRPG by WDAs 1 and 4 in particular.
- 6.88 In terms of the legality of the various arrangements between Council and NZRPG, while there are some processes that could have been improved (both as to the exercise of delegated powers by Council officers and the robustness of compliance with principles of public procurement), we generally consider the risk of successful challenge to be low. We are also cognisant that any challenge by way of judicial review would not necessarily produce a change in outcome, given that relief is discretionary. The dynamic and evolving nature of Council's



relationship with NZRPG may well mean that relief in relation to any upstream errors would be futile.



## 7 Recommendations on next steps

7.1 In this section we make recommendations and outline steps that we consider Auckland Council should take. This section does not purport to be an exhaustive account of all the matters that Council could “remedy” in the lengthy history of Westgate. Instead it focuses on initiatives that we consider are necessary and would be effective uses of resources by the Auckland Council.

### Approach to public/private partnerships of this nature

- 7.2 The development of the Westgate/Massey North stage of NorSGA had various drivers including stimulating economic growth and job creation so as to mitigate the effects of workers commuting away from the dormitory suburbs of West Harbour, Massey and Hobsonville.
- 7.3 Assisting as a catalyst to the development of this area was the LGAAA, which required councils within the Auckland region to integrate the land transport and land use policy and planning and make this consistent with the Auckland regional growth strategy. Doubtless, this provided a stimulus to begin the urbanisation of the NorSGA area. Through the submissions of Waitakere, the ARC extended the MUL in northern areas. Thus, a platform and framework for development was generally available.
- 7.4 Waitakere was keen to ensure that its vision for the area was realised but its ability to influence, to any great extent, the manner in which developments were completed could not be achieved simply through the District Plan and the Resource Management Act. There was a real risk that the area could be developed by one or more landowners to produce a patchwork of unrelated local subdivisions and developments. Waitakere recognised that there was a need for a concerted and coordinated approach to local needs outside the needs limited element of control provided by the statutory framework. In order to ensure the creation of a true town centre, library and associated public infrastructure benefits, an agreement would be required with the major landowner.
- 7.5 This led to the execution of the MOU between Waitakere and (now) NZRPG Management Limited. This document outlined the general roles of the parties and provided a framework for continued cooperation in achieving shared objectives. The parties subsequently entered into a number of agreements, as described above.
- 7.6 In essence, this series of agreements constitutes a loose form of public/private partnership. In our view this was necessary if Waitakere were to have sufficient influence and control to ensure that it could deliver the public infrastructure and benefits it envisaged for the area, rather than a series of disjointed developments and a perpetuation of malls.
- 7.7 Relationships of this type are not easy or straightforward. They require a great degree of cooperation and some flexibility from the parties if they are to be successful. In our view, the ongoing relationship between the Auckland Council and NZRPG is pivotal to the realisation of Waitakere’s vision. Auckland Council’s capacity to engage with NZRPG is subject of course to compliance with its obligations to ensure matters of legality and probity are assured.
- 7.8 It is worth mentioning that, because traditional controls on development through legislative and planning requirements cannot, on their own, necessarily deliver the type of development

and infrastructure that Council may seek for a particular project, arrangements with major landowners or participants will be critical if the new Auckland Council's visions are to be realised. This will become increasingly important in the coming years when one considers the ambitious vision proposed for Auckland under the draft Auckland Plan.

- 7.9 This point is particularly relevant to large greenfield sites where the Council, for good reason, will wish to ensure that its vision as forecasted in the draft Auckland Plan coincides with the implementation of that area's development. It will be critical in the future for the Auckland Council to reach agreement with developers of large tracts of land considered important, so that the Council can effectively manage the development in line with its own objectives and lessen the risk of uncontrolled development of greenfield sites. The Auckland Council will need to lead these developments as, without the drive of Council, they may never come to fruition.
- 7.10 The benefits to the developer/landowner of such arrangements include a greater degree of certainty as to the Council's requirements and monetary contribution, while the Council derives that greater degree of control to which it aspires.
- 7.11 In our view, the arrangements reached between Waitakere and Auckland Council and NZRPG are an example of this kind of public/private partnership, which we endorse as an appropriate and lawful mode of engagement by Council.

#### **Clarification of relationships and misunderstandings**

- 7.12 The Westgate/Massey North stage of NorSGA is not a simple development. The documents controlling much of its development create a matrix of legal obligations flowing between the Council and NZRPG. However, there has been criticism leveled at the Council for opting to deal principally with NZRPG to deliver the Council's vision for the area. In our view the course adopted by the Council was, for the most part, sensible.
- 7.13 There is no doubt that the parties recognised early the benefits of adopting a cooperative approach to development of the area. Through a collaborative approach, the Council was able to contract with NZRPG to deliver essential roading and public assets such as the town square and library and obtain NZRPG's "buy in" to the development concept, rather than proceeding with what could have been a piecemeal development largely devoid of public benefit. Among other things, the Council secured cost savings through dove-tailing NZRPG's and Council's works and through obtaining monetary concessions on land acquired for roads.
- 7.14 While a more contestable pricing model under WDAs 1, 4 and 5 might have satisfied many public procurement-related concerns, the pricing is vetted by quantity surveyors commissioned by the Council. Due to the treatment of the development area as one site, there are significant cost savings available that simply could not have been delivered through the awarding of a myriad of contracts to different parties. Furthermore, it was appropriate for Council to weigh heavily the advantage that WDAs 1 and 4 in particular delivered: transfer of the delivery risk of the relevant works to NZRPG.
- 7.15 One area that needs to be noted is the close relationship between NZRPG, Cannuck, the three assignees of WDAs 1, 4 and 5 and the head contractor for the earthworks contracts. They are all related through their respective directors and shareholders. We recommend that Auckland Council takes care to ensure that the contractual relationships entered into between the head earthworks contractor and NZRPG are transparent. This will enable the

Council to have confidence that cross-subsidisation of costs between the related entities does not result in additional costs to the Council. The open book review of the contract between NZRPG and the head earthworks contractor, as noted in this report, may well have assisted in protecting the Council from this risk.

- 7.16 The Council may also wish to ensure that it corrects a number of misunderstandings about the NorSGA project and its dealings with NZRPG, many of which are evident in the complaint material we have reviewed. We set out the principal misunderstandings we have encountered below.
- (a) The incorrect conclusion that Waitakere purchased road land from Cannuck for a sum exceeding \$17 million. This conclusion is evidently based on the recommendations contained in a 7 May 2009 report to Waitakere City Council, but under the IFA as eventually agreed and approved, Waitakere in fact paid nothing for the road land acquired from Cannuck.
  - (b) The assumption that the town square development involves, or should involve, a subdivision by the developer, thus allowing the Council to require compliance by the developer with various subdivision consent conditions under the Resource Management Act. However, the developer in this case (NZRPG) had no intention of subdividing, and the Council was powerless to alter that situation.
  - (c) The belief that NZRPG Management Limited is somehow distinct from "NZRPG", that its role is that of a project manager, and that in undertaking that role it has illegitimately appointed its related company to carry out the development works and is certifying payments. In fact NZRPG Management Limited is not a manager but is instead the contracting party responsible for delivering the IFA works and the contract works under the WDA agreements, and has procured those works in accordance with contractual provisions approved by Waitakere and protocols negotiated with the Auckland Council.
  - (d) Allied to the above belief, the view that there is no professional certification of payments under the contracts. In fact, responsibility for such certification rests with Cato Bolam, an established and reputable firm of professional engineers.
  - (e) That as a manager simply managing contracts on behalf of the Council, NZRPG is being paid an exorbitant management fee of █%. In fact, NZRPG is a contracting party that has assumed the delivery risk and is not simply a manager.
  - (f) That the cost estimates under the WDAs (alleged to be excessive) are to be the rates of the contract, i.e. without any review or alteration, when in fact review by the Council's quantity surveyors is provided in the agreements.
  - (g) That NZRPG should be the contracting party under the LDA. In fact, it was never possible for any party other than Waitakere to contract with Transpower to carry out the LDA works.
  - (h) That other land owners received nothing for their road land (because of the Council's betterment claim), while Cannuck was paid handsomely. In fact, Cannuck also received nothing for its road land.

- (i) That Cannuck received more than it should have for its non-road land, when in fact it received considerably less than any estimate or valuation.
- (j) That no other parties have land and road purchase agreements with the Council. In fact, several landowners have such agreements, which are on comparable terms to the IFA with NZRPG. The main exception to this is that, unlike the other agreements, the IFA is with an actual developer and therefore includes a component whereby the developer (NZRPG) is required to construct the roads – with a contribution to the cost of that construction by the Council.

### Improvement of procurement and competitive processes

- 7.17 We have considered questions of compliance with principles governing public procurement. We have noted that the WDAs are vulnerable to perceptions of partiality towards NZRPG given the potential existence of alternative suppliers and the absence of either a contestable tendering process or the use of formal procedures to deviate from the Council's default mode of public tender.
- 7.18 Notwithstanding this, we do not consider that the various procurement-related weaknesses generate the need for Auckland Council to reverse its decisions in relation to any of the arrangements. We have concluded that the Council can justify in substance its departure from the model of procurement by competitive tender due to the various efficiencies and benefits of contracting with NZRPG.
- 7.19 However we do recommend that procurement issues and the introduction of competitive incentives in the Westgate project are best managed carefully going forward, as much as is feasible within the existing contractual framework.
- 7.20 We recognise that a great deal of effort has been expended by the Auckland Council project team to ensure that, as far as practicable, procurement under the WDAs provides a reasonable result for the Council in the areas of performance and price. In particular, the negotiated requirement that there be at least three tenderers for the subtrade works under the WDAs has moved these agreements closer to the norm of competitive provision of services.
- 7.21 In respect of the IFA, the introduction of similar competitive arrangements is both less likely to be achieved within the confines of that agreement's contractual terms, and also less imperative for the Council, given that the Council's contractual obligation is merely to pay the capped contribution of \$ [REDACTED].
- 7.22 We recommend that Council officers continue to look for opportunities to improve the competitiveness and transparency of the existing arrangements, where the Council has the opportunity to do so. This may include the institution of a complete open book regime over the WDA and/or IFA works (i.e., extending to all trades). Clearly there will be contractual obstacles to this, but given the right circumstances it may be achievable, and would greatly assist the Council in monitoring performance and costs.
- 7.23 In respect of any further agreements to be entered into with NZRPG (which we understand are contemplated) we would expect these to build on what has been learnt, and to at least incorporate the agreed tendering processes introduced under the existing WDAs following negotiations between NZRPG and Auckland Council.

- 7.24 We further advise the Council to monitor the application of CSA 2 given the obligation it creates to pay for goods and services yet to be procured by another entity. While we are advised by Council officers that current application of the arrangement is working and payments made under it have been modest, the potential for significant costs to Council remains and we advise careful scrutiny.
- 7.25 More generally we recommend that Auckland Council seek opportunities to put aspects of NorSGA works out to contestable public tender or, where this is not a realistic option, for it to engage formally with its own procurement procedures in deviating from this standard mode of procurement. Such an approach would have the benefit of being transparent, lessen Council's contractual reliance on NZRPG and may also result in a better value outcome for Council (whether this be through a contract with NZRPG or another supplier). We are aware that senior Council officers involved with the Westgate project are very much alive to these issues and are indeed responsible for many of the competitive initiatives introduced by Auckland Council in the WDA arrangements since November 2010.

### **Progress payment management**

- 7.26 We further recommend that robust payment controls be put in place for future works, similar to those introduced for payments under the WDA agreements with NZRPG .
- 7.27 We acknowledge that, by the time the incoming Auckland project team had familiarised itself with the payments being made under the IFA with NZRPG, the "horse had bolted" to some extent, so that payments under that agreement have consistently been made in advance of actual progress, at least on a project timeline basis.
- 7.28 To that extent, we have assessed that, as at December 2011, Auckland Council was exposed in relation to the IFA in the amount of \$ [REDACTED]. This is because, in accordance with the agreed cashflow, the last payment (other than the \$ [REDACTED]) was made in December 2011 and, with [REDACTED] % of payments made but only [REDACTED] % of the work done, we calculate that there remains \$ [REDACTED] of work to complete. We note that this calculation is very approximate, assuming as it does that points on the project timeline coincide approximately with value.
- 7.29 Assuming our figure of \$ [REDACTED] for remaining works is correct, this leaves a possible exposure of \$ [REDACTED] - after factoring in the \$ [REDACTED], which is payable only on completion. We acknowledge that this exposure will reduce as the works progress, eventually becoming a gradually increasing retention, until the works are completed and the Council still has \$ [REDACTED] to disburse.
- 7.30 The salient point is that for the next few months the IFA works will need to be funded by NZRPG, as there will be no more funds available from the Council. In our view it is in the Council's interests to ensure that NZRPG has sufficient funding lines to complete the project. If not, again in the Council's own interest, arrangements may have to be made to ensure the works can be completed.

### **Ambiguities and oversights that need to be corrected to improve Council position**

- 7.31 We are aware that the Council and NZRPG differ on their interpretation of the cost saving provision in the WDA agreements. Our interpretation of this provision (also the advice given to the Council by Simpson Grierson) is that it only applies to specifically agreed cost saving

initiatives. Because the WDAs, subject to certain controls, simply pass through costs to the Council, in our view the benefit of any cost saving which arises through the performance of the WDA contracts as anticipated should accrue to the Council. We understand that NZRPG has a different view.

- 7.32 If this becomes an important issue (as could occur due to the sums involved), it may need to be resolved under the dispute resolution procedures in the WDAs. The Council may wish to prevent matters escalating to that point by making a concerted effort to find common ground with NZRPG on the operation of the cost saving provision.
- 7.33 We consider the Council's greatest risk of non-performance by NZRPG is in the payment of NZRPG's share of the Transpower undergrounding costs under WDA 2. That agreement gives the Council a right of set off, so that any payment due to NZRPG Management Limited, Cannuck or any associated entity may be withheld by the Council in lieu of NZRPG's payment obligation under WDA 2. The companies to which WDAs 1, 4 and 5 have been assigned are related companies to Cannuck, so this right of the Council remains.



### Improvement in Council governance processes

- 7.36 For each arrangement between Waitakere / Auckland Council and NZRPG, we have considered issues of legality and probity.
- 7.37 In relation to legality, the most common issues that we identified were Waitakere officers implementing and interpreting Council decisions very broadly and, as a result, risked straying outside their delegated powers and discretions. In most cases the officers' departures from best practice were not sufficiently material as to give rise to a reviewable error or a serious risk of proceedings.
- 7.38 Other issues of legality that arose were non-confirmation by ATA of some of Waitakere Council's decisions prior to the reorganisation of Auckland's local government on 1 November 2010 and, in some cases during the last days of Waitakere City Council, officers not involving Council in decisions at all (for example with the cost sharing agreements). These failures to follow best practice were arguably explained by the exigencies of the final months prior to the



reorganisation. In all cases, [REDACTED] the legal issues arising out of these failings were resolved by the re-execution and adoption of the affected contracts by Auckland Council following the reorganisation in November 2010 and with the benefit of a legal briefing by Simpson Grierson.



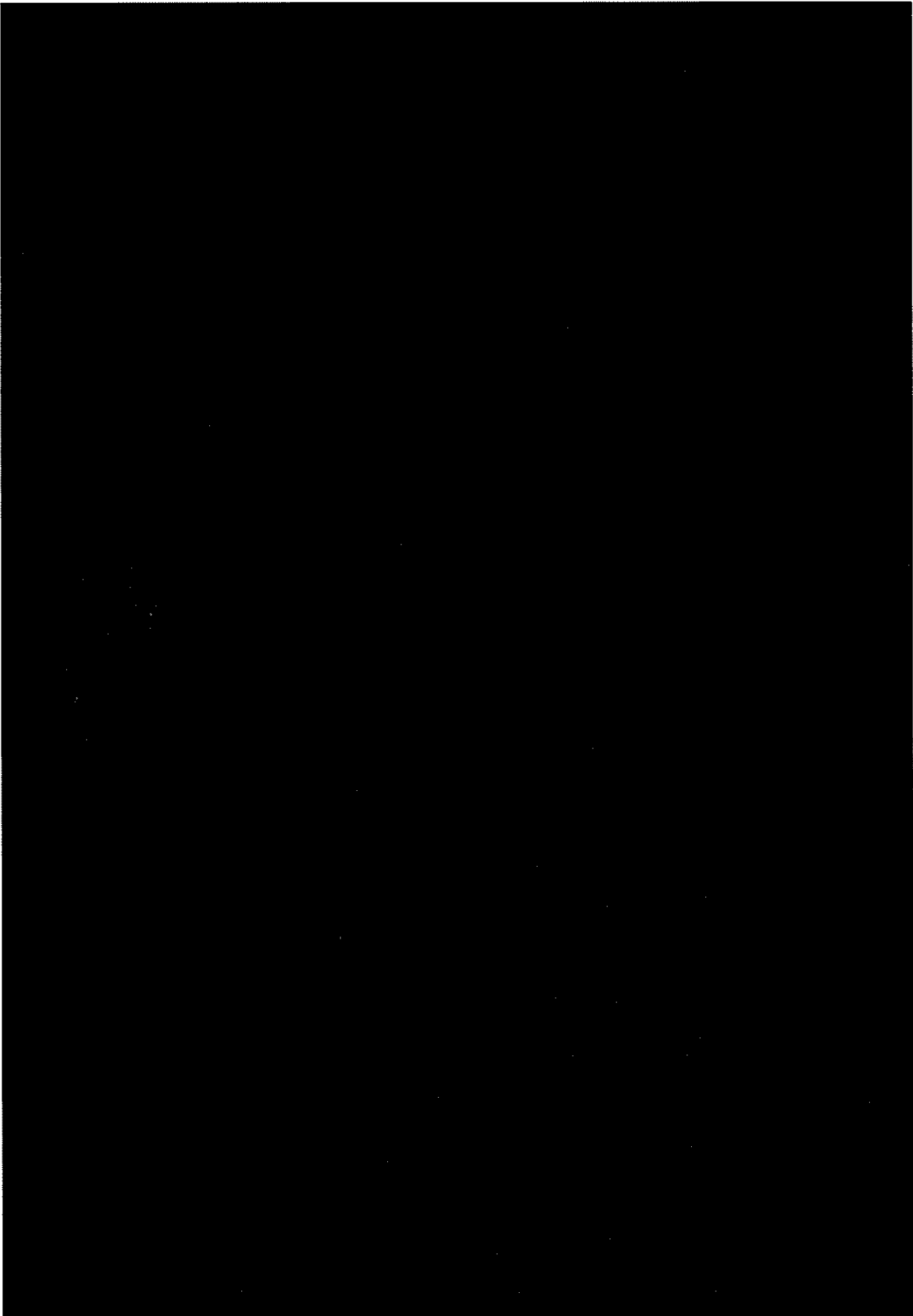
- 7.41 However, going forward, we do suggest that the Auckland Council considers carefully the need to engage its governing body and/or Council committees in the most significant decisions on NorSGA and the Westgate town centre. Obviously this engagement will need to occur in a manner that takes into account the sophistication of the project and the expertise required of the decision-makers.
- 7.42 The management of the project in the Waitakere Council era was predominantly at the level of Council officers, who demonstrated admirable commitment to the project and understanding of its complexity. However the extent of officer decision-making also rendered Waitakere more vulnerable to suggestions that Council staff were in too close a relationship with NZRPG and favoured the company. Judicious involvement of the Auckland governing body and/or Council committees is a means by which this impression can be avoided and Council staff decision-making endorsed and supported. We recognise that this will demand specialist skills of Councillors and, ideally, a commitment to understanding the complexities and dynamics of the Westgate project.
- 7.43 Turning to Waitakere's assessment of the significance of its key decisions on arrangements with NZRPG and the extent of public consultation required of it in connection with these decisions, we have concluded that decisions of significance by Waitakere were adequately consulted on. This is taking into account the extensive consultation (and Environment Court litigation) that had already occurred in relation to the change in the MUL, the LTCCP, and PC 15.
- 7.44 However we reiterate to Auckland Council the importance, both under the LGA 2002 and in general terms, of identifying decisions of significance in relation to NorSGA and Westgate and finding ways to continue to consult the public now that the planning process is concluded. Where further potentially significant decisions arise in relation to Westgate, we advise Auckland Council to specifically turn its mind to public consultation under the LGA 2002, because it cannot rely indefinitely on the consultation undertaken in relation to the MUL, LTCCP, and PC 15 since 2007.

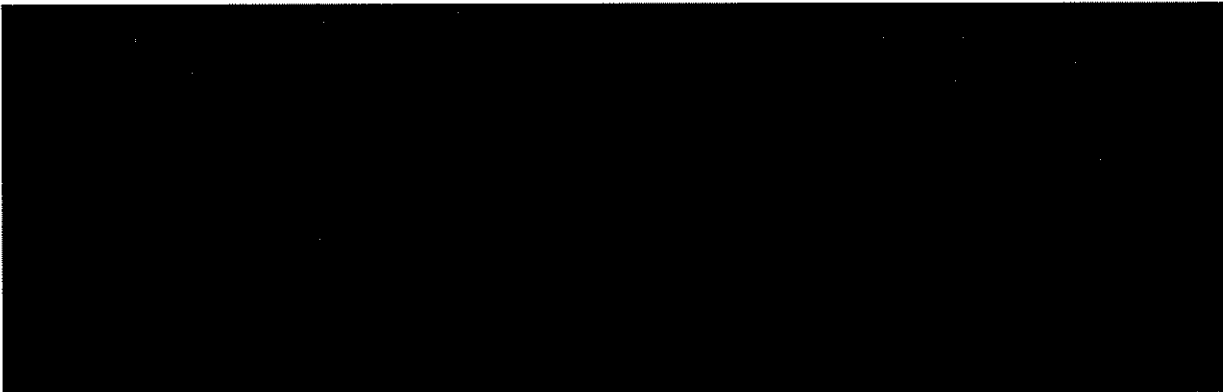
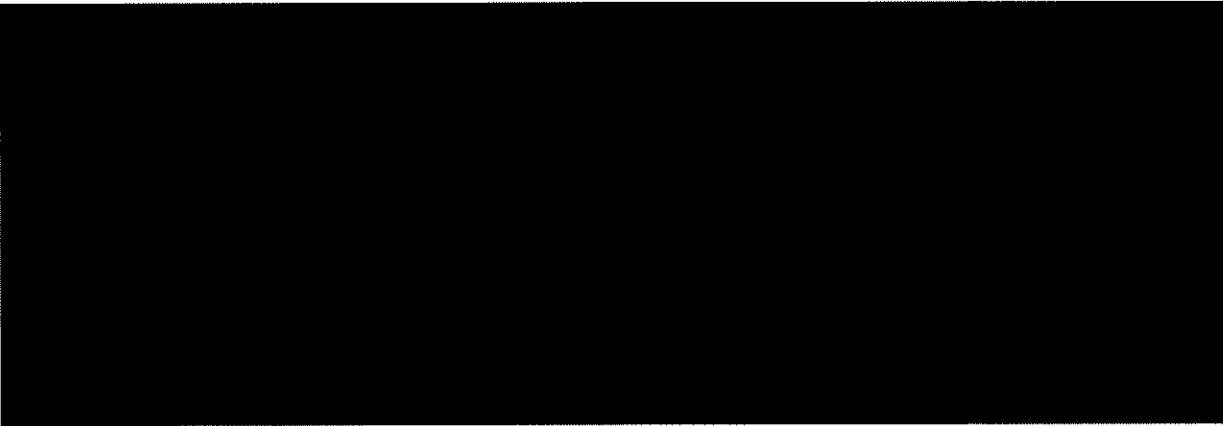
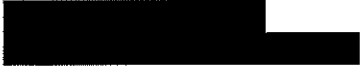
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**Absence of misfeasance**

7.62 We consider that any difficulties with the Waitakere and Auckland Council arrangements are not of such a character or magnitude to engage realistic considerations of misfeasance on the part of Council officers.



7.64 In summary, the Auckland Council needs to remain vigilant against misfeasance, fraud, dishonesty and inappropriate use of public power. But we do not perceive that this need is any greater in relation to NZRPG and Westgate than it is in the usual course of Council business.