

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CIV-2021-404-001618
[2022] NZHC 1620**

UNDER the Judicial Review Procedure Act 2016
IN THE MATTER of an application for judicial review
BETWEEN ALL ABOARD AOTEAROA
INCORPORATED
Applicant
AND AUCKLAND TRANSPORT
First Respondent
THE REGIONAL TRANSPORT
COMMITTEE FOR AUCKLAND
Second Respondents
AUCKLAND COUNCIL
Third Respondent

Hearing: 26-27 April 2022
Appearances: D Salmon QC and J Cundy for Applicant
V Heine QC, P McNamara and Z Fargher for Respondents
Judgment: 8 July 2022

JUDGMENT OF VENNING J

This judgment was delivered by me on 8 July 2022 at 2.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Jack Cundy, Auckland
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Counsel: D Salmon QC, Auckland
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[1] The applicant, All Aboard Aotearoa Incorporated (AAA) seeks to judicially review decisions of the respondents in relation to the Auckland Regional Land Transport Plan 2021 (RLTP).

Parties

[2] AAA is an incorporated society whose members share concerns regarding the social and environmental impacts of the transport sector in Tāmaki Makaurau, Auckland, including in relation to climate change, air quality and the need for transport to be decarbonised.

[3] Auckland Transport (AT) is a council controlled organisation (CCO) of Auckland Council established by s 38 of the Local Government (Auckland Council) Act 2009.

[4] The members of the Regional Transport Committee for Auckland (RTC) include directors of AT and the KiwiRail member appointed pursuant to s 38 of the Local Government (Auckland Council) Act 2009 (LGACA) and ss 5(1) and 105A of the Land Transport Management Act 2003 (LTMA).

[5] Auckland Council (Auckland Council) is the unitary authority established by s 6 of the LGACA.

The decisions in issue

[6] AT prepared and published for public consultation a draft RLTP between 29 March 2021 and 2 May 2021. At a meeting on 18 June 2021 the RTC resolved to submit and recommend the final RLTP to Auckland Council's Planning Committee (Planning Committee) for endorsement and to the Board of AT (AT Board) for approval (RTC decision).

[7] At a meeting on 24 June 2021 the Planning Committee endorsed the RLTP for submission to the AT Board (Planning Committee decision).

[8] At a meeting on 28 June 2021 the AT Board resolved to approve the RLTP (AT Board decision).

The challenges to the decisions

[9] AAA challenges the RTC decision as unlawful on the grounds:

- (a) in exercising its decision-making power under s 14 of the LTMA the RTC was not properly informed, failed to take into account relevant considerations and/or took into account irrelevant considerations;
- (b) in breach of s 14(a)(i) of the LTMA the RTC had no proper or reasonable grounds to be satisfied that the RLTP contributed to an effective, efficient and safe land transport system in the public interest; and
- (c) in breach of s 14(a)(ii) of the LTMA the RTC had no proper or reasonable grounds to be satisfied that the RLTP was consistent with the Government policy statement on Land Transport 2021 (GPS 2021).

[10] AAA seeks declarations that the RTC acted unlawfully in making the RTC decision and an order setting aside both the RTC and AT Board decisions. It also seeks orders directing AT and the RTC to prepare, submit and approve a new RLTP.

[11] AAA next challenge the Planning Committee decision as unlawful because:

- (a) in making the decision the Planning Committee was not properly informed, failed to take into account relevant considerations and/or took into account irrelevant considerations;
- (b) the Planning Committee failed to have any or proper regard to the mandatory requirements to act in accordance with the principles of s 14 of the Local Government Act 2002 (LGA); and
- (c) the decision breached ss 76, 77 and 80 of the LGA.

[12] AAA say the Planning Committee decision was significantly inconsistent with the Local Government Leaders Climate Change Declaration, the Auckland Council Climate Emergency Declaration, and Te Tāruke-ā-Tāwhiri.

[13] AAA seek a declaration that Auckland Council acted unlawfully in making the Planning Committee decision and an order setting aside that decision.

[14] In the third and final cause of action AAA challenge the AT Board decision as unlawful because:

- (a) in making the AT Board decision the AT Board relied on the RTC decision which was itself unlawful;
- (b) in making the AT Board decision, the AT Board was not properly informed, failed to take into account relevant considerations and/or took into account irrelevant considerations; and
- (c) in making the AT Board decision the AT Board acted contrary to its statutory purpose as set out in s 39 of the LGACA.

[15] AAA seek a declaration that the AT Board acted unlawfully in making the AT Board decision, an order setting aside the AT Board decision, and a further order that AT and the RTC prepare, submit and approve a new RLTP.

Relevant context

[16] The background to AAA's interest in the RLTP and reason for bringing these proceedings is its members' concern about the impact of climate change. AAA pleads the following matters regarding climate change which, for present purposes, are accepted by all respondents.

[17] The Intergovernmental Panel on Climate Change (IPCC) published a special report, Global Warming of 1.5°C (Special Report) in October 2018. The Special Report made the following points:

- by 2017 the global average surface temperature had increased by approximately 1°C above pre-industrial levels;
- the overwhelming scientific consensus is that this increase is caused by increasing concentrations of greenhouse gases in the atmosphere resulting from human activity;

- the increase has had adverse consequences around the world including extreme weather patterns leading to droughts and flooding, sea level rises and loss of biodiversity;
- these adverse consequences will worsen over the coming decades if average temperatures continue to increase;
- there is a significant difference between an increase of 1.5°C and an increase of 2°C (or higher);
- limiting global warming to 1.5°C with no or limited overshoot requires global net anthropogenic carbon dioxide emissions to decline by about 45 per cent from 2010 levels by 2030, and to reach “net zero” (where any emissions are balanced by removal of carbon dioxide from the atmosphere) by around 2050;
- pathways limiting global warming to 1.5°C with no or limited overshoot require rapid and far-reaching transitions in energy, land, urban and infrastructure (including transport and buildings), and industrial systems.
- limiting global warming to 1.5°C requires limiting total cumulative carbon dioxide emissions over time, because the extent of global warming is a function of total emissions over time. That requires staying within a total carbon budget on the way to reaching net zero emissions by 2050;
- delaying action to mitigate the effects of climate change shifts the burden from the present to the future;
- the costs of mitigating the effects are increasing and will continue to increase; and

- climate change creates a known and foreseeable risk to the rights to life, health, food, and an adequate standard of living, and to human cultural rights, including those of ethnic, religious and linguistic minorities.

[18] While admitting the above the respondents say further that:

- the nature and scope of the effects of global warming in various warming scenarios are uncertain and will vary depending on local circumstances;
- the question of climate change and the appropriate response raises complex policy issues at an international, national, local and individual level; and
- measures to mitigate climate change in New Zealand and elsewhere require a holistic and multifaceted approach across many levels of society and actors.

Relevant international and national responses to climate change

United Nations Framework Convention on Climate Change (UNFCCC)

[19] New Zealand is a signatory to the UNFCCC and ratified it on 16 September 1993. It is listed as an Annex 1 (developed) country. Article 4 of the UNFCCC requires Annex 1 countries to take the lead to reverse the long-term trends in anthropogenic emissions.

Paris Agreement

[20] The Paris Agreement is an international agreement under the UNFCCC. New Zealand signed the Paris Agreement on 22 April 2016 and ratified it on 4 October 2016. Article 2 confirms the aim to strengthen the global response to the threat of climate change, including by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and by pursuing efforts to limit the temperature increase to 1.5°C. The agreement requires each party to establish successive national climate action plans known as nationally determined contributions

(NDCs). New Zealand's first NDC is to reduce its greenhouse gas (GHG) emissions to 30 per cent below 2005 levels by 2030.

Zero Carbon Act

[21] The Climate Change Response (Zero Carbon) Amendment Act 2019 (Zero Carbon Act) came into force on 13 November 2019. The Zero Carbon Act amended the Climate Change Response Act 2002 and set a target for New Zealand to reduce net emissions of all greenhouse gases (except biogenic methane) to zero by 2050.

Declaration of climate emergency by Government and Parliament

[22] On 2 December 2020 Parliament passed a Government motion to declare a climate emergency.

Climate Change Commission advice to Government

[23] The Climate Change Commission (CCC) published its advice to Government on 9 June 2021. It recommends emissions budgets that would reduce net emissions by 2030 (against a 2019 baseline):

- (a) by 38 per cent in respect of long-lived greenhouse gases; and
- (b) by 47 per cent in respect of carbon dioxide.

C40 Cities Climate Leadership Group

[24] Auckland Council is a member of the C40 Cities Climate Leadership Group, a network of cities committed to take urgent action to address climate change which requires commitment to develop a climate plan consistent with the Paris Agreement.

Local Government Leaders' Climate Change Declaration 2017

[25] The Mayor and councillors of Auckland Council signed the Local Government Leaders' Climate Change Declaration 2017, which was published by Local Government New Zealand on 22 July 2017. The declaration contained a commitment to develop and implement ambitious action plans that reduce greenhouse gas (GHG)

emissions and support resilience, including plans to promote walking, cycling, public transport and other low carbon transport options.

Declaration of climate emergency by Auckland Council

[26] On 11 June 2019 the members of Auckland Council's Environment and Community Committee, including the mayor and ward councillors, passed a unanimous resolution to declare a climate emergency.

Te Tāruke-ā-Tāwhiri: Auckland's Climate Plan

[27] On 21 July 2020 members of Auckland Council's Environment and Community Committee passed a unanimous resolution to adopt Te Tāruke-ā-Tāwhiri (TTT). A core goal of TTT is to reduce Auckland's GHG emissions by 50 per cent by 2030 (against a 2016 baseline) and achieve net zero emissions by 2050.

Auckland's road transport emissions

[28] AAA pleads and the respondents accept that, between 2009 and 2018 road transport GHG emissions in Auckland increased by around 11 per cent, and that between 2009 and 2019 total vehicle kilometres (TVK) travelled by private motor vehicles, light commercial vehicles and heavy vehicles in the region increased by around 28 per cent.

[29] In 2018 road transport GHG emissions were around 38.5 per cent of total GHG emissions in Auckland and 5.5 of total GHG emissions in New Zealand.

The evidence

[30] The applicants have presented a number of affidavits in support of their claim. The first was from Nicholas Lee, a director of AAA. The thrust of his evidence was that it is imperative to reduce emissions and that Auckland Council's response to the climate emergency in the RLTP was poor. The Council had failed to listen to AAA's advice and, in his view, to meet the standards set out in the GPS 2021, and the objectives in TTT and had failed to meet its obligations as a member of the C40 Cities climate leadership group.

[31] AAA also filed an affidavit from Will Steffen, an earth system scientist. He summarised the scientific literature on climate change and its causes and effects, and the steps necessary to prevent or reduce its impact. Tim Naish, a professor in Earth Sciences at Victoria University of Wellington, who specialises in climate and sea level science, provided evidence similar to and supportive of Professor Steffen. He referred to a number of the relevant international agreements and legislation.

[32] Professor Alistair Woodward, a professor of Epidemiology and Biology at Auckland University, gave evidence about the effect of climate change on human health, with a particular focus on the effects on Māori.

[33] Todd Litman of Victoria, Canada, a planning consultant, and founder and Executive Director of the Victoria Transport Policy Institute, (an institute that performs transportation policy analysis for clients around the world), gave his opinion of the RLTP.

[34] In Mr Litman's opinion:

- (a) the four objectives set out in GPS 2021 would all be served by reducing transport GHG emissions and TVK travelled;
- (b) the RLTP fails to address and justify why transport emissions can only be expected to decrease by one per cent;
- (c) the RLTP underplays the importance of investing in infrastructure to reduce emissions;
- (d) removing road space for cars can lead to a "disappearing" effect on traffic;
- (e) reducing TVK will not inevitably led to a decrease in economic, social and cultural growth. Economic productivity has increased in places where there has been a reduction in TVK and emissions; and
- (f) creating more roads will lead to more tailpipe emissions.

[35] Jayne Metcalfe, a chemical engineer and air quality scientist, and director of Emission Impossible Limited, a specialist air quality and emissions management consultancy, considers that the RLTP will not meet a number of the emission reduction targets that Auckland Council has set. Further, in her opinion:

- (a) the RLTP does not focus enough on 'Avoid and Shift' measures to reduce emissions;
- (b) the RLTP modelling projections on emissions are flawed and even if they were correct show that Auckland will not meet its reduction goals;
- (c) the RLTP fails to take into consideration the lifecycle emissions of roads. The plan only considers tailpipe emissions;
- (d) the RLTP underestimates the benefit that infrastructure investment can have on emission reduction;
- (e) the RLTP incorrectly asserts that new roading projects will not necessarily increase emissions; and
- (f) the RLTP incorrectly asserts that reducing the number of lanes will simply result in an increase in congestion and no decrease in emissions.

[36] Ralph Chapman, an economist, supports AAA's judicial review. In his opinion:

- (a) Auckland needs to reduce its transport emissions;
- (b) the RLTP underestimates the benefit that infrastructure investment can have on emission reduction;
- (c) the RLTP overestimates the negative effects that reallocation of road space will have. There would be economic and other benefits from moving away from car dependent transport which would help to reduce emissions;

- (d) removing road space for cars can lead to a “disappearing” effect on traffic;
- (e) there will be significant national economic costs if Auckland emissions are not reduced; and
- (f) the RLTP does not align with current environment policy and thinking and is essentially delivering a plan to carry on ‘business as usual’.

[37] The principal evidence for the first and second respondents was by Hamish Bunn, the Group Manager, Policy Planning and Investment, AT. Mr Bunn gave evidence about the process of drafting the RLTP and responded to the allegations in the evidence of the applicant.

[38] Mr Bunn outlined the way in which the funding was allocated for the RLTP. The overall funding for transport projects in Auckland was \$31.4 billion. For various reasons much of the funding, in total \$29.5 billion, was allocated to ‘baseline’ (mandatory) projects, leaving \$1.8 billion to fund other discretionary projects. In the final budget the discretionary aspect of the budget came to \$2.066 billion. Within the budget that AT was operating it had to decide which packages (which were comprised of the baseline and discretionary projects) it would fund.

[39] Mr Bunn discussed the models that were used to forecast emission reduction. The principal model used was the Macro Strategic Model (MSM). The forecasted reduction in emissions, with all proposed interventions, resulted in a six per cent decrease by 2028 with an overall decrease of one per cent between 2016 and 2028. The most effective method of reducing emissions was aggressive road pricing schemes.

[40] In addition to using MSM, AT also used the OECD spine model. They modelled three scenarios: “promote public transport”; “promote EV package”; and “land use policy packages”. The finding of these models was also that aggressive road pricing was most effective.

[41] AT also used the CURB model which Mr Bunn did not consider very helpful.

[42] Mr Bunn noted that the AT staff report and s 14 analysis were not the only materials available to the RTC and AT Board when making their decisions. Apart from the existing experience of the AT Board members, several of them had been involved with the development of the Auckland Transport Alignment Project (ATAP) and RLTP so were further informed through that process.

[43] In response to AAA's claim that the RTC and AT Board had been given incorrect advice in relation to the mitigating effects of infrastructure, in particular that there would only be a small benefit, Mr Bunn noted:

- (a) first, infrastructure improvements take time to achieve and their corresponding emission reductions take time to eventuate. In the roughly 10-year time frame the emission reduction for infrastructure changes will be small;
- (b) secondly, while emission reduction might be small it does not mean that the reductions are insignificant and were not taken into account. Mr Bunn points out that many emission reduction measures will result in significant local area reductions, but when viewed on a national or regional scale they may be comparatively small. Mr Bunn says that projects will be prioritised on the basis that they provide significant local improvements or reductions rather than by their regional impact;
- (c) thirdly, large scale public transport interventions have minimal impact on travel behaviour outside peak periods;
- (d) fourthly, the structure and layout of Auckland (the urban sprawl) means that the average distances that a person needs to travel for work, shopping and social/personal trips are significant. These distances will usually necessitate that use of motorised transport;

- (e) fifthly, even a substantial project like the RLTP will only have a limited impact;
- (f) sixthly, non-car modes of transport compete with one another rather than with cars; and
- (g) seventhly, additional road capacity will be consumed by drivers.

[44] In response to Mr Chapman and Mr Litman's claims that large roading projects will result in increased emissions, Mr Bunn agreed that this was at least theoretically correct. However, in the Auckland context a population growth of 22 per cent is expected which will place greater demands on the road system. The new roading projects, when taking into account the increases in the population, will mean that there will not be a per capita TVK increase during the relevant period. Moreover, the population growth is anticipated to create more congestion which should dissuade many from driving.

[45] Mr Bunn disputes that the RTC and AT Board were given incorrect advice that no plausible change could be made to the RLTP that would yield different results. First, there were not any changes that could have been made that would materially change the results, and secondly, the resolution of the Planning Committee shows that other options were considered, namely land use policy.

[46] Mr Bunn defended the statement that "it is not a given that projects will automatically lead to increased tailpipe emissions". He states that in the following scenarios there could be a net reduction in emissions:

- (a) shorter routes;
- (b) reduced congestion; and
- (c) tolling.

[47] Mr Bunn also disputed the claim that no additional funding was made available to provide further reallocation of road space. Mr Bunn noted that there already been

significant investment into reallocating road space, and that the discretionary part of the budget did not need to go towards this. The baseline budget also encouraged sustainable modes of transport as well as sustainable growth projects.

[48] Mr Bunn next refuted the claim that the advice in relation to removing additional car lanes was wrong. He made four points:

- (a) first, that simply removing additional lanes without providing an appropriate alternative would not improve the situation. If there were to be fewer lanes without an alternative, the added congestion would negate any benefits;
- (b) secondly, even without providing alternative modes in lieu of removing lanes there is still an expense associated with removing car lanes. The budget had been fully allocated and there were no funds left to resource additional lane removal;
- (c) thirdly, there are negative economic, social and cultural effects of removing lanes; and
- (d) fourthly, Mr Litman and Mr Chapman's evidence that there will be "disappearing traffic" if lanes were removed does not apply in the Auckland context.

[49] In response to the claim that the RLTP is inconsistent with GPS 2021, Mr Bunn made the following points:

- (a) a considerable part of the budget for the ATAP/RLTP will be consumed by the maintenance of the Auckland transport infrastructure. Accordingly, the remaining funds do not allow much to occur in the way of emission reductions;
- (b) with the limited discretionary budget most of the projects that were funded would at least indirectly help to reduce emissions;

- (c) there are multiple objectives of GPS 2021. The focus is not solely on emission reductions;
- (d) GPS 2021 does not require a per capita reduction of TVK or a reduction of TVK. It only requires a reduction in GHG emissions and simply refers to TVK as a proposed indicator;
- (e) the forecasted increase of TVK is primarily attributable to the increase in the population; and
- (f) the suggestion there should be a reallocation of the budget from new highways and renewals to achieve more ambitious reductions is not plausible. Funding renewals is necessary and will help to reduce emissions. Mr Bunn also disagreed with the characterisation that there are “new highways” being funded. Only one project could be called a new highway.

[50] Mr Bunn concluded by recognising the need for GHG emission reductions and accepting that the RLTP only achieves modest reductions but pointed out the following limiting factors:

- (a) overall budgetary constraints and the committed nature of part of the programme;
- (b) current land use and travel patterns in Auckland, which mean that public transport and cycling interventions will struggle to compete for many of the journeys Aucklanders make – particularly outside of the peak period;
- (c) high population growth in Auckland;
- (d) the need to simultaneously satisfy the other strategic priorities in GPS 2021; and
- (e) the inherently limited ambit of a RLTP.

[51] Jenny Chetwynd, the Executive General Manager, Planning & Investment AT, gave evidence on AT's role and aspects of the RLTP as relevant to AT. She also explained the relevance of ATAP in the development of the RLTP.

[52] Adrienne Young-Cooper, the Chair of the Board of AT, gave evidence concerning the context of the RLTP, the role of the RTC and the AT Board in relation to the RLTP and AT's overall response to climate change. She gave details of her (and other Board members') relevant experience. She also made the point that the RLTP was not prepared in a vacuum. Its starting point is the real life situation in Auckland. Also this was not the first RLTP. It carries forward many long term capital projects.

[53] Evidence for the third respondent Council was given by Megan Tyler, the Chief of Strategy at Auckland Council. Her affidavit covered the structure of Auckland Council, the Council's response to climate change and its consideration and endorsement of the RLTP.

[54] The applicant filed a number of affidavits in reply:

- (a) a further affidavit from Mr Litman responding to Mr Bunn's affidavits and particularly criticising the Macro Strategic Model (MSM), which Mr Bunn had relied on in developing the RLTP. In his opinion it has a systemic bias which may underestimate induced vehicle travel, leverage effects and traffic evaporation.
- (b) an affidavit from Neelima Ghanta, who was seconded to work at AT and has experience and education in Urban Planning. She considered the process undertaken to develop the RLTP was flawed and did not comply with good planning practice;
- (c) a further affidavit by Ms Metcalfe in which she repeated her criticism of the process adopted;
- (d) a further affidavit of Mr Chapman, again noting that the MSM modelling should not be relied on too heavily; and

- (e) Alec Tang, a chartered environmentalist who previously worked with Auckland Council, also gave evidence in reply. The general thrust of his evidence was that the RLTP did not adequately take into account the TTT.

[55] Although other affidavits were filed, the above affidavits contained the principal evidence before the Court on the issues.

Issues

[56] The principal issues for the Court are:

- (a) Was the RLTP developed in accordance with the purposes of the LTMA and consistent with GPS 2021?
- (b) Were the challenged decisions of the RTC, the Planning Committee and AT Board vitiated by failings in the process for developing the RLTP and in particular, were the challenged decisions vitiated by material inaccuracies in the advice AT provided the RTC, Planning Committee and the AT Board?
- (c) Did the Planning Committee fail to identify all reasonably practicable options as required by s 77 of the LGA before endorsing the RLTP?
- (d) Did the Planning Committee breach s 80 of the LGA by failing to identify its decision to endorse the RLTP as being significantly inconsistent with plans or policies of Council, including TTT?

The development of the RLTP

[57] As AAA challenge the process adopted by AT in its preparation of the RLTP it is necessary to consider in a little more detail the background to the development of the RLTP.

[58] An overview of the development of the RLTP is set out in Ms Chetwynd's affidavit, with more detail provided in Mr Bunn's affidavit.

[59] The ATAP played a significant part in the development of the RLTP. ATAP was developed as a strategic partnership between Auckland Council and central government in 2015 to address Auckland's transport challenges. It is a non-statutory agreement between Government (the Ministers of Finance and Transport) and AT on transport priorities for Auckland over a 10 year period. It includes an agreed cross-agency partnership involving Ministry of Transport, Waka Kotahi New Zealand Transport Agency (NZTA), KiwiRail, the Treasury, Auckland Council, AT and the State Services Commission.

[60] Ms Chetwynd confirms that since 2015 ATAP has delivered a series of strategic reports and developed an indicative 10 year package of transport investments for Auckland on a regular basis. It informs statutory processes, including the preparation of the RLTP and the National Land Transport Plan (NLTP). ATAP is updated and developed with an awareness of the need to satisfy statutory requirements and, in particular, to be consistent with the relevant GPS. In 2020 central government and Auckland Council updated the 2018 ATAP package. A revised set of objectives for the ATAP package for 2021 was agreed. While not identical to the strategic priority settings in GPS 2021, in Ms Chetwynd's opinion they are well aligned with them.

[61] In developing the RLTP, first the objectives to guide both ATAP and the RLTP were identified and set out in the ATAP terms of reference in May 2020. AT then:

- identified baseline projects and programmes being existing matters to include in ATAP and the RLTP without further reprioritisation;
- sought internal proposals for new projects and programmes as well as increased funding for existing projects and programmes; and
- undertook reprioritisation of existing projects which were not part of the baseline and prioritisation of new projects to agree a short list of projects to be included in ATAP and the RLTP.

[62] On 15 September 2020 the RTC was briefed on the development of the RLTP with regard to the ongoing ATAP programme. It was asked to decide the strategic objectives for the RLTP on 29 October 2020.

[63] Based on feedback on the ongoing ATAP programme and informed by the above process, drafting of the RLTP began in late January 2021. By that stage the ATAP programme had been approved by the ATAP governance group and was used as the foundation for the programme of activities in the draft RLTP. However, a number of meetings and workshops were held between 25 February 2021 and 18 June 2021 to further develop the RLTP.

[64] The RTC received and considered the draft RLTP on 23 February 2021 and on 25 February 2021 approved the draft to go to the Planning Committee for its endorsement to be approved for consultation. The Planning Committee endorsed the draft RLTP for consultation on 11 March 2021.

[65] During the Planning Committee's consideration of the draft RLTP it requested AT and the Council work with central government to investigate "levers" complementary to the RLTP to reduce transport related emissions. AT and the Council proposed a Transport Emissions Reduction Plan (TERP) to be reported to the Environment and Climate Change Committee for adoption mid-2022.

[66] On 23 March 2021 the RTC approved the draft RLTP for public consultation. Public consultation took place between 29 March and 2 May 2021 with hearings on 29 and 30 April 2021. In total, 5,814 submissions were received, including from AAA.

[67] The RTC met to consider the feedback from public consultation on 10 and 24 May 2021. The feedback as relevant to the issue of climate change was noted in an executive summary as:

There were two particular areas of criticism of the RLTP – that the programme did not do enough to address climate change and should be substantially reprioritised to increase investment in sustainable modes; and, that the programme does not do enough to address congestion and needs reprioritisation to address freight connectivity issues.

[68] The summary went on to note:

Although the RLTP is consistent with the outcomes in these key GPS priority areas, we agree with the submitters that it is desirable to seek better outcomes in terms of emission reductions and improving freight connectivity (amongst other areas) However, we are also cognisant that there is limited opportunity to reprioritise the RLTP towards one area without compromising other GPS priorities or the overall contribution to efficiency, effectiveness, safety, or the public interest. Scenario testing as part of ATAP indicated that any significant reprioritisation of activities is unlikely to make a significant difference to [GHG] emissions.

[69] The RTC held workshops on 14 and 16 June 2021 to discuss legal advice on the RLTP, including its consistency with s 14 of the LTMA and to discuss changes to the RLTP.

[70] The decisions under review then followed.

Was the RLTP developed in accordance with the purposes of the LTMA and consistent with GPS 2021?

[71] The RLTP is provided for by the LTMA. The LTMA requires AT to prepare a RLTP every six financial years and to approve it by a date appointed by NZTA.¹

[72] Section 14 requires the RTC to be satisfied that the RLTP contributes to the purpose of the LTMA and is consistent with the GPS on land transport:

14 Core requirements of regional land transport plans

Before a regional transport committee submits a regional land transport plan to a regional council or Auckland Transport (as the case may be) for approval, the regional transport committee must—

- (a) be satisfied that the regional land transport plan—
 - (i) contributes to the purpose of this Act; and
 - (ii) is consistent with the GPS on land transport; and
- (b) have considered—
 - (i) alternative regional land transport objectives that would contribute to the purpose of this Act; and
 - (ii) the feasibility and affordability of those alternative objectives; and
- (c) have taken into account any—

¹ LTMA, s 13(2).

- (i) national energy efficiency and conservation strategy; and
- (ii) relevant national policy statements and any relevant regional policy statements or plans that are for the time being in force under the Resource Management Act 1991; and
- (iii) likely funding from any source.

[73] Part 2 of the LTMA in which s 14 is contained, provides for the “Planning and funding of land transport system”. The NZTA is established in Part 4.

[74] The required form and content of the RLTPs are provided for in s 16 of the LTMA. The section confirms the focus on funding considerations. As the evidence of Mr Bunn and Ms Chetwynd also confirms, RLTPs are essentially bids to NZTA for National Land Transport Funding (NLTF).² The RLTP is primarily a proposed capital programme.

[75] The NLTF is the principal source of transport funding in New Zealand. Funds provided under the NLTF can only be used for specified transport activities. Besides being a public statement of transport objectives, policies and priorities, the main practical purpose of the various RLTPs is to collect and prioritise funding bids from multiple agencies at a regional level so that they can be considered by NZTA for inclusion in the NLTF. Inclusion of a project in the RLTP does not guarantee funding. The RLTP in issue set out Auckland’s transport objectives, policies and priorities and listed the activities and projects to be submitted as bids for funding from the NLTF.

[76] AAA submits that the RTC failed to comply with s 14 of the LTMA because it had no proper or reasonable grounds to be satisfied that the RLTP contributed to the purpose of the LTMA and nor could it be satisfied that the RLTP was consistent with GPS 2021, particularly the climate change strategic priority and associated primary outcome identified in that document.

[77] In the context of considering whether the RTC could be satisfied the RLTP met the requirements of s 14, Mr Salmon QC referred to the comments of Keith J and

² LTMA, s 10(3).

Elias CJ in *Discount Brands Ltd v Westfield (NZ) Ltd* where both had emphasised the obligation imparted by the requirement to be “satisfied”.³ Keith J had noted:⁴

[52] Significant in the basic requirements stated in ss 93(1) and 94(2) are the double emphases on “satisfied”, the strongest decisional verb used in the Act, the etymology of “satisfy” (to do enough), and a standard meaning relevant in this context – to furnish with sufficient proof or information; to assure or set free from doubt or uncertainty; and to convince; or to solve a doubt, difficulty.

[78] Elias CJ noted:⁵

[23] The requirement that the consent authority must be “satisfied” that adverse effects on the environment are minor before it decides not to notify a resource consent application for a discretionary activity is a significant obligation. By contrast, when a substantive decision is made on the application for resource consent for a discretionary activity under s 105, the consent authority is simply empowered to decide whether or not to grant the consent and on what conditions, after taking into account the considerations identified by the Act and in the context of the district plan. Such decisions may be finely judged. That is not the approach required of the decision maker by s 94(2). The requirement that the consent authority be “satisfied” that adverse effects on the environment are minor is a pointer to additional conviction and the need for some caution.

[79] Mr Salmon argued that the requirement to be satisfied placed a significant onus on the RTC.

[80] However, the above comments from *Discount Brands* must be read in the context of what was in issue in that case. It involved a judicial review challenge to the decision of the Council that it was satisfied the adverse effect on the environment would be minor, so that it was unnecessary to require the applicant to give notice to potentially affected land-owners of the application for resource consent.

[81] As Cooper J observed in *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council*, a decision not to notify under the Resource Management Act 1991 is essentially a fact-driven judgment which is of pivotal importance to the rights of third parties to participate in the statutory processes in

³ *Discount Brands Ltd v Westfield (NZ) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

⁴ *Discount Brands Ltd v Westfield (NZ) Ltd*, above n 3 (footnotes omitted).

⁵ *Discount Brands Ltd v Westfield (NZ) Ltd*, above n 3.

relation to resource consent applications under that Act.⁶ By contrast the *New Zealand Motor Caravan Association Inc* case involved the Council’s control of freedom camping by the creation of a bylaw. The decision involved a high policy content.

[82] As noted, the RLTP is principally a funding document. It also includes a high policy content. As Mallon J noted in the *Thompson v Minister for Climate Change Issues*, a case relied on by AAA:⁷

If a ground of review requires the Court to weigh public policies that are more appropriately weighed by those elected by the community it may be necessary for the Court to defer to the elected officials on constitutional grounds, and because the Court may not be well placed to undertake that weighing. ...

[83] In the *New Zealand Motor Caravan* case, Cooper J also considered the fact there had been a consultative process before the decision was made to be a relevant consideration.⁸ Again, the LTMA provides in s 18 for a consultative procedure during the preparation of the RLTP.

[84] The intensely fact driven analysis required under the notification provisions of the Resource Management Act can be contrasted with the evaluative exercise required under s 14 of the LTMA that the RLTP “contributes to” the purpose of the LTMA and is “consistent with” GPS 2021. The close factual inquiry required for councils to “be satisfied” when making decisions about notification of resource consent applications involves quite different considerations and the application of a different test from that for the RTC to be satisfied of under s 14 of the LTMA .

[85] For those reasons the test that the RTC must meet to “be satisfied” as to the requirements of s 14(1) of the LTMA is quite different from consideration of the test discussed in *Discount Brands*.

[86] On a related preliminary point of interpretation, Mr Salmon submitted that the Court has recognised the particular importance of judicial review in relation to

⁶ *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council* [2014] NZHC 2016, [2014] NZAR 1217 at [99].

⁷ *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160 at [134] (footnotes omitted).

⁸ At [100].

decisions that involve climate change, referring to the decisions of *Thomson v Minister for Climate Change Issues*; *Hauraki Coromandel Climate Action Inc v Thames Coromandel District Council*; and the observation of the Court of Appeal in a different context in *Smith v Fonterra Co-operative Group Ltd*.⁹

[87] However, the heightened scrutiny or different approach to the intensity of review is not subscribed to by all. For example, in *Patterson v District Court, Hutt Valley*; and *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police* Cooke J forcefully noted the complications involved in applying a variable standard of review.¹⁰ Such an approach raises issues as to identifying the standard or intensity of review to be applied in a particular case which can lead to difficulties. I agree with Cooke J that the focus should rather be on whether the decision-maker has acted in accordance with the power in issue and with any other requirements imposed by relevant legislation.

[88] There is also force in Ms Heine QC's submission that, in context, although the decisions under review may have implications in terms of GHG emissions and climate change, they are not climate change decisions as such. They are land transport planning and funding decisions. The approach argued for by the applicants would have it that in every case which may have an impact on climate change (even if peripheral) a different standard of review would apply. The difficulty with such an approach is obvious.

The purposes of the LTMA

[89] As noted, before submitting the RLTP to AT for approval, the RTC had to be satisfied that the RLTP contributed to the purposes of the LTMA. The purpose of the

⁹ *Thomson v Minister for Climate Change Issues*, above n 7, at [134]; *Hauraki Coromandel Climate Action Inc v Thames Coromandel District Council* [2020] NZHC 3228, [2021] 3 NZLR 280; and *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284. See also *Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation* ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, 13 January 2020); and, writing extrajudicially, Helen Winkelmann, Susan Glazebrook and Ellen France "Climate Change and the Law" (paper prepared for Asia Pacific Judicial Colloquium, Singapore, 28–30 May 2019) at [59] regarding Human Rights.

¹⁰ *Patterson v District Court, Hutt Valley* [2020] NZHC 259; and *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police* [2020] NZHC 1456.

LTMA is said to be “to contribute to an effective, efficient and safe land transport system in the public interest”.¹¹

[90] Mr Salmon noted that prior to the RTC decision the Mayor and councillors had declared a climate emergency, Auckland Council had committed to develop a plan consistent with the Paris Agreement,¹² and had recognised in TTT a 64 per cent reduction in transport GHG emissions by 2030 was required. He argued that the failure to address those matters and the applicant’s evidence showed that the proposed investment plan in the RLTP would not deliver social, economic, cultural and environmental wellbeing. As such, it could not be said to contribute to an effective, efficient and safe land transport system that was in the public interest.

[91] The starting point must be the wording in the LTMA. The statutory purpose identified in s 3 of the LTMA makes no reference to social, economic, cultural or environmental wellbeing as part of the purpose of the LTMA. Although GPS 2021 provides that a land transport system will be in the public interest where it supports economic, social, cultural and environmental wellbeing, the statutory wording of the LTMA relates the public interest referred to in s 3 back to the concepts of an effective, efficient and safe land transport system.

[92] I also note that the amendments to the statutory purpose of the LTMA in 2013 removed the reference to “improving social and environmental responsibility”. At the same time, s 14 was amended to remove references to:

- protecting and promoting public health; and
- ensuring environmental sustainability

from the list of factors that the RTC had to be satisfied the RLTP contributed to.

[93] It appears the decision to remove the references to public health (other than the general concept of safety) and environmental sustainability was part of a deliberate

¹¹ LTMA, s 3.

¹² By its membership of the C40 Cities Climate Leadership Group.

refocusing of the LTMA at the time. In the explanatory note to the Land Transport Management Amendment Bill 2012, which led to the amendment in 2013, it was stated:¹³

The funding framework will be refined to focus on the effectiveness and efficiency of public expenditure. This will be reflected in a new purpose and streamlined decision-making criteria that will emphasise effectiveness, efficiency and safety.

[94] For those reasons, I do not consider that, in considering whether it could be satisfied that the RLTP contributed to the purposes of the LTMA the RTC was required to consider whether the RLTP addressed environmental sustainability and climate change. There is no suggestion that the RLTP did not contribute to an effective, efficient and safe land transport system

[95] Mr Salmon suggested if that was the correct statutory interpretation of the amendments to the LTMA, then GPS 2021 would be ultra vires to the extent that it identified climate change as a priority. I do not consider that follows. Section 68 of the LTMA, while focused on the application of funding, includes reference to the “results the Crown wishes to achieve from the allocation of funding”. That wording supports the inclusion of a number of objectives, including climate change as one of the priority strategies under the GPS as a result the Crown wishes to achieve. It would not be ultra vires provided it was not directly inconsistent with the purpose of an effective, efficient and safe land transport system in the public interest. In any event, the legality of GPS 2021 is not in issue before the Court. The respondents accept the need for the RTC to be satisfied the RLTP was consistent with GPS 2021. The point for present purposes is that environmental sustainability and climate change are not expressly identified as purposes of the LTMA.

[96] The place for consideration of climate change is in the requirement for the RTC to be satisfied the RLTP was consistent with GPS 2021.

[97] Finally, and in any event, Appendix 9 to the RLTP addressed the purposes of the LTMA, and how the RLTP addressed those purposes. In doing so, it referred to

¹³ Land Transport Management Amendment Bill (46—1), explanatory note.

(and thus took into account) the suggestion in GPS 2021 that public interest had a broader concept. In addressing the public interest consideration, the appendix referred to developing the public transport and cycling networks to encourage greater take-up of more sustainable modes. It noted that the RLTP expected:

- 64 per cent of new trips in the AM peak will be taken up by public transport and active modes;
- 200 kms of new or improved cycling infrastructure will be delivered; and
- the investment programme provided for, along with initiatives already signalled by Government, will contribute to GHG emission reductions goals by achieving a reduction in GHG emissions between 2016 and 2031 despite a 22 per cent increase in Auckland's population over the same period. When coupled with other policy levers promoted in the RLTP, much larger reductions in GHG emissions could be achieved.

[98] For the above reasons the RTC was entitled to be satisfied that the RLTP contributed to the purposes of the LTMA.

GPS 2021

[99] As noted, the principal place for consideration of the concerns of AAA regarding climate change in this context is through the requirement for the RLTP to be consistent with GPS 2021.

[100] AAA says AT's approach was that it would be sufficient if the RLTP could be said to lend any support to a transition to a low carbon transport system and make any contribution to a reduction in GHG emissions, whereas the proper interpretation of the climate change primary outcome was that the investment decisions themselves were required to support the rapid transition to a low carbon transport system, contribute to the reduction of emissions, and give effect to the CCC's emissions reduction targets.

[101] Part 3 of LTMA provides for the Minister to issue a GPS on land transport covering a period of six financial years. On 17 September 2020 the Government published GPS 2021, which came into effect on 1 July 2021.

[102] GPS 2021 identified four strategic priorities:

- (a) safety;
- (b) better travel options;
- (c) improving freight connections; and
- (d) climate change.

[103] Under the Climate Change section of the GPS 2021:

- (a) the strategic priority was noted as: “Transforming to a low carbon transport system that supports emissions reductions aligned with national commitments, while improving safety and inclusive access”;
- (b) a primary outcome was: “Investment decisions will support the rapid transition to a low carbon transport system, and contribute to a resilient transport sector that reduces harmful emissions, giving effect to the emissions reduction target the CCC recommended to Cabinet until emissions budgets are released in 2021”; and
- (c) two of the short to medium-term results, to be delivered by 2031, were:
 - (i) reduced GHG emissions; and
 - (ii) reduced air and noise pollution.

[104] AAA submits that the strategic priority of climate change is the overriding and overwhelming consideration of GPS 2021. Mr Salmon noted that, after consultation, the climate change primary outcome was amended to provide the direction the

Auckland Council had sought. He emphasised the change of wording to provide for “giving effect to”. In his submission the climate change primary outcome was a strong directive creating a firm obligation on those subject to it.

[105] Mr Salmon submitted that the four strategic priorities interrelated and that climate change initiatives would deliver co-benefits across other strategic priorities in GPS 2021. The strategic priorities did not compete or pull in different directions.

[106] He argued that the outcomes acknowledged in the RLTP were manifestly inconsistent with GPS 2021. The AT s 14 analysis proceeded on an erroneous understanding of what the climate change strategic priority and primary outcome required. As noted, Mr Salmon characterised AT’s interpretation as, that it was sufficient if the RLTP investment decisions could be said to lend any support to transition to a low carbon transport system and make any contribution to a transport sector that reduced emissions. He argued the proper interpretation was that investment decisions were required to give effect to the CCC’s emissions reduction targets. The RLTP had to make the greatest contribution it could to reducing transport emissions and meet the CCC target. AT had to pull the transport investment levers as far as it could, notwithstanding that delivering climate change primary outcome might require additional actions outside RLTP.

[107] The starting point for consideration of AAA’s submissions as to the primacy of the Climate Change strategic priority is its place in GPS 2021. Climate change is the fourth listed strategic priority, although I accept all are of equal weight. There is nothing in the format or wording of GPS 2021 to suggest that any one strategic priority, such as climate change, has priority over or is more important than the other strategic priorities. If climate change was to have the pre-eminence AAA argue it has, GPS 2021 could have been structured that way or could have expressly stated it. Neither the format of GPS 2021 nor its wording supports the argument that climate change is to have priority.

[108] Each strategic priority refers to key outcomes, including primary and co-benefits. The strategic priorities overlap to a degree, but not entirely. For example, under safety, environmental sustainability does not feature as a co-benefit.

[109] It also has to be observed that each of the strategic priorities is, at least in part, aspirational. For instance, the safety priority is “developing a transport system where no-one is killed or seriously injured”, and the primary outcome is stated to be “to develop a transport system that advances New Zealand’s vision that no-one is killed or seriously injured while travelling ...”. Such an outcome is clearly aspirational. While people drive vehicles and ride bikes accidents will occur and people will be injured and killed.

[110] Nor is there anything in s 68 of the LTMA, which provides for the content of the GPS,¹⁴ to suggest that climate change is to be the focus. Rather, the focus is clearly directed at funding considerations, albeit that those funding considerations are expected to achieve the results the Crown wishes to achieve as noted in GPS 2021.

[111] Finally, as Ms Heine submitted, such an interpretation (that the Climate Change strategic priority has pre-eminence) would be inconsistent with the activity class framework of the LTMA and GPS 2021 itself. GPS 2021 sets minimum and maximum funding ranges for the activity classes referred to in s 20 of the LTMA. The RLTP is required to address the activity classes to be funded and the funding ranges for each activity claim.¹⁵ NZTA is required to allocate funding within those ranges. Under those provisions, GPS 2021 requires funding to be allocated to state highway and local road improvements and maintenance. Mr Salmon’s suggestion that state highways and local roads could be improved and maintained by applying the funding to further bus lanes and cycle ways to the exclusion of motor vehicles does not withstand scrutiny when the statutory context is considered. It is also inconsistent with the following statement in GPS 2021:

- ¹¹. A large proportion of land transport will continue to be focussed on maintaining the transport system at acceptable levels of service, taking account of the strategic priorities in GPS 2021.

The levels of service referred to must apply to all road users, including freight and private vehicle use. It is not restricted to public transport or cycling.

¹⁴ LTMA, s 68.

¹⁵ LTMA, s 68(2)(b)(ii) and (vii).

[112] It follows that I find the Climate Change Strategic Priority was not a pre-eminent or dominant consideration under GPS 2021 as suggested by AAA. The Climate Change Strategic Priority was one of the four strategic priorities under GPS 2021. The respondents were required to be satisfied that the RLTP was consistent with GPS 2021 taken overall. AAA's challenge to the decisions at issue must be considered in that context.

[113] However, AAA goes further and submits that there were fundamental failings in the process adopted by AT in developing the RLTP and that its advice to decision-makers was flawed so there was no proper basis for the RTC to be satisfied that the RLTP was consistent with GPS 2021. It accordingly erred in approving it. That engages the second principal issue, namely: were the decisions vitiated by failings in the process for the development of the RLTP and/or inaccurate advice to the RTC?

Were the decisions vitiated by failings in process or factual inaccuracies in the information provided to decision-makers?

[114] Mr Salmon submitted that, to be satisfied the RLTP was consistent with GPS 2021, the RTC had to be sufficiently and relevantly informed. He submitted that the RTC did not have an adequate factual basis to be satisfied the RLTP was consistent with GPS 2021.¹⁶ The basis for the challenge to the decisions on this ground is explained in the following passage from the *Secretary of State for Education and Science v Metropolitan Borough of Tameside*:¹⁷

If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made on a proper self direction as to those facts, whether the judgment has not been made on other facts which ought not to have been taken into account.

[115] Similarly, in *R v Connell* the High Court of Australia held the decision-maker could not have been properly satisfied as there was “no evidence upon which the [decision-maker] could be satisfied that the rates were anomalous”.¹⁸

¹⁶ *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1977] AC 1014 (HL) at 1047.

¹⁷ Per Lord Wilberforce at 681.

¹⁸ *R v Connell* (1944) 69 CLR 407.

[116] Mr Salmon submitted New Zealand Courts had taken the same general approach. In *Air Nelson Ltd v Minister of Transport* the Court of Appeal held that an inadequate briefing to the Minister of Transport, which failed to properly inform the Minister of key facts relevant to the decision, constituted a material error of fact.¹⁹

[117] AAA's submission is effectively that RTC (and later the AT Board) did not have sufficient information before it (or it had inaccurate information before it) when they endorsed or approved the RLTP. It effectively challenges the factual basis for RTC's decision as untenable.

[118] I note that the Supreme Court have confirmed that it will be a rare case where review will succeed on the basis there was no evidence to support the decision or that the only reasonable conclusion contradicts the decision. In *Bryson v Three Foot Six Ltd* the Supreme Court said:²⁰

[26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs “in which there is no evidence to support the determination” or “one in which the evidence is inconsistent with and contradictory of the determination” or “one in which the true and only reasonable conclusion contradicts the determination” Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test. ...

[119] Mr Salmon also emphasised the wording of the primary outcome in the Climate Change section of the Strategic Priority required “giving effect to” the emissions reduction target of the CCC. He referred to the case of *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* and submitted in that case the Supreme Court had confirmed the directory nature of the requirement to “give effect” to.²¹

[120] However, in the *King Salmon* case the Supreme Court went on to say:

¹⁹ *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139. See also *Ennor v Auckland Council* [2018] NZHC 2598, [2019] NZRMA 150 at [31].

²⁰ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 (footnotes omitted). See also *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153.

²¹ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

[80] We have said that the “give effect to” requirement is a strong directive, particularly when viewed against the background that it replaced the previous “not inconsistent with” requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

[121] The wording of both the Climate Change Strategic Priority and the primary outcome is at a very high level of abstraction.

[122] Further, as noted, the obligation under s 14 of the LTMA is for the RLTP to be consistent with GPS 2021 taken as a whole. The requirement that investment decisions will give effect to the GHG emissions target of the CCC is found within the primary outcome of one of the strategic priorities of the GPS. It is not a dominant requirement.

[123] Next, there is a difference between “give effect to” and “consistency”. The requirement to be “consistent with” is clearly not as directory as the requirement to “give effect to”. The relevant definition of “consistent” in the OED is “agreeing or according in substance or form; congruous, compatible”.²² Section 14 of the LTMA requires the RTC to be satisfied the RLTP was consistent with GPS 2021 overall.

[124] As Ms Heine submitted, consistency with GPS 2021 cannot mean absolute consistency at a sentence-by-sentence level because even within the priorities there are inconsistencies or considerations which pull in separate ways. Further, the principles of *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* provide limited assistance where, as here, GPS 2021 has four strategic priorities of equal standing.

[125] Finally on these background interpretative points, the requirement of s 14 for the RTC to be satisfied the RLTP is “consistent with” the GPS overall can be contrasted with the wording of s 19B of the LTMA which provides the NZTA must ensure that

²² *Oxford English Dictionary* (online ed, Oxford University Press, 2022), definition of “consistent”.

the NLTP “gives effect” to the GPS.²³ Parliament has not used the same wording in s 14 to require the RLTP to “give effect” to the GPS.

[126] I return to AAA’s principal challenges to the preparation of the RLTP. Mr Salmon submitted that there were a number of flaws in the process in developing the RLTP including:

- (a) all significant decisions regarding the transport investment programme for the next decade were taken before RLTP 2021 was prepared, in the context of developing the ATAP programme;
- (b) throughout the process, AT was committed to delivering its pre-existing (2018) investment programme. It started from the flawed premise that more than 93 per cent of the investment was required for projects and programmes that it deemed to be mandatory;
- (c) when AT realised the investment programme was unlikely to reduce emissions, its strategy was to shift the conversation from transport investment decisions, which it could control, onto levers outside its control;
- (d) there was no change to the approach following the release of the final GPS 2021, which included the strengthened primary outcome for the climate change strategic priority that Auckland Council had sought;
- (e) by its own admission, AT failed to assess any of the individual projects and programmes in RLTP against the strategic priorities and indicators set out in GPS 2021. The only assessment it conducted related to less than seven per cent of the investment, but even that was only on a blended package basis;

²³ As a further example of more directory language, under s 70 the NZTA must give effect to the GPS on land transport when performing its functions.

- (f) AT failed to apply a proper climate lens in selecting projects and programmes for the investment programme, and (as the Council acknowledged) there was no priority given to it; and
- (g) much of the budget was allocated to like-for-like renewals of infrastructure. As the Council identified, process and culture change within AT, and a pipeline of climate positive cases, were needed to move past that.

[127] Mr Salmon submitted that AT had conducted a retrospective assessment of the “consistency” between RLTP and GPS 2021 after the investment programme had already been finalised.

[128] As a result, AAA submit the s 14 analysis considered by the RTC failed to meet the requirements of s 14 of the LTMA in a number of ways. AT did not consider the impact of the proposed projects and programmes on GHG emissions, so that it was not reasonably and fairly informed. The process for developing the RLTP meant its ability to reduce emissions was not properly tested.

[129] Mr Salmon supported his challenge to the process of the preparation of RLTP by referring to the following matters:

- (a) there was no evidence of the subject matter advice or of the climate workstream Mr Bunn referred to in his evidence;
- (b) Mr Bunn specifically confirmed in correspondence on 8 April 2021 there was no assessment at the programme level; and
- (c) the only assessment of climate impacts of individual projects and programmes were conducted after the RLTP had been substantially finalised. They did not inform what went into the programme.

[130] The background to the development of the RLTP has been set out earlier. I consider that when regard is had to the content of the RLTP and the evidence of Mr Bunn and Ms Chetwynd concerning its development the criticism that the

development of the RLTP failed to properly consider the requirements of the final GPS 2021 falls away.

[131] While AAA assert that there is no evidence for Mr Bunn's statements as to subject matter advice and climate workstreams, when his affidavit is read as a whole I also consider that criticism is also unfounded.

[132] As the RLTP records, the ATAP 2018 package was updated to reflect a number of issues, including climate change and mode shift as increasingly significant policy considerations. That was in the context of the need to provide direction to the upcoming round of policy documents including the GPS. The development of the RLTP involved a number of workshops, including climate change workstreams and a prioritisation and evaluation workstream which identified baseline projects and programmes. The GPS published in September 2021 was materially unchanged from earlier drafts so no change from the ATAP/RLTP objectives or policies was required.

[133] As the timeline establishes, the draft 2021 GPS was published on 19 March 2020. At that time the development of the RLTP objectives had begun (in February 2020) but following the Council's submissions on the draft GPS on 11 May 2020 the Council then endorsed the ATAP terms of reference which were only agreed later in May 2020. On 20 July 2020 advice was provided to the AT Board regarding the alignment between ATAP and the GPS objectives.²⁴

[134] A workshop involving the AT Board was held on 12 August 2020 on the ATAP and RLTP. There was then a briefing to the RTC on 15 September 2020 about the process for developing the RLTP. Further committee workshops on the development of the ATAP and RLTP followed on 14 October 2020 before the RLTP's strategic objectives were decided and the RTC approved the RLTP for consultation in March 2021.

[135] I agree with Ms Heine's submission that for procedural purposes the ATAP objectives, the RLTP objectives and the GPS priorities aligned. Mr Bunn's evidence confirms that the total programme was dominated by investment in public transport

²⁴ Affidavit of Hamish Bunn, dated 25 February 2022 at 49.

improvements and services, which offered strong support for better transport options and GHG emission reduction outcomes. Further, and importantly, each project promoted by RLTP was individually assessed for climate change impact. For example, the assessment of the draft RLTP noted that, in comparison to the AT's proposals, other national projects such as the state highway maintenance operations and renewals such as Penlink, Mill Road, State Highway 1 (Papakura to Drury South) and State Highway 1 (Puhoi to Warkworth) had a much higher proportion of projects that were emissions neutral or emissions adding.

[136] In settling the form of the final RLTP the submissions AAA had made during the consultation process were addressed. The report noted:

- (a) reducing carbon emissions, while very important is one part of an overall land transport system that is required to comply with the statutory objectives of being effective, efficient and safe;
- (b) GPS 2021 notes that a number of different agencies and decision-makers have a role in providing and maintaining the transport system requiring co-ordination and investment;
- (c) likewise, TTT notes that multiple parties need to be involved in the governance of and have accountability for the implementation and actions within the plan; and
- (d) the RTC is satisfied that the RTL contributes to the purpose of the LTMA and is consistent with the GPS by reference to Appendix 9 of the RLTP.

[137] The suggestion in AAA's submissions that by its own admission AT failed to assess the individual projects or programmes in the RLTP against the strategic priorities and indicators in GPS 2021 cannot be sustained. It is apparently based at least in part on the following comments in a letter of 8 April 2021 from AT to a Ms Rose, which stated, inter alia:

Auckland's draft RLTP has been prioritised against the objectives agreed by ATAP and is consistent with the indicative ATAP programme. Given that the ATAP programme has been agreed by Cabinet and Council we do not anticipate further assessment at a programme level against GPS indicators.

[138] As noted from the above timeline, by the date of the letter, 8 April 2021, the draft RLTP had been prepared and was out for consultation. The comment that AT did not anticipate further assessment at a programme level would be undertaken must be interpreted in that context. Further, the letter went on to note:

The ATAP objectives, set by the parties, were developed from both the GPS and Auckland Plan.

and that those objectives included:

improving the environmental resilience and sustainability of the transport system and significantly reducing the [GHG] emissions it generates.

Those objectives aligned with climate change strategic priorities within the GPS.

[139] As is apparent from Mr Bunn's evidence a considerable amount of work and documentation was considered in preparing the RLTP directed to the issues that AAA submitted on and continue to challenge.

[140] The criticism that AT started from a flawed premise, that the vast majority of the investment was required for mandatory projects, also overlooks the point made in Ms Young-Cooper's evidence that the RLTP was not the first RLTP and that it was not prepared in a vacuum. It necessarily carried forward many long-term capital projects. Further as Mr Bunn said, a number of baseline projects were, for practical purposes, mandatory. However, there was consultation as to which projects were baseline.

[141] One of the reply affidavits filed by AAA was by Neelima Ghanta. Ms Ghanta is a member of one of AAA's constituent groups. She is also an experienced planner and was formerly employed by Auckland Council. Ms Ghanta took a different view to Mr Bunn as to the appropriate process to use for developing the RLTP. She did not consider that his approach to allocating funds was appropriate. In her opinion, an iterative approach would have been preferable. While that is a different view, it does

not mean that Mr Bunn's approach was wrong. I note Ms Ghanta was not directly involved in the development of the RLTP.

[142] It follows that I reject the challenge to the process of developing the RLTP as flawed.

Was the RTC properly informed/relevant and irrelevant considerations

[143] The s 14 analysis presented to the RTC advised that in relation to the climate change strategic priority and primary outcome:

Forecast emissions reductions are consistent with the priority of 'Transforming to a low carbon transport system that supports emissions reductions that align with national commitments'. They are also consistent with key elements of the Primary Outcome – particularly:

- supporting a rapid transition to a low carbon transport system and
- contributing to a resilient transport sector that reduces harmful emissions, giving effect to the emissions reduction target the Climate Change Commission (CCC) recommended to Cabinet until emissions budgets are released in 2021.

Forecast emissions reductions are, however, likely to be less than the CCC's emission budget in its advice to the Government. Nevertheless, as required by the Primary Outcome the investment decisions as incorporated in the RLTP do contribute to and support this income.

[144] Mr Salmon submitted that despite the references to consistency with the climate change strategic priority and primary outcome, the RTC could not have been satisfied that the RLTP was consistent with GPS 2021 because it made its decision on the basis of inadequate or incorrect information.

[145] AAA expressly plead the following failings with the analysis presented to the RTC:

- (a) RTC was incorrectly advised that investment in infrastructure or services only has a very minor impact on total emissions. In fact, investment in infrastructure and transport services is a key factor in transport emissions.

- (b) RTC was wrongly advised that no plausible changes could be made to the RLTP programme that would yield materially different results. In fact, as recognised in the Planning Committee’s resolution of 24 June 2021 changes to the mix of transport investment in the RLTP that result in a reduction of emissions could (and should) have been made.
- (c) RTC was wrongly advised that roading projects do not increase emissions. In fact, increased road capacity generates more traffic over time because it encourages driving and enables car-dependent development (a phenomenon known as “induced demand”).
- (d) RTC was wrongly advised that the Penlink and Mill Road highway projects would together have decreased carbon dioxide emissions by 2031. In fact, those projects would have increased carbon dioxide emissions.
- (e) RTC was wrongly advised that there is no available funding to provide further reallocation of general road space towards cycling and other sustainable modes.
- (f) RTC was wrongly advised that gains from deterring car travel through lane reallocation would be offset by increased emissions and congestion. In fact, reallocating road space to other modes would reduce emissions and congestion.
- (g) RTC was wrongly advised that reallocating road space without additional effective alternatives would materially reduce the RLTP’s contribution to the objectives of the LTMA in respect of effectiveness and economic, social and cultural public interests. In fact, reallocating road space to other modes would itself provide effective alternatives, promote safety, and contribute to the purpose of the LTMA.
- (h) The analysis purported to explain to the RTC how the RLTP supports economic, social and cultural wellbeing, but made no mention of

environmental wellbeing, the adverse impacts that the RLTP would have on environmental wellbeing, and the importance of environmental wellbeing for economic, social and cultural wellbeing.

- (i) RTC's attention was not drawn to AT's modelling of the expected emissions impacts of the RLTP programme itself (as distinct from the impacts of anticipated improvements in vehicle efficiency and planned government interventions), being a six per cent increase in emissions between 2016 and 2031.
- (j) RTC's attention was not drawn to AT's modelling that TVK travelled are expected to increase under the RLTP in line with expected population growth of 22 per cent between 2016 and 2031, with no material reduction in per capita vehicle kilometres travelled.
- (k) RTC was wrongly advised that consistency between the RLTP and GPS 2021 could be inferred from the fact that the RLTP was derived from the ATAP. In fact, that was wholly irrelevant to the RTC's assessment of consistency between the RLTP and GPS 2021.
- (l) RTC was presented with a binary choice between approving the RLTP (as prepared) and the existing 2018 Auckland RLTP remaining in effect.

[146] There is a degree of overlap between the above points. Mr Salmon summarised them in submission. In particular he argued the following assertions in the s 14 analysis were incorrect:

- (a) "Fundamentally, investment in infrastructure or services only has a very minor impact on total emissions, whether positive or negative."
- (b) "There is limited practical scope to relocate [sic] elements of the programme from roading projects to further increase investment in public transport and active modes."
- (c) "It is not a given that roading projects will automatically lead to increased tailpipe emissions. For example, Penlink is likely to result in a net reduction in tailpipe emissions..."

- (d) “General road space reallocation towards cycling and other sustainable modes has also been proposed by submitters as a way of addressing climate issues... As noted, there is no available funding for further reallocation.”
- (e) “In practice, it is also likely that gains from deterring car travel through lane reallocation alone would be largely offset by the increase in emissions associated with increased congestion and diversion amongst the remaining traffic.”
- (f) “Reallocation of general traffic lanes without additional effective alternatives (which cannot be funded) would also materially reduce the RLTP’s contribution to LTMA objectives around effectiveness and economic, social and cultural public interests”.

[147] Mr Salmon submitted that the s 14 analysis was contradicted by TTT, the Council’s own experts, the TERP and independent evidence. As a result, the decision to approve the RLTP was unreasonable in the administrative law sense and vitiated the decisions at issue.

The MSM model

[148] The AAA experts consider that the traffic model MSM, which Mr Bunn relied on to support several propositions which AAA challenge, was fundamentally flawed. Mr Bunn relied on the modelling in the preparation of the RLTP and in relation to, inter alia, the advice in the officer’s report and s 14 analysis for the RTC regarding investment in infrastructure; the effect of roading projects on emissions; that gains from deterring car travel and lane re-allocation would be offset by increased emissions and congestion and the re-allocation of roading space would potentially not meet the purposes of the LTMA.

[149] Mr Litman, Mr Chapman and Ms Metcalfe (in part) and Ms Ghanta all criticised the MSM modeling used by Mr Bunn in the process of preparing the RLTP. Mr Salmon noted that their evidence in reply was not challenged and submitted the Court should regard the MSM model as discredited.

[150] The respondents did not seek to respond to the applicant’s reply evidence about the MSM model. Instead, Ms Heine objected to the admissibility of the evidence. She submitted it was fresh evidence and not in reply. I agree that the applicants would have been aware of the use of the MSM model and Mr Bunn’s reliance on it when

preparing the RLTP. They should have addressed the issue in their original affidavits. However, I do not consider anything particularly turns on that or on the respondents' failure to seek to respond to the reply evidence. Mr Bunn himself recognised the limitations of the MSM model.

[151] The MSM model is managed and run by the Auckland Forecasting Centre, an organisation formed by partnership of AT, Auckland Council and NZTA. MSM is a traditional transportation model that covers travel by walking and cycling; bus, train, ferry and rapid transit; private vehicles and medium/heavy use vehicles. VKT is a standard output indicator of the MSM.

[152] As with any model, the MSM model has limitations. Mr Bunn acknowledged as much. He noted that while it has many strengths, it has two principal limitations for present purposes. It does not directly model walking and cycling modes to the same level of detail as other modes, and it does not model the changes in land use that might arise as a result of further projects. It may also miss some disappearing traffic effects.

[153] However, the advantages of the MSM model outweigh those limitations for the reasons given by Mr Bunn. In his opinion, it is the best available tool for modeling regional network level effects of large-scale transport intervention as it is calibrated to Auckland conditions, includes land use and population forecasts based on Auckland Council data and can model the entire regional network.

[154] In his reply evidence, Mr Litman criticised the reliance on the MSM model. In his opinion it is unsuitable for evaluating mode shift and the GHG emission reductions potential of the RLTP. Mr Chapman was somewhat more circumspect in his reply evidence. His evidence included the following statement: "the results of the MSM modeling should not be relied on too heavily, especially at a time of rapid change in travel habits". I put Ms Ghanta's criticism to one side. She has never run the MSM model.

[155] As with a number of the challenges advanced by AAA to the s 14 analysis, the challenge to the MSM model and its results raise matters of opinion and assessment,

rather than fact. The experts supporting AAA have certain views about the usefulness of the MSM model. Mr Bunn and those involved in developing the RLTP have a different opinion.

[156] While AAA and its witnesses may criticise Mr Bunn’s approach and reliance on the MSM model, in the context of judicial review I am not prepared to say that Mr Bunn’s approach and reliance on the MSM model was so flawed as to be in error, or that his reliance on the model vitiates his conclusions. This case is quite different to the *Air Nelson* case relied on by AAA.²⁵ In that case the Court accepted that the report presented to the Minister was in error in a number of fundamental respects. What the Court is faced with in this case is a criticism of and challenge to Mr Bunn’s approach and his reliance on the MSM model. A fundamental error as was shown in the *Air Nelson* case has not been established. I note that the Court of Appeal in the *Air Nelson* case confirmed that what was required was a “fair, accurate and adequate report”.²⁶ The witnesses’ opinions vary, but the evidence led by AAA does not lead me to conclude that the officer’s report and s 14 analysis for the RTC and Mr Bunn’s opinion and comments are factually inaccurate. The s 14 analysis can fairly be described as a fair, accurate and adequate report.

The impact of transport investments on emission

[157] Mr Salmon submitted the advice in the officer’s report that investment in infrastructure or services only has a very minor impact on total emissions, was wrong, based as it was on the MSM model’s inherent bias towards private vehicle traffic, and that the model was unsuitable for estimating the mode shift. Mr Salmon also argued that the proposition had been roundly rejected by the Council itself:

- (a) the TTT is premised on the series of actions that require delivery of infrastructure for public transport and active modes;
- (b) on 10 June 2021 the Council advised the Environment and Climate Change Committee that urgent action was required; and

²⁵ *Air Nelson Ltd v Minister of Transport*, above n 19.

²⁶ At [48].

- (c) on 12 August 2021, in a paper regarding the TERP, the Council advised the Environment and Climate Change Committee that implementation of ‘avoid’ and ‘shift’ interventions was especially important, and in a further paper on 2 December 2021 Council advised mode shift was the most powerful to meet the 2030 target.

[158] As with a number of the above matters relied on by AAA, it is important to put the advice in context.

[159] Mr Bunn deposed:

224. ... the modelling evidence demonstrated that investment in infrastructure and services has only a minor impact on regional scale emissions. This limited impact is explained by a number of factors as follows:
- (a) The limited effect of these projects, particularly the large-scale public transport projects, on travel behaviour outside the peak periods (which accounts for the majority of VKT). ...
 - (b) The fact that the urban form of the city is already largely set, leading to a wide distribution of trip origins and destinations.
 - (c) Even a major investment programme like the RL TP only changes a limited proportion of the network at one time;
 - (d) Because they tend to compete for the same markets (i.e. the city centre or other large employment centres and commuting or education journeys) non-car driver modes tend to cannibalise each other. ...
 - (e) Spare road capacity created by public transport is subject to the same laws of induced traffic and triple convergence that apply to road capacity projects.

[160] The advice was based on the scenario testing and went on to explain that “external variables such as demand associated with population growth or improvements in fleet efficiency have a much larger impact on total emissions”. In making that statement, Mr Bunn also relied on his involvement in Auckland specific transport planning over 10 years. The fact AAA’s witnesses have a different opinion does not mean Mr Bunn’s opinion was factually incorrect. Also, for the reasons that follow, TTT and the other Council initiatives are not directly relevant to the s 14 exercise.

The effect of roading projects (including Penlink and Mill Hill) and lane reallocation on GHG emissions

[161] AAA's challenge to Mr Bunn's opinion that roading projects would not automatically lead to increased tailpipe emissions, and that gains from deferring car travel through lane reallocation alone would be largely offset by the increase in emissions associated with increased congestion and diversion was based primarily on Mr Litman's evidence that road space reallocation was an accepted way to provide affordable improvements to sustainability. Ms Metcalfe also considered that the modelling failed to take account of lifecycle emissions.

[162] As Mr Bunn noted in his evidence, what the analysis actually said about roading projects was: "it is not a given that projects will automatically lead to increased tailpipe emissions", which is a subtly different proposition. For example, shorter routes and reduced congestion would lead to reduced GHG emissions.

[163] AAA also criticised the advice that the Penlink and Mill Hill highway projects would have decreased GHG emissions by 2031.

[164] Again, there is a difference in opinion, but the fact that the AAA deponents take a different view does not make Mr Bunn's opinion wrong. For example, the advice cited by Mr Bunn that "a modeling test for the 2031 year shows that removal of the Penlink and the full Mill Rd project ... would lead to a very small (0.15%) increase in CO2 emissions due to an increase in total VKT and higher congestion. Remaining projects will also make important contributions to other objectives including safety, connectivity overall effectiveness and freight access ..." was open to him. At the least it cannot be said to be so fundamentally, and demonstrably wrong that the RTC's reliance on it was unsustainable.

[165] As to lane reallocation, Mr Salmon submitted that Mr Bunn's reasons for dismissing further consideration about removing lanes and reallocating them to other modes, namely that gains from deterring car travel through lane reallocation would be offset by increased GHG emissions and congestion missed the point. The AAA argue that the Auckland Council has acknowledged in the TTT that the reallocation of road space away from private vehicles to public transport and other modes such as walking

and cycling is required to meet the economic, social and cultural interests of the public. Reallocating space in that way would reduce GHG emissions.

[166] Again, context is important. The officer's report recognised that submitters had argued for road space reallocation. It noted that was already occurring through the wider Cycling and Connected Communities projects providing for bus lanes, bus priority and cycling improvements. Relevantly, there was no funding available for further lane reallocation. In those circumstances, the statement: "Reallocation of general traffic lanes without additional effective alternatives (which cannot be funded) would also materially reduce the RLTP's contribution to LTMA objectives..." is correct, as the gains would be offset by increased emissions arising from congestion. The problem with the AAA approach is that the issue is only considered through one lens – it does not recognise the potential impacts of their proposals on the system overall. Nor does it recognise the constraints inherent in the process of developing the RLTP.

Effect of road space reallocation

[167] On a related point AAA says the RTC was wrongly advised that reallocating road space from private vehicle use would materially reduce the RLTP's contribution to the objects of the LTMA.

[168] Like a number of other points, this issue is not one where it can be said there is an absolute truth. Different, but still valid opinions are possible. The actual advice was that reallocation of lanes without additional effective measures (which could not be funded) would materially reduce the RLTP's contribution to a number of its objectives. That opinion was plainly open.

The availability of funding to achieve reallocation

[169] On a related point, AAA criticised the advice that there was no available funding to provide further reallocation of general road space. They argued around \$2.1 billion of the total funding available was discretionary; the renewals budget in the RLTP should have been used to fund the reallocation; reallocation could be delivered

as part of other projects under the RLTP and AT had made a choice not to reallocate further funding.

[170] Mr Bunn's evidence confirmed that, with the possible exception of a Crown allocation to complete the City Centre to Mangere light rail project, no further funding appeared likely for additional sustainable modes. This was because funding from the NLTP was already at the \$16.3 billion allocation set out in the GPS. Council funding for additional public transport services was also limited. There was limited practical scope to relocate elements of the programme from committed roading projects to further increase investment in public transport and active modes. Finally, further road space reallocation was already occurring as noted above.

[171] The information conveyed in the officer's report on this issue has not been shown to be materially inaccurate.

The importance of environmental wellbeing for economic, social and cultural wellbeing

[172] Mr Salmon submitted that the officer's report materially misunderstood the alignment of GPS 2021 and the assertions in it were inconsistent with the available evidence. AT had failed to prioritise rapid emissions reductions and overall the RLTP had failed to contribute to the purpose of the LTMA bearing in mind that the Mayor and councillors had:

- (a) declared a climate emergency;
- (b) Council had committed to develop a climate plan consistent with the Paris Agreement; and
- (c) recognised in TTT the public interest required a 50 per cent reduction in Auckland's emissions by 2030.

[173] To the extent AAA relies on the argument that the RLTP is inconsistent with the declaration and commitments referred to, the short point is that there is no legal requirement that the RLTP be consistent with them. The Council has no formal role

or responsibilities in relation to RLTPs under the LTMA. Further, TTT is an Auckland Council document prepared under the LGA.

[174] AAA also argued generally that, in the context of an acknowledged climate emergency, an investment programme that failed to make any material reduction to transport emissions over the next decade was plainly not in the public interest, would not deliver social, economic and cultural and wellbeing, and could not contribute to an effective, efficient and safe land transport system in the public interest. The RTC had no proper or reasonable grounds to be satisfied otherwise, and the decision was unlawful. Overall AAA submits that RLTP was a business-as-usual plan that failed to recognise and respond to the mandatory requirements of GPS 2021.

[175] I accept Ms Heine’s submission that AAA’s challenge involves the evaluation of political, social and economic choices which the legislation has vested in the statutory decision-maker. The caution noted by the Supreme Court in *Unison Networks Ltd v Commerce Commission* is appropriate:²⁷

In this area the courts are concerned with identifying the legal limits of the power rather than assessing the merits of its exercise in any case. They must be careful to avoid crossing the line between those concepts.

[176] The statutory language of s 14 is important. I return to the point that s 14 of the LTMA required the RTC to be satisfied the RLTP was “consistent with” GPS 2021. AAA challenge the conclusion reached by the RTC from their focus on climate change but that does not address the issue of whether, objectively, the RTC was entitled to be satisfied that taken overall, the RLTP was consistent with GPS 2021. There are other considerations apart from climate change. GPS 2021 does not, for example, establish a specific GHG emissions reduction target for the RLTP. To the extent emission targets are referred to, they are national targets set by the Government and are New Zealand wide targets.

Advice regarding the GHG emissions’ impact and increased TVK

[177] Mr Salmon next noted the RLTP accepted that the combined effect of the anticipated reduction of the per capita transport emissions of 13 per cent between 2016

²⁷ *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [54].

and 2031, the 22 per cent predicted increase in population, and the Government's commitment to Clean Car policy and shift to biofuels only led to a forecasted reduction in transport GHG emissions of around one per cent from 2016 to 2031. The investment programme would, on its own, result in a six per cent increase in total emissions by 2031 and a 22 per cent increase in VKT. Also, the reduction of one per cent was entirely reliant on anticipated government intervention.²⁸ AAA plead that RTC's attention was not drawn to this. Mr Salmon submitted such outcomes could not be consistent with the climate change strategic priority.

[178] To the extent AAA criticise reliance on the Government's proposed steps to reduce GHG emissions, the respondents correctly note that the RLTP was a planning exercise, so that it would be artificial to ignore reasonably expected actions by the Government and other agencies.

[179] Further, as the respondents note, the 6 per cent figure was drawn to the attention of the RTC and it was made aware of the relevant modelling of expected VKT over the period 2016 to 2031. For example, the RLTP noted:

The RLTP investment package is forecast to see public transport's share of motorised distance travelled increase from 12 percent to 20 percent in the morning peak, and from five percent to 10 percent in the inter-peak period. Nevertheless, private vehicle trips are still forecast to increase and, when combined with an increase in average vehicle trip distance, total VKT between 2016 and 2031 increases roughly in line with the expected 22 percent increase in population.

The relevance of ATAP

[180] AAA submit RTC was told that consistency between the RLTP and GPS 2021 could be inferred from the fact the RLTP was derived from the ATAP when that was irrelevant.

[181] It has always been the respondents' position that the RLTP investment programme was directly aligned to ATAP and effectively achieved the same results. The Minister's support of ATAP was, at the least, supportive of the conclusion the RLTP was consistent with GPS 2021.

²⁸ Mr Litman criticised that outcome as insignificant.

The binary choice issue/the possibility of changes

[182] AAA plead that the RTC was presented with a binary choice: approve the RLTP as prepared or the existing plan would remain in effect. Further, that it was wrongly advised no plausible changes could be made to it. The RTC could and should have requested amendments to it. The failure to provide RTC with that option was a material inaccuracy or perhaps an irrelevant consideration.

[183] It is of course AAA's case that changes should have been made to the RLTP. However, taken overall it is not correct to categorise the position as one where the RTC was presented with a binary choice. As Mr Bunn confirmed, the RTC wanted to know the implications of not recommending approval to the AT Board and requested advice. The advice in the officer's report included:

171. ... we are also cognisant that there is limited opportunity to reprioritise the RLTP towards one area without compromising other GPS priorities or the overall contribution to efficiency, effectiveness, or the public interest. Scenario testing as part of ATAP indicated that any significant reprioritisation of activities is unlikely to make a significant difference to greenhouse gas emissions.

Although there is limited flexibility for major change, several refinements are proposed address more localised issues. These reflect areas where there is significant feedback from consultation and/or local boards; there is a community expectation as a project was included in the previous RLTP; planning was underway; they can be funded within the current funding arrangements; and they are consistent with the GPS and the intent of ATAP.

[184] Mr Bunn also noted:

172. The report also advised that the RTC could not "remove or amend any regionally significant' expenditure on activities that are funded from sources other than the National Land Transport Fund [such as NZUP projects]; or remove or amend a significant rail activity proposed by KiwiRail.

[185] While Mr Bunn did not disagree with Mr Chapman and Mr Litman on a theoretical level as to the possibility of change to reduce GHG emissions, as he noted, the particular context of Auckland and the RLTP had to be taken into account.

[186] AAA's submission on this point also overlooks the role and involvement of the RTC in the development of the RLTP. The RTC had been involved in the process of

amending the draft RLTP before the ultimate recommendation that it be sent to the AT Board for approval.

Summary – consistency with GPS 2021

[187] I am satisfied that the RTC directed itself to the issue of whether the RLTP was consistent with GPS 2021. Appendix 9 to the RLTP noted the four strategic priorities and summarised the reasons why the RLTP was consistent with GPS 2021. While AAA's witnesses disagree with the s 14 analysis, and the officer's report, which underlie that summary, the conclusions in them were available. Based on Mr Bunn's evidence and, on the further information before it (including the personal knowledge and experience of the RTC members), it was open for the RTC to be satisfied that the RLTP was consistent with GPS 2021.

[188] For the above reasons the suggestion that the RTC had no proper or reasonable grounds to be satisfied the RLTP was consistent with GPS 2021 must also be dismissed.

The Planning Committee decision

[189] The second challenge is to the decision of the Planning Committee. AAA argues it is immaterial that the approval of the Planning Committee was not an express statutory step in relation to the preparation and adoption of the RLTP. The Planning Committee Decision was made under the delegated powers given to the Planning Committee by Auckland Council and is plainly amenable to judicial review. It was always understood and agreed that the Planning Committee would be required to endorse the RLTP before it was submitted to the AT Board for approval.

[190] As a preliminary point, Mr Salmon suggested an adverse inference could be drawn from the fact there was not any affidavit evidence from a member of the Planning Committee. I decline to draw such an inference. The agenda (including the detailed briefing to the Planning Committee) and the minutes of the meeting are before the Court. It was not necessary for evidence to be adduced from a member of the Planning Committee.

[191] In the briefing, the Planning Committee was advised that it had a non-statutory role arising from the CCO review recommendation that AT and Auckland Council jointly prepare the RLTP, and that Auckland Council endorse the draft RLTP before it went to the AT Board for approval.

[192] The Planning Committee was presented with a recommendation that it endorse the RLTP. It was advised that if the RLTP was not approved by the AT Board, the existing RLTP would remain in effect, AT's ability to access funds from the NLTF would be affected, and there would be a likely impact on new and existing activities.

[193] Ms Tyler explained the reason for the endorsement process was that, while the Council did not have a statutory role in relation to the RLTP, there was a need for alignment between it and the relevant planning documents.

[194] The Planning Committee decision was made at the Planning Committee meeting on 24 June 2021. It was carried with two dissenting votes.

[195] The Planning Committee's resolution confirming its endorsement went on to note Council's commitment to TTT to halve emissions by 2031 will require further change to transport and land use policy in the mix of transport investment and noted Council and AT staff are jointly developing a TERP that will identify pathways to support the required emissions reductions reflected in TTT.

[196] AAA's challenge is based on the requirements of 76 of the LGA. Section 76 of the LGA provides that every decision made by a local authority must be made in accordance with ss 77 to 82. In particular, s 77(1)(a) and (b) require a local authority, in the course of its decision-making, to seek to identify all reasonably practicable options for the achievement of the objective of a decision, and to assess the options in terms of advantages and disadvantages.

[197] AAA submit the Planning Committee decision failed to comply with s 77 of the Act because it failed to seek to identify all reasonably practicable options for the achievement of the objective of the decision. Mr Salmon submitted the Planning Committee should have considered requiring AT to make changes to the RLTP (for

instance reallocating road space and changing the mix of transport investments). Instead, the Planning Committee was effectively presented with a binary choice to endorse the RLTP or not to endorse it.

[198] The short answer to AAA's challenge to the Planning Committee's decision is that the Planning Committee had no power, either under the LTMA in relation to the preparation of the RLTP, nor under its oversight role in respect of AT, to require changes to the RLTP. As Ms Tyler explained in her evidence and the paper for the Planning Committee confirmed, it had a non-statutory role to endorse the draft RLTP before it went to the AT Board for approval. The principal purpose for that was to ensure alignment between RLTP and relevant planning documents. The only relevant parties with any statutory role in relation to the RLTP were the RTC and AT.

[199] The suggestion the Planning Committee should have required AT to make changes to the RLTP was misplaced as it would have involved the Planning Committee stepping into the roles assigned to the RTC and AT under the LTMA. There was no practical or legal ability for the Planning Committee to amend the RLTP or require the RTC to make changes to it prior to it going to the AT Board for approval. Under s 18(3)(b) of the LTMA it was for the AT Board to refer the RLTP back to the RTC to request reconsideration of one or more aspects of it. Such decisions were for AT not the Planning Committee.

[200] Further, as Mr McNamara submitted, the decision of the Planning Committee, in context, was not itself significant. The RLTP was a significant document, but the Planning Committee's endorsement and reference to the AT Board for consideration was not significant. It was not legally required and had no legal consequence.

[201] In any event, if the Planning Committee considered there were major issues with the RLTP then it could have declined to endorse it. Indeed two members of the Planning Committee did decline to endorse it.

[202] Finally, it could not, in any event, be said that the Planning Committee's decision to endorse the RLTP was not reasonably open to it in light of the information before the Planning Committee.

[203] AAA also submits that the Planning Committee's decision to approve the RLTP did not comply with s 80 of the LGA:

80 Identification of inconsistent decisions

- (1) If a decision of a local authority is significantly inconsistent with, or is anticipated to have consequences that will be significantly inconsistent with, any policy adopted by the local authority or any plan required by this Act or any other enactment, the local authority must, when making the decision, clearly identify—
 - (a) the inconsistency; and
 - (b) the reasons for the inconsistency; and
 - (c) any intention of the local authority to amend the policy or plan to accommodate the decision.
- (2) Subsection (1) does not derogate from any other provision of this Act or of any other enactment.

[204] Section 80 requires that, if a decision of a local authority is significantly inconsistent with, or is anticipated to have consequences that will be significantly inconsistent with any policy adopted by the local authority then it must, when making the decision, clearly identify the inconsistency, the reasons for it, and any intention to amend the policy to accommodate the decision.

[205] The purpose of s 80 is to ensure that a plan can be changed to accommodate the decision which is significantly inconsistent with a subsequent decision of the Council. It does not vitiate the decision itself.

[206] AAA pleaded that the Planning Committee decision was significantly inconsistent with the Local Government Leaders' Climate Change Declaration, the Auckland Climate Change Emergency Declaration and TTT.

[207] During submissions Mr Salmon confirmed that AAA no longer relied on the alleged inconsistency with the Local Government Leaders' Climate Change Declaration. The Auckland Climate Emergency Declaration was a high-level commitment made by the Council's Environment and Community Committee in June 2019 as to the way in which the Council might conduct itself in response to climate change. It was not a policy or plan and certainly not one required or provided for by

statute. Ms Tyler confirmed that in declaring the climate emergency, the Council did not make any commitment to any specific GHG emissions target. The Climate Emergency Declaration had no statutory or legal implications. The applicant is unable to identify any specific commitment in the Climate Emergency Declaration that is inconsistent with the Planning Committee's decision to endorse the RLTP.

[208] The focus of Mr Salmon's submissions on this point was on TTT.

[209] Mr Salmon noted that the RLTP recorded it was not expected to make any material reductions to transport emissions by 2031. TTT required emissions to be reduced by 50 per cent by 2030. He submitted there was a manifest inconsistency between the two and the Planning Committee failed to identify clearly the reasons for the inconsistency.

[210] There are specific parts of the TTT, namely the goal to reduce Auckland's GHG emissions by 50 per cent by 2030, and the model 64 per cent reduction in transport emissions, which are not met by the RLTP. However, the issues are whether the Planning Committee decision to endorse the RLTP for reference to the AT Board is significantly inconsistent with the TTT and, more fundamentally, whether TTT is a "plan required" under any enactment.

[211] Section 80 LGA applies to any policy adopted by the Council and to "any plan required by [the LGA] or any other enactment". TTT is a plan but one voluntarily prepared and adopted by the Council. It is not required by the LGA or any other enactment. Section 80 LGA was not engaged by the Planning Committee's decision.

[212] Even if s 80 LGA was engaged, it would not apply to the Planning Committee's decision to endorse the RLTP for consideration by the AT Board.

[213] The wording of s 80 is "significantly inconsistent with". What is required is a departure from what the Council has previously said it would do in the relevant policy or plan. In *Council of Social Services in Christchurch/Outautahi Inc v Christchurch City Council*, a decision by the Council to increase the rent charge for social housing

by 24 per cent was significantly inconsistent with the long-term Council community plan which had provided charges would continue “as for previous years”.²⁹

[214] At a general level the RLTP itself is not significantly inconsistent with TTT given that it expects to lead to a reduction in GHG emissions by 2031. Both TTT and the RLTP aim to reduce GHG emissions albeit at different rates and by different methods. The TTT acknowledges that the GPS is to be consistent with the Council’s climate change priorities. It does not, however contain any statement requiring the RLTP to achieve any specified reduction in GHG emissions.

[215] Further, as Mr McNamara submitted, in the present case the TTT and RLTP are so different in their purpose, scope and focus it is not meaningful to compare them for consistency. TTT has a significantly broader scope than the RLTP. It covers all sectors and is not limited to transport. The TTT acknowledges that delivering the objectives it refers to will require action by a range of diverse stakeholders, including central Government businesses and individuals in addition to the Council. The only reference to the RLTP in TTT is as follows:

The Auckland Transport Alignment Project (ATAP), which is being updated 2020, reflects the joint transport investment priorities – including climate change – of Auckland Council and central government. The draft Government Policy Statement (GPS) on Land Transport for 2021 includes climate change as a strategic priority. The [RLTP] for Auckland ... which will set out the region’s land transport objectives, policies, and measures for the next ten years, is being developed to be consistent with ATAP and the GPS.

[216] Next, no changes to the TTT were needed or even possible to accommodate the Planning Committee’s decision to endorse the RLTP. The Planning Committee decision was a procedural decision to endorse the RLTP for submission to the AT Board for approval.

[217] As the Planning Committee had no formal or legal decision-making role in relation to the RLTP (its role being one of oversight at most) its endorsement of the RLTP could not and did not affect AT’s or the RTCs statutory decision-making roles in relation to the RLTP. The resolutions passed by the Planning Committee and the

²⁹ *Council of Social Services in Christchurch/Outautahi Inc v Christchurch City Council* [2009] 2 NZLR 123 (HC).

terms in which they were passed, made it clear the Planning Committee was not making the RLTP. It was endorsing it and indicating that Council's endorsement of the RLTP as suitable for approval by the AT Board.

[218] In any event, s 80 does not prevent inconsistent decisions but merely requires them to be acknowledged.

[219] The last point AAA raise to challenge the Planning Committee's decision is that, in endorsing the investment plan with its defects, the Planning Committee did not have or could not have had proper regard to the interests of the future as well as current communities as required under ss 14(1)(c)(ii), 14(1)(h)(i), 14(1)(h)(ii), and 14(1)(h)(iii) of the LGA.

[220] I agree with the respondents' submission that the principles in s 14 of the LGA are not mandatory requirements enforceable in their own right, but rather are a guide to the Council's exercise of its powers and functions.

[221] In any event, the general principles relied on were not engaged by the Planning Committee's decision to endorse the RLTP.

[222] Again, the point is that the role of the Planning Committee in the RLTP process was limited. At most it was to act in accordance with the principle in s 14(1)(e) of the LGA that it should seek to collaborate and co-operate with other local authorities and bodies (in this case AT) to improve the effectiveness and efficiency with which it was to achieve identified priorities and outcomes.

[223] Ultimately, the Planning Committee did not adopt or approve the RLTP as such. It was simply a non-statutory process which the Council had chosen to adopt to ensure alignment. Even without that process the RLTP, after approval by RTC, could have been referred to the AT Board for approval. Sections 13 and 14 of the LTMA did not provide for or require the Planning Committee's approval.

The approval of the AT Board

[224] AAA's third cause of action is based on the same errors alleged to have been made by the RTC. AAA alleges that in its decision of 28 June 2021 approving the RLTP, the AT Board acted contrary to its statutory purpose under s 39 of the LGACA, to "contribute to an effective, efficient and safe Auckland land transport system in the public interest".

[225] AAA accepts that its challenge to the AT Board's decision stands or falls with the challenge to the RTC decision. Section 39 uses the same wording as s 3 of the LTMA, which has been discussed above. Section 39 cannot enlarge the obligations which already apply under the LTMA. For the above reasons, this challenge must also fail.

Result

[226] AAA's challenges to the decisions and actions of the respondents in relation to the RLTP are dismissed.

Costs

[227] Costs should follow the event. In the event the parties are unable to agree memoranda can be exchanged and the Court will deal with the issue of costs on the papers.

Venning J