

ORIGINAL

Decision No. C 42. /2006

IN THE MATTER of the Resource Management Act 1991 (the Act)

AND

IN THE MATTER of an appeal pursuant to section 120 of the Act

BETWEEN TRANSIT NEW ZEALAND

(ENV C 227/05)

Referrer

AND

SOUTHLAND DISTRICT COUNCIL

Respondent

AND

FOVEAUX ESTATE LIMITED

Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith (presiding)

Environment Commissioner S J Watson

Environment Commissioner D H Menzies

Hearing at Invercargill on 27-28 February and 1 March 2006

Appearances

Mr J A Knight and Ms K A Diek for Transit New Zealand (**Transit**)

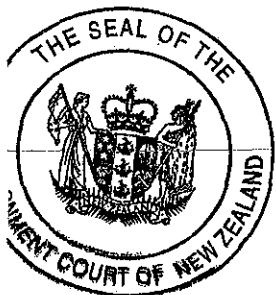
Mr B J Slowley for the Southland District Council (**the Council**)

Mr R T Chapman for Foveaux Estates Limited (**Foveaux**)

### DECISION

#### *Introduction*

[1] Foveaux applied for and was granted consents for the subdivision and construction of homes upon some 32 residential lots at Colac Bay.



[2] The development provided for the formation of an existing paper road (Stokes Street) enabling access to the subdivision. Stokes Street connects to Colac Bay Road, a local road in terms of the Southland District Council Operative Plan (**the Plan**). Colac Bay Road is also part of the Southern Scenic Route which deviates from State Highway 99 at Colac Foreshore Road and Colac Bay Road, rejoining State Highway 99 at the western end of Colac Bay Road (**the Intersection**).

[3] Transit has appealed the decision of the Council and, at the hearing, sought the insertion of a further condition or, alternatively, that both consents be declined.

[4] The case raises some matters of particular importance relating to the role of Transit before this Court and also the extent to which Transit can seek improvements to its roading network beyond any direct effects caused by a development.

***The appeal***

[5] The notice of appeal sought the following relief:

*8.1 Inclusion in the resource consents of condition(s) to the effect that the intersection be upgraded:*

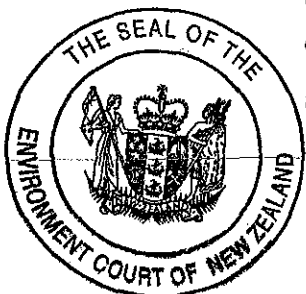
- (a) At Foveaux's own expense;*
- (b) To Transit Standards (ie T-intersection, with Diagram D widening, quadrant kerbing and flag lighting); and*
- (c) In time to ensure that the effects of the proposed development that would otherwise arise are avoided or mitigated in time.*

...

OR

*8.2 In the alternative, declining of the consent.*

[6] By the time of this hearing Transit sought primarily the imposition of a further condition of consent or in the alternative that both consents be cancelled. The condition sought was:



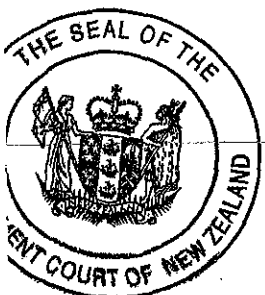
*No certificate for the purposes of section 224(c) of the Resource Management Act 1991 may be lodged with the Registrar-General of Lands unless and until the intersection of State Highway 99 and Colac Bay Road has been upgraded to the standard in the Opus diagram D (31-100ECM/Day) and with quadrant kerbs and flag lighting, in accordance with Beca Drawing no. 3380882 – CK01 referred to in the evidence of Dr Shane Turner dated 10 February 2006, or any other suitable and appropriate standard that may be approved by Transit New Zealand.*

[7] We annex hereto as “**A**” a copy of the Enhanced D diagram, being a generalised design for T-intersections in rural areas. We also attach as “**B**” a copy of the more specific design (3380882 – CK01) as a concept layout. Annexure “**B**” also shows the layout of the intersection generally.

[8] At present there are two intersections connecting with State Highway 99 at the western end of Colac Bay Road: one is the Western intersection (constructed in the 1960s) where Colac Bay Road merges with State Highway 99 (**the Western intersection**) and the other is a T-type intersection with the State Highway around 100 metres further to the east, which was described at the hearing as **the Eastern intersection**.

[9] The intent of the condition sought is to close both these intersections and to create a new intersection at an intermediate point between them with road widening of the State Highway as shown on Annexure “**B**”. The works sought include kerbing and channelling at the intersection, closure of the existing Western intersection and the creation of access to properties, and flag lighting at the new intersection itself.

[10] The existing Transit Minor Safety Works Programme for Southland 2005/2006 included the Colac Bay Road tee-up intersection as a safety project to be implemented in association with other projects. This project would be to a significantly lesser standard of works than that now proposed, with approximate costs of \$40,000 in September 2005.



[11] The approximate costs for the works Transit propose be undertaken by the applicant is \$150,000. Ms D A Field, appearing for Transit, acknowledged to the Court that the work now proposed is of a higher standard than that provided for in the existing works programme and is a higher standard than Transit would otherwise undertake of its own accord.

[12] The issue before the Court on this appeal related to whether or not a condition should be imposed as sought by Transit or consent otherwise refused on the basis that the impacts on the State Highway system of granting this consent could not be adequately avoided, mitigated or remedied.

### *State Highway 99*

[13] State Highway 99 is a low traffic volume road of district and regional importance and is recognised in the Plan as such. We also accept that it performs a role of national importance as a State Highway, notwithstanding its low traffic volumes. The entire traffic flow at the Intersection in question (including that on State Highway 99) is less than 700 vehicles per day. Accordingly there was no argument that the formation width of 3.5 metres per lane is more than sufficient to carry the expected vehicles.

[14] Recently State Highway 99 has become part of the Southern Scenic Route. The Southern Scenic Route deviates from State Highway 99 at a point several kilometres to the east of Colac Bay at the Tihaka Sands Development and then follows the Colac Foreshore Road for several kilometres before reaching a T-intersection with Colac Bay Road. The scenic route then continues along Colac Bay Road, past the applicant's site and rejoins State Highway 99 at the Intersection.

[15] Transit-approved brown tourist direction signs clearly identify the scenic route at both exits from the State Highway for vehicles travelling both east and west. We accept, as a fact, that not all the vehicles on Colac Bay Road or Colac Foreshore Road belong to Colac Bay residents. We accept that there is a significant (if not dominant) element of through traffic from the scenic route and also from vehicles travelling to Colac Bay from outside the area.



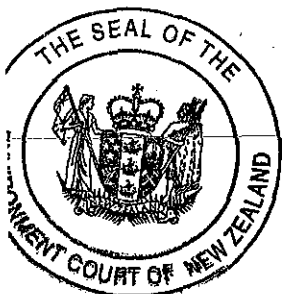
[16] This is important in this case because of the assumption of Dr S A Turner (the transportation engineer called for Transit) that all traffic travelling on Colac Bay Road was generated from within Colac Bay. We annex hereto and mark as "C" a copy of the average vehicle counts and estimated daily traffic volumes. The following can be noted from this diagram:

- (a) that there are approximately 63 vehicles travelling out of Colac Bay Roads to the east per day;
- (b) there are approximately 42 vehicles travelling from the east into Colac Bay Roads per day;
- (c) there are some 92 vehicles travelling to the west out of Colac Bay Roads per day; and
- (d) there are some 91 vehicles travelling into Colac Bay Roads per day from the west.

[17] Dr Turner has made the assumption that this represents the existing division of traffic to the east and west from Colac Bay itself. We have concluded that Dr Turner has failed to consider the effect of the scenic route on these traffic numbers and the influence of the scenic route on through traffic to and from the west. This is a matter of considerable importance because it is the Western intersection which impacts on safety and which is of particular concern to Transit.

[18] Other witnesses before the Court, particularly Ms Field called for Transit, acknowledged that the majority of existing residents' vehicle movements out of Colac Bay Road onto the State Highway would be to and from the east. This has two particular impacts:

- (1) it demonstrates that if the total number of vehicles belonging to residents travelling through the intersection was in the order of 100 to 120, then the generation rate for vehicles from the properties is low;
- (2) that an increase in the number of residents would not necessarily increase the number of vehicles travelling to and from the west, or at least not at the rate suggested by Dr Turner.



*Traffic at the Intersection*

[19] Accordingly, we have concluded that the existing traffic environment at this intersection consists of traffic movements by residents at Colac Bay, with the majority travelling to and from the east through the Eastern intersection, overlain by the effect of the southern scenic route through the Western intersection particularly and, to a lesser extent, some traffic movements to and from Colac Bay by people living outside it.

[20] It is clear to us that the amount of traffic generated from Colac Bay at the present time is not high and that there are likely to be traffic movements associated with the two taverns in the area. It also means that, of the existing 60 residences in Colac Bay, there are limited vehicle movements associated with these, we suspect largely because a majority of the residences are cribs or holiday houses.

[21] Again it was accepted in answers to questions that the majority of vehicle movements associated with this new subdivision would be to and from the east. There was considerable dispute between the witnesses as to the level of subdivision traffic that will be generated, with Dr Turner suggesting that eight vehicles per day should be expected from each additional dwelling. Dr Turner assumed that all the vehicles leaving Stokes Street would turn left and go through the intersection. On questioning, however, he acknowledged that some of the traffic may turn right and travel along Colac Foreshore Road. He had not made any allowance for this in his calculations.

[22] We have concluded that the suggestion that all the homes in the subdivision will be occupied by full-time residents is fanciful. Another more recent subdivision closer to Colac Bay itself has several houses which appear to be occupied on a full-time basis, while others appear to be in the nature of cribs. In the end we prefer the evidence of Mr G L Huish, traffic engineer called for the applicant, that between four and six vehicles per day per property in the new subdivision would be going through the intersection. In our view this more properly takes into account the generally lower traffic generation rates in Colac Bay, some vehicles travelling towards the foreshore and the fact that a good proportion of any homes established are likely to be cribs only occupied on an occasional basis.



[23] On this basis, we have concluded that the number of vehicles to be generated from this site and going through the intersection would be in the order of 120 to 180 per day. Of those, the majority of traffic movements would be to and from the east. Unfortunately, the witnesses could not give any particular percentage breakdown of traffic movements.

*Existing safety issues at the Intersection*

[24] It was clear from the course of the hearing that Dr Turner's concern related primarily to the Western intersection, which he described as *inherently unsafe* and not meeting Transit's layout standards in its existing condition. He provided extensive information on the substantially increased risk for this type of intersection as compared with a preferred T-intersection. He largely accepted that the existing eastern junction is a T-intersection and accordingly had higher levels of safety, although it did not fully comply with Transit's standards.

[25] Importantly, he acknowledged that closing the Western intersection (i.e. with all traffic going through the eastern T intersection) would, on its own, effect a significant increase in road safety in this area. On Dr Turner's figures for traffic generation from the subdivision of some 288 vehicles per day and on his calculation of the existing accident rate at 0.15 compared with the accident rate for all vehicles travelling through the intersection at the current division to the east and west of 0.22, closing the western arm would improve the safety of the intersection to a risk below that existing (i.e. less than 0.15).

[26] Although Dr Turner had undertaken modelling of the intersection based on analysis of over 100 T-intersections and some 15 Y-intersections, the results of his model study did not result in an accident rate which matched the record for the existing intersection. The site record is one injury accident over 23 years compared with a calculated accident rate of one in seven years. Unfortunately, because of assumptions that Dr Turner made as to the number of vehicle movements per day generated from the site (288 compared with our figure of 120 to 180) and the division of traffic to the east and west, including tourist traffic on the Southern Scenic Route being attributed to



traffic movements to the west which may seem unlikely to occur, his calculation as to the increased risk at this intersection is, in our view, unreliable.

[27] Moreover, Dr Turner himself accepted that having regard to the very limited sample numbers (some 15) for the Y-intersections and even in respect of the T-intersection sample of 100, there were inherent uncertainties and inaccuracies. He suggested in the order of 10% for the 100 samples and in the order of 20% for the lower numbers. Dr Turner also accepted that there is either an injury accident in the year or there is not, and thus dealing with probabilities in terms of very small numbers such as 0.15 or 0.2 results in an inherent statistical uncertainty.

[28] Taking into account the other assumptions which we have already discussed, we cannot have any particular confidence that a small calculated increase in accident risk from a one in seven year event to a one in five year event is of any particular significance. In our view it is within the range of statistical uncertainty by virtue of the various uncertainties we have raised.

[29] Quite simply, we agree with Mr Huish that the issues relating to this intersection are twofold:

- (a) the Western intersection is inherently unsafe; and
- (b) there is a shortfall in the sight distance required by the Transit New Zealand planning policy manual.

Those are existing deficiencies and are independent of any increase in vehicle movements through the intersection.

*Transit's objective*

[30] Transit's objective is not to simply mitigate the effect of any extra traffic travelling through the intersection. This could be addressed by simply closing the Western intersection. Even with increased use, the Eastern intersection would achieve a higher safety rating than the existing situation. What Transit seeks is not only a significant upgrade of the Intersection but other enhancements to the State Highway





including widening. These would improve the Intersection well beyond any impact of subdivision traffic and would overcome existing deficiencies.

[31] Again we agree entirely with Mr Huish that the Transit indicative list of projects dated September 2005 to “tee-up” the intersection at \$40,000 does not appear to involve the additional works including intersection widening now being sought in terms of Annexures “A” and “B”. In answer to questions from Commissioner Watson, Ms Field for Transit confirmed that the works now sought were more extensive than those set out in Transit’s programme of works. We have concluded as a fact that the works now sought include significant upgrading beyond that necessary to provide for any increased traffic as a result of this particular project.

[32] Furthermore, we have concluded that Transit has failed to take into account the ability for the Court to compare the permitted baseline (if it is appropriate to do so) with not only the existing environment but with those activities which are permitted as of right. It was acknowledged that there were some 20 additional sections in Colac Bay which could be built on as of right without further consent being required. In addition to that, it is possible for further subdivision to occur in terms of a permitted standard within the Colac Bay area. We were told that at the current time one subdivision for around 12 lots was being finalised as a permitted activity.

[33] On this basis, we do not consider it at all unreasonable or fanciful to consider that at least the same number of properties as proposed in this application could be established as of right. In those circumstances the potential additional effect on the intersection to be attributed to the Foveaux development would be a proportion of increased traffic rather than the total increase. We understand that the Scenic Route itself is becoming more popular. This will also have an impact, particularly on the Western intersection, compared with other general or local traffic which is likely to impact upon the Eastern intersection.



*Section 104*

[34] Because of the ability to take the permitted baseline into account in assessing any effects the Court has spent some considerable time addressing the existing environment and the permitted baseline under section 104. The Court is directed to consider matters under section 104 for an unrestricted discretionary activity. In this particular case, the only issue that gives rise to any concern to the Court or the appellant relates to the traffic issues. Accordingly the Court accepts the other evidence advanced that the consent with the conditions imposed by the District Council is otherwise appropriate.

[35] In terms of an application made under the 2003 Amendment Act (the appropriate version of the Act for the purposes of this appeal) the Court has a discretion under section 104(2) to disregard an adverse effect where it is permitted under the Plan. In the circumstances of this case we have concluded that it is appropriate for the Court to take into account those effects in order to understand the particular position of the parties on this appeal.

*Effects*

[36] It follows from our earlier discussion that, although there might be additional road use relating to this subdivision development, there is no conclusive evidence that this would fundamentally alter the current status of the intersection. In particular we are not satisfied that the evidence demonstrates any particular increased risk from the traffic from this development. Rather, the evidence demonstrated that the closing of the Western intersection would significantly improve the safety of the Intersection as a whole, irrespective of any additional traffic generated from this development and other permitted developments.

[37] To that extent we reject Dr Turner's modelling on the basis:

- (a) that it miscalculates the number of vehicles;
- (b) that it miscalculates the number of western traffic movements;
- (c) of the statistical margins of error and information collected for both the T-intersections and Y-intersections;



- (d) that the improvement in accordance with Transit's work programmes would significantly improve the safety of the intersection no matter whether these additional vehicles were included or not. Even the closure of the Western intersection would significantly improve the safety of the intersection.

[38] Overall, therefore, we have concluded that the addition of this traffic will not significantly affect the safety of this intersection. It is presently inadequate and the matter could simply be addressed by closing the Western intersection at minimal cost.

[39] The Court initially considered the concept of having the applicant pay for the cost of closing the Western intersection. Although no specific costs were given for this, it would be significantly less than the \$40,000 improvements proposed in the Transit Safety Projects Schedule as it incorporates only part of the Transit upgrade works (only the closure of the Western intersection and not the improvement of the T-intersection). It would clearly make the Intersection safer than it is currently, even with the additional traffic. However, Transit made it clear during the course of the hearing that they did not seek this course of action and accordingly it is not sought by them in terms of the appeal.

[40] Moreover, we see statutory problems with contributions towards partial upgrade costs in terms of this particular Plan. The applicant is required to pay a significant sum towards local road upgrading on Colac Bay Road, and this may include the link of Colac Bay Road to the State Highway. In those circumstances, even if the Court had the power to do so, we have concluded it should not exercise its discretion so as to require such a payment for or require a payment towards the closure of the Western intersection applicant.

#### *The role of Transit*

[41] During the course of the hearing, the Court raised questions as to the role of Transit in this appeal and further submissions were called for. Mr Knight made it clear in those submissions that Transit had a right to file a submission. There is no doubt that Transit would constitute a person in terms of the Resource Management Act and thus



would be entitled to file a submission. With respect, this does not answer the particular question the Court asked. We address our understanding of Transit's role on roading matters.

[42] Transit constitutes a Crown entity under the Crown Entities Act 2004 and as such operates within terms of its statutory functions set out in sections 77 and 78 of the Land Transport Management Act 2003. The objective of Transit is set out at section 77, subsection (1):

*The objective of Transit is to operate the State highway system in a way that contributes to an integrated, safe, responsive, and sustainable land transport system.*

[43] Its functions set out in section 78 include, importantly:

(a) *to control the State highway system, including planning, design, supervision, construction and maintenance, in accordance with this Act and the Transit New Zealand Act 1989.*

...

[44] Transit has produced the Planning Policy Manual Supplement (SP/M001, effective from 1 September 2005). This is not a statutory document but represents the approach of Transit to planning matters. Importantly, it states in 1.1:

*The Land Transport Management Act 2003 (LTMA) introduced a new statutory regime and confirmed that the role of Transit New Zealand (Transit) is not simply to build roads in response to traffic pressures, but to manage the State Highway network as a component of New Zealand's transport system. This, together with the New Zealand Transport Strategy (NZTS) signals a clear focus on achieving an integrated, safe, responsive and sustainable land transport system.*

*For Transit, this broad focus requires:*



- *protection of State Highways and their functionality as strategic components of the transport system, positioned at the top of the roading hierarchy.*

[45] This appeal appears to represent a significant step by Transit away from the role of controlling the State Highway system *per se*. In broad terms, it appears to be a more assertive control over who may connect to or use the State Highway system and on what terms. Put another way, it was clear from answers to questions by Ms Field that the intent was that Transit would, through controlling intersections and connections to the State Highway, control where development occurred.

[46] There appeared to be some general proposition that this would occur in terms of plan provisions with the agreement of councils. However where there was a disagreement between the council and Transit, Transit may then argue that no development should occur in a particular area until such time as the network is upgraded. It appears to us that decisions as to where and when development occurs would then be in the hands of Transit rather than the local authorities or the Environment Court. Alternatively this would force developers into major infrastructural upgrades (if agreed to by Transit) in order to proceed with a development.

[47] Mr Chapman for Foveaux pointedly quoted from paragraphs 186 and 187 of the decision of the Court of Appeal in *Estate Homes Limited v Waitakere City Council*<sup>1</sup>:

*[186] With respect to the view of Chambers J, we consider that the Council cannot extort the creation of a public work without compensation by demanding it as the price of consent to subdivision. Certainly, as Chambers J argues, Estate was not bound to proceed with its subdivision. But if it chose to exercise its right to do so in accordance with the law it was not liable to be taxed for the privilege. As Professor Joseph observes in his discussion of the principles (Constitutional and Administrative Law in New Zealand (2<sup>nd</sup> ed) 909):*



*The Local Government Act 1974 [s 690A] codifies the common law against extra – parliamentary taxation.*

[187] *That is an expression of the principle now stated in s 22 of the Constitution Act 1986, that:*

*It shall not be lawful for the Crown, except by or under an Act of Parliament*

*(a) To levy a tax ...*

*which must apply a fortiori to a local council.*

[48] When we examine the terms of this appeal, which directly sought the payment of costs of improvement of the intersection, we can only conclude that Transit are seeking that this Court impose a condition levying a tax as discussed above. The tax is the imposition of a significantly improved intersection on this developer. We are strengthened in that conclusion by the following:

- (a) Transit is a Crown entity;
- (b) its funding is directly provided for by statute (see the Land Transport Management Act);
- (c) the notice of appeal sought a condition that Foveaux pay for the cost of upgrading the intersection;
- (d) the upgrade is a significant enhancement over that provided for in Transit's own schedule of works. (Ms Field confirmed that other intersections to this standard were all agreed by developers and was not able to name any that had been otherwise constructed to this standard by Transit in Southland);
- (e) the condition would overcome an existing deficiency rather than address an effect of the subdivision. The existing deficiencies at the intersection could easily be addressed by closing the Western intersection.



[49] Mr Chapman argued that the imposition of a condition as sought by Transit would offend against the principles of *Newbury DC v Secretary of State for the Environment*<sup>2</sup>. He argues that the imposition of such a condition would be to achieve an ulterior purpose, namely the funding of works required by Transit to upgrade the Intersection and that such a condition would be to overcome a direct prohibition in the Act (Section 108 (8-10)) which requires all financial contribution conditions to be set out in the Plan, and would therefore be unreasonable. We now consider this submission.

***Section 108 of the 2003 Amendment Act***

[50] Section 108 sets out the provisions for conditions of resource consents. Provisions for financial contributions are set out as follows:

- (9) *In this section, financial contribution means a contribution of—*
- (a) *Money; or*
  - (b) *Land, ... [not relevant]*
  - (c) *A combination of money and land.*
- (10) *A consent authority must not include a condition in a resource consent requiring a financial contribution unless —*
- (a) *The condition is imposed in accordance with the purposes specified in the plan [or proposed plan] (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and*
  - (b) *The level of contribution is determined in the manner described in the plan [or proposed plan].*

[51] Mr Chapman submitted that the wording of the section was so wide that it must include a payment of money or land, howsoever arising. In other words, it must include any financial contribution relating to a third party such as Transit. We agree that the only sensible interpretation of this provision must be that it relates to any financial condition, no matter who the beneficiary is. We are strengthened in that view by reference to the Land Transport Management Act section 10(6)(iv) that financial



contributions made by developers will be taken into account in making funding payments from the national land transport account. We can see nothing in the Act which would prevent Transit being included within a District Plan in relation to financial contributions.

[52] In this particular case, the Plan itself recognises the importance of the State Highway and impacts upon it, but financial contributions in relation to Transit assets are not included in the Plan. This is probably based upon an expectation by all participants that funding for matters of national importance (i.e. State Highways) would be provided from specific Government sources.

[53] Section 67 of the Transit New Zealand Act 1989 provides:

*whole cost of construction and maintenance of State highways to be paid out of State Highways Account*

(1) *Subject to subsections (2) and (3) of this section and section 17 of this Act, the whole of the cost of construction and maintenance of the carriageway of any State highway (including any part of a State highway that is the subject of a delegation pursuant to section 62 of this Act) in accordance with the standard prescribed by the Authority shall as from the date of designation of the State highway, be provided by the Authority out of [the State Highways Account].*

Subsections (2) and (3) are not directly relevant.

[54] Although there may be a question as to whether or not there could be a financial contribution required for the State Highway carriageway (to widen the State Highway), one assumes that a financial contribution for those parts of the intersection outside the State Highway itself could be subject to a financial contribution requirement.

[55] Furthermore, seeking such a condition in this instance for what can only be an ulterior purpose to effect improvements to remedy an existing deficiency in the State Highway is contrary to the rationale of the *Newbury* decision.





[56] Transit's position appears to be somewhat confused in that, notwithstanding these powers to seek financial contributions, Ms Field, who was called as the witness for Transit, was not aware of them. In that regard it is unfortunate that a senior person who could have assisted the Court with a better understanding of the statutory role of Transit was not available to give evidence. For current purposes, we can only conclude that, if Transit does have powers to seek provisions for financial contributions within Plans, no such provisions are contained within the Southland District Plan.

*The Southland District Plan*

[57] Various provisions of the Plan were drawn to the Court's attention, particularly by Ms Field. There is no doubt that the Plan recognises the importance of the State Highway as part of the transportation infrastructure (see section 3/2 page 51). The objectives reflected in the Plan (TRAN.1, to TRAN.3) include:

*Objective TRAN.1*

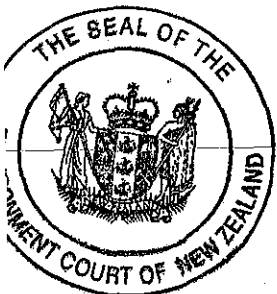
*To mitigate the adverse effects of land use activities on the District's transportation system.*

[58] This is reflected in 3.2.4 - Policies, including Policy TRAN.1(a) which adopt a roading hierarchy structure. State Highway 99 is a regional arterial road, being the second highest level in the roading hierarchy. Its regional importance is also reflected in Rule TRAN.1(b) which recognises that the regional arterials are roads which:

- *are of strategic regional importance,*
- *are a significant element in the regional economy,*
- *are state highways not included in the National Routes category,*
- *give access to important tourist areas or significant areas of population,*

among other factors.

[59] In practical terms we accept that this means that the effects on the roading network need to be taken into account having regard to the regional importance of the



roading system. In this regard we refer to our earlier extensive discussion on this issue. We further note that the Southern Scenic Route deviates from State Highway 99 at Colac Bay and includes Colac Bay Road.

*Any other matters under section 104*

[60] We have discussed issues relating to the role and funding of Transit. We have concluded that the enabling powers of Transit do not extend so far as to control development, especially in circumstances where that would require a developer to overcome existing deficiencies in the network. As a discretionary activity, we cannot see any issues of general integrity of the Plan arising and the Council itself believes that the conditions as granted by Council are appropriate.

[61] Mr Slowley, for the Council, was particularly concerned at the attempt to levy the total costs of the new intersection against this developer. In his view, a contribution is a matter that could be properly addressed by the Council or the Court in assessing an appropriate outcome in terms of conditions. Mr Slowley also properly raised with the Court the issue that the fulfillment of any such condition is within the control of Transit. Although we were told by both Mr Chapman and Mr Knight that Transit would not refuse consent for the work to be undertaken by the developer, the actual permission for the works to be undertaken would need to be formally given by Transit. In our view it is a matter of legal competence that control for that work would be within the control of Transit and therefore could be refused. In practical terms, this must mean that the imposition of the condition would delegate to Transit the power to enable the consent to proceed.

[62] In this regard there is an interesting commentary in the decision of *Westfield (New Zealand) Limited & Ors v Hamilton City Council*<sup>3</sup>:

*[54] I agree that the power to impose conditions for resource management consent is not unfettered. The conditions must be for a resource management purpose, relate to the development in question, and not be so*

<sup>3</sup> CIV2003 485 000956, High Court, Fisher J, 17 March 2004, paras 54-56.



*unreasonable that Parliament could not have had them within contemplation: see, for example, Newbury District Council v Secretary of State for the Environment [1981] AC 578 and Housing New Zealand Ltd v Waitakere City Council [2001] NZRMA 202 (CA).*

[55] *Conditions attached to a consent will usually be regarded as unreasonable if incapable of performance. A classic example was consent to erect additional dwellings subject to a condition requiring access via 4.8 metre wide strip when access to the Applicant's property was in fact possible only through an existing strip with a width of only 3.7 metres: Residential Management Ltd v Papatoetoe City Council (Planning Tribunal A62/86, 29 July 1986, Judge Sheppard); and see further Ravensdown Growing Media Ltd v Southland Regional Council (Environment Court, C194/2000, 5 December 2000, Judge Smith).*

[56] *On the other hand, a condition precedent which defers the opportunity for the Applicant to embark upon the activity until a third party carries out some independent activity is not invalid. There is nothing objectionable, for example, in granting planning permission subject to a condition that the development is not to proceed until a particular highway has been closed, even though the closing of the highway may not lie within the powers of the developer: Grampian Regional Council v City of Aberdeen [1983] P&CR 633, 636 (HL).*

[63] It is therefore arguable as to whether or not such a condition, which could be regarded as a condition precedent, would be unreasonable. In this case we must have regard to the fact that Transit indicate that it is most unlikely that the works will occur in the foreseeable future and they are not part of a current funding programme. Although we remain concerned as to whether or not such a condition could be imposed in these circumstances, we shall proceed on the assumption that a condition precedent could be worded so as to overcome the difficulty set out in the *Westfield* decision.

[64] It appears to us that the added difficulty is that payment of the funds would not in itself guarantee the undertaking of the works. It appears that the condition would



need to specifically contemplate those works being undertaken by the developer. Interestingly, the condition proposed by Transit does not give permission or propose that the developer undertake the works to the standard necessary.

*Part II of the Act*

[65] There is no doubt that State Highway 99 is a matter of some particular significance and of both regional and national importance. No party raised any specific issues under sections 6, 7 and 8, although section 7(b) and (g) relating to the physical resource of the roading infrastructure are matters that would bear upon the decision of this Court. The Court also keeps in mind that section 5 provides for enabling people in communities to provide for *inter alia* their safety. We agree with Transit that this must include issues of road safety, which are matters of widespread concern.

[66] However, in the circumstances of this case, we are not satisfied that there is any enabling of a greater level of safety as a result of the imposition of the condition sought by Transit, even assuming a rewording as we have discussed. On the other hand, we are concerned that there appears to be a clear intention to disable people in communities from providing for future growth unless costs of national roading upgrades are met by individual developers.

[67] The evidence gave rise to a significant concern by us that this was an attempt to extract the costs of significant roading improvements to overcome existing network deficiencies from developers. Having regard to the fact that permitted activities would result in the same level of effect without compensation to Transit, we conclude it is, in principle, wrong to extract full costs for such an improvement from just one developer. Although the provisions for financial contributions under section 108 might provide a remedy in some situations, they are not contemplated in terms of this Plan.

[68] Even if the Court had the power to impose a financial contribution condition in favour of Transit, we would not have taken this step because of:

- (a) the diffuse nature of the effect;
- (b) the permitted activity status of other similar development in the area;



- (c) the minimal improvement necessary to overcome any increased safety risk as a result of this application;
- (d) the low cost of undertaking closure of the Western intersection to address existing deficiencies.

[69] In all the circumstances of this case we believe that the condition sought by Transit is wrong, both in principle and in the exercise of our discretion.


***Conclusion***

[70] We conclude that the consent should be confirmed as granted by the District Council. Accordingly the appeal is dismissed.

***Costs***

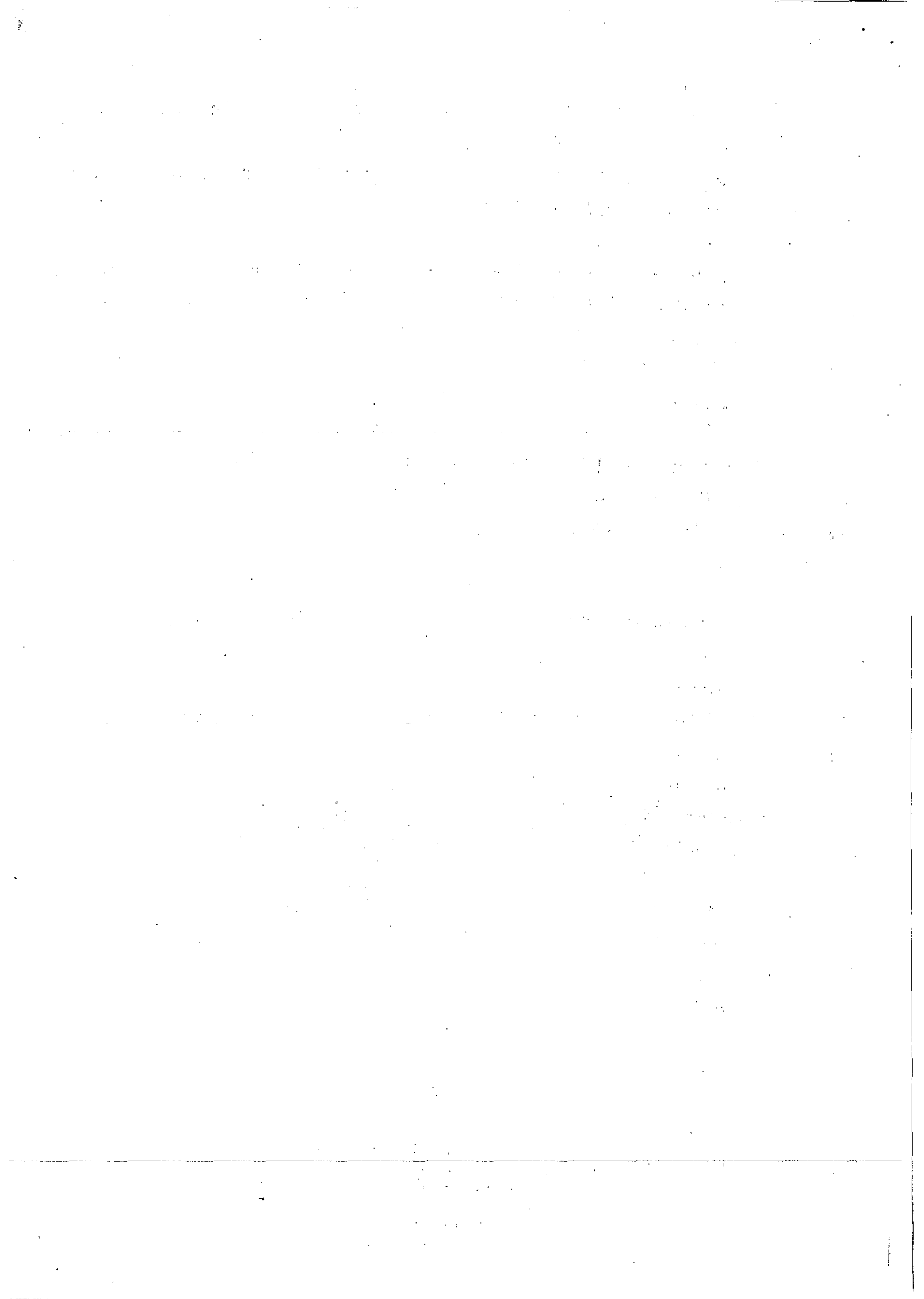
[71] Any application for costs is to be filed within 20 working days, any reply 10 working days thereafter and final reply (if any) 5 working days thereafter.

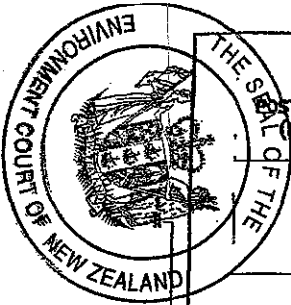
**DATED** at CHRISTCHURCH this 12<sup>th</sup> day of April 2006

  
\_\_\_\_\_  
J A Smith  
Environment Judge



Issued<sup>4</sup>: 18 APR 2006

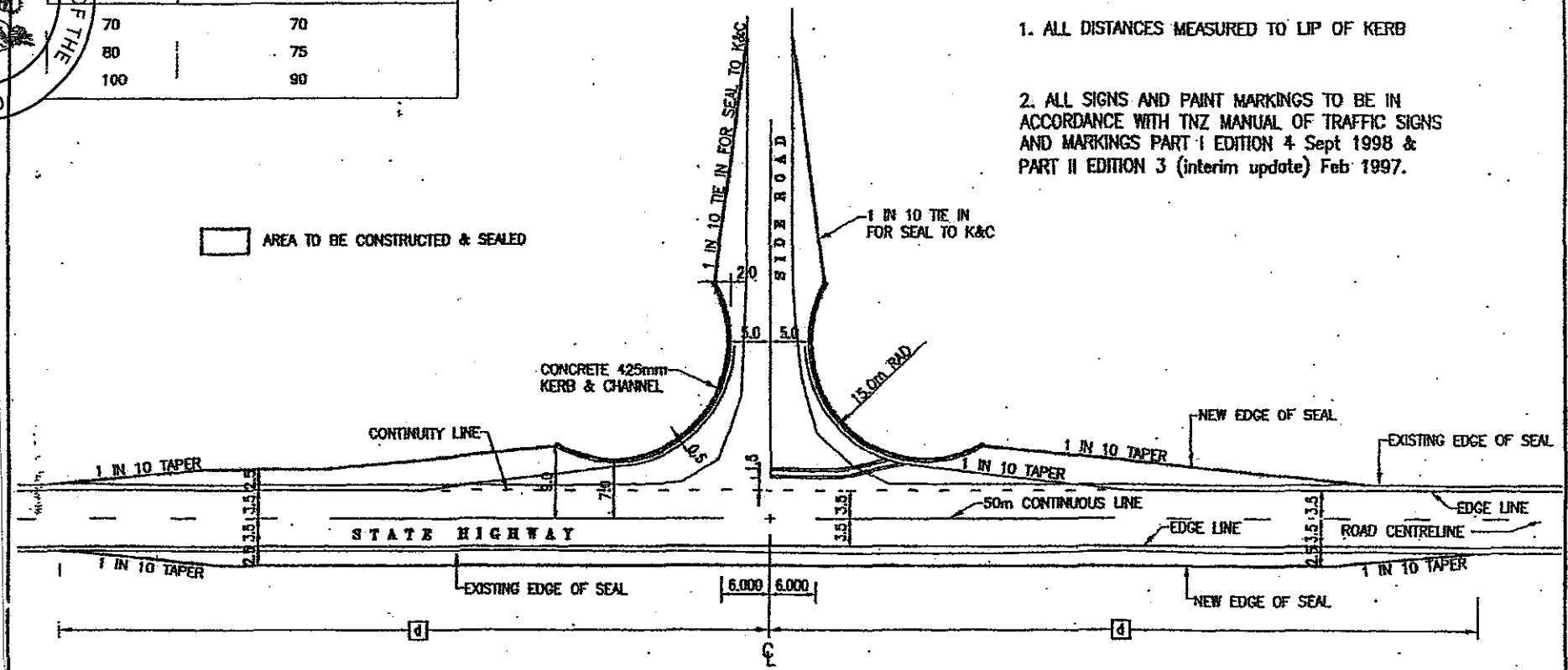




POSTED LIMIT (km/h)	Length of seal (d) required from centre line of side road or access (including taper) (metres)
70	70
80	75
100	90

**NOTES:**

1. ALL DISTANCES MEASURED TO LIP OF KERB
2. ALL SIGNS AND PAINT MARKINGS TO BE IN ACCORDANCE WITH TNZ MANUAL OF TRAFFIC SIGNS AND MARKINGS PART I EDITION 4 Sept 1998 & PART II EDITION 3 (interim update) Feb 1997.



□ AREA TO BE CONSTRUCTED & SEALED

NO	REVISED	DATE

**TRANSIT NEW ZEALAND**  
**R D O'CAIN**  
 Regional Manager, Dunedin

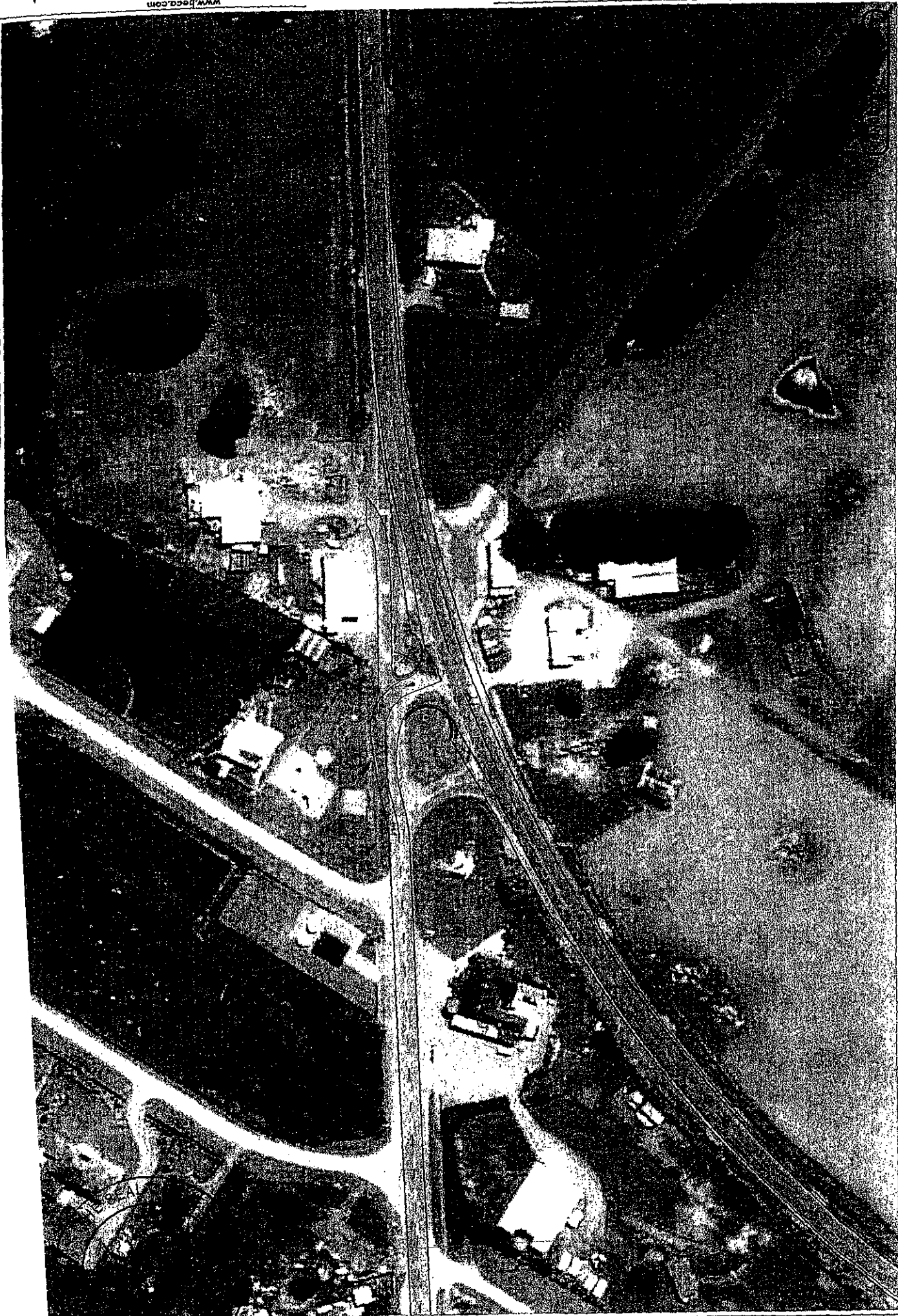
**INTEGRITY Office**  
 PO Box 807  
 Dunedin, New Zealand  
 Tel: 03 474 7000  
 Fax: 03 474 7009


PROJECT: TRANSIT NEW ZEALAND SHARED HIGHWAY DESIGN RURAL INTERSECTION	
DIAGRAM D (31,100 ecm/day) WITH QUADRANT KERBS	
SUBJECT: Scheduling/Quat Estimate	DATE: 17/11/04
SCALE: 1:500	FILE NO: 17/11/04 0 1149
FEEDBACK NUMBER: 0000	DATE: 17/11/04
SHEET: 1	TOTAL SHEETS: 1





Printed on 10/11/11 at 10:00 AM



		<b>INTERSECTION UPGRADE</b> Drawing No. 3380882-CK01	
<b>COLAC BAY ROAD INTERSECTION</b>		CIVIL	
Scale: 1:500 Date: 10/11/11	Project: 3380882-CK01 Client: BCCQ	Drawing No. 3380882-CK01 Revision: A	Date: 10/11/11
Engineers • Planners • Managers			

PLANNING COURT OF NEW ZEALAND



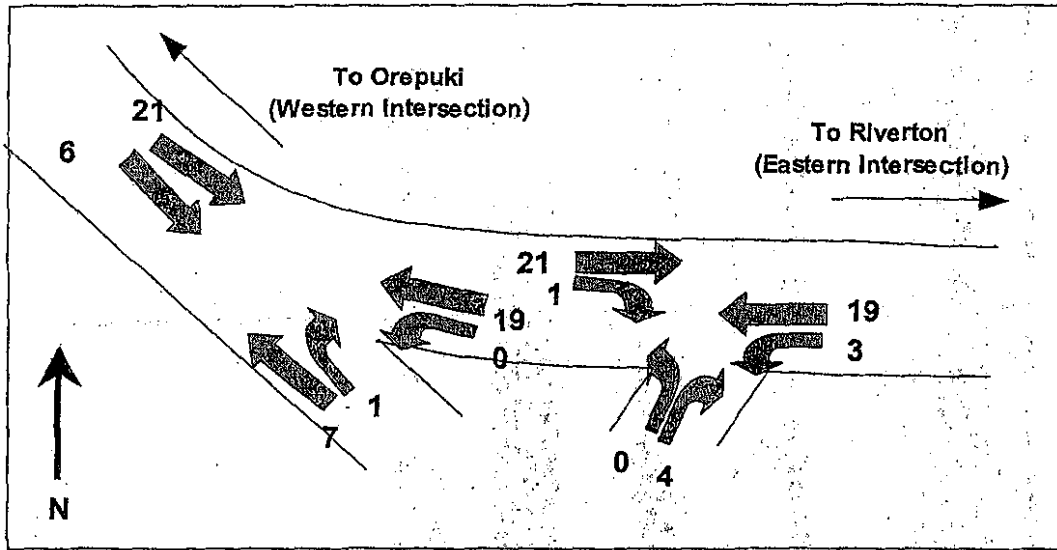


Figure 2 - Average hourly counts (2006)

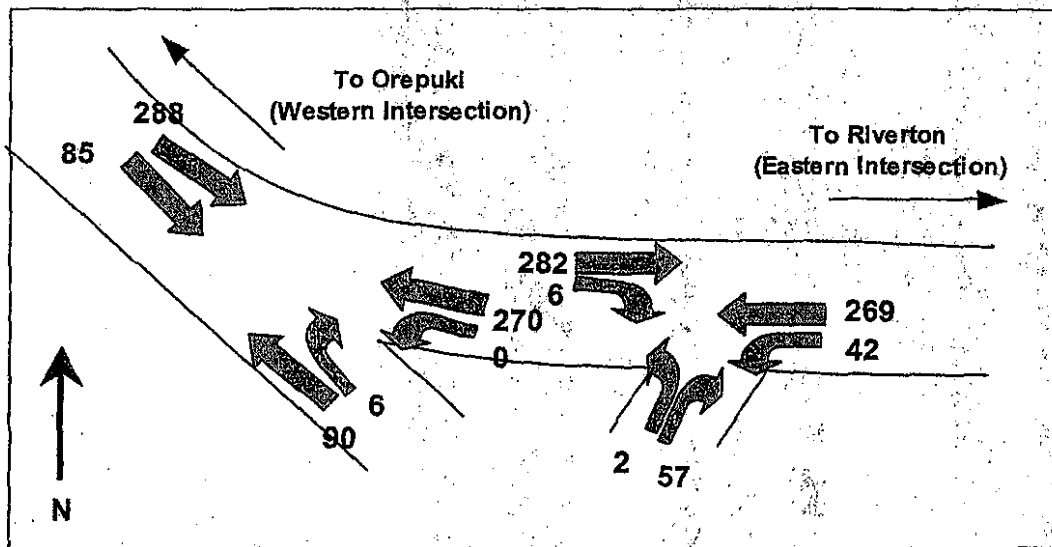


Figure 3 - Estimated daily traffic volumes (2006)



