

Submission on the Draft Regional Land Transport Plan

Summary

1. Lawyers for Climate Action NZ Inc (**LCANZI**) is a non-profit group of over 300 lawyers who have come together to advocate for legislation and policies to ensure Aotearoa New Zealand meets or exceeds its commitment under the Paris Agreement to achieve net zero carbon emissions as soon as possible and no later than 2050. More information about us can be found on our website: <https://www.lawyersforclimateaction.nz/>
2. LCANZI is a member of the All Aboard Aotearoa alliance and fully supports the submission being made by that organisation. The focus of our separate submission is to consider in greater detail whether the draft Regional Land Transport Plan (**RLTP**) complies with the applicable legal framework, including:
 - Local Government (Auckland Council) Act 2009;
 - Land Transport Management Act 2003;
 - Local Government Act 2002;
 - Auckland's Climate Plan;
 - Local Government Leaders' Climate Change Declaration 2017, signed by Mayor Phil Goff;
 - Climate Change Response Act 2002;
 - Te Tiriti o Waitangi; and
 - New Zealand Bill of Rights Act 1990.
3. Our conclusion is that the draft RLTP does *not* comply with the applicable legal requirements. The main reason for this is that, while the combined effect of the legal instruments listed above is to require a substantial reduction in emissions, including transport emissions, by 2030, the draft RLTP provides for transport emissions to increase by 6% by 2031, or, at best, reduce by 12% depending on whether the Government makes certain policy interventions.
4. The draft RLTP is therefore not capable of approval in its current form and must be radically overhauled. In particular, the RLTP must provide for a 64% decrease in transport emissions by 2030, from 2016 levels, consistent with the Te Tāruke ā Tāwhiri (Auckland Climate Plan). Failing this, the RLTP will be unlawful and Auckland Transport and the Council will be in

breach of their duties in relation to it. Any decision to approve the draft RLTP will be at risk of being set aside by a Court on an application of judicial review.

5. The New Zealand Courts have signalled their willingness to closely scrutinise and set aside decisions by Councils that relate to climate change. In *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council*,¹ Justice Palmer explained:

There is no doubt that climate change gives rise to vitally important environmental, economic, social, cultural and political issues in 2020. [...] The inhabitants and environment in the Thames-Coromandel District, and the cost of Council infrastructure, are likely to be significantly impacted by the effects of anthropogenic climate change. I accept that the intensity of review of decisions about climate change by public decision-makers is similar to that for fundamental human rights. Depending on their context, decisions about climate change deserve heightened scrutiny.

6. We urge Auckland Transport and the Council to comply with the law and revise the RLTP such that it achieves the necessary reduction in transport emissions. If this requires the Council to liaise with the Government on ATAP, then that is what must happen.

The legal requirements for the RLTP have not been met

7. We set out below the legal requirements that must be met in relation to the RLTP, and the respects in which the draft RLTP does not meet them.

Local Government (Auckland Council) Act 2009

8. Auckland Transport, the body charged with preparing the RLTP, is constituted under the Local Government (Auckland Council) Act 2009. The Act provides that Auckland Transport's purpose "is to contribute to an effective, efficient, and safe Auckland land transport system in the public interest".² It also provides that one of Auckland Transport's functions is to prepare the RLTP.³
9. Auckland Transport must act in accordance with its statutory purpose. This means that in preparing the RLTP, Auckland Transport must "contribute to an effective, efficient, and safe Auckland land transport system in the public interest". Failure to do so will mean that Auckland Transport has acted unlawfully and its decisions in relation to the RLTP will be at risk of being set aside by a Court on an application for judicial review.⁴

¹ *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* [2020] NZHC 3228 at [50]-[51].

² Local Government (Auckland Council) Act 2009, s 39.

³ Local Government (Auckland Council) Act 2009, s 45(a).

⁴ The decisions of council-controlled organisations are susceptible to judicial review: *Moncrief-Spittle v Regional Facilities Auckland Limited* [2021] NZCA 142 at [68]; *Moncrief-Spittle v Regional Facilities Auckland Limited* [2019] NZHC 2399 at [27]-[29]; Graham Taylor, *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [2.02].

10. There is no doubt that the “public interest” requires a swift and substantial reduction in emissions to achieve net zero by 2050. The Council has made this clear in its own Climate Plan: it has set a “core goal” of reducing emissions by 50% by 2030 and reaching net zero emissions by 2050.⁵ The Council says that achieving this “core goal” requires a 64% reduction in gross emissions from transport in Auckland by 2030, compared to 2016 levels.⁶
11. This reduction in emissions is of such public importance that the Council has declared a climate emergency.⁷ The Council has also signed the Local Government Leaders’ Climate Change Declaration in which it has committed to “develop and implement ambitious action plans that reduce greenhouse gas emissions”.⁸ The Council has promised that “these plans will: promote walking, cycling, public transport and other low carbon transport options”.⁹
12. The Council has spelt out in its Climate Plan what actions it must take to achieve the necessary reduction in transport emissions. In short, the Council says it must: “encourage a shift to public transport use, walking and micro-mobility devices, rather than driving”.¹⁰ The Council has said it will do this including by reducing private vehicle travel, and making travelling by public transport more appealing than using personal vehicles.¹¹
13. The draft RLTP is plainly not consistent with the Council’s Climate Plan and is not in the public interest. This is because it provides for a 6% increase in transport emissions by 2031, or, at best, a 12% decrease if the Government makes certain policy interventions.¹² Rather than encouraging the mode-shift away from driving the Council has declared necessary in its Climate Plan, the draft RLTP provides for private vehicle trips and vehicle kilometres travelled to increase.¹³ In our opinion, in preparing the RLTP Auckland Transport has failed to act in accordance with its statutory purpose. Its decisions in relation to the RLTP are thus susceptible to being set aside by the Court.

Land Transport Management Act 2003

14. The Land Transport Management Act 2003 defines the “core requirements” for the RLTP.¹⁴ Among other things, before the RLTP can be approved, the Regional Transport Committee must be satisfied that the RLTP:¹⁵

⁵ Auckland Climate Plan, p. 7.

⁶ Auckland Climate Plan, p. 52.

⁷ https://infocouncil.aucklandcouncil.govt.nz/Open/2019/06/ENV_20190611_MIN_6851_WEB.htm.

⁸ Local Government Leaders’ Climate Change Declaration 2017.

⁹ Local Government Leaders’ Climate Change Declaration 2017.

¹⁰ Auckland Climate Plan, p. 85.

¹¹ Auckland Climate Plan, pp. 82-85.

¹² Draft RLTP, p. 65.

¹³ Draft RLTP, p. 64.

¹⁴ Land Transport Management Act 2003, s 14.

¹⁵ Land Transport Management Act 2003, s 14.

- a. contributes to the purpose of the Land Transport Management Act 2003, that purpose being “to contribute to an effective, efficient, and safe land transport system in the public interest”;¹⁶ and
 - b. is consistent with the Government Policy Statement on land transport.
15. As we have explained in the previous section, the draft RLTP does not “contribute to an effective, efficient, and safe land transport system in the public interest”. Nor is the draft RLTP consistent with the Government Policy Statement on land transport.¹⁷ That Statement calls for reduced transport emissions by 2031 through mode-shift, i.e. increasing the share of people’s travel by public transport, walking or cycling.¹⁸ This requires a “rapid transition to a low carbon transport system”.¹⁹ The draft RLTP is inconsistent with this: it provides for an increase in emissions, and for private vehicle trips and vehicle kilometres travelled to increase.²⁰
16. The Regional Transport Committee does not have unfettered discretion in deciding whether the RLTP meets these requirements. As a body constituted by statute,²¹ its decisions must comply with the law, including the public law standard of reasonableness. This means that, even if it is satisfied that the RLTP meets the “core requirements” set out in s 14 of the Land Transport Management Act 2003, if that is a decision that no reasonable committee could make, it will be unlawful and at risk of being set aside by a Court on an application for judicial review.
17. In our submission, no Regional Transport Committee acting reasonably could possibly be satisfied that the RLTP, as it stands, meets the “core requirements” set out in the Land Transport Management Act 2003.

Local Government Act 2002

18. The Local Government Act 2002 requires the Council to work for the benefit of future generations:
- a. The Council’s statutory purpose is to “meet the current and future needs of communities for good quality local infrastructure” which means “infrastructure and services that are efficient, effective and appropriate to present and anticipated future circumstances”.²² As a public body, the Council must act in accordance with its statutory purpose.

¹⁶ Land Transport Management Act 2003, s 3.

¹⁷ Land Transport Management Act 2003, ss 3, 14(a)(ii).

¹⁸ GPS dated September 2020, p. 22.

¹⁹ GPS dated September 2020, p. 22.

²⁰ Draft RLTP, p. 64.

²¹ Land Transport Management Act 2003, s 105.

²² Local Government Act 2002, s 10(2) (emphasis added).

b. When making any decision, the Council must act in accordance with the following principles:

- i. The Council “should take account of the interests of future as well as current communities” and “the likely impact of any decision” on environmental wellbeing, as well as social, economic and cultural wellbeing.²³
- ii. The Council “should ensure prudent stewardship and efficient and effective use of its resources in the interests of its district or region, including by planning effectively for the future management of its assets”.²⁴
- iii. “In taking a sustainable development approach, the Council should take into account: the social, economic, and cultural wellbeing of people and communities; the need to maintain and enhance the quality of the environment; and the reasonably foreseeable needs of future generations”.²⁵

19. In our opinion, the foregoing purpose and principles entail the Council acting in a manner that will achieve the required emissions reduction, as called for in its own Climate Plan. A decision by the Council to endorse an RLTP that does not reduce emissions in accordance with the Council’s own Climate Plan will therefore be contrary to the Council’s statutory purpose and evidence that the Council failed to act in accordance with the principles above. The Council’s decision to endorse the RLTP would therefore be unlawful and at risk of being set aside by a Court on an application for judicial review.

20. The Local Government Act 2002 also imposes obligations on Auckland Transport as a council-controlled organisation. It provides that the principal objective of a council-controlled organisation is to:

- a. achieve the objectives of its shareholders, both commercial and non-commercial, as specified in the statement of intent; and
- b. exhibit a sense of social and environmental responsibility by having regard to the interests of the community in which it operates, among other things.²⁶

21. The Council, as a shareholder of Auckland Transport, has the objective of reducing transport emissions by 64% by 2030, from 2016 levels (as set out in its Climate Plan). This is reflected in AT’s Statement of Intent for 2020-2023:

²³ Local Government Act 2002, s 14(1)(c) (emphasis added).

²⁴ Local Government Act 2002, s 14(1)(g) (emphasis added).

²⁵ Local Government Act 2002, s 14(1)(h) (emphasis added).

²⁶ Local Government Act 2002, s 59(a) and (c).

Auckland Climate Plan sets a pathway to rapidly reduce greenhouse gas emissions and help prepare Auckland for the impacts of climate change. It will inform detailed actions for inclusion in the next RLTP to be finalised in 2021.²⁷

In October 2020, Auckland Council will be launching Te Tāruke-ā-Tāwhiri, Auckland's Climate Plan. AT has worked closely with Auckland Council on the development of the Plan, and within available resources will continue to work to help deliver the Climate Plan's outcomes, which includes the goal of a 50% greenhouse gas emissions reduction by 2030.

With around 40% of Auckland's greenhouse gas emissions coming from the transport sector, reducing transport emissions is vital to meeting the region's greenhouse gas emissions reduction goals. Given the size of reduction needed, an aligned approach between Auckland Council, Central Government and AT is essential.²⁸

[...]

AT is fully committed to helping reduce Auckland's transport emissions. [...] The recently declared climate emergency, and focus on reducing emissions, confirms the need for AT to continue investing in mode shift as a priority with available funding. Encouraging mode change away from private transport is the main mechanism AT can use to reduce greenhouse gas emissions.²⁹

22. The RLTP does not achieve the objective of reducing transport emissions as specified in the Statement of Intent, and nor does it exhibit a sense of environmental responsibility. This means that Auckland Transport, in preparing the RLTP, has failed to act in accordance with its principal statutory objective. This forms a further basis for judicial review of Auckland Transport's decisions in relation to the RLTP by the Courts.

Auckland Climate Plan, Auckland Council's Climate Emergency Declaration, Local Government Leaders' Climate Change Declaration 2017

23. In our opinion, the Council's declarations, plans and policies to reduce transport emissions by 64% by 2030, in particular by encouraging mode-shift away from driving, have created a legitimate expectation on the part of Auckland residents that the Council will take action to do this, including by providing for it in the RLTP. Auckland residents have relied, and continued to rely, on the Council to do this.

24. Legitimate expectations can be legally enforced against Councils.³⁰ For example, in *Aoraki Water Trust v Meridian Energy Limited*, the High Court recognised that water rights holders

²⁷ Auckland Transport Statement of Intent 2020-2023, p. 9.

²⁸ Auckland Transport Statement of Intent 2020-2023, pp. 13-14.

²⁹ Auckland Transport Statement of Intent 2020-2023, p. 17.

³⁰ *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* [2020] NZHC 3228 at [31].

had a legitimate expectation that the regional council would not derogate from their water rights grants unless specifically empowered to do so by statute.³¹

25. In *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council*, the High Court highlighted the possibility of a successful action for breach of legitimate expectation on the basis of the Local Government Leaders' Climate Change Declaration 2017:³²

[I]f a Council endorses their Mayor signing the Declaration and the Mayor signs it, then the Mayor would have ostensibly signed it on the Council's behalf. That appears to be what was proposed here by Councillor Peters. And if, for example, the Council were then to refuse to even consider developing any action plan to reduce greenhouse gas emissions, or to decide not to work with its community at all to understand the physical impacts of climate change, then a successful action for breach of legitimate expectation could not be ruled out.

26. We consider that Auckland residents have a legitimate expectation that the Council will create, or procure Auckland Transport to create, a RLTP that provides for the necessary reduction in transport emissions. If the RLTP does not do this, the Council risks facing a successful action for breach of legitimate expectation.

Climate Change Response Act 2002

27. The Climate Change Response Act 2002 sets a target for New Zealand to:

- a. reduce net emissions of all greenhouse gases (except biogenic methane) to zero by 2050; and
- b. reduce emissions of biogenic methane to 24-47 per cent below 2017 levels by 2050, including to 10 per cent below 2017 levels by 2030

(the **2050 Target**).

28. The 2050 Target can only be achieved if Auckland fully decarbonises its transport system by 2050. It is difficult to see how this could occur if the draft RLTP is adopted, and transport emissions continue to increase until at least 2031.

29. The Council and Auckland Transport are expressly permitted by section 5ZN of the Climate Change Response Act to take into account the 2050 Target in exercising their functions, which include drafting and adopting an RLTP. In our view, the 2050 Target is so obviously material to the RLTP that the Court is likely to consider that the Council and Auckland Transport are *required* to have regard to the 2050 Target when drafting and adopting the RLTP.

30. The draft RLTP contains passing reference to the 2050 Target but does not explain how the Council and Auckland Transport have taken it into account, nor does it explain how the

³¹ *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* [2020] NZHC 3228 at [31].

³² *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* [2020] NZHC 3228 at [32].

draft RLTP relates to the 2050 Target. Accordingly, if the RLTP is adopted in its current form, we consider it likely that the Court would find that the Council and Auckland Transport have not given proper consideration to the 2050 Target in drafting and adopting the RLTP.

Te Tiriti o Waitangi

31. Te Tiriti o Waitangi places overarching obligations on the Crown. Under Article 2 of Te Tiriti the Crown has the obligation to preserve and protect tino rangatiratanga of Māori over their whenua, kāinga and taonga. The Court of Appeal has held that this imposes a duty on the Crown to actively protect Māori use of their lands and waters to fullest extent practicable.³³ In our view, this encompasses a duty on the Crown to preserve and protect Māori lands and waters and other environmental taonga against the effects of climate change. The Crown's duty of protection, in our view, requires active steps by the Crown to mitigate the effects of climate change on Māori by cutting emissions.
32. Section 4 of the Local Government Act 2002 provides that "in order to recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi", Parts 2 and 6 of the Act "provide principles and requirements for local authorities that are intended to facilitate participation by Māori in local authority decision-making processes". Some of the principles in Part 2 are set out at paragraph 18.b above.
33. We consider that the draft RLTP – providing as it does for an increase in emissions, and not the necessary decrease – is inconsistent with the Crown's obligations under Article 2 of Te Tiriti.
34. While these are our views of the relationship between the RLTP and Te Tiriti, we acknowledge that we have not consulted with iwi/Māori representatives on this issue and we do not claim to speak on behalf of iwi/Māori.

New Zealand Bill of Rights Act 1990

35. In performing their functions, both Auckland Transport and the Council are required to comply with the New Zealand Bill of Rights Act 1990 (**NZBORA**).³⁴ As an illustration of this, the Court of Appeal has recently found that Regional Facilities Auckland Limited was bound to observe the NZBORA in deciding whether to cancel a venue hire agreement.³⁵
36. One of the fundamental rights protected by the NZBORA is the right to life. Section 8 provides that "[n]o one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice".

³³ *NZ Māori Council v Attorney-General* [1987] 1 NZLR 641 CA. See also the Wai 262 Report.

³⁴ New Zealand Bill of Rights Act 1990, s 3.

³⁵ *Moncrief-Spittle v Regional Facilities Auckland Limited* [2021] NZCA 142 at [68].

37. The right to life in s 8 of the NZBORA has counterparts in global and regional human rights instruments, such as the International Covenant on Civil and Political Rights,³⁶ which Aotearoa New Zealand is a party to, and the European Convention on Human Rights (ECHR).³⁷
38. The scientific consensus is that the consequences of global warming for human life will be much more severe if warming exceeds 1.5° Celsius above pre-industrial levels. The Council has declared a climate emergency and formulated a plan for achieving net zero emissions by 2050, including by reducing transport emissions by 64% by 2030 compared to 2016 levels.
39. In view of this, we consider that preparing and approving a RLTP that does not provide for this reduction in transport emissions is inconsistent with the right to life under the NZBORA.
40. Support for our view comes from the Dutch case of *The State of the Netherlands v Stichting Urgenda*,³⁸ which arose from a 2013 challenge to the Dutch Government's target of a 20% reduction in emissions by 2020. The applicant NGO argued that the target was inconsistent with, inter alia, the right to life in the ECHR, in circumstances where the scientific consensus was that a reduction of 25-40% was necessary to keep warming to a maximum of 2°C. The Dutch Supreme Court upheld the lower court rulings that the State was under a duty to reduce emissions by 25% by 2020.
41. The Court concluded that the right to life imposes a positive obligation on States to take appropriate measures to protect the lives of those within its jurisdiction from a "real and immediate risk" which is "genuine and imminent".³⁹ The Court also noted that, while the Netherlands' output of GHG emissions is relatively small when looked at on a worldwide scale, this did not excuse it from action. It held that the right to life "should be interpreted in such a way that [it] oblige[s] the contracting states to do 'their part' to counter [the] danger" of climate change.⁴⁰
42. The success of *Urgenda* has inspired similar challenges in other jurisdictions, including in Ireland, where the Irish Supreme Court held that the Irish Government's National Mitigation Plan 2017 was invalid on the grounds that the plan did not meet statutory requirements and also noted that there may be environmental cases where the right to life may be engaged.⁴¹ A number of other cases involving similar claims based on the right to life are currently proceeding through court systems worldwide, including in the South

³⁶ International Covenant on Civil and Political Rights, art 6.

³⁷ European Convention on Human Rights, art 2.

³⁸ *The State of the Netherlands v Stichting Urgenda* ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, 13 January 2020).

³⁹ At [5.2.2].

⁴⁰ At [5.8].

⁴¹ *Friends of the Irish Environment v Ireland* [2020] IESC 49.

Korean Constitutional Court,⁴² the Canadian Federal Court of Appeal⁴³ and in the European Court of Human Rights.⁴⁴

43. In light of this, we consider that Auckland Transport and the Council are obliged to ensure that the RLTP is consistent with the right to life of Aucklanders (and indeed all New Zealanders). In our opinion, this means that the RLTP must provide for the necessary reductions in transport emissions. Failure to do this will, in our view, be a breach of the NZBORA and susceptible to judicial review on that basis.

The role of ATAP

44. The draft RLTP states that it has been informed by ATAP.⁴⁵ As the draft RLTP rightly acknowledges, ATAP does not replace Auckland Transport's and the Council's statutory obligations in relation to the RLTP.⁴⁶ The RLTP must comply with the law regardless of what ATAP says. Auckland Transport and the Council are required to do what is necessary to produce a compliant RLTP, including liaising with the Government.
45. The Council is required to consult on the RLTP in accordance with the principles set out in s 82 of the Local Government Act 2002.⁴⁷ The High Court has recently found that Queenstown Lakes District Council breached these statutory consultation requirements by failing to make clear during the consultation process that it was contemplating a 100-year lease for jet services at Wanaka Airport, and therefore the subsequent grant of the lease was unlawful.⁴⁸
46. The draft RLTP is not "set in stone" despite having been informed by ATAP.⁴⁹ If that is not correct, and the Council not willing to alter the RLTP due to ATAP, it will have breached the consultation requirements in the Local Government Act 2002. The RLTP will therefore be vulnerable on this additional basis to being set aside on an application for judicial review.

The way forward

47. In summary, the law is clear: the RLTP must provide for an effective, efficient, and safe Auckland land transport system in the public interest. In light of the climate emergency, this means that it must provide for a 64% reduction in transport emissions by 2030 as compared to 2016 levels, consistent with the Council's Climate Plan.
48. The draft RLTP must be revised to achieve this. If this means that the Council must liaise with the Government and revise ATAP, then that is what must happen. The draft RLTP as it stands is in breach of the legal requirements and is not capable of lawful approval.

⁴² *Do-Hyun Kim v South Korea* (filed 13 March 2020).

⁴³ *La Rose v Her Majesty the Queen* (appealed 24 November 2020).

⁴⁴ See <<https://youth4climatejustice.org/>>.

⁴⁵ Draft RLTP, p. 85.

⁴⁶ Draft RLTP, p. 85.

⁴⁷ Land Transport Management Act 2003, s 18.

⁴⁸ *Wanaka Stakeholders Group Inc v Queenstown Lakes District Council* [2021] NZHC 852 at [218]-[222].

⁴⁹ Draft RLTP, p. 85.

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