

18 May 2021

The Directors
Auckland Transport

The draft Regional Land Transport Plan (RLTP)

1. We write to you in your capacity as directors of Auckland Transport and members of the Regional Transport Committee (RTC).
2. The purpose of this letter is to notify you that, in our view, the draft RLTP is unlawful and that decisions by the RTC and the board to approve the RLTP will be vulnerable to being set aside on an application for judicial review. This letter expands on the presentation that representatives of Lawyers for Climate Action NZ Inc gave to a sub-committee of the RTC on 10 May.
3. The primary reason why the draft RLTP is unlawful is that it provides for greenhouse gas emissions from transport to increase by 6 percent by 2031 or, at best, decrease by 12 percent if the Government makes certain policy interventions. This is contrary to the Government Policy Statement on land transport, Te Tāruke-ā-Tāwhiri: Auckland's Climate Plan and the public interest generally. As a result, the draft RLTP does not comply with the Local Government (Auckland Council) Act 2009, Land Transport Management Act 2003, Local Government Act 2002, the Climate Change Response Act 2002 or the New Zealand Bill of Rights Act 1990. This is explained in detail in our submission on the draft RLTP, a copy of which we **enclose**.
4. In our view, the RTC cannot lawfully approve the draft RLTP. That is because the RTC, acting reasonably, cannot be satisfied that the draft RLTP meets the requirements in s 14(1) of the Land Transport Management Act 2003. Approval by the board may also constitute a breach of the directors' duties under s 44 of the Local Government (Auckland Council) Act 2009. Approving the RLTP and then immediately seeking to have it varied would indicate that the RTC and the board failed to comply with their duties in the first place when considering whether the RLTP should be approved.
5. The RTC and the board must use this opportunity to insist that the draft RLTP be re-drafted in order to provide the necessary emissions reductions. If that means going back to the government in relation to ATAP, that is what must happen. We appreciate that this may not be easy. But this is what is required – not only as a matter of law, but as a matter of leadership. You will make the final decision as to whether New Zealand's

largest city has a transport plan that puts us on course to achieve the necessary emissions reductions or not. If there was ever a time for you to show leadership, this is it. The people whom you serve are counting on you.

The Regional Transport Committee cannot lawfully approve the RLTP

6. Section 14(1) of the Land Transport Management Act 2003 provides that, before submitting the draft RLTP to the Council or Auckland Transport for approval, the RTC must be satisfied that the RLTP:
 - a) contributes to the purpose of the Act, that being “an effective, efficient, and safe land transport system in the public interest”; and
 - b) is consistent with the Government Policy Statement on land transport (GPS).
7. The RTC, being a statutory body exercising a statutory function, must act reasonably in making decisions, including in deciding whether it is satisfied that the draft RLTP meets these requirements.¹ This means that if no reasonable decision-maker in the RTC’s position would be satisfied that the draft RLTP meets these two requirements, then any decision by the RTC that it is so satisfied will be unlawful and vulnerable to being set aside upon judicial review.
8. In our opinion, the draft RLTP does not meet the two requirements in s 14. No reasonable decision-maker could be satisfied that it does so.

The draft RLTP is not “in the public interest”

9. The draft RLTP is not “in the public interest” because it provides for an increase in greenhouse gas emissions from transport.
10. Recent case law indicates that courts are ready to accept that the “public interest” requires significant emissions reductions. In the recent case *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council*, the High Court accepted that the expert evidence before it “demonstrates unequivocally that anthropogenic climate change is occurring”, that “the scientific consensus is that the effects of climate change, if unmitigated” include severe consequences for the natural world and humanity, and that “the scientific consensus demonstrates dangerous anthropogenic warming is likely to be unavoidable unless substantial mitigation steps are undertaken immediately”.²
11. Cases have also been won where emissions reduction targets set by public bodies have been too low. In *The State of the Netherlands v Stichting Urgenda*, the Supreme Court of the Netherlands found that the Dutch Government’s emissions reduction target was

¹ The RTC is constituted under s 105 of the Land Transport Management Act 2003.

² *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* [2020] NZHC 3228 at [4]-[5].

insufficiently ambitious and therefore unlawful. At issue was the government target set in 2013 to reduce emissions by 20% by 2020.³ The applicant NGO argued that the target was inconsistent with, among other things, the right to life in the European Convention on Human Rights, 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.

12. The Council's own Climate Plan is likely to be understood as good evidence of what the public interest requires. In that Plan, the Council has set a "core goal" of reducing emissions by 50% by 2030 and reaching net zero emissions by 2050. 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.⁴ The reduction in emissions is of such public importance that the Council has declared a climate emergency and 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".⁵ The Council's own declarations, plans and policies make clear what the public interest requires.
13. The "public interest" thus requires the swift and substantial reduction in emissions. No decision-maker, acting reasonably, could be satisfied that the draft RLTP – providing as it does for emissions to increase, or only modestly decrease – is in the public interest. Any decision by the RTC that is satisfied that the draft RLTP is in the public interest will be unlawful.

The draft RLTP is not consistent with the GPS

14. The GPS identifies action against climate change as a "strategic priority" and calls for "transforming to a low carbon transport system that supports emissions reductions aligned with national commitments, while improving safety and inclusive access".⁶
15. "National commitments" are defined in the Climate Change Response Act 2002, as amended by the Climate Change Response (Zero Carbon) Amendment Act 2019. This provides that New Zealand will contribute to global efforts to limit warming to

³ *The State of the Netherlands v Stichting Urgenda* ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, 13 January 2020).

⁴ Auckland Climate Plan, p. 52.

⁵ Local Government Leaders' Climate Change Declaration 2017; https://infocouncil.aucklandcouncil.govt.nz/Open/2019/06/ENV_20190611_MIN_6851_WEB.htm.

⁶ GPS, p. 22 (emphasis added).

1.5 degrees Celsius and achieve net zero by 2050.⁷ New Zealand has committed to reduce greenhouse emissions to 30% below 2005 levels by 2030.⁸

16. A “primary outcome” under the GPS is that “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 Climate Change Commission recommended to Cabinet until emissions budgets are released in 2021”.⁹ The Climate Change Commission’s draft report recommends an almost 50% reduction in transport emissions by 2035, from 16.6 Mt CO₂-e in 2018 to 8.8 Mt CO₂-e in 2035.¹⁰
17. The GPS also calls for “mode shift in urban areas from private vehicles to public transport, walking, and cycling” in order to “support efforts to reduce emissions”.¹¹
18. The draft RLTP is not consistent with the GPS. The GPS calls for emissions to decrease, including by mode-shift away from private vehicles. The draft RLTP, by contrast, provides for emissions to increase by 6% and private vehicle use to increase (thus undermining mode-shift).

Alignment with ATAP does not render the draft RLTP lawful

19. We understand that the draft RLTP has been prepared to align with ATAP. This does not render it lawful. The RLTP must comply with the statutory requirements regardless of what is contained in ATAP. ATAP does not override the RTC’s, Auckland Transport’s or the directors’ statutory obligations in relation to the RLTP.

Approval of the RLTP may constitute a breach of the directors’ duties

20. Approval of this RLTP by the board may also constitute a breach of directors’ duties under s 44 of the Local Government (Auckland Council) Act 2009. This provides:

Duties of directors

- (1) A director must not breach this Act or cause a breach, or agree to any breach by Auckland Transport, of this Act.
- (2) A director must, when acting as a director, act with honesty and integrity.

⁷ Sections 3 and 5Q.

⁸ New Zealand’s “nationally defined contribution” (<https://www.mfat.govt.nz/en/environment/climate-change/meeting-our-targets/>)

⁹ GPS, p. 22 (emphasis added).

¹⁰ Climate Change Commission, 2021 Draft Advice for Consultation, p. 15.

¹¹ GPS, p. 22.

(3) A director must, when acting as a director, act in good faith and not pursue his or her own interests at the expense of Auckland Transport's interests.

(4) A director must, when acting as a director, exercise the care, diligence, and skill that a reasonable person would exercise in the same circumstances, taking into account (without limitation)—

(a) the nature of Auckland Transport; and

(b) the nature of the action; and

(c) the position of the director and the nature of the responsibilities undertaken by him or her.

21. We explain below how the board's approval of the draft RLTP could constitute a breach of these duties.

"A director must not breach this Act or cause a breach, or agree to any breach by Auckland Transport, of this Act"

22. A director of Auckland Transport must not breach the Local Government (Auckland Council) Act 2009 him or herself, and must not cause, or agree to, Auckland Transport breaching the Act.

23. Approving the draft RLTP would cause Auckland Transport to breach section 39 of the Act, which provides that Auckland Transport's purpose is to "contribute to an effective, efficient and safe Auckland land transport system in the public interest". Auckland Transport must act in accordance with its statutory purpose, including when preparing the RLTP which is one of its statutory functions.¹² As explained above, the draft RLTP is not "in the public interest". In preparing it, Auckland Transport has acted contrary to its statutory purpose, in breach of s 39.

24. By approving the RLTP, the board will have caused, or agreed to, Auckland Transport breaching s 39. Approval would also potentially put the directors in breach of their other duties, as we explain below.

"A director must, when acting as a director, act with honesty and integrity"

25. The directors, in considering whether to approve the draft RLTP, must act with honesty and integrity.

¹² Local Government (Auckland Council) Act 2009, s 45(a).

26. “Dishonesty” is the equivalent of “conscious impropriety”.¹³ Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective.¹⁴ Wilful blindness, i.e. shutting one’s eyes to the obvious, may also constitute dishonesty in some circumstances.¹⁵
27. “Integrity” is a broader concept than honesty.¹⁶ In a professional conduct context, it connotes “adherence to the ethical standards of one’s own profession” and is linked with manner in which that particular profession professes to serve the public.¹⁷ That involves more than mere honesty.¹⁸
28. If the directors consider that the draft RLTP is not acceptable and should be revised, but nevertheless approve it in order to preserve their positions or avoid political fallout (for example), they would be at risk of being found to have acted without integrity.

“A director must, when acting as a director, act in good faith”

29. The directors must, when acting as directors of Auckland Transport, act in good faith.
30. The directors of companies have the same duty.¹⁹ In that context, the Courts have determined that “good faith” requires that directors act honestly and with a proper motive.²⁰ The duty of Auckland Transport directors to act is likely to be understood in the same way.
31. If the directors were to privately consider that the draft RLTP is not acceptable and should be revised, yet were to nevertheless approve it in order to preserve their positions or avoid political fallout (for example), that would arguably be acting with improper motive.

“A director must, when acting as a director, exercise the care, diligence, and skill that a reasonable person would exercise in the same circumstances”

32. The directors of companies are under an analogous duty under the Companies Act 1993.²¹ The standard imposed is objective.

¹³ *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97 at 106.

¹⁴ *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2005] UKPC 37 at [10].

¹⁵ *Westpac New Zealand Ltd v MAP and Associates Ltd* [2011] NZSC 89, [2011] 3 NZLR 751 at [27].

¹⁶ *Wingate & Anor v Solicitors Regulation Authority* [2018] EWCA Civ 366 at [95].

¹⁷ *Wingate & Anor v Solicitors Regulation Authority* [2018] EWCA Civ 366 at [102].

¹⁸ *Wingate & Anor v Solicitors Regulation Authority* [2018] EWCA Civ 366 at [100].

¹⁹ Companies Act 1993, s 131(1).

²⁰ *Delegat v Norman* [2012] NZHC 2358 at [103].

²¹ Companies Act 1993, s 137.

33. In our opinion, no director exercising the care, diligence, and skill that a reasonable person would exercise in the same circumstances could approve this RLTP. Approval of this RLTP may thus constitute a breach of this duty.

Conclusion

34. In our opinion, the only lawful course of action open to the RTC is to withhold approval of the RLTP until it has been substantially changed. Approval by the board may also constitute a breach of directors' duties. We therefore urge you to consider the matters raised in this letter before deciding whether or not to approve the draft RLTP.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Jennifer Cooper". The signature is written in a cursive, flowing style.

President
Lawyers for Climate Action NZ Inc