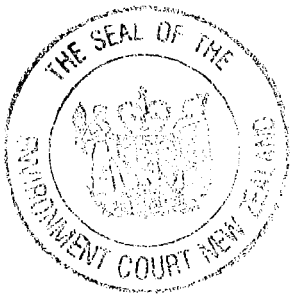
BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2019] NZEnvC 001

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under section 120 of the Act and an application for a declaration under s 311 of the Act
BETWEEN	TAURANGA ENVIRONMENTAL PROTECTION SOCIETY INCORPORATED (ENV-2018-AKL-000256 and ENV-2018-AKL-000384) Appellant and Applicant
AND	TAURANGA CITY COUNCIL BAY OF PLENTY REGIONAL COUNCIL Respondents
AND	TRANSPOWER NEW ZEALAND Applicant for consent
AND	NGAI TUKAIRANGI TRUST LUKE FRANCIS MEYS MAUNGATAPU MARAE TRUST TE RUNANGA O NGAI TE RANGI IWI TRUST Section 274 parties to appeal

Court:	Environment Judge D A Kirkpatrick sitting alone under s 279(1)(a) of the Act
Hearing:	On the papers
Date of Decision:	8 January 2019
Date of Issue:	

DECISION OF THE ENVIRONMENT COURT CONCERNING PROCEDURE FOR APPLICATION FOR DECLARATION



[1] This decision addresses a procedural issue concerning two related proceedings:

(a) An appeal by Tauranga Environmental Protection Society Inc ("TEPS") against a decision to grant resource consents to Transpower New Zealand Limited ("Transpower") for the Rangataua Bay (Hairini to Mt Maunganui 'A' transmission line) Realignment project;

and

(b) An application by TEPS for a declaration or preliminary determination whether or not the following statement is a correct statement of law for the purposes of determining its appeal:

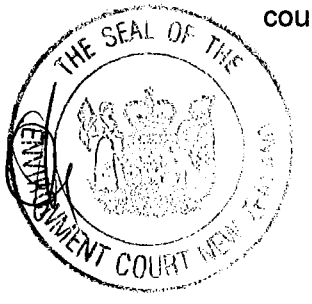
> In determining whether there is an adverse effect on the values and attributes of an identified and unchallenged outstanding natural feature and landscape ("ONFL"), being the Rangataua Bay part of Tauranga Harbour (the whole of the Harbour being an ONFL), arising from the two proposed transmission monopoles (33C – Managatapu, 34.7 m high and 33D – Matapihi, being 46.8 m high) and aerial transmission lines crossing the harbour between them, it is impermissible and would be an error of law to discount or offset the positive effects of removing the existing A-line (in a different alignment across the Bay), including existing tower 118, from the effects of the new structures and lines.

[2] The appeal is subject to existing timetable directions as set out in the Court's minute dated 10 December 2018. It is scheduled to be heard in the week commencing 29 April 2019. There is no current proposal to adjourn that fixture.

[3] The application has been filed in response to a further direction of the Court in the minute dated 10 December 2018 that counsel for TEPS file and serve a memorandum identifying any preliminary question of law that he seeks to have resolved prior to hearing. There were then directions enabling other parties to respond. The Court would then consider whether a further conference is required to discuss how best to deal with any such question of law.

[4] The application is framed as an application either for a declaration or a preliminary determination of a question of law. Counsel for TEPS, Mr Gardner-Hopkins, seeks to have this dealt with prior to the substantive hearing of the appeal. In support, counsel submits:

i) that it is clearly a question of law rather than one of mixed fact and law;



ii) that it should be determined on a preliminary basis rather than in the course of the appeal hearing because doing so will most likely determine the extent to which TEPS may pursue the issue of alternatives and need to call expert landscape evidence, with significant consequences for the nature and extent of the hearing; and

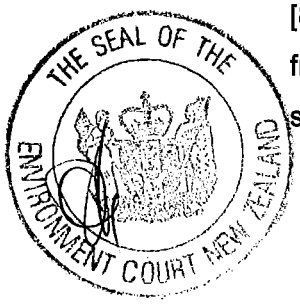
iii) that TEPS has limited resources and should be able to know prior to a hearing how it must address its case.

[5] In response, Transpower disagrees that the application needs to be or should be heard as a preliminary matter or otherwise determined in advance of the substantive hearing of the appeal. Counsel for Transpower, Mr Beatson and Ms Lincoln, submit that the statement presents a question of mixed fact and law which should not be determined in the abstract as it requires evidence both for general context and in order to assess the proposal in terms of the relevant objectives and policies of the applicable statutory planning documents. Counsel further submit that the request for a preliminary determination amounts to an attempt to get the Court to assist one party in its litigation strategy at the expense of the other parties. They point out that the resolution of the question will not avoid the need for a hearing.

[6] Counsel for both respondents, Ms Hill, endorses Transpower's position and observes that if the application were heard separately as a declaration proceeding, it might be that neither Transpower nor the respondents would wish to be heard, leaving the Court to determine the question without a contradictor presenting any opposing argument.

[7] The application has been treated by the Court's registry as a fresh proceeding, but that is not determinative of how it should be heard. The Court routinely hears two or more proceedings together where that would be conducive to dealing with the issues in a fair, efficient, timely and cost-effective way, as required by s 269 of the Act. In this case the application directly follows from the Court's direction in the appeal requiring particulars of any legal issue so that the most appropriate procedure for addressing it could be determined, in particular, whether that issue would be better addressed on some preliminary basis or as part of the substantive appeal.

[8] While the statement set out in the application is essentially a question of law, it is framed in a particular environmental and planning context. One might reduce the statement to an essential legal question in more abstract terms by omitting the



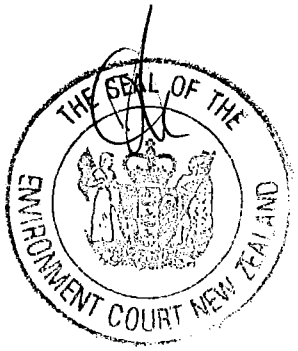
particulars of the case, so that it was framed along the following lines:

> In determining whether proposed works have adverse effects on the environment, it is an error of law to discount or offset the positive effects of removing any existing works from the adverse effects of the proposed works.

[9] Considering this version of the legal question and comparing it to the statement in the application demonstrates the significance of the factual matrix to the application of the law. It highlights the problems in attempting to reduce the law which is relevant in complex fact situations, such as often arise in resource management appeals, to bare legal propositions. It is conceivable that the particular adverse and positive effects associated with a proposal might be identified in a way that could enable them to be directly compared or even commensurately quantified so that they might be discounted or offset against each other. It is also possible that however much such a scenario can be conceived of, such effects will turn out to be incommensurable so that a prescriptive approach will simply not be available to the decision-maker. In those terms, I tentatively doubt that the question can be answered in any simple or absolute way.

[10] In this case, the values and attributes of the ONFL and the degree to which those would be maintained or enhanced in the context of relevant objectives and policies, or not, by any particular works or by different dimensions of any works, appear to be central to any detailed consideration of the essential question. The question really depends, then, on matters of degree in the context of all the things to which regard must be had under s 104(1) RMA. The assessment of those will require evidence, primarily of fact as to the quality of the existing environment (as defined in s 2 RMA) and the actual and potential effects (as defined in s 3 RMA) of the proposal, and submissions as to how those facts are to be assessed against the relevant policy statements and plans, fairly appraised and read as a whole.

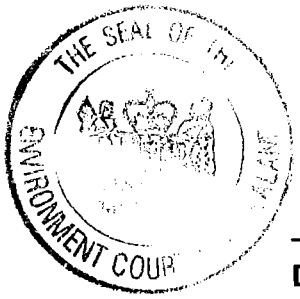
[11] Whether expert opinion evidence will likely enable the Court to obtain substantial help from such opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding is a relevant matter that counsel will have to assess in the presentation of their cases and the evidence they intend to call. It is not something that the Court can offer assistance with at this stage of the proceeding. The Court is mindful of the limits of TEPS' resources. The Court is also mindful of the dictum that "[p]reliminary points of law are



too often treacherous short cuts. Their price can be . . . delay, anxiety, and expense."[1]

[12] For those reasons, I am of the view that while the essential legal question raised by the application is of significance to the way in which each party's case is to be presented, it is not suitable for determination as a preliminary matter because it is very likely to depend on the factual matrix in which it arises. I conclude in the overall interests of justice that the appeal and the application should be heard together, so that the statement set out in the application can be considered in the light of the evidence that is put before the Court in the appeal.

[13] I direct that the Court's files be managed accordingly. On that basis there is no need to amend the timetable directions made on 10 December 2018.



D A Kirkpatrick
Environment Judge

1 *Tilling v Whiteman* [1979] UKHL 10; [1980] AC 1; [1979] 1 All ER 737; *per* Lord Scarman.