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Dear Murray

RIMUTAKA RAIL TRAIL- APPLICATION TO CONSTRUCT RAILWAY

1. Thank you for your letter of 14 November 2011.

2. Subsequent to our discussion last year, I met with Jozsef Bognar of Jigsaw Property Ltd earlier this month. Following that meeting, I endeavoured to trace background material leading to the enactment of the Wellington Regional Water Board Act (1972) (**WRWBA**). As I allude to later, that exercise did not provide anything definitive.

Question for Answer

3. The essential question which you wish to have answered is whether the Council (**GW**) has power to grant to the Rimutaka Incline Railway Heritage Trust (**the Trust**) a lease, easement, or licence enabling the Trust to construct and operate a heritage railway on the route of the former railway track known, in part, as the Rail Trail between Maymorn and the Summit. The former track runs through the Pakuratahi Forest owned by the Council.

Answer in Summary

4. In my opinion:

   4.1 The land is still held by GW under the WRWBA and is therefore subject to its provisions.

   4.2 The area over which the Trust wishes to obtain an easement, right of way, lease or licence is probably still classified as a water collection area.

   4.3 There is no power under the WRWBA enabling GW to grant any easement right of way, lease or licence over land set apart as a water collection area.

   4.4 If GW were to consider the proposal had such merit that ways and means should be explored to facilitate its establishment, the land would have to be reclassified under the WRWBA as forestry land (in respect of which a licence may be granted) or a suitable amendment to the WRWBA would need to be passed.

   4.5 On the information presently available, it is unlikely the reclassification of the

land as a forestry area would withstand judicial scrutiny.

4.6 If the land were reclassified as a forestry area under the WRWBA, it is arguable that the grant of an easement or licence for the purpose sought is authorised under section 53 of the WRWBA.

4.7 Even if the grant of a licence were authorised under s.53 of the WRWBA, the terms might prove unattractive to the Trust.

4.8 A local bill to amend the WRWBA is possible, but it would be expensive, time-consuming, and may not pass legislative scrutiny.

Material Considered and Background Facts

5. I have read the following documents you enclosed with your letter:

5.1 Letter dated 24 January 2011 from O'Brien Property Consultancy Ltd.

5.2 Development proposal dated November 2011 prepared by the Trust.

5.3 Section 6.6 of GW's Park Network Plan dated July 2011 (relating to Pakuratahi Forest).

5.4 Extract from Schedule of Designations (Chapter 36/9) of Upper Hutt City Operative District Plan.

6. I have also reread my opinion of 8 April 2003 given to O'Brien Property Consultancy Ltd on the issue as to whether GW had power to grant an easement or licence for the construction and operation of wind turbines on land held under the Reserves Act 1977 (**RA**), and the WRWBA (also enclosed with your letter).

7. In addition, I have seen:

7.1 Letter dated 14 December 2011 from Rimutaka Incline Railway Heritage Trust which, inter alia, requests "*a licence period of 25 years with a right of renewal*".

7.2 A copy of Identifier 36815 Wellington Land Registry, which is the legal title to the land comprising the Pakuratahi Forest (attached to Mr O'Brien's letter of 24 January 2011).

7.3 A copy of a statutory declaration pursuant to s.52(4) of the Public Works Act 1981 (**PWA**) completed in 2006 by Jane Bradbury (as Principal Administrative Officer of the Council) dealing with land held by the Council (including that in Identifier 36815).

7.4 A copy of an extract from the New Zealand Gazette No.142, p.3718 published on 20 December 2007 pursuant to s.20 PWA entitled "Land to be Acquired for water Supply, Recreation and forestry Purposes – Wellington Region".

8. The following are further important background facts:

8.1 The great majority of land, having been held under The Wellington City and Suburban Water Supply Act 1927 (**WCSA**), vested in the Wellington Regional Water Board by operation of s.105 WRWBA.

8.2 In turn, on the creation of GW and the dissolution of the Wellington Regional Water Board, that land was vested in GW by Order in Council dated 12 June 1980.

8.3 It seems more likely this land was originally acquired for water supply and is likely to have been held for such purpose, rather than forestry, when it vested in GW.

8.4 An area of 218.2217 ha was taken in 1954 by Wellington City Council for water supply purposes and was held by that Council under the WSCA and would have been subject to the requirements of that Act (and, therefore, to the direction of the former Wellington City and Suburban Water-Supply Board).

8.5 The copy of Plan SO.30094 attached to the search copy of Identifier 36815 shows the land was held for waterworks purposes.

8.6 Section 6.6 of GW's Park Network Plan under the heading "*Legislative Status*" records the purpose for which GW holds the land as "*water supply, recreation and forestry*".

8.7 A (small) part of the Pakuratahi Forest was transferred to GW by the Royal Forest and Bird Protection Society of New Zealand (**Forest & Bird**) and is (or is to be) held under the Reserves Act 1977 (**RA**).

8.8 Apart from affect the land acquired from Forest & Bird, no part of the Pakuratahi Forest land is held under the RA.

8.9 The proposal does not affect the land acquired from Forest & Bird.

8.10 Although under Part X of the WRWBA GW has power to acquire land for the purposes of providing sports grounds and recreation areas, none of the land within the Pakuratahi Forest was, in fact, acquired for such purposes.

9. From this, I conclude that, at least up until the date of the Gazette Notice, it is most likely that part of the land affected by the proposal was held by GW for water supply purposes, was a water catchment area, and was subject to the provisions of the WRWBA.

The Gazette Notice

10. The background to this, as I understand it, is that GW engaged Mr O'Brien to do a

review of all its land holdings and the purposes for which they were held because of a concern that GW might have a liability under s.40 PWA to offer back to the original owner (or the successor in title of the original owner), at a significant discount to current market value, parcels of land which were no longer required for any local or public work. Mr O'Brien conducted a comprehensive review of all GW's land holdings and prepared a paper setting out the purposes for which he understood individual parcels of land were being held. He recommended applying to the Minister for Land Information under s.52(4) of the PWA to record the then current purposes for which individual parcels of land were held.

11. GW approved that paper. The land in Identifier 36815 was amongst those parcels. It was classified for water supply, recreation and forestry. On the face of it, therefore, those are the purposes for which the land is presently held.

12. So that my subsequent comments can be understood, it may be helpful if I set out s.20 of the PWA (under which the Minister of Lands purported to act) and s.52 of the PWA (under which GW made its application). They are:

> ***20 Declaration may give effect to agreement***
>
> *(1) Where under this or any other Act, power is given to acquire land under this Act, the Minister, upon being satisfied—*
> *(a) That the owner of the land has agreed to his land being acquired; and*
> *(b) That no private injury will be done by the acquisition, or that compensation is provided by this Act for any private injury that will be done by the acquisition—*
> *may issue a declaration in writing that, an agreement to that effect having been entered into, the land is thereby acquired for the purpose for which it is authorised to be acquired.*
>
> *(2) Every declaration issued under subsection (1) of this section shall have the effect of and be deemed to be a Proclamation under section 26 of this Act, and the provisions of this or any other Act relating to Proclamations shall apply to any such declaration as if it were a Proclamation issued under that section, except that it shall not be necessary to publicly notify the declaration.*
>
> *(3) Where an agreement for the purchase of any land has been entered into, title to the land, if not otherwise acquired, shall be transferred or surrendered to the Crown or to the local authority, as the case may be.*
>
> *(4) Any land purchased and transferred or surrendered under this section shall be deemed to be land acquired under the authority of this Act.*
>
> ***52 Setting apart Crown land, public reserve, etc, for public work***

(1) Subject to subsections (2) and (3) of this section, if the whole or any part of—

(a) A public reserve is required for any public work; or

(b) Any Crown land, or common marine and coastal area, is required for any public work; or

(c) Any wildlife management reserve, wildlife refuge, or wildlife sanctuary within the meaning of the Wildlife Act 1952 is required for any public work; or

(d) Any land held for a Government work is required for another Government work—

the Minister may, by notice in the Gazette, declare the land to be set apart for that work without complying with any of the provisions of this Act in respect of the acquisition of other land for that purpose.

(2) The whole or any part of a public reserve shall not be set apart under subsection (1) of this section without the consent of the Minister of Conservation, given after consultation with the administering body (if any) of the reserve.

(3) Land shall not be set apart under subsection (1) of this section without the consent of—

(a) The Minister of Conservation, if it is a conservation area within the meaning of the Conservation Act 1987 or is managed by the Department of Conservation under section 61 or section 62 of that Act:

(b) The Minister of Transport or the Minister of Conservation, as may be appropriate, if it is part of the common marine and coastal area:

(c) The Minister of Conservation, if it is a wildlife management reserve, wildlife refuge, or wildlife sanctuary within the meaning of the Wildlife Act 1953.

(4) Subject to subsections (6) to (8) of this section, if the whole or any part of any land held by a local authority (other than a road, access way, or service lane) is required for another local work to be undertaken by that local authority, the Minister, on receiving a written request by the local authority signed by its chief executive, may by notice in the Gazette declare the land to be set apart for that other local work.

(5) The whole or any part of a public reserve held by a local authority shall not be set apart under this Act for a public work to be undertaken by the same local authority unless the land is designated for the work in the district plan of the territorial authority.

(6) Every request by a local authority under subsection (4) of this section shall contain particulars of the land affected, of the work for which it is held, and of the work for which it is proposed to set the land apart.

> *(7) A statutory declaration by the chairperson or mayor or the chief executive of the local authority to the effect that the local authority is authorised by law to undertake the work for which it is proposed to set the land apart may be accepted by the Minister as sufficient evidence of that fact.*
>
> *(8) Where the provisions of section 32 of this Act are not applicable, the local authority shall attach to the request to the Minister a plan in triplicate of the survey of the land, approved by the Chief Surveyor, showing accurately the position and extent of the land proposed to be set apart.*

13. Although I shall return to these provisions shortly, at this stage it will suffice if I summarise their effect as being to enable a local authority to set out the purpose for which land it acquires is held [s.20] or, in the case of land already held, to change the purpose for which it is to continue to be held [s.52].

The Effect of the Gazette Notice

14. The critical (and rather vexed) issue is whether the notification in the New Zealand Gazette, which clearly was intended to declare the purpose for which the land was to be held in the future, had the effect, in law, of changing the status of the land as land vested in GW under the WRWBA (and therefore subject to the limitations set out in that Act) to land, although held for the notified purposes, in the general ownership of GW (in respect of which GW has more extensive powers),. Why that is important I deal with below.

15. At this juncture, I record one caveat, namely that my comments are based only on the information presently available. To be more definitive, it would be necessary to undertake a comprehensive search of the full title history of the land in Identifier 36815 and of earlier Gazette Notices establishing the purpose for which that land was acquired and of any classification in respect of it. Whether that would be warranted largely depends on whether GW considers the proposal of such merit that further investigation is necessary to confirm the land was, in fact, either acquired or held as a water collection area. If not, the likely cost would not seem to be justified.

16. The reason why the legal effect of the Gazette Notice is critical is that under the WRWBA, GW has no power to grant any lease, easement or licence in respect of land held as a water collection area. If, regardless of the publication of the Gazette Notice, the land is still subject to the provisions of the WRWBA and is a water collection area, then GW cannot grant a lease, easement or licence to facilitate the implementation of the proposal whilst that classification remains.

17. To appreciate this more fully, some explanation of the provisions of the WRWBA may be helpful.

The Requirements of the WRWBA

18. Under the WRWBA, GW may hold land for different purposes. The two primary purposes are those referred to in s.43, namely as a water collection area and a forestry area (reflecting the provisions of Parts II (Bulk Water Supply) and III (Forestry) of the Act respectively.

19. The powers which GW has under the WRWBA in respect of water collection areas and forestry areas differ.

20. There is no power under the WRWBA to grant any lease, easement or licence over a water collection area. The sole power available to GW is to grant a permit for temporary occupation under s.52. The grant of an easement, right of way or licence to establish and operate a railway would clearly not be within the limitations of s.52. The construction of a railway as proposed (25 years with right of renewal) is the very antithesis of "*temporary occupation*".

21. In respect of a forestry area, under section 53 of the WRWBA GW has power, to grant a licence not exceeding 21 years (with one right of renewal not exceeding 21 years) for a number of specified purposes and, [in s.53(1)(e) "*such other purposes as the Council thinks fit*"]. For the present, I shall assume that the phrase "such other purposes" is not limited to those which are directly related or incidental to the preceding specified purposes.

22. On that assumption, there would appear to be no impediment in principle to the grant of an easement or right of way in respect of forestry land held by GW so long as the construction and operation of the proposed railway did not adversely affect GW's activities on or interest in the forestry areas. The terms and conditions of any grant would clearly require proper consideration before any grant was made.

23. However, there is a well established principle of construction (known as the *ejusdem generis* rule) that words of general application which follow words of specific application are to be taken as referring and extending only to matters which relate directly or incidentally to the preceding specified purposes. If the phrase "*such other purposes*" were to be construed by applying that rule, then the construction and operation of the proposed railway would be unlikely to fall within the authorised purposes, as it is not a purpose related to the earlier specified forestry activities. Indeed, it is an activity more directly related to recreation, which is dealt with under Part X of the WRWBA. The existence of specific provisions in Part X as to leasing and licensing of recreation activities would rather suggest that recreation activities are to be authorised, if at all, only in respect of land held for that purpose and not land held for forestry purposes.

24. Under the WRWBA, therefore, what powers GW has to grant leases, easements or licences for particular activities depend on the classification of the land or the purpose for which it is held. Although it may appear the purposes themselves are not necessarily mutually exclusive at all times and in all respects, the powers which GW may exercise with regard to the different purposes do appear to be different and mutually exclusive.

25. The reason for this may be found in the history of the legislation which preceded the

WRWBA. Section 4 of the WCSA refers to the vesting of land under that Act. The purposes specified were (a) water supply for the suburban area and city, (b) forestry, (c) pleasure-grounds, parking grounds, scenic-highways, and generally for recreation purposes for the inhabitants of the City of Wellington and the surrounding districts, and (d) any other purpose provided for by the Act. The City Council was required, subject to the consent of the Board, to define from time to time which of the above purposes for which the lands or parts were held. Although the phrase "*which of the above purposes*" does not necessarily imply only one purpose to the exclusion of all other, the natural and ordinary meaning would suggest only one purpose was intended. This construction tends to be supported by s.25 in Part VI. That section authorises to the establishment of pleasure-grounds, parking-places, or buildings for amusement and convenience of the public, but excludes these activities on land held as a catchment area, watershed, or waterworks.

26. The difference between the licensing provisions under the WCSA and the WRWBA would also seem to support that construction. Under s.26 in Part VII of the WCSA (headed "*Licences*"), the City Council had power to grant licences in respect of "*the land subject to the provisions of this Act*". This power would seem to be exercisable in respect of all land regardless of the purpose for which it was held (though .s.25 clearly precludes licensing of land held as a catchment area, watershed, or waterworks from being licensed for the purposes set out in Part VI). In the WRWBA, the general provision to grant licences is replaced with specific powers according to the use for which the land is held. Indeed, the provisions of s.26 of the WCSA are incorporated into only the forestry provisions of the WRWBA (s.53) but not into the water supply provisions. On the face of it, this would seem to be deliberate. It would seem to follow, therefore, that the legislature intended no leasing or licensing powers with regard to water supply areas, only those specified with regard to forestry areas and somewhat wider powers with regard to recreation areas.

27. Before leaving this topic, I note also the absence in the WRWBA of any express power of sale in respect of land held for water supply or recreational purposes and the limited power of sale in respect of land held for forestry purposes. The latter is subject to the consent of the Minister of Forests (s.45). There is no express power of sale in the WCSA. This factor is also relevant to a consideration of the legal effect of the Gazette Notice in 2007. I shall return to that shortly, but at this point, it will suffice to observe as at the date of enactment of the WRWBA, local authorities had no general power of competence and could only exercise those powers expressly conferred on them or those that could necessarily be implied from the relevant legislative enactment. So, if there was no express power of sale, such a power would have to be justified by necessary implication. In the case of the WRWBA, that would be difficult. There is another principle of statutory construction (going under the Latin tag "expressio unius est exclusio alterius") which would suggest no such power can be implied. Put simply, the principle is that if the statute expressly provides for one thing, it impliedly excludes all others. In the present case, the provision of an express power of sale for forestry land would imply no power of sale was to be conferred in respect of other land. If, therefore, the WRWBA still prevails, there is no power of sale of land held for water supply purposes.

28. I endeavoured to see whether the speeches and debates in the House of Representatives when the WRWBA was introduced as a Bill (recorded in Hansard) would cast any light on any of these matters. They do not do so directly, though there were some pointers to other material. What does emerge is that the Bill was the result of lengthy negotiation amongst the various local authorities who were being asked to surrender their existing rights in favour of the creation of a new authority, the Wellington Regional Water Board, and accept in future the management of water on an integrated basis throughout the region (e.g. the citizens in the Hutt Valley were giving up rights to the Hutt aquifer). It seems that preservation of the water catchment and water supply were the dominating issues with forestry and recreation occupying a somewhat lesser position. In that context, the absence of an express power of sale of water supply land is hardly surprising. It would seem it was never contemplated.

Did the Gazette Notice Change the Status of the Land so that it is no longer subject to the WRWBA?

29. There are a number of problems with the procedure leading up to the publication of the Gazette Notice. First, there is the question as to whether GW was competent to reclassify the land at all. I say that because it is clear the land was vested in GW as successor to Wellington City and Suburban Water-Supply Board. At least as at the date that occurred, the land would have been subject to the provisions of the WRWBA. The WRWBA has specific provisions as to the classification of land held under that Act. There is a serious doubt that the general provisions of the PWA (permitting reclassification) could override the express provisions of the WRWBA. Again there is an applicable principle (coming with its Latin tag "generalia specialibus non derogant" – a general clause is not applicable where there is a special provision covering the same matter). The force of this may be seen in the consequences for limited the power of sale of forestry land under the WRWBA. If the general provision in s.52 of the PWA were to apply, GW could simply get around the provisions of s.45 of the WRWBA, requiring the consent of the Minister of Forests to any sale, by reclassifying the land in question. That would seem to be a rather astonishing result. There must therefore be a serious doubt that GW was competent to reclassify land held under the WRWBA except by exercising its powers under the WRWBA.

30. Secondly (and consequentially), I would be surprised if the provisions of the WRWBA were even considered when the land was reclassified. I suspect the emphasis was on the possible consequences of a claim under PWA rather than any consideration of the relevant factors under the WRWBA. If that is the case, then the legality of the reclassification and its consequent notification in the New Zealand Gazette would be open to challenge.

31. Thirdly, I do not think the notification in the New Zealand Gazette was made pursuant to the correct statutory provision. I understand this was not the responsibility of anyone acting on behalf of GW. If GW had power to reclassify under the PWA and without regard to the WRWBA, then it did so under the correct statutory provision (s.52). Section 20, which the Minister utilised, relates only to land purchased under the acquisition by agreement section of the PWA. Except for one parcel, none of the land in Identifier 36815 was acquired by agreement. It was land vested by statute. The

notification would therefore be at risk of challenge.

32. Fourthly, the current classification has inherent difficulties. If, as I believe is the better view, the land is still subject to the provisions of the WRWBA, its classification for all three purposes contains elements of what might best be described as inherent internal inconsistency. The objectives of water supply, forestry and recreation are different and not necessarily consistent one with the other. Specifically, as between the different purposes, the licensing powers are quite inconsistent, as this proposal highlights. If a specific area of land can only be regarded as being held for water supply or as a water catchment area, then the grant of rights for uses not specifically permitted would be open to serious challenge.

33. I am conscious I have referred to land as being held both for water supply and as a water catchment area. The two terms are not synonymous. Clearly a parcel of land acquired within an urban area for a pumping station is an area of land acquired for water supply purposes but it is not a water catchment area. That said, it is difficult to see how the Pakuratahi Forest land, if acquired for water supply, could be other than a water catchment area (or for a future water catchment area) and, as I have indicated earlier, was probably classified as such when it vested in GW. The limitations for such areas would therefore apply to the Pakuratahi Forest land.

34. In summary, therefore, I have serious doubts GW could grant any easement lease or licence without undertaking a proper examination of its future needs for the land under the WRWBA and determining, on proper grounds, that a reclassification was warranted.

Options for Leasing or Licensing Proposed Activity

35. In anticipation that question might be raised, it may be helpful if I address the possibility of either changing the status of any land held for water supply purposes to forestry purposes, so as to enable GW to exercise the licensing powers available to it under s.53 of the WRWBA or of having the WRWBA amended to permit leasing or licensing within water catchments areas.

36. Dealing first with the option of changing the status of the land to forestry, if that were the sole purpose for the change of status, the decision would almost certainly be set aside were anyone to challenge it by way of judicial review in the High Court. A decision to change the status of land held under the WRWBA would result from the exercise of a statutory power by GW and, as such, is liable to review by the High Court. If the sole reason were to facilitate the grant of a privilege to the Trust, it would be bound to be set aside because the proposal by the Trust is irrelevant in law to the question as to whether or not the particular land should be held as a water catchment area or as a forestry area. What would be required is an examination of the respective merits of holding the land in question for either water catchment or forestry purposes. In view of the fact that much of the land was acquired for water supply purposes and the land is designated in the Upper Hutt City district plan for that purpose, it would be difficult to justify any change of status in the absence of an abandonment of the area as a potential water catchment area in the future (or some other compelling reason, of which I currently cannot conceive). I would therefore counsel GW against considering that

possibility.

37. Next, the change in classification might still not achieve the desired objective for the reason I set out in paragraph 23 above.

38. Finally, even if the status of the land were changed from water catchment to forestry, the grant of any right of way or easement might still be unattractive to the Trust. Under s.53(4), no compensation would be payable to the Trust on the termination or expiry of the licence for any improvements erected on the land, though the Trust would be entitled to remove them. Further, under s.53(5), at any time within the last year of the licence, GW would have the right to purchase any buildings, plant and machinery at a price to be fixed by arbitration (in default of agreement). GW would not be competent to contract out of these rights or waive them.

39. Even if GW were to consider a lease, having regard to these limitations, it would have to give anxious consideration to the risk that the Trust's operations might be unsuccessful with the result GW would be left with the cost of removing the rail track laid down pursuant to any licence. The experience of the taxpayer from the sale of New Zealand Rail should be a salutary warning of the risks.

40. Clearly, an appropriate amendment to the WRWBA would give GW the necessary power to grant a lease or licence over a water catchment area so as to facilitate the proposal. However, this option raises serious issues of principle and would be subject to intense scrutiny. The fact that, currently, no such powers exist point to the undesirability of having any activities of a permanent (or semi-permanent) nature within a water collection area. In the debates in the House of Representatives when the Bill which became the WRWBA was introduced, much was made of the purity of the water and the absence of contamination in the existing catchments. There could be no certainty that an amendment to the WRWBA would obtain the necessary support. Moreover, as some councillors may be aware from the amendment permitting the establishment of renewable energy, there would be considerable expense and a lengthy delay in securing an amendment even if it did find acceptance.

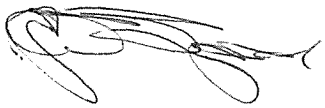
41. In contemplating whether or not to seek an amendment to the WRWBA, a further factor needs to be considered. The WRWBA is a somewhat unique piece of legislation. Unlike the legislative provisions governing water supply in Auckland (which have been the subject of successive change), the WRWBA has remained largely intact. It has provided the basis for the successful supply and development of water supply within the region on a basis which has enjoyed wide community acceptance. It is only a little over 10 years ago when the then Minister of Local Government embarked on a campaign to abolish regional councils. Had that succeeded, it is difficult to see that the present arrangements (including the requirements of the WRWBA) would have emerged unscathed. As I see it, the WRWBA works well. Councillors might wish to consider whether the risk that an amendment simply to facilitate this particular proposal might provoke an examination of the whole of the WRWBA (and generally of the water supply provisions to the region) is a risk worth running.

RMA

42. Lastly, there is an issue under the RMA. .As I have stated earlier, the land is subject to a designation under the RMA. As GW is the person who required the designation, it could withdraw the designation at any time. However, if it did so, that decision could be subject to challenge if there were not proper grounds and proper reasons for doing so. Much the same matters would arise as I have adverted to in paragraph 36 above. Currently, the designation would not permit the construction and operation of the proposed railway as, prima facie, it is contrary to the retention of the area as a catchment for water supply. Despite the designation, GW could grant consent, though that decision could also be challenged on review in the High Court.

43. If there are any further matters, please do not hesitate to contact me.

Yours sincerely
OAKLEY MORAN



J.W. Tizard