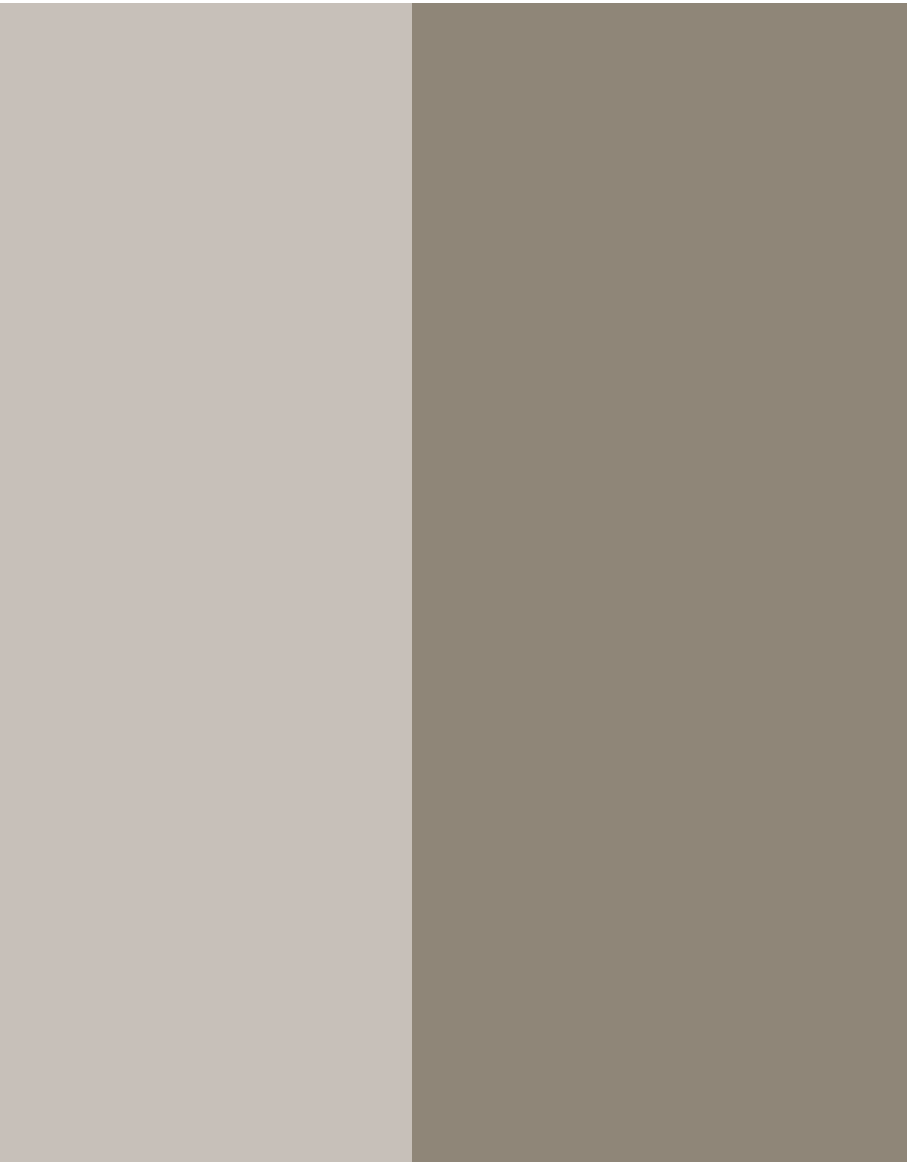




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Inquiry into aspects of Auckland Council's Westgate/Massey North town centre project





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Presented to the House of
Representatives under section 20 of
the Public Audit Act 2001.

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Auditor-General's overview

In February 2015, I announced that my Office would carry out an inquiry into Auckland Council's management of a project to develop a new town centre in Massey North.¹

Several people had raised concerns with me about the establishment and management of this new town. They questioned whether the public and private costs and benefits of the project have been appropriately balanced between Auckland Council and a private developer.

The focus of my inquiry was on Auckland Council's management and governance of the project from 1 November 2010, when the newly amalgamated Auckland Council inherited the project from the now dissolved Waitakere City Council.

However, the report also details how the project was set up and how the contractual relationship developed between Waitakere City Council and the private developer New Zealand Retail Property Group Limited (NZRPG).

The development, from inception, spans 15 years to date and is factually and contractually complex. Rather than describe or comment on every aspect of the commercial arrangements entered into by the respective Councils, this report focuses on some specific aspects of the development that appear to have caused concern.

Waitakere City Council's establishment and management of the project

As far back as 1999, Waitakere City Council had a vision to develop a self-contained town at Massey North where people could live, work, and access services without travelling to other parts of Auckland. As part of that vision, Waitakere City Council developed the Northern Strategic Growth Area programme. The programme aimed to support residential and employment needs; create a regionally significant business address; create further services, jobs, and amenities in the north-west of Waitakere City; reduce the amount of travel by residents out of the area; and reduce pressure for growth in rural areas.

The first stage of the programme involved developing the Hobsonville Airbase, Hobsonville Village, and a new town centre project at Massey North. A high-quality town centre was envisaged with particular features of design, including public spaces.

Companies in the NZRPG group owned or controlled much of the land where the new town centre was to be located. As a result, Waitakere City Council entered into a Memorandum of Understanding with NZRPG in 2004 to establish a collaborative working relationship to design and develop the town centre. In 2010,

¹ Massey North has been known as Westgate since 2013. We use the term Massey North throughout our report for the sake of simplicity.

the Council and NZRPG entered into a suite of contractual arrangements for the actual development of the new town centre and the sharing of the costs between them.

The Council's decision to purchase Westgate Street

While the focus of my inquiry was on Auckland Council's management and governance of this project from 2010 onwards, concerns were also raised about Waitakere City Council's decision to pay the developer \$6 million for a street in the existing Westgate shopping centre. Concerns had been raised about this purchase because, usually in a new development, a developer will bear the cost of constructing roads – which then vest in the Council at no cost when land is subdivided.

Accordingly, in order to provide sufficient context, my report sets out additional background detail about the decision-making process undertaken by Waitakere City Council in relation to the purchase, and the basis on which the purchase price was agreed.

Responsibility for the costs of relocating transmission lines

Concerns were also raised with my Office about the contractual arrangements between Waitakere City Council (and, subsequently, Auckland Council), Transpower, and NZRPG to relocate transmission lines passing over the development underground. Waitakere City Council entered into an agreement with Transpower to pay the costs of the relocation.

The evidence supports the need to relocate the power lines for the development of the town to proceed.

In the agreement with Transpower, Waitakere City Council accepted the primary responsibility to pay all the cost of relocating the lines – that is, its own 35% and NZRPG's 65% share of the cost. The share of the costs to be paid by NZRPG would be recovered under a separate agreement between Waitakere City Council and NZRPG.

Waitakere City Council was clearly aware that, in accepting the primary payment risk, it needed to protect its position in case NZRPG failed to pay its share of the costs. It put in place several mechanisms to provide this protection, including an offsetting agreement. Importantly however, although Auckland Transition Agency confirmed the agreement with Transpower, it did not confirm the offsetting agreement. As a result, the agreement with NZRPG to pay its share was legally invalid. As a result, the Council was party to a binding contract to pay the full costs

of relocating the power lines without having a corresponding binding contract in place to recover NZRPG's share of the costs from NZRPG.

In November 2010, Auckland Council came into existence and inherited the project from Waitakere City Council. It also inherited the issue relating to the legal invalidity of the agreement with NZRPG to pay its share of the relocation costs. Auckland Council resolved this issue by entering into a new agreement with NZRPG to share the costs.

However, in 2012, it then decided to postpone NZRPG's obligation to pay its share. Council documents indicate that this decision was made because it perceived a risk to the progression of the project. The result of this decision has been that the financial risk borne by the Council and its ratepayers will continue until such time as NZRPG's contribution has been fully paid. As at 20 September 2016, NZRPG had paid about \$3 million of the \$11.3 million it owed to Auckland Council.

Development contributions from the developer

As part of its contractual relationship with NZRPG, Waitakere City Council carried out several infrastructure works at its own expense. Among other things, this included work such as the construction and widening of roads, the development of intersections, the provision of water supply and wastewater services, and the design and construction of the town square and library. The intention was that the Council would subsequently recover some of the costs associated with this work through development contributions to be paid by the developer.

Development contributions are fees charged by a council for community and network infrastructure as a result of a development project. The amount of contribution was to be determined by Waitakere City Council in accordance with its Development Contributions Policy, which set out how contributions were to be calculated.

This policy made provision for the Council to subsequently agree to vary the provision of the contributions. The calculation of development contributions in this project was not straightforward, given the complexity of assessing the balance between the public and private benefits of the development. We have been unable to ascertain or calculate the value of the development contributions but expect it to be a significant amount of money.

On 28 October 2010, Waitakere City Council reached an agreement with NZRPG to vary the amount and the timing of payments of development contributions.

The decision was made just before the transition to Auckland Council, and was recorded in an exchange of letters over two working days. The decision was not confirmed by the Auckland Transition Agency.

Auckland Council subsequently entered into an agreement with NZRPG to formalise the development contributions arrangements. The agreement provides for the off-setting of some of the development contributions owed, as well as the postponement of when some development contributions are to be assessed and paid. While there are still development contributions payable by NZRPG before the end of the project, Auckland Council has taken on a greater risk at this stage in the project by the postponement of these payments. Whether the final amount of development contributions is appropriate will need to be weighed up as part of the overall balance of costs between the parties at the conclusion of the project.

Specific steps taken by Auckland Council after 1 November 2010

Once it became responsible for the project, Auckland Council immediately sought legal advice on the agreements it had inherited. It became clear that the Auckland Transition Agency had not confirmed all of the agreements, which was a prerequisite for transfer to Auckland Council. Auckland Council signed replacement agreements to ensure that they were all legally valid. In October 2011, the Regional Development and Operations Committee of Auckland Council agreed that a review into probity issues raised at the Committee be conducted and that the review be reported back to the Committee for further consideration. Auckland law firm Meredith Connell was commissioned to undertake that review.

In my view, commissioning this review was good practice given the complicated matrix of arrangements between the former Waitakere City Council and NZRPG. The review put Auckland Council in a good position to understand the obligations it had inherited and any risk that it might need to manage.

The Meredith Connell review was summarised and discussed at the public excluded part of the June 2012 Regional Development and Operations Committee meeting. The Committee agreed that the report and associated resolutions remain confidential until the reasons for confidentiality no longer exist.

Auckland Council has since improved the contractual arrangements with NZRPG, including linking payments more directly to the delivery of work and instituting a better procurement process for subcontractors working on the new town centre.

Governance

The amount of information provided to the elected members of Auckland Council on this development could have been more comprehensive. Councillors have been concerned about the project and should not need to resort to me to get answers. In my view, the risks involved with this development warrant greater involvement by Auckland Council's governing body in overseeing the project, including its costs. More information and clarity about the issues that management need to refer to the governing body would help this oversight.

Transparency could have been better

Public concerns have been raised with my Office, and directly with Auckland Council, about the lack of transparency with this development. My Office received complaints from members of the public who have been unable to access information about the project, including the Meredith Connell report. Similar concerns have been expressed to my Office by Council members.

It is important that local authorities strike the right balance between balancing commercial sensitivity, maintaining legal privilege as appropriate and being open with ratepayers and elected representatives to provide transparency about the agreements they enter into and to demonstrate that they are getting value for money. Such openness allows public discussion and debate, and is essential to supporting public sector accountability.

In my view, Auckland Council could have made more information about this development available. Auckland Council obtained the Meredith Connell advice on a confidential basis and has treated the report as legally privileged and commercially sensitive. Given the public interest and that commercial sensitivity has likely reduced with the passage of time, I encourage Auckland Council to consider what information it could now release – including all or some of the Meredith Connell report.

A final thought

As far back as 1999, Waitakere City Council had a vision for a town centre at Massey North. The arrangements that the Council entered into to achieve that vision were different from those one would normally see between a council and a private developer.

This inquiry has not been straightforward, given the project's duration, the complexity of the arrangements, and the change in Councils. My view is that it is too early to definitively determine the extent to which the Council's vision will be achieved and the ultimate cost to be borne by the ratepayers to achieve that.

However, this exercise has highlighted once again the importance not just of *making* good decisions but also of being able to *show* that good decisions have been made. This is especially so in times of change.

Acknowledgments

I thank staff of Auckland Council and the former Waitakere City Council, staff from NZRPG, and other interested parties for their assistance with this inquiry.

A handwritten signature in black ink, appearing to read 'Lyn Provost', written in a cursive style.

Lyn Provost
Controller and Auditor-General

31 January 2017

1

Introduction

- 1.1 Between 2009 and 2010, after several years of discussion dating back to 2002, Waitakere City Council entered into a series of agreements with companies in the New Zealand Retail Property Group Limited group of companies (NZRPG) to develop a new town centre at Massey North, in north-west Auckland.
- 1.2 NZRPG is a private commercial property developer that had built and owned the existing Westgate shopping centre next to the proposed location of the new town. NZRPG also owned or leased much of the land that the new town centre was to be built on.
- 1.3 For the development of the new town centre to proceed, the Council decided to acquire land from NZRPG and other private landowners in the area for the town's road network, for the provision of infrastructure, and for the public parts of the town, such as the town square and community park.
- 1.4 The agreements the Council entered into with NZRPG set up a collaborative project between the parties to construct the town centre. An Infrastructure Funding Agreement comprised the main agreement between the parties, setting out the purchase of assets, the development of infrastructure for both NZRPG's and the Council's parts of the development, and the sharing of costs. Further detail about how the works would be carried out and how costs would be shared was then set out in a series of Works Development Agreements and Cost Sharing Agreements.
- 1.5 During the time that these contracts were under negotiation, it was announced that Waitakere City Council was to in effect merge with six other Auckland councils and Auckland Regional Council, to form Auckland Council. Waitakere City Council and the other six councils were dissolved on 31 October 2010. As a result, Auckland Council became responsible for the project on 1 November 2010.
- 1.6 Some parts of the town – both public and privately owned – have now been completed. This includes the roads and other infrastructure, a community park, a town centre, a new shopping centre (the NorthWest Shopping Centre), and an area of "large format" retail units. Other parts of the town, including the library and community centre, are still to be completed.
- 1.7 Over the years, concerns have been raised about the project both with Auckland Council and with us. The project required Waitakere City Council to form relationships and enter into contracts with several private landowners and developers in the area. However, the focus of the concerns raised with us was the respective Councils' relationship with NZRPG.
- 1.8 In February 2015, we decided to carry out an inquiry into the project under section 18 of the Public Audit Act 2001. The purpose of our inquiry was to provide

information to the public about the nature of the relationship between Auckland Council and NZRPG, to provide assurance that the Council is managing that relationship appropriately, and to report on any other matters of relevance to the Massey North project.²

1.9 In the course of doing this work, it became apparent that the project is factually and commercially complex and spans more than 15 years. We have not attempted to describe or comment on every decision made or action taken by the respective Councils, nor have we been able to make a judgement about the value of the project overall.

1.10 Although we reviewed an extensive amount of documentation about the Council's relationship with NZRPG and the wider project, this report focuses on those aspects of the project that appeared to have caused particular concern. Those are:

- the background to the development and how the relationship between Waitakere City Council and NZRPG began;
- the agreements entered into between Waitakere City Council and NZRPG;
- three specific arrangements between the respective Councils and NZRPG: the decision to buy Westgate Street (now Maki Street), relocating overhead power lines, and the arrangements about deferral of the payment of development contributions by NZRPG;
- some of the steps Auckland Council took after November 2010 when it came into being; and
- aspects of Auckland Council's governance of the project.

1.11 As background and context to our report on Auckland Council's governance and management of the project, we describe in broad terms the contract negotiations between Waitakere City Council and NZRPG, and the main factors that shaped the agreements they entered into.

How we carried out our inquiry

1.12 We reviewed records of Auckland Council and the former Waitakere City Council dating back to 2004.

1.13 We talked to some of the complainants, NZRPG, elected members of Auckland Council with an interest in the project, Auckland Council employees, ex-employees from Waitakere City Council, Auckland Council's legal advisors, and Waitakere City Council's legal advisors.

² The terms of reference for our inquiry are on our website (oag.govt.nz).

- 1.14 We engaged project management and engineering experts, and reviewed Auckland Council's project management processes for the development at Massey North.
- 1.15 We also reviewed a report commissioned from Meredith Connell by Auckland Council in 2011. Auckland Council provided this to us on the basis that it is legally privileged.

How this report is structured

- 1.16 In Part 2, we explain in broad terms what the Massey North project is, how the relationship between Waitakere City Council and NZRPG came about, and the background to the negotiation of the commercial agreements between the Council and NZRPG.
- 1.17 In Part 3, we explain the negotiation process and the nature of the agreements that were entered into.
- 1.18 In Part 4, we describe Waitakere City Council's decision to buy a street in the existing Westgate Shopping Centre from NZRPG (Westgate Street, now Maki Street).
- 1.19 In Part 5, we outline the agreements for infrastructure funding and works development agreed between Waitakere City Council and NZRPG.
- 1.20 In Part 6, we describe the agreements between Waitakere City Council, Transpower New Zealand Limited and NZRPG about relocating a high-powered transmission line (the power lines) underground.
- 1.21 In Part 7, we outline an arrangement approved by Waitakere City Council under which the Council agreed to postpone or remit NZRPG's obligation to pay certain development contributions (development contributions are contributions developers are required to make to cover the costs of providing new infrastructure).
- 1.22 In Part 8, we discuss some specific steps Auckland Council took when it inherited the project from Waitakere City Council, including subsequent decisions made about the payment by NZRPG of development contributions and costs relating to the relocation of power lines.
- 1.23 In Part 9, we discuss aspects of Auckland Council's governance of the project.

Background to commercial arrangements with the New Zealand Retail Property Group

2

2.1 In this Part, we describe:

- what the Massey North project is and how it came about;
- how Waitakere City Council's relationship with NZRPG began;
- how changes were made to the Council's District Plan to enable the new town centre to be built; and
- how the Council assessed infrastructure needs for the new development and how responsibility for providing that infrastructure was to be shared between the Council and developers.

What is the Massey North project and how did it come about?

2.2 The Massey North project involves developing a new town centre in the north-west of Auckland. The project came about in the context of the Auckland Regional Growth Strategy. The purpose of this Strategy was to ensure that Auckland's growth (estimated at that time to be a population of two million by 2051) is accommodated in a way that meets the best interest of all the region's inhabitants. The Regional Growth Strategy was developed in 1999 under section 37SE of the Local Government Act 1974.

2.3 The working mechanism of the Regional Growth Strategy were "Sector Agreements" between the various Auckland Councils. Waitakere City Council was party to the Northern and Western Sectors Agreement, along with Rodney District Council and North Shore City Council. The first iteration of the Northern and Western Sectors Agreement in 2001 anticipated a new sub-regional centre in north-west Waitakere and urban development at Hobsonville. This area became known as the Northern Strategic Growth Area (NorSGA), and a series of projects was developed with the aim of implementing the regional growth strategy in the area.

2.4 The purpose of the NorSGA programme was:

... to promote the sustainable development of Waitakere City and the surrounding region in a way which:

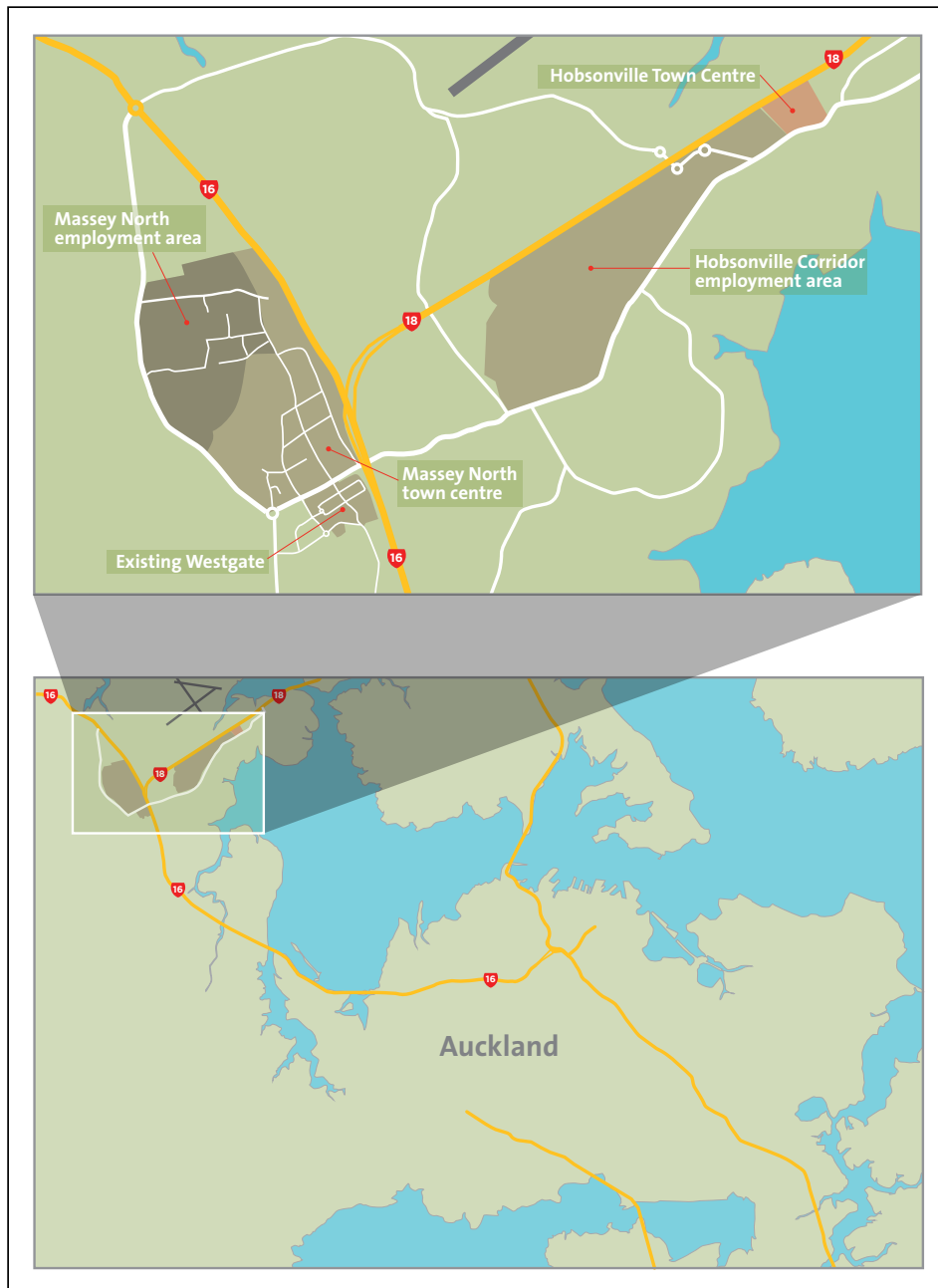
- *accommodated a portion of the region's residential and employment needs, as agreed in the Auckland Regional Growth Strategy;*
- *created a regionally significant business address which made efficient use of the investment that was taking place at the time in the area's state highway network;*
- *enabled the development of further services, jobs and amenities in the north west of Waitakere City to serve the existing population and projected population growth; reduced the amount of travel undertaken by residents*

of the area to find services, jobs and amenities and strengthened public transport investment;

- *reduced the pressure for growth in rural areas and the Waitakere Ranges.*

- 2.5 The plan was to progress the Northern Strategic Growth Area in three stages. The first stage involved developing Hobsonville Airbase, Hobsonville Village, and Westgate/Massey North. The focus of our report is the development at Westgate/Massey North.
- 2.6 At the time, there was already a shopping centre at Westgate (developed on land purchased in the 1990s by NZRPG), but the area to the north of the shopping centre was largely undeveloped. The Massey North area was a “dormitory suburb” where people lived but had to travel some distance to get to work in the cities of Auckland.
- 2.7 Under the Northern and Western Sectors Agreement, Waitakere City Council was required to determine the best location for the proposed new town centre, and prepare appropriate changes to the District and Regional Policy Statement documents. Various sites were rejected on the grounds of topography and transport. The preferred site was land controlled by NZRPG, which was next to the Northwestern Motorway. This land was considered to have good transport access and easy contour, and was in control of a single entity. In discussions with the Council, NZRPG had indicated its willingness to proceed on the basis that the town centre would be designed in accordance with “new urbanism” principles.
- 2.8 In 2004, the Local Government (Auckland) Amendment Act was passed. Under that Act, councils in the Auckland region were required to align their District Plans with the Auckland Regional Growth Strategy published in 1999. A particular requirement of the Act was to align land use and transport planning. The Act also supported the “new urbanism” approach. We have been told that that approach is characterised by street-based developments incorporating sustainable employment, civic functions, cultural facilities, recreational facilities, open space, and high specification environmental performance.
- 2.9 The Council also considered it important that the town centre met certain urban planning and design criteria to ensure that it would attract higher levels of investment in the surrounding retail, commercial, and residential sectors. A particular concern for the Council was to avoid the possibility of mall developments covering the proposed site.
- 2.10 Figure 1 shows the location of the new Massey North town centre and nearby other Northern Strategic Growth Area projects.

Figure 1
Map showing the location of the new Massey North town centre and nearby other Northern Strategic Growth Area projects



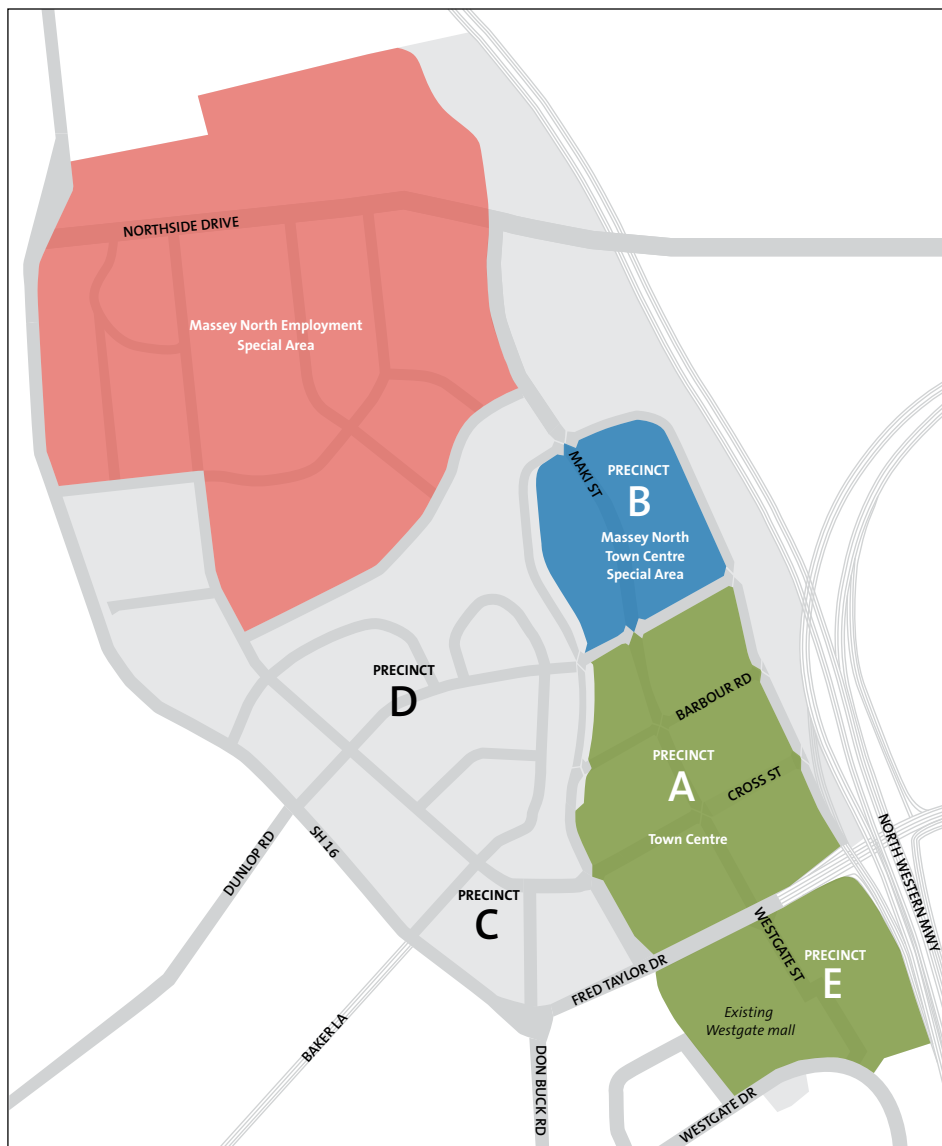
How Waitakere City Council's relationship with the New Zealand Retail Property Group began

- 2.11 Once the Council had decided the preferred location for the town and implemented the necessary Plan Changes, a complex set of issues needed to be resolved before the development could proceed. The establishment of a town involved both public and private developments. The Council needed to acquire control of the land it needed for the public parts of the town, such as the road network and town square. The Council had to assess what infrastructure would be needed and which party – the Council or private developers – should be responsible for building and paying for it. It is evident from the papers available to us that resolving these issues was challenging, given the scale of the development and the number of private landowners affected, and that the Council carefully considered how best to proceed.
- 2.12 The Council had three basic options for developing the town:
- It could do nothing and leave it to private developers to develop the town.
 - It could seek to acquire the land needed for public roads and infrastructure, either by agreement or compulsorily under the Public Works Act 1981, and appoint a contractor or contractors to carry out the necessary works on the Council's behalf.
 - Alternatively, it could work co-operatively with landowners and private developers in the area, to acquire land and provide infrastructure for both the public and private parts of the development in a co-ordinated manner.
- 2.13 The land on which the new town was to be built was mostly privately owned. Therefore, to ensure that the new town centre was built to its requirements, the Council needed to work closely with several private landowners and property developers in the area.
- 2.14 At the time, the land identified for the town centre was almost all controlled by NZRPG companies. For the purposes of this part of our report, we do not distinguish the individual companies within the group but refer to them simply as NZRPG.
- 2.15 NZRPG owned the existing Westgate shopping centre, which is next to the land on which the new town centre was to be constructed. NZRPG also owned or leased the major portion of the land on which the new town centre was to be built. Therefore, NZRPG was the most significant of the landowners and property developers the Council needed to talk to.

Memorandum of Understanding

- 2.16 Discussions between Waitakere City Council and NZRPG date back to around 2002. NZRPG told us that, at that time, it already had its own plans to redevelop the existing Westgate Shopping Centre and to develop the land it had acquired to the north of that site. However, it understood the Council's rationale for wanting to establish a new regional town centre that would incorporate the existing Shopping Centre, and it was sympathetic to the Council's view.
- 2.17 In June 2004, NZRPG and the Council entered into a Memorandum of Understanding. The Memorandum of Understanding recorded the parties' "shared goals of providing a city centre at Westgate that is socially vital, economically viable, environmentally responsive and aesthetically pleasing".
- 2.18 It also signalled the parties' intention to have an ongoing working relationship and set out the following specific goals:
- to establish a formal working relationship to determine and agree on a vision for the Westgate city centre, and agree on and prepare a concept plan for the development;
 - to establish processes for collaborating on the design of the new Massey North town centre;
 - to work together to prepare the detail needed to expedite changes to the District Plan;
 - to work together in a mutually supportive manner in advocating and negotiating for agreed outcomes with Auckland Regional Council and other stakeholders; and
 - to provide a framework for possible cost-sharing of building, public infrastructure, and other facility development.
- 2.19 Figure 2 shows the Massey North Concept Plan. This includes the proposed road network within the town centre and the roads that would link the town centre to the public network – State Highway 16 and Fred Taylor Drive to the south and a new road, Northside Drive, to be constructed to the north. State Highway 16 and Fred Taylor Drive may have historically been referred to as Hobsonville Road, although that road extends beyond the Westgate Town Centre.

Figure 2
Massey North Concept Plan



Changing the District Plan (March 2005 to June 2007)

- 2.20 Before any development work could begin on the new town centre, or on the broader NorSGA project, changes needed to be made to Waitakere City Council's District Plan. The Plan Changes include changes relating to public transport and urban design requirements.
- 2.21 Under the Local Government (Auckland) Amendment Act 2004, all of the NorSGA Plan Changes were required to be publicly notified. This meant that the public was entitled to make submissions on the proposed changes. The main Plan Change that is relevant for the purposes of this report is referred to as Plan Change 15. Plan Change 15 was notified on 31 March 2005, and a Hearings Panel was appointed to hear submissions.
- 2.22 The Hearings Panel issued its recommendations on Plan Change 15 in May 2007. Waitakere City Council adopted these recommendations in June 2007. Changes made to Waitakere City Council's District Plan as a result of Plan Change 15 included:
- establishing two "special areas" – the Massey North Employment Special Area, which provided for the establishment of industrial activities, and the Massey North Town Centre Special Area, which provided for a mix of commercial and residential activities;
 - re-zoning land from rural to urban use;
 - establishing several "precincts", each with specific rules to control the location and mix of activities, design quality of development, and so on;
 - introducing a "Massey North Concept Plan" to guide the development; and
 - introducing a rule requiring any development carried out in the Massey North Town Centre Special Area to have a "Comprehensive Development Plan" addressing matters such as roads, community facilities, stormwater, wastewater, housing densities, site layouts, the position of the main buildings, and open space areas. The Comprehensive Development Plan required the Council's approval.
- 2.23 The Hearings Panel's recommendations resulted in a large number of appeals to the Environment Court. These appeals were all resolved before the transition to Auckland Council.

Assessing infrastructure requirements

- 2.24 After the adoption of Plan Change 15, the Council implemented several projects designed to bring the Plan Changes into effect. These included:
- an infrastructure project to determine what infrastructure, such as transport, the three waters, parks, property, community facilities, and broadband, was needed, and to facilitate landowner understanding of the infrastructure requirements;
 - an urban design project to up-skill relevant Council staff on the new urban design requirements introduced as a result of the Plan Changes and to prepare guidance material for developers;
 - a social infrastructure project to ensure that the future social infrastructure needs of the communities covered by the NorSGA Plan Changes were identified, planned for, and met over time; and
 - a Development Contributions Action Plan to determine the development contributions for the NorSGA area. Development contributions are contributions developers are required to make to cover the costs of providing new infrastructure.
- 2.25 A specific project was also established for the Plan Change 15 area. The purpose of this project was to co-ordinate interactions with developers and landowners, co-ordinate communications, manage the Comprehensive Development Plan processes, and resolve issues about integrating the existing Westgate shopping centre with the new town centre.
- 2.26 At the beginning of June 2008, Council staff reported to the Council's Finance and Operational Performance Committee that planning for infrastructure in the NorSGA area had progressed to the point where preliminary needs could be assessed and that a view had been formed of the likely cost of providing new infrastructure for the development. This information was used as a basis for discussions with developers about how the infrastructure would be provided and paid for.
- 2.27 Officials explained that, from the Council's perspective, the starting point for discussions with developers was to seek to ensure that portions of major infrastructure required for the development were paid for directly by developers and vested in the Council on completion. The developer would then be credited for that work in accordance with the Council's development contributions policy. The advantage of this approach for the Council was that the Council did not need to fund the cost of the infrastructure up front.

- 2.28 If the infrastructure work completed by a developer provided additional capacity to enable neighbouring land to be developed, the Council would reimburse the developer for that additional cost by collecting development contributions or financial contributions from neighbouring landowners who benefited from the infrastructure. These agreements would be covered in a “developer agreement” between the Council and the developer.
- 2.29 Officials explained that this approach to negotiating developer agreements was likely to be reasonably successful with some, but not necessarily all, of the landowners in the Plan Change 15 area. This was because several developers in the Plan Change 15 area had not yet formed any clear plan for development. This made it difficult for the Council to determine the extent of works needed or the form developer agreements should take.
- 2.30 The extent of infrastructure that the Council would need to provide was also unclear because this depended on the way in which the land was developed – for example, whether developers chose to aggregate several parcels of land and develop them as one or to develop them separately. This meant that it was not necessarily obvious whether the responsibility to provide new infrastructure lay most appropriately with the Council or developers.
- 2.31 Officials advised that, until the picture became clearer, the Council was planning for the minimum level of infrastructure based on known developments, plus some major networks to service later developments within Plan Change 15 and other Plan Change areas.
- 2.32 As part of the planning for Plan Change 15, officials had already identified various parcels of land it wanted to buy immediately under the Public Works Act 1981 for water and road alignment purposes.
- 2.33 Officials proposed that, once the infrastructure had been built on the land, the Council would dispose of the balance of the land to offset part of the purchase cost. The cost of the land retained for the works would be recovered by means of development contributions and/or financial contributions from developers benefiting from the infrastructure.
- 2.34 Officials recommended buying the land to provide infrastructure, rather than waiting till the landowners concerned chose to develop their land. This was because, although it meant that the Council would have to provide the funding in advance, it would ensure the timely development of wastewater and stormwater infrastructure assets for the new development. It would also enable the landowners who wanted to get started to do so.

- 2.35 The Council approved the proposed buying of land under the Public Works Act 1981.

The transition to the new Auckland Council

- 2.36 In May 2009, the Local Government (Tamaki Makaurau Reorganisation Act) 2009 was passed. That Act provided for the existing local authorities in the Auckland region to be dissolved with effect from 1 November 2010 and for a new Auckland Council to be established from that date.
- 2.37 The Act also established the Auckland Transition Agency. The Auckland Transition Agency was responsible for making arrangements to enable Auckland Council to operate on and from 1 November 2010, and to manage and oversee the transition process.
- 2.38 There was a transition period, from 25 May 2009 to 31 October 2010, during which the Auckland Transition Agency was required to review and confirm any spending decisions of local authorities in the Auckland region that could have a significant effect on the new Council.
- 2.39 In June 2009, the Auckland Transition Agency told the Council that all decisions about the wider NorSGA project (including the Massey North project) must be confirmed by the Auckland Transition Agency before being implemented.

Agreements between Waitakere City Council and the New Zealand Retail Property Group

3

- 3.1 Between May 2009 and October 2010, Waitakere City Council entered into a series of agreements with NZRPG.
- 3.2 In this Part, we explain how agreements between the Council and NZRPG were negotiated and agreed. We discuss:
- concerns about the viability of the project;
 - NZRPG offering to sell land for road and infrastructure; and
 - the Council's \$29 million funding allocated for the project.

Introduction

- 3.3 By April 2008, discussions between the Council and NZRPG about the project generally and infrastructure needs had been under way for several years. Our review of Council records shows that considerable thought had been given to what land should be acquired and how it should be valued, which party (the Council or NZRPG) should provide the necessary infrastructure, how the provision of infrastructure should be funded, who should bear the up-front costs, how costs should be shared, and how costs should be recovered from those benefiting from the development.

April 2008 – Concerns about delay

- 3.4 In April 2008, NZRPG wrote to the Council requesting an urgent meeting with the Mayor to discuss timing issues relating to the development. NZRPG expressed concern about the time the planning process had taken with still no discernible end in sight. The letter said that NZRPG now found itself at a crossroads where “commercial imperatives and responsibilities to our shareholders must move us to consider alternative options”.
- 3.5 NZRPG repeated its support for the Council's desire to establish a traditional town centre, as opposed to another mall, but said that, of necessity, NZRPG had now started down the road of exploring an alternative opportunity to the town centre.

July 2008 – Concerns about the viability of the project

- 3.6 In July 2008, the Council and NZRPG met to discuss the project. According to the Council's record of that meeting, concerns had begun to emerge about the lack of market interest in the development.
- 3.7 The main concern was that lenders and valuers were not seeing Massey North Town Centre as the only viable new city centre development in the north-west of Auckland. According to NZRPG, “the market appeared unconvinced that Rodney or even [Waitakere City Council] would not do another plan change to create more land for development”.

- 3.8 The Council's records show that NZRPG indicated it might not be able to finance the development proposed for the centre as originally envisaged. It wanted the Council to look at ways it could be involved in "partnering" with NZRPG to help deliver the new town centre.
- 3.9 Specific options NZRPG asked the Council to consider were:
- providing NZRPG with debt/equity funding;
 - lending money to NZRPG at the Council's discounted debt rate;
 - buying the land required for infrastructure and facilities (such as parks, roads, libraries, leisure centres, land for stormwater ponds) early at a discounted rate;
 - offering NZRPG deferred payment options for rates and development contributions with a view to not charging rates on any commercial developments for a period to attract investors;
 - the Council taking over certain "management functions" for the centre, such as beautification and security; and
 - some combination of these options.
- 3.10 The record of the meeting shows that NZRPG was also involved in discussions with another commercial property developer at the time, either about selling land in the Plan Change 15 area or about entering into some form of joint venture. This was a concern for officials because they did not want the other developer to be in charge of the development. They were worried that the Council's vision for the town centre would be compromised.
- 3.11 In response to discussions with NZRPG on how to finance the project, Council staff agreed to put a team together to look at how the Council could assist. The team included a person with commercial design knowledge and experience, and a leasehold/ freehold expert to help determine which parts of the Plan Change 15 area the Council might look to either buy or lease.

November 2008 – The New Zealand Retail Property Group offers to sell land for road and other infrastructure assets

- 3.12 At the beginning of November 2008, NZRPG wrote again to the Council. The letter referenced earlier correspondence and recent discussions, and outlined a proposal under which the Council would acquire certain land within the proposed town centre from NZRPG to build roads and other infrastructure. NZRPG said that, by acquiring the land for the public parts of the town, the Council would be in a position to protect the town form and the essence of the Comprehensive Development Plan.

- 3.13 NZRPG also proposed that both parties should consider a shared equity investment in the ownership structure proposed for the building of the town centre and that NZRPG should restructure its corporate structure to provide the opportunity for the Council to take an equity interest in the town centre and existing Westgate Shopping Centre. The letter went on as follows:
- In essence, overall, the best assistance that Council can provide at this time is a level of certainty around the first transaction that will allow us to set a stable equity basis for the proposed new structure moving forward ... As discussed ... we have need to conclude an arrangement as outlined above as to form (not substance) on or before 30 November 2008.*
- 3.14 Later that month, officials presented a proposal from NZRPG to the Council under which the Council would acquire land from NZRPG for the purpose of roads and other infrastructure within the town centre.
- 3.15 The proposed infrastructure included:
- land for the proposed town centre road network;
 - land for non-riparian “reserve” areas; and
 - land for the town centre square, a community building, and large open community space.
- 3.16 When presenting the proposal, officials noted that buying land to build roads was not something the Council typically did.
- 3.17 In a “typical” development, such as a privately owned commercial or residential subdivision, it is generally the developer’s responsibility to construct roads at the developer’s expense. When the land within the development is subdivided (typically, when individual sections are ready for sale), ownership of the roads transfers to the council, usually at no cost.
- 3.18 There is an exception if the council requires the developer to construct an “arterial” road when a smaller road would have been enough to service the requirements of the development alone. The council would generally compensate the developer for any additional road width or construction costs the developer incurs in providing facilities that benefit the wider community, such as wider footpaths or cycleways.
- 3.19 The council typically funds any costs it incurs in constructing roads by rates, rather than development contributions. This is because roads are generally seen to provide public benefit, while other infrastructure, such as water networks, mainly benefit property owners within the development.

- 3.20 The council is generally responsible for providing infrastructure, such as water networks, up to the boundary of the development. The cost of that work might be met from rates, financial contributions or development contributions from the owners of the land served by those services as development occurs, or a combination of these methods. The choice of funding method depends on where the balance between public and private benefit lies. Financial responsibility to provide infrastructure within the development lies with the individual developer.
- 3.21 For “community infrastructure”, such as open space for reserves, the council could require developers to contribute land or money to the council’s “reserve fund” when the land is subdivided or developed. It might also buy land needed for community infrastructure from developers at market value as required.
- 3.22 However, officials explained that the “typical” approach outlined above might not work for Massey North. There were two main reasons for this.
- 3.23 The first reason was that, during discussions with NZRPG about its Comprehensive Development Plan for the town centre, NZRPG indicated that it did not intend to subdivide its land as part of the development process. This meant that any roads NZRPG constructed in the town centre would remain the property of NZRPG – as was the case with the existing Westgate Shopping Centre.
- 3.24 Not owning the town centre road network posed an immediate problem for the Council. It meant that the Council might not be in a position to acquire the land it needed to link Hobsonville Road to the town centre network, as required by the District Plan. This was because, if the town centre roads were not part of a public network, the Council considered that it did not have grounds to acquire any privately owned land it needed to build the linking roads.
- 3.25 The second reason was that purchasing Westgate Street would enable NZRPG to buy out one of its minority shareholders in the existing Westgate Centre. The shareholder wanted to exit the company by the end of November 2008.
- 3.26 NZRPG said that, although it had the financial ability to settle the transaction, it was looking to the Council to buy land so that it would be in a position to provide “additional comfort” to its bankers. NZRPG said that it did not require an agreement to be finalised before 30 November 2008. It just needed the Council to commit to buying the land.
- 3.27 Officials also concluded that, because of current economic circumstances (at the time of the Global Financial Crisis), buying the land at that time might prove to be a good investment for the Council. This was because, although there was an expectation of a continuing and declining period of deflation of land prices in the short to medium term, buying land at the current value might be a good

long-term investment for the Council. Officials said that this was especially so if the purchase was a catalyst for further investment in Waitakere City and served to stimulate development activity.

- 3.28 Therefore, it was proposed that the Council buy the land under the Public Works Act 1981 at current market value, subject to several issues being resolved. These included:
- the value of the land – officials noted that the Council had no advice at that point on the value of the land but that, clearly, there would need to be a contestable process for determining its market value;
 - how the Council would fund the acquisition;
 - the extent to which the Council would be able to recover the cost of buying the land through development contributions and/or financial contributions – there was a particular concern about the extent to which the cost of buying the land needed for roads could be recovered from development contributions;
 - the risk of setting a precedent; and
 - the risk to the Council if it bought the land but the development did not proceed for some reason.
- 3.29 About the risk of setting a precedent, officials said that, historically, the Council had been a reluctant purchaser and developer of network infrastructure for greenfield development. Therefore, the decision to enter into an agreement of the type proposed by NZRPG might be viewed in some quarters as inconsistent with previous policy and/or creating a precedent that would create encourage similar approaches in the future.
- 3.30 Despite these risks, officials recommended that the Council should consider NZRPG’s proposal. The main reason was the Council’s strategic intent. Developing a regional-scale town centre at Westgate/Massey North was an established strategic goal of the Council, and its strategic importance had been incorporated into regional planning and growth management policies.
- 3.31 For some years, the Council had pursued a desired urban form for the centre that focused on creating a town, rather than a mall, with active street frontages and civic amenities rather than a closed format. NZRPG had “embraced” these strategic objectives in its proposed Comprehensive Development Plan for the site.
- 3.32 Other factors favouring buying land from NZRPG included:
- the current global economic situation;
 - being able to secure the Council’s vision; and

- the possibility that it might help the Council find a resolution to problems that had arisen because of the need to relocate the power lines that ran through the middle of the town centre land.
- 3.33 According to officials, the current global economic situation had been shown to have an effect on local and regional development economics and to have affected the affordability, timing, form, and execution of development projects. In this changed economic environment, officials considered it appropriate to consider how the Council might use or modify its resources and practices to assist and stimulate appropriate development that would hasten local economic recovery.
- 3.34 In terms of securing the Council’s vision, officials argued that, if the Council bought the land for the roads, it might be better placed to ensure that the adjoining land was developed in keeping with the Comprehensive Development Plan, rather than as a mall or other large retail space.
- 3.35 The power lines were to be relocated underground before any significant development could proceed. Discussions were under way between NZRPG and Transpower about the relocation, and it appears that NZRPG were looking to the Council to fund some of the cost.
- 3.36 Officials said that, if the Council could assist to find a resolution to the relocation of the power lines by entering into an agreement with NZRPG to buy land in the town centre, it might “provide an effective bargaining chip to enable Council to dictate the outcome which it finds acceptable and to resist previous overtures ...”.
- 3.37 Officials presented four options to the Council to consider.
- 3.38 The first option was to do nothing and adopt a “wait and see” approach to the development of the town centre. Officials considered that this approach would do little for the relationship between the Council and NZRPG, that it would not promote an early start to work, and that it would not promote the Council’s goal of securing the Council’s vision for the town centre.
- 3.39 They said there would also be the prospect of NZRPG abandoning its investment in the town centre, which might result in inappropriate development and/ or diversification of ownership of the town centre land among several parties, making it more difficult to achieve a cohesive outcome. On the other hand, it meant that the Council would not face the funding cost of borrowing to complete the land purchase or any uncertainties that might arise with recovering costs using a development contribution mechanism.
- 3.40 The second option was to buy the land for the road network and open space immediately, and buy the Waitakere City Council Park land on a deferred basis. Officials proposed this option because the road network was critical to

development of the town centre and, to a lesser extent, to the rest of the Plan Change 15 area. The open space was critical to the development of the whole of the Plan Change 15 area because of the stormwater management requirements of the catchment management plan.

- 3.41 The Waitakere City Council Park land was not immediately critical. However, an agreement to secure the land would ensure that appropriately sized and located land would be available for the Council's purposes. The disadvantage of this option was that, if market values were declining, the Council would pay more for the land than it would pay if it waited. On the other hand, developing roads and infrastructure normally resulted in an increase in land values, so there was also the possibility that the value of the land would increase over time.
- 3.42 The third option was to buy parts of the road network and all of the open space and Waitakere City Council Park land. Under this option, officials said, the Council would try to limit the amount of road land it bought to the critical elements (the central road link between Hobsonville Road (now referred to as State Highway 16 and Fred Taylor Drive) in the south and Northside Drive in the north) and the portion of the road network that would serve a proposed bus interchange.
- 3.43 The problem with this option was that discussions were still under way about the final form of the road network, so deciding which roads were critical and which were not was not straightforward. Not owning parts of the town centre road network might also hinder the Council's ability to acquire adjoining land under the Public Works Act 1981 to build roads connecting to the broader road network. Therefore, this was not considered a sensible option.
- 3.44 The fourth option was to buy all of the land on offer by NZRPG on appropriate terms, including deferred payment until a significant commitment to development in keeping with the Comprehensive Development Plan had occurred. This option was the best option for securing a relationship with NZRPG.
- 3.45 It also had the benefit of having a certain outcome, and a deferred payment option would reduce the Council's financing costs. However, there would still be a time lag between the Council paying for the land and having its expenditure reimbursed through development contributions or financial contributions. There would also be a risk that the Council would pay more for the land than it would if it waited to buy the land until after any appeals to the District Plan changes had been resolved. Officials recommended the second option – that is, immediately buying land for the road network and the open space land, with deferred purchase of the land for Waitakere City Council Park. This was on the basis that NZRPG should bear the cost of road construction and maintenance, except to the extent

that the roads were formed to additional width to provide capacity to handle the traffic from adjoining land.

- 3.46 The Council accepted this recommendation and resolved to buy the assets on the basis outlined in the second option. The purchase was to be made on terms and conditions approved by the Council's Legal Services Manager, at a price approved by the Council's registered valuer or determined by a contestable valuation process. The agreement was also conditional on approval of the proposed capital expenditure in the long-term council community plan for 2009-19.

February 2009 – Waitakere City Council approves \$29 million to purchase New Zealand Retail Property Group land and existing infrastructure

- 3.47 In December 2008, the Council obtained a valuation, from an independent registered valuer, of the land NZRPG had offered to sell. There was a considerable difference between the Council's valuation and that of NZRPG.

- 3.48 In January 2009, NZRPG wrote to Waitakere City Council, repeating its concerns about the commercial viability of the development and about the level of costs NZRPG was incurring. The letter said:

[NZRPG] has consistently held the view that the proposed form of development will offer commercial value in the long-term, probably beyond 15 years. However, in the immediate term it will be extremely difficult to deliver commercially due to higher infrastructure costs, the early provision of commercial space that is not viable, higher commercial risks as perceived by funders due to the unknown market response to the more traditional urban form, and the delivery of serviced land that is unlikely to reach commercial potential within the first ten years. These issues significantly raise the commercial risks of the project and bring increasing pressure to compromise the offer to improve the immediate commercial value or to record early sales of portions of the land, if that is possible, to release much needed capital/return ...

... [NZRPG] has continued to absorb significant costs on the project, is subject to significant shareholder pressure to return early commercial value commensurate with the degree of risk, and is also now operating within a business environment that has felt the weight of the international credit crises producing fatalities all around.

3.49 NZRPG said that it was against this backdrop that the parties needed to agree on a way to:

... deliver significant commercial value to the project to ensure that the best outcome is assured, no matter how such value was derived. This value could take the form of Council funding infrastructure, delivering bulk infrastructure, delaying development contributions, acquiring/leasing opportunities for civic infrastructure, underwriting some risks on vacant commercial space etc ...

Opportunities exist for the Council to assist in risk mitigation by the early acquisition of public infrastructure and also to benefit from being “upfront” in that acquisition thereby acquiring such infrastructure at a significant discount to the normal “develop and vest” process that added major value and Council cost to the assets to be sold at the end of the development cycle.

The opportunity also still remains for the Council to take some “position” within the development to secure certain outcomes and to mitigate its costs and offset its limited risks.

3.50 On 21 January 2009, the Council and NZRPG met to discuss NZRPG’s letter and how to progress the proposed buying of assets.

3.51 NZRPG was told that the Council had formally considered NZRPG’s request and supported the notion of providing a level of support to develop the town centre, subject to several conditions seeking assurances about the affordability and prudence of doing so.

3.52 The type of support envisaged might involve acquiring infrastructure, the timing of development contributions, acquiring civic facilities, underwriting vacant commercial space, and possibly contracting NZRPG to construct the infrastructure. These were all matters to consider, including in an Infrastructure Funding Agreement.

3.53 The parties also discussed the difference between the Council’s valuation of the assets and NZRPG’s. Officials said that this was not a surprise, but the parties needed to agree on a process for valuation that gave both a clear picture of the costs involved. The timing of acquisition was negotiable and depended to some extent on the framework of the Council’s debt profile. The question the Council needed to understand was whether NZRPG was being driven by the immediate need for cash for an assured cash flow or for certainty about the timing of cash.

3.54 At its February 2009 meeting, the Council was updated on the progress that had been made on negotiations to buy NZRPG land. It appears that, by this stage,

a firm view had been reached that the Council needed to own the roads in the town centre. Officials reported as follows:

The Council needs to own land for public road so that there is an enduring means of managing and controlling the road asset on which it sits. Other reasons for the Council owning road land include:

- *Clear definition of public realm*
- *Social inclusion*
- *Traffic access certainty*
- *Avoidance of negotiated access to privately owned roads and street network*
- *Single point of road corridor management and responsibility*
- *Regulation and enforcement of traffic behaviour*
- *Consistency and defensibility of council policy on road ownership and traffic behaviour*
- *Provision of emergency services and public transport access*
- *Provision of public corridors for underground services.*

- 3.55 Officials concluded that owning roads was a more effective way of delivering statutory outcomes, particularly a road network, than statutory mechanisms.
- 3.56 For the value of the land, officials noted that the current land value was “pre-zoned” and “pre-developed”. However, once NZRPG’s Comprehensive Development Plan was lodged (which was expected to be in March 2009), its value was likely to increase. The Council’s current valuation valued the land at between \$23 million and \$29 million depending on resolution of valuation issues, the components agreed on, and negotiation of other matters under the proposed Infrastructure Funding Agreement.
- 3.57 Therefore, the Council approved the continued negotiation of the proposal to acquire land on the basis that a total of no more than \$29 million would be paid to NZRPG to buy land and existing infrastructure. The acquisition was also conditional on \$16.7 million for proposed capital expenditure in the long-term council community plan for 2009-19 being committed for that purpose in 2009/10.
- 3.58 The Council also approved acquiring other privately owned land in the north and south of the Plan Change 15 area to build roads to link the town centre network to the wider public road network.

Decision to buy Westgate Street

- 4.1 In this Part, we describe an agreement under which Waitakere City Council bought the street running through the middle of the existing Westgate Shopping Centre (Westgate Street) from NZRPG.
- 4.2 We describe:
- the background to the purchase;
 - how the Council considered Westgate Street to be a strategic asset;
 - the arrangements for the Council to recover the costs of the purchase;
 - the effect of buying the street on the broader asset purchase; and
 - the Council's overall assessment.

Background

- 4.3 In April 2009, NZRPG approached the Council with a proposal for the Council to buy one part of the roading network from NZRPG before concluding the broader buying of assets under the Infrastructure Funding Agreement.
- 4.4 The street concerned – formerly known as Westgate Street – is a street within the existing Westgate retail centre and was owned by one of the companies within NZRPG. It was part of the roading network for Plan Change 15 and the Council was considering whether to acquire it, but it was not part of the package of assets NZRPG had offered the Council in November 2008.
- 4.5 Figure 3 shows the Massey North town centre roading network. Westgate Street is marked.
- 4.6 The Council was told NZRPG wanted to sell Westgate Street before the sale of other parts of the roading network because it needed funds to buy out the investor who wanted to divest its interests in NZRPG.
- 4.7 In considering whether to accept NZRPG's offer to sell Westgate Street, the Council considered three main issues:
- whether Westgate Street was a “strategic asset” that the Council should own;
 - whether the Council should buy it without having a clear understanding of the extent to which it could recover its costs; and
 - the extent to which buying Westgate Street might limit the Council's options to buy other strategic assets within Plan Change 15.

Figure 3
Massey North town centre roading network



Was Westgate Street considered a strategic asset?

- 4.8 The Council concluded Westgate Street was a strategic asset for several reasons.
- 4.9 In the Plan Change 15 Urban Concept Plan, the existing Westgate retail centre and the new town centre were intended to form a single place. Therefore, the Council considered the link between the existing shopping centre and the new town centre to be important.
- 4.10 Although Westgate Street already existed as a private asset, its significance and function would change significantly. Once the new town centre was completed, Westgate Street would be the major traffic link and bus route for residents in the south to the heart of the centre. It would also form part of the major north/south link for traffic through the centre of the development.
- 4.11 It was of strategic value for the Council to own the entire route through the heart of the town centre and employment centre because the Council could then more effectively influence the nature, timing, and quality of development in the heart of the centre during the ensuing decades.
- 4.12 Westgate Street is shown in the Urban Concept Plan as part of the wider road network for the town. At the time of purchase, it was a minor street within the existing Westgate shopping centre. However, once the road network for the new town centre was built, it was likely to become much more significant. The plan was for Westgate Street to be joined to the existing road network to the south and the new town centre road network to the north. Once this work was completed, Westgate Street would form part of the main road running south to north through the town centre and would be important not only for private vehicles, especially those travelling from the southern suburbs, but also for the public transport network that was an important part of the Council's overall plan for the town.
- 4.13 Waitakere City Council also saw advantages in owning Westgate Street, along with the rest of the town centre road network, because it would better enable the Council to secure its vision for the town centre, as contemplated by the Urban Concept Plan – in particular, for public access and urban design features.
- 4.14 Purchasing Westgate Street would, in the Council's view, prevent the existing Westgate Centre being developed in the future into mall-style shopping, which was something the Council was anxious to avoid.
- 4.15 The roading network for Plan Change 15 had always shown Westgate Street as part of that network. Therefore, buying it simply gave legal effect to that pattern.
- 4.16 The Council considered other factors that supported buying the street.

- 4.17 Purchasing Westgate Street before the wider asset purchase would show commitment to NZRPG at a critical time in the development process. The economy was in recession, and NZRPG need to secure commitments from its funders to construct the first stage of the town centre. If the Council were to buy Westgate Street, it would reassure NZRPG's investors that the Council was committed to the project.
- 4.18 Purchasing the street also meant that NZRPG would be able to meet its commitments to existing investors in Westgate and pay them out. There would then, it was thought, be an indirect benefit to the Council because it would be dealing with fewer interests in all of NZRPG's land within the Plan Change 15 area. Common shareholding would mean simpler dealings.
- 4.19 If the Council bought Westgate Street, it would be able to impose certain controls that had been introduced under the District Plan about the way in which buildings on main streets front the street and provide a safe and attractive aspect to the street.

Cost recovery

- 4.20 According to a Council valuation, the value of the street (as at 22 December 2008) was \$5.13 million. This valuation excluded improvements (that is, carriageway, lights, footpaths, and drainage). NZRPG estimated the value of improvements to be \$1.757 million. The Council valued them at \$1.053 million, based on their current condition.
- 4.21 Council officers had made a preliminary inspection. They considered that it was likely that the street would need investment in five years at a cost of about \$1.7 million. Some of the retaining walls might need strengthening, along with the street, to allow for an expected increase in traffic.
- 4.22 A downside of buying Westgate Street was that Council officers had not finalised the extent of cost recovery likely to be achieved. The preliminary conclusion was that, based on a purchase price of \$7 million, the Council would be able to recover \$2.8 million from development contributions for any loan it required for capital costs. The remaining \$4.2 million would need to come from the Council.

Effect on broader asset purchase

- 4.23 There was also a potential effect on the broader asset purchase. If the Council bought Westgate Street, there would be less money available to spend on other road assets in the new town centre.

- 4.24 Officials calculated that buying all of the road land, land for non-road assets (such as the town square land), and Westgate Street would put the Council \$1.8 million above the allocated \$29 million. On the other hand, buying only the road land needed for core roads, land for non-road assets, and Westgate Street equated to \$24.89 million. This would mean that the Council would still be within the allocated \$29 million.

What price was paid?

- 4.25 The price the Council paid for Westgate Street was \$6 million plus GST.
- 4.26 This price was based in part on a valuation from an independent registered valuer engaged by the Council. The purpose of the valuation was to establish what would be appropriate for the Council to pay for the street if it decided to buy it. We note that the Council was carrying out extensive valuations of land in the Plan Change 15 area at the time as a basis for potential acquisition of land under the Public Works Act 1981, from NZRPG and from other landowners in the area.
- 4.27 The estimated area of the street, according to the valuation, was 8556m² (subject to survey). It is described in the valuation as “the principal thoroughfare through the Westgate shopping centre linking Hobsonville Road (now referred to as State Highway 16 and Fred Taylor Drive) and Westgate Drive”.
- 4.28 The valuer explained that the valuation of the street vested in two parts:
- the underlying value of the land (as undeveloped); and
 - the value of the existing site developments, including civil works and streetscape.

Underlying value

- 4.29 In terms of underlying value, the valuer explained that the land was of a shape and nature for which there was no general demand or market. By implication, it would be difficult to establish a “market value” for it.
- 4.30 He said that, in cases such as this, a typical approach to valuing land was to value it on a “before and after” basis – that is, to determine whether there was any gain or loss in value when the land was sold/bought. He concluded that there was no difference between the street’s value as a private street and its value if it became a public street. Therefore, the value of the land was “directly relative to the value of the land within the centre”.

- 4.31 The valuation needed to take account of:
- the zoning of the land as “community environment”;
 - the surrounding built form of the centre; and
 - the status of the centre as one of regional significance within Waitakere City.
- 4.32 The valuer pointed out that there was little meaningful sales evidence for this type of property within the Western Districts or throughout the wider Auckland regions. However, based on the sales information available to him and the factors outlined above, he concluded that the value of Westgate Street was \$600 plus GST for each square metre.

Value of site developments

- 4.33 As well as the underlying valuation, the valuer said it was necessary to take account of any “site developments”. For the street, he described the site developments as “all civil works and streetscape” and said that these were best represented in depreciated replacement cost. He recommended that the Council ask NZRPG to make the depreciated replacement cost available so that the Council could have an appropriate expert review it.

Overall valuation

- 4.34 The valuer’s overall assessment was that, based on the area of 8556m², valued at \$600 for each square metre, the value of the street was \$5,133,600 plus the value of street improvements.

The Council’s valuation

- 4.35 The Council later valued the improvements at \$1,053,000. Therefore, the overall value of the street, based on advice from the independent valuer and the Council’s internal valuation of the street improvements, was \$6,186,600 plus GST.

The Council’s overall assessment

- 4.36 In essence, the Council considered that the question of whether it should buy Westgate Street at that point or wait until it had clarified whether it could recover costs was one of risk – both strategic and financial.
- 4.37 There was risk to the entire project if the Council did not provide funding to NZRPG by buying Westgate Street and if it did not demonstrate commitment to the project. On the other hand, if the Council could not recover its costs, the risk was \$7 million, or \$385,000 each year in additional rates.

- 4.38 On balance, officials recommended that the Council buy Westgate Street before any broader asset purchase because:
- money was available in that financial year;
 - the effect on rates was minor;
 - the risk of delaying the town centre project was significant in terms of jobs and the effect on confidence to invest in the wider corridor; and
 - the Council could still buy the other main assets it was seeking and keep within the allocated \$29 million.
- 4.39 The Council authorised the Chief Executive to negotiate and conclude an agreement under the Public Works Act 1981 to buy Westgate Street on the following conditions:
- The price would not exceed \$7 million plus GST.
 - The new urban design requirement agreed under the District Plan changes would apply to the full length of the new road from Hobsonville Road (now referred to as State Highway 16 and Fred Taylor Drive) to Westgate Drive.
 - No further private roads would be constructed to intersect with the new road without the Council's approval.
 - NZRPG would commit to sell a library site to the Council in the new development area of Plan Change 15.
- 4.40 The Agreement for Sale and Purchase was entered into in May 2009. The Council paid \$6 million plus GST for the street. The Agreement for Sale and Purchase also included the following provisions:
- NZRPG agreed to certain easements for Westgate Street.
 - The parties agreed certain compromises to the design of the main street of the town centre.
 - NZRPG agreed that the Council could acquire its preferred site for the library under the Infrastructure Funding Agreement.
 - The parties agreed that the bus interchange would be centrally located, on the road shown as Cross Street, west of the town square.
 - NZRPG agreed to manage the development of its land in a manner that ensured that the Council would receive the full benefit of the agreements the parties had reached on urban design issues.
- 4.41 Buying Westgate Street was treated as an early acquisition of assets and roads by the Council. Therefore, the payment was in effect the first portion of the \$29 million allocated by the Council to buy land and other assets from NZRPG.

5

Infrastructure funding and works development

- 5.1 Waitakere City Council's agreements with NZRPG included an Infrastructure Funding Agreement, under which the Council agreed to acquire certain land in the proposed town centre from NZRPG to construct roads and other infrastructure, and to contribute to the costs of constructing those roads.
- 5.2 In this Part, we discuss:
- the revised list of assets the Council would buy;
 - the Infrastructure Funding Agreement; and
 - the Works Development Agreements and Cost Sharing Agreements.

Revised asset list

- 5.3 In May 2009, officials provided a further update to the Council on the progress of the negotiation of the Infrastructure Funding Agreement.
- 5.4 By this stage, NZRPG had submitted its Comprehensive Development Plan for the site and a disagreement had arisen about the construction of a road referred to as Cross Street East (see Figure 3). The Council wanted Cross Street to extend east to west on both sides of the main street running through the centre of the town. It considered that this was needed to minimise the effects of an internal retail area (that is, a mall) being built in such a way that the wider town centre was undermined and would not integrate with public transport.
- 5.5 NZRPG did not want Cross Street East to be built because it considered that it would interfere with its plan for the development of the site, as indicated in the Comprehensive Development Plan.
- 5.6 A compromise had been reached under which the enclosed retail area over Cross Street would be partly opened by a "piazza" area. Officials considered that this would help integrate a private mall environment and a public street environment. Certain other design features were also under discussion, including a ratio of retail floor area on the main street relative to the amount of retail areas in the mall to try to ensure that the mall was subsidiary to the main street.
- 5.7 Another complication was that part of the land needed for roads and the public park was owned by another landowner, and NZRPG had not been able to acquire the land to date. Officials still hoped that negotiations could be concluded within the \$29 million allocated for the project, but there could be no assurance on that outcome.
- 5.8 Officials had done more analysis to assess the extent of the Council's ability to recover its costs through development contributions. Officials advised that the list of assets to be bought had been altered to ensure greater cost recovery. Under

the revised asset list, Council agreed to contribute to roading construction costs, provided that any contribution was still within the \$29 million. The amount of the Council's contribution to road construction would be defined in the Infrastructure Funding Agreement, and priority would be given to Council-owned land for the piazza and Main Street areas.

- 5.9 Councillors authorised the Chief Executive to negotiate and conclude an agreement to buy the revised asset set from NZRPG under the Public Works Act 1981. This was subject to the Chief Executive carrying out any due diligence considered necessary and on terms that, after negotiation, best achieved the following outcomes:
- the negotiated purchase price would not exceed \$29 million plus GST, including the price agreed to buy Westgate Street and any contribution to road construction; and
 - an urban form acceptable to the Chief Executive, having particular regard to the need for:
 - a library site, preferably on the western edge of the town square;
 - a town square/piazza;
 - the development of Precinct A of District Plan Change 15, including retail development fronting public streets;
 - light penetration to the ground level of Cross Street East if it was not a public street;
 - a bus interchange at the heart of the town centre; and
 - Main Street and the town square/piazza area being prioritised for development at an early stage.
- 5.10 The Council agreed to consider including a gross cost of \$29 million in the long-term council community plan for 2009-19. This would buy non-road assets, road assets, and road construction within Plan Change 15 and be funded from a combination of loans, future development contributions, and financial contributions.
- 5.11 The Chief Executive was required to report back to the Long-Term Council Community Plan and Annual Plan Committee, proposing an alteration to the final long-term council community plan to be adopted by the Council in June 2009. This alteration would set out the rationale for the Council buying the assets and making a contribution to road construction. It would also seek adequate budget to enable it to do this and to amend the development contributions schedule to support this.

- 5.12 The Council also recommended to the Long-Term Council Community Plan and Annual Plan Committee that the approach taken to establishing development contributions in the Chief Executive's report be included in the Council's Development Contributions and Financial Contributions Policy and applied citywide as appropriate.

September 2009 – Approval of the Infrastructure Funding Agreement

- 5.13 In September 2009, officials reported to the Council that the Infrastructure Funding Agreement, which included the proposed asset purchase from NZRPG, had been finalised.
- 5.14 Officials reported that:
- The methodology for recovering contributions to fund construction had been resolved, and the necessary changes had been made to the development contributions policy.
 - Westgate Street had been bought.
 - The Council had not been able to get NZRPG to agree to vesting "Cross Street East" as a road. However, its other urban design objectives had been achieved, including:
 - buying sites for the library, town square, and bus interchange; and
 - securing certain design features, such as the form of the town square and light penetration requirements, by NZRPG entering into a memorandum of encumbrance.
 - Extensive valuation advice had been taken to assess different scenarios – for example, what roads might be purchased.
 - NZRPG had changed its preferred negotiating position from a transaction under which the Council would buy the land in question, including the road land, at full consideration and contribute any money left over within the budget limit of \$29 million towards the cost of road formation, to a position where it preferred to transfer the road land without consideration, with the money that might otherwise have been applied to land purchase costs being notionally applied as a contribution towards construction costs.
- 5.15 The overall issue for determination was whether the Council was satisfied that its strategic objectives had been achieved, or sufficiently achieved, to approve the Infrastructure Funding Agreement in the form proposed.
- 5.16 Officials were satisfied that the list of assets ultimately agreed (referred to as "Asset Set B") would meet the Council's strategic goals and also enable the Council to recover a higher proportion of its costs than other options on the table.

- 5.17 The Infrastructure Funding Agreement was authorised to sign on 7 September 2009. It was confirmed by the Auckland Transition Agency on 17 November 2009 and signed by the parties on 22 February 2010.

The Infrastructure Funding Agreement

- 5.18 The main agreement the parties entered into is the Infrastructure Funding Agreement.³ Waitakere City Council agreed to carry out or procure certain works and projects at its own expense, including:
- construction and/or widening of the roads;
 - construction of stormwater ponds;
 - provision of adequate freshwater supply capacity and wastewater services to the boundary of NZRPG's land;
 - design (in consultation with NZRPG) and construction of the town square and library; and
 - acquisition of certain land for open space purposes.
- 5.19 NZRPG acknowledged that:
- The Council's ability to complete these works depended on the Council concluding agreements with the landowners concerned to acquire the necessary land under the Public Works Act 1981.
 - The Council would seek to recover all or part of the costs by way of development contributions, either on a city-wide or local catchment basis, in accordance with the Council's development contributions policy.
- 5.20 The Council agreed to acquire certain land from NZRPG under the Public Works Act 1981 to construct roads. It was agreed that the Council would not be required to pay NZRPG any compensation for this land. In return, the Council agreed not to make any claim for betterment.⁴
- 5.21 NZRPG owned some of the land in question, but most of it was leased. Therefore, the Agreement was conditional on the parties obtaining the owner's consent as lessor and on the Council buying the lessor's interest in the land under the Public Works Act 1981.
- 5.22 In addition to land for roads, the Council agreed to acquire land from NZRPG under the Public Works Act 1981:
- for the purposes of a town square (purchase price was \$275,000 plus GST);

³ The Infrastructure Funding Agreement is a form of "Development Agreement". A Development Agreement is an agreement between a local authority and a private developer under which the private developer agrees to provide infrastructure as an alternative to paying all or part of a development contribution.

⁴ Under the Public Works Act, if Council works, such as a new road, increase the value of adjoining land, the Council can claim "betterment" from the landowner – that is, payment in recognition of the value the Council's works has added.

- for the purposes of a library (purchase price \$891,000 plus GST);
 - for a community park (\$1.00 inclusive of GST); and
 - certain riparian and non-riparian land for stormwater management purposes (\$377,059 plus GST for the non-riparian land, \$1.00 inclusive of GST for the riparian land).
- 5.23 As with the road land, some of this land was owned by NZRPG, and some was leased. Therefore, the agreement to acquire the leased land was conditional on the Council obtaining the consent of the owner to the acquisition of the land under the Public Works Act 1981.
- 5.24 NZRPG accepted full responsibility for the design and construction of roads on, and services within, certain road land, including bus stops and bus lanes, amenity planting, and landscaping. The roads were to be constructed in accordance with plans and to the minimum standards agreed between the parties or approved by the Council.
- 5.25 When constructing the roads, NZRPG was required to include all the usual services (water, electrical power, gas, telephone, and media ducting) and adequate street lighting.
- 5.26 Where these services were provided in land that was required to serve other land, services were required to be installed in a manner that facilitated connection by the adjoining land owner.
- 5.27 The Council agreed to pay the following amount as a contribution towards the cost of constructing the certain roads and associated services:
- A – (B + C), where:

A = the sum of \$23 million (exclusive of GST).

B = the amount the Council was required to pay for the town square, library site, and community park (\$1,166,001 plus GST).

C = the amount the Council was required to pay to buy NZRPG’s interest in the non-riparian open space (\$377,059 plus GST).
- 5.28 Where services were provided that provided additional capacity to serve other land in the Plan Change 15 area, Waitakere City Council agreed to reimburse the reasonable additional costs incurred by NZRPG to provide that additional capacity. If the Council was going to be required to reimburse costs, the parties had to first discuss and agree on a proposed estimate of costs (based on advice from a quantity surveyor employed by NZRPG at its expense), a work timetable, and the cash flow for payment of the Council’s contribution.

Summary of payments

5.29 The Council agreed to make the following payments under the Agreement:

Land for town square (owned by NZRPG)	\$275,000 plus GST
Land for library (owned by NZRPG)	\$891,000 plus GST
Land for community park (leased by NZRPG)	\$1 inclusive of GST
Non-riparian open space land (leased by NZRPG)	\$377,059 plus GST
Riparian margin (leased by NZRPG)	\$1 inclusive of GST
Contribution towards construction of roads and associated services	A – (B + C) Where: A = the sum of \$23,000,000 (exclusive of GST). B = the amount the Council was required to pay for the town square, library site, and community park (\$1,166,001 plus GST). C = the amount the Council was required to pay to buy NZRPG's interest in the non-riparian open space (\$377,059 plus GST).
Reimbursement of reasonable additional costs incurred as a result of providing additional capacity to serve other land within the Plan Change 15 area	As agreed between the parties, based on advice from a quantity surveyor employed by NZRPG at its expense.

5.30 The parties agreed the following other matters under the Agreement:

- to co-operate in relation to certain matters relating to designations imposed by the New Zealand Transport Agency on NZRPG land;
- to co-operate with each other in their efforts to persuade Transpower to agree to all matters necessary to facilitate the replacement of the existing overhead transmission lines over NZRPG land with an underground installation;
- to make certain changes to the covenants previously agreed in the Agreement for the Sale and Purchase of Westgate Street (the covenants related to urban design issues, including the location of a bus interchange, an undertaking to ensure certain land was available for public use at all times, and the design and construction of a pedestrian access way);
- to consult in relation to the design of buildings and other improvements to be constructed on the open space land, community park, and library site, including

consideration of NZRPG’s concerns in relation to car parking at the library site;
and

- to negotiate in good faith the terms on which a park and ride facility would be developed on NZRPG’s land as required by Plan Change 15.

5.31 The Auckland Transition Agency confirmed the terms of the Infrastructure Funding Agreement in November 2009, and the Agreement was formally signed by the Council in February 2010.

Works Development Agreements and Cost Sharing Agreements

5.32 After the Infrastructure Funding Agreement, the parties entered into agreements which detailed how the construction and civil works would be carried out and how costs would be shared are set out in a series of Works Development Agreements and Cost Sharing Agreements.

5.33 Under Works Development Agreements 1, 4, and 5, NZRPG was required to build roads and infrastructure for the Council, at the Council’s cost. The Works Development Agreements were made on the following basis:

- The Council would pay NZRPG its actual costs of providing the infrastructure plus fee of 8.5% of the approved costs.
- The costs of providing the infrastructure are recorded in the Agreements as estimates but with provision for the estimated amounts to be revised at certain points.
- NZRPG was required to operate on an “open book” basis – that is, it was required to give the Council full access to any documents relating to the costs of the works.
- Any claim NZRPG made for payment from the Council was required to include a breakdown of costs with supporting information.

5.34 The Agreements also included a “cost saving” provision under which any cost savings NZRPG made in carrying out the works would be split, with the Council receiving 65% of the costs savings and NZRPG the other 35%. The estimated amount payable by the Council under Works Development Agreements was as follows:

• Works Development Agreement 1	\$16,139,000
• Works Development Agreement 4	\$16,099,000
• Works Development Agreement 5	\$256,000

- 5.35 In each instance, the agreement provides for these estimated amounts to be revised at the detailed design and letting of tender stages. The actual costs payable by the Council is on a progress payments basis when approved by Waitakere City Council's quantity surveyor.
- 5.36 Two further agreements, referred to as Cost Sharing Agreements, allocate responsibility between Waitakere City Council and NZRPG for acquiring land, obtaining consents, design, landscaping, consultancy, and construction costs. Consultancy costs were split 65%/35% between NZRPG and Waitakere City Council. Landscaping design was allocated 20%/80% between NZRPG and Waitakere City Council.
- 5.37 The Council approved Works Development Agreements 1, 4, and 5 and the two Cost Sharing Agreements, but the Auckland Transition Agency did not. We discuss the consequences of this in Part 8.
- 5.38 The agreements outlined in this Part comprise most of the suite of agreements transferred to Auckland Council in November 2010. In Parts 6 and 7, we describe two further arrangements relating to the relocation of overhead power lines and development contributions.

6

Relocating overhead power lines

- 6.1 In this Part, we describe agreements under which Waitakere City Council agreed to pay Transpower to relocate the power lines affecting the development area and recover a portion of the costs from NZRPG.
- 6.2 We describe:
- a report on possible options for the relocation;
 - an agreement between NZRPG and Transpower to develop a detailed solution;
 - an agreement between the Council and Transpower to develop a detailed solution; and
 - the negotiation of an agreement for the relocation works.
- 6.3 There were two main agreements – a Line Deviation Agreement (between Waitakere City Council and Transpower New Zealand Limited) and a “back-to-back” cost recovery agreement, referred to as Works Development Agreement 2 (between Waitakere City Council and NZRPG).
- 6.4 Transpower owned the transmission power lines, which ran the length of the Plan Change 15 development area, from north to south. These power lines were to be relocated underground before any significant development in the Plan Change 15 area could begin.
- 6.5 Under the Infrastructure Funding Agreement, Waitakere City Council and NZRPG had agreed that they would “cooperate with each other in their efforts to persuade Transpower to agree to all matters necessary to facilitate the replacement of the existing overhead transmission lines over NZRPG land with an underground installation”.
- 6.6 Figure 4 shows the location of the overhead power lines.

Figure 4
Location of the overhead power lines, Massey North



- 6.7 The documents available to us do not provide a complete record of the history of discussions between Waitakere City Council, NZRPG, and Transpower about the transmission lines. However, we set out our understanding of this history in the following paragraphs.

July 2008 – The New Zealand Retail Property Group commissions report into possible options for relocation

- 6.8 In 2008, NZRPG commissioned an investigation into possible options for new locations and construction types (underground or overhead) for the line. That report presented a range of options. After discussions between Transpower, Waitakere City Council, and NZRPG, the preferred option was to place the transmission lines from tower 6 to tower 12 underground, by relocating them principally along the main street of the proposed new town.

Waitakere City Council willing to assist, but not wanting to contribute to costs

- 6.9 The November 2008 paper officials presented to the Council when outlining NZRPG's proposal that the Council buy land for roading and other infrastructure assets referred to the transmission lines. Officials commented at the time that acquiring the land might enable the Council to help find a resolution to the relocation of the power lines.
- 6.10 The next reference to the transmission lines is in the April 2009 report to the Council about acquiring Westgate Street. During the discussion about the terms of that acquisition, it had been found that a power pylon was possibly located on land the Council was considering buying. Officials were concerned that, if the power pylon was on NZRPG-owned land, it might affect the value of the land.
- 6.11 If the Council bought the land, it might get drawn into the costs of funding the relocation, which, at that stage, was expected to cost about \$10 million.

May 2009 – Meeting to agree on the route for underground power lines

- 6.12 From the records we have seen, the next month, on 12 May 2009, Waitakere City Council and NZRPG met with Transpower and the New Zealand Transport Agency to agree on the route for the underground line for the purposes of a technical and cost study. It was agreed that the underground line would go from tower 6 on Westgate Drive to tower 11 to the north of Northside Drive.

- 6.13 It was recorded that the study was due to be completed by 31 July and would be carried out by Transpower's consultants. It was also recorded that Transpower had estimated that the design work would take seven months and the construction would take 1½-2 years.

Waitakere City Council asks Transpower to consider contributing to costs

- 6.14 The next day, on 13 May 2009, Waitakere City Council met separately with Transpower to discuss the commercial agreements and funding for the relocation of the power lines. According to the minutes of that meeting, the Council's Chief Executive spoke about the Council's desire to facilitate development at Westgate and asked about the possibility of Transpower providing some form of contribution to the cost.
- 6.15 According to the minutes, Transpower advised that the likely cost at that stage was about \$3 million per kilometre, plus the cost of "termination structures" which was likely to be about \$500,000. Transpower agreed to investigate the supply of cable.

June 2009 – Agreement between the New Zealand Retail Property Group and Transpower for detailed solution development

- 6.16 We have seen evidence that, in June 2009, NZRPG entered into an agreement with Transpower for "detailed solution development" in relation to relocating the transmission lines underground. The contract involved conceptual design, the assessment of project risks and the potential cost impact of those risks, preparation of a cost estimate, and a proposed project programme.
- 6.17 Under this contract, it was agreed that:
- the preferred route was along the main street running through the centre of the new town, roughly following the existing overhead line route;
 - the underground section would be extended so that the final transition state would be close to the existing tower 12 (to go under the proposed Northside Drive roading development by the Council); and
 - NZRPG would be charged only for the work between towers 6 and 11. The additional cost for work between towers 11 and 12 would be resolved between Transpower and the Council. We have been told the reason for the work between towers 11 and 12 was because Northside Drive had to be quite high to cross over State Highway 16 and overhead lines would be too low for the safe operation of the new road.

October 2009 – Exchange of letters

- 6.18 In October 2009, there was an exchange of letters between Transpower and NZRPG about the contract they had entered into in June 2009 for the initial design and project planning work. It appears from those letters that Transpower was refusing to continue work under the contract because of a dispute with NZRPG.

May 2010 – Waitakere City Council and Transpower enter into agreement for detailed solution development – Stage II

- 6.19 After October 2009, there is a gap in the information available to us until May 2010, when Council officials reported that Transpower’s estimated cost had gone up from \$8 million to \$16 million.
- 6.20 It was reported that the Council was going to take over the design contract from NZRPG “to speed things up”.
- 6.21 On 12 May 2010, the Council and Transpower entered into an agreement referred to as the Agreement for Detailed Solution Development in New Zealand – Stage II: ALB-HEN A Undergrounding at Massey North.

July 2010 – Negotiation of agreement for relocation works

- 6.22 By July 2010, the Council, Transpower, and NZRPG were negotiating the contracts for the relocation works. The proposal was that the Council would enter into the agreement with Transpower and accept the primary payment obligation.
- 6.23 The Council and NZRPG would then enter into an agreement at the same time, under which NZRPG would reimburse the Council for costs the Council incurred on NZRPG’s behalf under the relocation agreement.
- 6.24 It is not clear from the papers what discussions the parties had about splitting costs, but it appears there were at least two separate lines of discussion. One proposed a split on the basis that the Council would pay 25% and NZRPG would pay 75% of the costs.
- 6.25 This was on the basis that the overhead lines were 2.4km long and that they crossed 1.8km of land that NZRPG would own and 0.6km of land that Waitakere City Council would own. Another approach suggested that a quantity surveyor should make the final determination, although it was not clear on what basis.
- 6.26 The parties also discussed options for securing NZRPG’s payment obligations. It was agreed that the Council would have a right of set off – that is, if NZRPG’s payments were overdue, the Council could deduct any amount NZRPG owed

from any amount the Council owed NZRPG (for example, under the Infrastructure Funding Agreement). It was also agreed that the Council would seek to take a first ranking security over NZRPG land, before the existing first ranked security holder.

6.27 In September 2010, officials from Waitakere City Council sought approval from the Council to enter into the “Line Deviation Agreement” with Transpower. The Line Deviation Agreement included:

- installing an underground ducting system in Westgate Drive and in new roadways that were to be formed as part of the Plan Change 15 earthworks (all of these works to be carried out during the 2010/11 construction season);
- the Council obtaining all resource/building consents and a designation for Transpower to generate the underground cable;
- Transpower completing the final design and specification for the underground cable design, procuring and installing the underground cable, and removing the overhead line (including towers 6-11); and
- the Council paying all costs (including contractors’ and internal costs) incurred by Transpower in relocating the line. The total budgeted costs were \$17,829,675, but the actual costs payable could be more or less than this amount. The Agreement specified the procurement process to be applied by Transpower, and a cost monitoring regime, to limit the extent to which the budget might be exceeded.

6.28 Officials said that it was essential to conclude the Line Deviation Agreement with urgency to procure the necessary cabling and negotiate physical works contracts by Transpower to ensure completion by the end of the 2011/12 construction season.

6.29 Under the Line Deviation Agreement:

- Transpower agreed to relocate the power lines that passed over the development in Precincts A and B of Westgate Town Centre.
- The line was to be routed under all of the proposed Council roads in the town centre, including Westgate Street.
- It was estimated the work would cost about \$17 million. The Council was required to pay these costs as they were incurred.
- The Council was required to meet the first \$2 million of the cost. The Council effectively made this payment on behalf of the third landowner affected by the relocation, whose land the Council was in the process of acquiring under the Public Works Act 1981. The payment was in lieu of payment for the land.
- The balance of the costs was to be shared between the Council and NZRPG. The Council would pay 35% of the costs. NZRPG would pay 65%.

- NZRPG was required to reimburse the costs the Council paid on its behalf under the Line Deviation Agreement. This arrangement was set out in a separate agreement between NZRPG and the Council referred to as Works Development Agreement 2 (see paragraphs 6.30-6.34).
- As security for NZRPG's obligations, the Council had a "right of set-off" for any money it was owed by NZRPG (that is, if NZRPG did not pay an amount owing under the Line Deviation Agreement, the Council could deduct that amount from any amount the Council owed NZRPG under other agreements).
- NZRPG was also required to use "best endeavours" to put in place a first ranking security to secure its payment obligations.

Works Development Agreement 2

- 6.30 At the same time as approving the Line Deviation Agreement, Waitakere City Council was asked to approve the back-to-back agreement between the Council and NZRPG under which NZRPG agreed to reimburse the Council for its share of the costs of relocating the power lines.
- 6.31 This Agreement was referred to as Works Development Agreement 2. The purpose of the Works Development Agreement was to ensure that a mechanism was in place, either before or at the same time as signing the Line Deviation Agreement, to ensure that the Council would be in a position to recover NZRPG's share of the costs of relocating the power lines.
- 6.32 At several points, Council records stress that, to properly protect the Council, the back-to-back agreement had to be entered into before the Line Deviation Agreement or that both had to be entered into at the same time. This was to ensure that the Council was not left exposed by having a payment obligation to Transpower without a corresponding payment obligation from NZRPG to the Council.
- 6.33 The Line Deviation Agreement was approved on 29 September 2010 and signed on 29 October 2010. Works Development Agreement 2 was approved on 29 September 2010 and signed on 28 October 2010.
- 6.34 However, although the Auckland Transition Agency approved the Line Deviation Agreement, it did not approve Works Development Agreement 2. It is not clear from the Council's records why the Auckland Transition Agency approved one agreement but not the other.
- 6.35 In Part 8, we discuss the implications for Auckland Council and the steps the Council took.

Arrangement about development contributions (October 2010)

7

- 7.1 In this Part, we describe an agreement under which the Council agreed to remit or postpone the payment of certain development contributions by NZRPG.
- 7.2 Development contributions are a means of recovering costs from landowners where infrastructure services are provided at the Council's cost. Development contributions can comprise money or land, or a combination of the two.
- 7.3 Under the Local Government Act 2002, councils are required to put in place a development contributions policy if they intend to collect development contributions. The development contributions policy must meet specific requirements set out in the Local Government Act 2002. These include, for example, a requirement to explain and justify the way each development contribution is calculated.
- 7.4 Under Waitakere City Council's development contributions policy, the Council was able to postpone, remit, or refund development contributions to developers subject to specific criteria set out in the policy. For example, the Council could remit development contributions if the developer intended to provide community facilities or other works within the development that would otherwise have to be funded through development contributions.
- 7.5 On 27 October 2010, NZRPG wrote to the Council's Chief Executive applying for relief from the requirement to pay development contributions for development carried out in Precincts A and B of the Plan Change 15 area.
- 7.6 The application referred to three specific sections of Waitakere City Council's development contributions policy:
- Section 27(a) gave the Council a discretion to postpone the obligation to pay development contributions, where certain criteria were met – for example, where there was a demonstrated benefit to the community for the early commencement and completion of the development.
 - Under section 27(c), the Council could remit development contributions under the "Tool for Urban Sustainability Code of Practice (TUSC)". This was a rating system devised by Waitakere City Council in conjunction with its Sustainable Management Fund. It measured the extent to which a new building or other development, whether "greenfields" or "infill", minimised demand on infrastructure.
 - Section 29 allowed the Council to remit development contributions in relation to an Infrastructure Development Agreement.

7.7 NZRPG applied for a postponement and remission of development contributions on the following basis:

Postponement under section 27(a) on the grounds that:

The benefit to the community from the commencement, and delivery of a sub-regional town centre which meets the strategic, social, and sustainability aspirations of the Council.

The integration of community, social infrastructure, and public realm within the proposed development.

The assessed development contribution to be postponed is not less than \$100,000.

Repayment of the postponed development contribution will be secured by a performance bond to the satisfaction of Council.

Payment of the proposed DC will be made no later than 24 months after the date upon which it would have otherwise been payable.

The postponement of these payments will serve to encourage the delivery of the Town Centre, and is an acknowledgement of the scale, strategic important, and mutually beneficial outcomes that characterise the project.

Remission under section 27(c) on the grounds that:

The delivery of Precinct A and B Westgate Town Centre as provided for by the Comprehensive Development Plan is aligned in terms of desired sustainability outcomes with the principles and objectives of TUSC policy.

The TUSC rating improvement of 40% is an objective and aspiration adopted by [NZRPG] in the proposed delivery of the Town Centre as reflected in Part 3 of [NZRPG's] Comprehensive Development Plan conditions. Accordingly this application serves to advise that [NZRPG] will be seeking a remission to the equivalent of \$2,000 per HHU/HEU upon achieving a 40% TUSC rating or any lower remission commensurate with a lower TUSC rating improvement as the Policy prescribes. [NZRPG] will make application for remission in accordance with Policy 27(c)(i-v) of the Plan.

Remission under section 29 on the grounds that:

The terms of the IFA provide for [NZRPG] to deliver a range of infrastructural assets and areas of land which will vest in the Council. These assets will be constructed in accordance with the terms of the Comprehensive Development Plan approved for Precinct A and B of Westgate Town Centre.

In order to equitably reflect Council's contribution (agreed at 35%) to the external fees and charges incurred by [NZRPG] to obtain the Comprehensive Development Plan and commensurate Resource Consents required to deliver the public

infrastructure, [NZRPG] applies for a remission of development contributions payable of \$2,520,842 plus any GST.

The sum of this remission is applied against the first development contributions greater than or equal to \$2,520,842 assessed for the combined development for which building consent is obtained in both Precincts A and B.

7.8 NZRPG also sought to place a maximum limit on the development contributions assessable against the development of land within Precincts A and B of Westgate Town Centre. It said:

The purpose of this limit is to provide certainty to the developer that contributions payable may not exceed those currently budgeted for and advised by Council. Accordingly this application seeks that development contributions be set at a capped maximum in accordance with the schedule attached to this application. Development contributions assessed from time to time shall be the lesser of revised development contributions assessed in accordance with the most recent published schedule or those contributions provided for in the schedule attached.

7.9 Agreement between Waitakere City Council and NZRPG was recorded in the letter from NZRPG dated 27 October 2010 and a letter from the Chief Executive to NZRPG dated 28 October 2010. The Chief Executive's letter recorded that the agreement was as set out in NZRPG's letter of 27 October 2010.

7.10 The letter states that:

- the terms and conditions were as set out in NZRPG's letter; and
- a note would be placed on the Land Information Memorandum, the Resource Consent file, and the Comprehensive Development Plan files to give effect to this agreement.

7.11 In summary, the effect of the agreement was that:

- NZRPG could offset some of its development contributions (about \$2.5 million);
- NZRPG did not have to pay some of the contributions until some future time (when construction consents were given);
- there was a maximum cap on the amount of contributions NZRPG would be required to pay; and
- some development contributions were remitted, so were not payable at all.

7.12 We have found no record of the development contributions agreement being forwarded to the Auckland Transition Agency for approval.

7.13 We discuss the development contributions agreement further in Part 8.

8

What Auckland Council did after November 2010

- 8.1 In this Part, we look at what Auckland Council did after 1 November, once it took overall responsibility for the project.
- 8.2 We describe and comment on:
- how Auckland Council assessed the situation it inherited from Waitakere City Council;
 - the changes Auckland Council made to how payments were made to NZRPG, work was procured under the Works Development Agreements, and how subcontractors were procured;
 - the review Auckland Council commissioned from Meredith Connell;
 - Auckland Council's subsequent approach to the project and the changes it made; and
 - the transparency of Auckland Council's handling of the project.

What was Auckland Council's assessment of the situation it inherited from Waitakere City Council?

- 8.3 From 1 November 2010, Waitakere City Council ceased to exist and Auckland Council came into being. The Local Government (Tamaki Makaurau Reorganisation) Act 2009 dissolved the existing local authorities. Section 35(1) of the Act provided that, among other things:

... the functions, duties, and powers of each existing local authority under any enactment become functions, duties, and powers of the Auckland Council ...

... all rights, liabilities, contracts, entitlements, and engagements of each existing local authority become rights, liabilities, contracts, entitlements, and engagements of the Auckland Council ...

... anything done, or omitted to be done, or that is to be done, by, or in relation to, each existing local authority (including, to avoid doubt, the existing community boards of each existing local authority) must be treated as having been done, or having been omitted to be done, or to be done, by, or in relation to, the Auckland Council ...

- 8.4 This made Auckland Council the signatory to a set of arrangements for the project, some of which had received the required confirmation by the Auckland Transition Agency and some of which had not.
- 8.5 As outlined, a contract or arrangement that needed to be confirmed by the Auckland Transition Agency was not considered valid if that confirmation was not obtained. The Infrastructure Funding Agreement and the Line Deviation Agreement with Transpower had been confirmed and were legally valid. However,

the Works Development Agreements and Cost Sharing Agreements were not confirmed and so, as a matter of law, were invalid. In summary, Auckland Council inherited the agreements shown in Figure 5.

Figure 5
Agreements inherited by Auckland Council

Agreement	Date	Confirmed by Transition Agency?
Infrastructure Funding Agreement	22 February 2010	Yes
Line Deviation Agreement	29 October 2010	Yes
Works Development Agreement 1	22 October 2010	No
Works Development Agreement 2	28 October 2010	No
Works Development Agreement 4	22 October 2010	No
Works Development Agreement 5	22 October 2010	No
Cost Sharing Agreement 1	28 October 2010	No
Cost Sharing Agreement 2	28 October 2010	No
Southern Cable Terminating Station Agreement	Waitakere City Council resolution 6 October 2010	No
Southern Cable Terminating Station Access Deed	Waitakere City Council resolutions 6 October 2010 and 29 October 2010	No

- 8.6 Auckland Council was aware that the Auckland Transition Agency had not confirmed some of the contracts entered into by Waitakere City Council and that those contracts were therefore not valid. Faced with this situation, Auckland Council sought advice about the contracts it had inherited and the extent of the obligations under those contracts. This advice was from a firm of solicitors who had been involved in developing the contracts for Waitakere City Council and the previous Manager of Legal Services of Waitakere City Council.
- 8.7 As at November 2010, no staff from Waitakere City Council involved in the project transferred to the Auckland Council team responsible for the project. We understand there was little communication between the staff of Waitakere City Council and the staff at Auckland Council who would have responsibility or oversight of the project.

8.8 Auckland Council received the external solicitors' advice in November 2010. It then considered its position. That consideration included:

- Waitakere City Council had properly executed the Line Deviation Agreement with Transpower and had that agreement confirmed. This meant that it was committed to paying the cost for placing the power lines underground. The estimated cost for this was about \$17 million.
- There was no corresponding back-to-back agreement with NZRPG to meet its share of this cost and to make land and easements available to Transpower for the southern cable terminating station. This sharing of costs and access between the parties was contemplated and was covered in Works Development Agreement 2. However, Works Development Agreement 2 was invalid. As a result, there was risk in Auckland Council relying on Works Development Agreement 2 to recoup NZRPG's share of the cost. This meant Auckland Council might be exposed to meeting the full cost.
- One means of mitigating this was to suspend work on the relocation. This would likely create delay and could also increase overall costs.
- Auckland Council understood that NZRPG was aware that the Auckland Transition Agency had not confirmed some of the contracts. NZRPG was reluctant to continue incurring costs implementing the Works Development Agreements without Auckland Council committing to paying its share of the costs under those agreements. This problem might also cause delay.

8.9 On 22 November 2010, the Team Leader of the Strategic Transformation Team recommended to the Chief Executive of Auckland Council that he re-sign in the name of Auckland Council those agreements that the Auckland Transition Agency had not confirmed. It was also recommended that the agreements be considered a package and that "it was commercially prudent to deal with all the contracts as a package because this is how the contracts are intended to operate". The view at this time was that the unconfirmed contracts were conditional and that, once the contracts were signed, they would be unconditional.

8.10 The nature of the development and the essence of the issue facing Auckland Council was described to the Chief Executive in this way:

1.0 Introduction

The Northern Strategic Growth Area (NorSGA) programme is the product of over ten years planning, consultation, and design focussed on delivering a job-rich northern edge of sustainable development to the former dormitory suburbs of Massey North/Westgate and Hobsonville. The overall programme comprises three stages, with the Massey North town Centre (MNTC) development being part of stage one.

A number of plan changes were initiated by Waitakere City Council (WCC) for the wider NorSGA programme, with Plan Change 15 covering the MNTC development. The WCC agreed to a public amenity and infrastructure investment programme and has provided \$325m funding in its 2009 ten year [long-term council community plan].

The capex funds acquisitions, new roads, new park areas, stormwater, town square, library and other public amenities.

2.0 Issue

There are various legal documents that deliver the infrastructure elements of the PC15 / MNTC project. WCC has formally passed a resolution to enter into these agreements ...

Although some of these contracts have been fully executed and are valid, a number of contracts did not receive [Auckland Transition Agency] confirmation and are therefore still “conditional”.

- 8.11 The Chief Executive was told about the issue with the Auckland Transition Agency in this way:
- The issue around [Auckland Transition Agency] confirmation involved clarification as the WCC approvals, the extent of the infrastructure works being agreed and adequate budget provisions in the [long-term council community plan]. Ultimately, time constraints have meant that while the clarification is able to be provided, it was not by 29 October [the last day before the statutory deadline] and hence the [Auckland Transition Agency] confirmation condition is not able to be satisfied.*
- 8.12 The recommendation to the Chief Executive was to enter into the contracts in the form in which they were received from Waitakere City Council. This recommendation was supported by the Team Leader (Strategic Transformation Team), the Manager (City Transformation Projects), the Manager (Regional and Local Planning), and the Chief Financial Officer.
- 8.13 Further to the advice and recommendations, the Chief Executive of Auckland Council agreed on 25 November 2010 to execute replacement contracts for Works Development Agreement 1, Works Development Agreement 2, Works Development Agreement 4, Works Development Agreement 5, Cost Sharing Agreement 1, Cost Sharing Agreement 2, the Southern Cable Terminating Station Agreement, and the Southern Cable Terminating Station Access Deed.
- 8.14 Those replacement contracts were signed on 29 November 2010. In form, these contracts were exactly the same as those entered into by Waitakere City Council,

except that the parties to the agreements were changed to expressly reflect that the agreements were now between Auckland Council and NZRPG. Being signed after 1 November 2010, these contracts did not require confirmation by the Auckland Transition Agency.

Specific steps taken by Auckland Council

A change to how Auckland Council paid the New Zealand Retail Property Group

- 8.15 Auckland Council also acted to change how it made payments to NZRPG under the Infrastructure Funding Agreement.
- 8.16 After 1 November 2010, Auckland Council identified that the payments made under the Infrastructure Funding Agreement were being paid to NZRPG monthly, rather than linked to the delivery of work. It also seemed to have identified that there might not have been any agreement between NZRPG and Waitakere City Council of estimates for work before that work began, as was required under the Infrastructure Funding Agreement.
- 8.17 The original intention was the payments would be made according to progress. The Infrastructure Funding Agreement provided that contributions towards constructing “black roads and associated services” would be “paid by progress payment on a progressive basis”. However, in practice, NZRPG was paid on a monthly basis and the payments were not connected to progress. Auckland Council has told us that it was practically difficult to confirm the value of the ongoing Infrastructure Funding Agreement works against payments made to NZRPG. In Auckland Council’s view, the Infrastructure Funding Agreement did not provide a clear mechanism for certifying the value of the work performed to date.
- 8.18 Auckland Council acted to obtain the agreement of NZRPG to change the payment process. Auckland Council told us this was because NZRPG was consistently about 10% behind delivering the works in comparison to the payments it received. Under the change, payments became due when Auckland Council received satisfactory evidence of progress. This progress would be measured by NZRPG’s project engineer and NZRPG’s project manager providing letters certifying the percentage of work completed. Payment would then be made on actual costs.
- 8.19 As discussed in Part 9, Auckland Council has systems to process and verify payments.
- 8.20 Changing how the “progress payments” were made so they were in line with the work completed was an improvement to the arrangements with NZRPG. Being

able to demonstrate a connection between the services provided and payment for those services is expected practice.

Procurement under the Works Development Agreements

- 8.21 The Works Development Agreements taken over by Auckland Council and re-signed on 29 November 2010 were as agreed between Waitakere City Council and NZRPG.
- 8.22 Those agreements provided a process for work under them to be procured. Under that process:
- NZRPG would procure and project manage the carrying out and completion of the Council Works (as defined), for which NZRPG would receive an 8.5% fee.
 - NZRPG would enter into contracts for the completion of the Council Works “subject to the prior approval of the Council to the identity of the contractor and the contractual documents”.
 - The Council’s approval would not be “unreasonably withheld”.
- 8.23 Under this process, NZRPG proposed appointing a company as the head contractor. The amount to be paid under the Works Development Agreements was about \$32 million.
- 8.24 Auckland Council was required to approve that recommendation. To evaluate whether to give that approval, Auckland Council carried out a non-price attributes assessment of that company. After this analysis, Auckland Council approved the appointment.
- 8.25 In approving this appointment, Auckland Council appreciated that it was not best practice. Best practice would have been to put the work under the Works Development Agreements to the market, seeking the best value possible for the expenditure. That said, the process for the procurement had been agreed and outlined in the contract entered by Waitakere City Council. Auckland Council added the non-price attributes assessment. Doing so provided a measure for whether the suggested contractor would be able to perform the work required.
- 8.26 When this appointment was made, there was a close connection between NZRPG and that company. The company was already appointed as the head contractor under the Infrastructure Funding Agreement. One of the directors of the company was (as at November 2010) also a director in some of the NZRPG companies involved in the project:
- One of those companies owned land central to the development and was party to the Infrastructure Funding Agreement and Works Development Agreement 2.

The other director of this company was the Managing Director or Chairman of other NZRPG companies.

- 8.27 Another of those companies was Westgate Properties Limited, which is party to the purchase by Waitakere City Council of Westgate Street in May 2009. It appears that Auckland Council was aware of this relationship from the information it considered in November 2010. It was not evident from the evidence we saw if, or how, it considered the relationship as part of approving the appointment of the company. Auckland Council has told us that it did assess the risk of a conflict of interest at that time but considered that risk to be low.

Changes to procurement

- 8.28 The absence of a competitive process for subcontractors doing the work under the Works Development Agreements also concerned Auckland Council.
- 8.29 To address this, Auckland Council negotiated with NZRPG to introduce a closed tender process that required a minimum of three tenders to be sought from a pool of contractors for each item of work tendered. NZRPG ran this process.
- 8.30 The pool was the list of subcontractors proposed by the company appointed as the head contractor. As such, the group of potential contractors was closed, so the process was not an open market procurement.
- 8.31 When those tenders were received, Auckland Council evaluated the tenders by using its quantity surveyor to identify any aspects of the tenders that were high or not within market limits. This went some way towards ensuring that a reasonable price was paid for the works. However, it is not a substitute for obtaining prices from the open market. An open market process would have been better practice.
- 8.32 More recently, Auckland Council has entered into further Works Development Agreements using different procurement processes. These are Works Development Agreement 6 (for work on the town square/piazza) and Works Development Agreement 7 (a variation providing for a higher level of finish on the roads).
- 8.33 Both of these more recent Works Development Agreements specifically required three tenders for Council works. They are a more open market process. Further, one of those contracts (Works Development Agreement 6) introduced the engagement of a consultancy company to carry out construction observation services for the Council. This is another level of independent verification and assurance about value for money.

Auckland Council's procurement policy

- 8.34 When the councils amalgamated on 1 November 2010, there was a mix of procurement policies and Auckland Council did not have one consistent policy for procurement. The draft policy it prepared in August 2011 outlined that, as a matter of principle, procurement would be open, fair, and contestable. The draft policy said that Auckland Council was committed to acting with integrity and would honour its existing agreements and respect existing suppliers. Having a procurement policy such as this is good practice.
- 8.35 Auckland Council's current procurement policy reiterates the principle of open and competitive procurement processes, where possible and appropriate.

The Meredith Connell report

- 8.36 In October 2011, the Regional Development and Operations Committee of Auckland Council unanimously agreed that an independent review into probity issues raised in relation to Westgate be initiated. The Committee agreed that the review was to be reported back to it for further consideration. Meredith Connell was commissioned to carry out that review.
- 8.37 This is a different piece of work to the advice taken by Auckland Council in November 2010 after the amalgamation of the Councils. That advice was taken to gain an understanding of the project, the arrangements inherited from Waitakere City Council, and Auckland Council's position. This review by Meredith Connell was a legal and factual review of the arrangements, obligations, and any risk.
- 8.38 The Meredith Connell review was received by Auckland Council in April 2012. It includes a summary of the arrangements entered into by Waitakere City Council and then by Auckland after 1 November 2010, makes some comments about those arrangements, and makes recommendations about actions Auckland might take.
- 8.39 The Regional Development and Operations Committee discussed a confidential summary of the Meredith Connell report at the public excluded part of its June 2012 meeting. Copies of the Meredith Connell report were available to Committee members to read but not to retain in their possession. The Committee agreed that "the report and associated resolutions remain confidential until the reasons for confidentiality no longer exist".
- 8.40 We have considered the contents of that review in preparing this report. We comment later about Auckland Council's use of the review.

An agreement with the New Zealand Retail Property Group about development contributions

- 8.41 As outlined earlier, Waitakere City Council had the ability to recover development contributions from NZRPG as referred to in the Infrastructure Funding Agreement. It also entered into an arrangement with NZRPG in October 2010 about relief from development contributions.
- 8.42 After the Meredith Connell report, Auckland Council decided to formalise the agreement about development contributions made between Waitakere City Council and NZRPG by exchange of letters on 27 and 28 October 2010. Documents show that Auckland Council appears to have considered that the purpose of the agreement between Waitakere City Council and NZRPG was to provide some certainty to NZRPG and to bind the Council.
- 8.43 On 8 June 2012, the City Transformation team at Auckland Council sought approval from the Regional Operations and Development Committee to enter into a development contributions arrangement with NZRPG. That approval was provided on 26 June 2012.
- 8.44 At the time, Auckland Council considered that the arrangement would put it in the same position as Waitakere City Council, with the advantage of the certainty of a formal agreement. The Council calculated that the arrangement was likely to be “cost neutral when compared to the current draft development contributions policy likely to apply at the time any development contributions are assessed”.
- 8.45 Auckland Council and NZRPG entered into this agreement on 12 June 2013.
- 8.46 The agreement recognised that Waitakere City Council and NZRPG had “agreed certain matters in relation to the payment of development contributions for development”. It stated that Auckland Council had the power under its development contributions policy to require development contributions and to enter into agreements about development contributions where that was in the interests of the Council and the developer.
- 8.47 The agreement provides for offsetting the development contributions, where Auckland Council reduces the amount of development contributions assessed and invoiced to NZRPG up to an offset amount of \$2,520,842 plus GST. The purpose of reducing the contributions in this way is described as recognising the value to the Council of the Comprehensive Development Plan prepared by NZRPG in 2007 for Precincts A and B of Westgate Town Centre, and to make a contribution to the costs incurred by NZRPG in obtaining that plan. Auckland Council told us that, as at September 2015, there had been offsets to the value of \$2,353,175 plus GST.

- 8.48 The agreement also provides for postponing when Auckland Council will assess development contributions to when building consent is granted for the development. When building consents are granted, NZRPG is to provide a bond to the amount of the development contributions.
- 8.49 The agreement also provides for remission of development contributions if, when applications for resource consent are made, NZRPG can demonstrate a certain rating for how those buildings minimise demand on infrastructure.
- 8.50 The agreement also provides for a maximum level of development contributions. That maximum level is the lesser of the amount specified in the development contributions policy specified at the time of the remission and the amounts specified in agreement for residential and non-residential developments outlined in the agreement.
- 8.51 At the time, Auckland Council did not have a development contributions policy that fully integrated the various policies inherited from the previous councils. This was in place from 1 July 2012. Until that time, Auckland Council used an interim policy, which adopted Waitakere City Council's development contributions policy.
- 8.52 Under the interim policy, Auckland had the power to impose development contributions and, like Waitakere City Council before it, the power to enter into agreements about those contributions. Specifically, it had the power to postpone, remit on a general basis, and remit under the Tool for Urban Sustainability Code of Practice, if certain criteria were met.
- 8.53 Under that policy, Auckland Council had the authority to enter into the agreement with NZRPG. The policy does not specifically refer to placing a maximum amount on the development contribution.
- 8.54 When Auckland Council entered into the development contributions agreement with NZRPG, it had a new development contributions policy in place. That policy does not appear to allow for development contributions to be remitted.
- 8.55 From the evidence we have seen, it appears that Auckland Council considered it necessary to the ongoing development of the new town centre and to the ultimate pursuit of the overall vision to enter into this formal agreement with NZRPG. It perceived that not doing so presented a risk to the project and possibly to the Council for not honouring an agreement Waitakere City Council had made with NZRPG.
- 8.56 That said, the agreement with NZRPG formalised the arrangement made with NZRPG. The offset arrangement is still in effect. That offset arrangement provides

practical relief to NZRPG, because it is not required to pay contributions it might otherwise have had to pay.

- 8.57 We have been told that, as at September 2015, Auckland Council had received development contributions payment of \$266,000 from NZRPG and further charges of \$1,681,140 were applied to NZRPG but not invoiced because they were credited to the offset.

Relocation of power lines and a variation to Works Development Agreement 2

- 8.58 As outlined in Part 2, Waitakere City Council entered into an agreement (the Line Deviation Agreement) with Transpower about relocating the power lines over the development area. That agreement provided that Waitakere City Council would pay Transpower for the costs of the relocation.
- 8.59 Through Works Development Agreement 2, NZRPG and Waitakere City Council agreed that Waitakere City Council was responsible for 35% of those costs and NZRPG was required to pay the other 65% of the costs.
- 8.60 The agreement gave Waitakere City Council (and now Auckland Council) a right of set-off of any overdue amounts against amounts it owed to NZRPG and to register security arrangements over the development land. NZRPG was required to use its best endeavours to arrange (by 31 January 2011) security for the Council for NZRPG's payment obligations under Works Development Agreement 2. Failure to comply with this requirement constituted a material breach of Works Development Agreement 2.
- 8.61 The effect of this arrangement is that Waitakere City Council (and then Auckland Council) has taken financial responsibility for NZRPG's proportion of the relocation costs. Waitakere City Council, and not NZRPG, had overall responsibility for paying the overall costs of putting the power lines underground to Transpower. This exposed Waitakere City Council (and then Auckland Council) to the risk that NZRPG would not meet these costs. Payment of that share was through the agreement outlined in Works Development Agreement 2.
- 8.62 As we understand it, NZRPG did not make the required security arrangements, nor did it make any payments to Waitakere City Council.
- 8.63 In 2012, Auckland Council agreed with NZRPG to postpone the payment of NZRPG's share of the costs. NZRPG had approached Auckland Council about varying the payment provisions in Works Development Agreement 2. Rather than

making the payments as outlined in Works Development Agreement 2, it was suggested that the payments towards the relocation costs be:

- made on a pro rata basis as the overall area was developed;
- subject to a minimum interest rate; and
- paid by a future date, unless extended by agreement.

8.64 When the arrangement was proposed to the Regional Operations and Development Committee of Auckland Council, there was no mention that NZRPG had not complied with the earlier agreed terms or payment.

8.65 The Regional Operations and Development Committee approved this arrangement on 26 June 2012, and it was referred to the then Chief Executive to sign. An agreement was made between the parties on 31 October 2012. The payment of NZRPG's share of the costs became linked to the issue of Code Compliance Certificates or Certificates of Public Use under the Building Act 2004 of units in Precinct A and Precinct B of Westgate Town Centre. Interest remained payable to the future payment date. One of the reasons the City Transformation team gave for recommending this variation was the "substantial investment made by council over a long period to forge a partnership to achieve a successful development of Northern Strategic Growth Area and Westgate in line with council's vision". It appears that Auckland Council perceived a risk to NZRPG, and so the project, if this agreement was not made. The variation was seen as the most prudent action. Another apparent motivation was that this arrangement would encourage NZRPG to efficiently progress the project.

8.66 The risks associated with the approach taken by Auckland Council (and Waitakere City Council before it) have become real. As at 30 June 2015, NZRPG owed \$11.3 million of its share of the relocation cost (being the initial payment of about \$9 million plus interest). Auckland Council has told us that, as of 20 September 2016, NZRPG had paid \$2,982,796 on the issuing of Code Compliance Certificates for buildings against the relocation debt. NZRPG had also been invoiced for the full relocation debt, including the interest charged on remaining amounts owing.

8.67 Without relocating the power lines, Waitakere City Council's vision of a town centre might not have been possible. However, in our view, the financial risk of the relocation was passed from NZRPG to the respective councils. Further, NZRPG was not required to make the contemplated payments until sometime in the future.

What is our view on the transparency with which Auckland Council managed the project?

- 8.68 We have received complaints from the public about not being able to get information about the project. We received complaints from people who were unable to obtain a copy of the Meredith Connell report provided to Auckland Council. We also received complaints from Council members about what they considered to be a lack of transparency.
- 8.69 The commissioning of that report was confidential. The report itself was considered confidential/commercially sensitive and legally privileged. It was not widely disseminated to staff. As above, the findings of the Meredith Connell review were summarised in a report distributed to all Councillors and discussed at the public excluded part of a June 2012 Committee meeting. However the full copy of the Meredith Connell report was only made available to Councillors in the presence of staff and on the basis it was returned.
- 8.70 It is important for a local authority to be as open as possible with the ratepayers it serves and the elected officials who represent those ratepayers. Proper financial management and accountability processes, and transparency, serve the interests of all parties. As we have said in other contexts, effective public debate requires transparency, which strengthens public sector accountability and promotes fairer and more effective and efficient governance. Transparency includes responding to requests for information, particularly if the people need the information to engage in the decisions that affect them.
- 8.71 There will be times when a council is involved in commercial negotiations with external parties and, like any other such negotiator, is sensitive to information about the prospective arrangement being divulged to other parties. This would put the council at a competitive disadvantage and could prejudice the relationship with the other party. The perception that such negotiations might be divulged to the public in the future could also hinder future commercial discussions with this or other parties.
- 8.72 This being so, it is reasonable for a council to conduct commercial negotiations on a confidential basis, where that is warranted, and not publicly discuss the nature of those negotiations while they are under way. This protection is reflected in the ability to withhold information of this type under the Local Government Official Information and Meetings Act 1987. This is the approach currently taken by Auckland Council.

- 8.73 However, a council should then be prepared to be as transparent as possible about the outcome of that negotiation. The position taken by the council and the expenditure to which it is committed on the ratepayer's behalf should be open to scrutiny and discussion. The council should be able to demonstrate the reasons for the commitments it has made and demonstrate the value for money being obtained.
- 8.74 In this case, it might have been reasonable for Auckland Council (and Waitakere City Council before it) to conduct negotiations with NZRPG and other parties on a confidential basis and to consider its options, the decisions it might make, and the reasons for those decisions without necessarily being required to release that material to the public.
- 8.75 However, once those agreements were made, there is less reason for the Council (or Council staff) to withhold that information. As the agreements for the project are of wide interest, it is in the public interest for the Council to provide interested parties with information about the agreements, the reasons for decisions, and the outcomes achieved.
- 8.76 An immediate example of this is the Meredith Connell report, which Auckland Council has not released. Not releasing that report or being more open with other information about the project led to many of the concerns raised. The timely release of information about the agreements could have significantly reduced the level of complaints and criticisms directed at Auckland Council.
- 8.77 Many of the concerns raised with us could have been allayed by Auckland Council releasing information about the agreements. We understand that Auckland Council plans to release the report at some stage and in some form. We encourage that to happen. Where appropriate, parts of the report could have been protected so as not to reveal legal advice or other matters that could properly be withheld. With those measures in place, the information in that report would have provided those complaining about secrecy with most of the information they would need to be aware of the background to the project and the contractual agreements entered into by Waitakere City Council and Auckland Council.

9

Aspects of Auckland Council's governance of the Massey North development

- 9.1 In this Part, we describe and comment on the Massey North development's:
- governance arrangements;
 - reporting arrangements;
 - management structure and cost controls;
 - costs; and
 - completeness.

What are the governance arrangements?

- 9.2 It is important that Auckland Council has the right governance structure to ensure that there is a clear direction for the Massey North development, that it is adequately progressing in that direction, and that hard questions are asked about whether the direction and progress remain appropriate.
- 9.3 The right governance structure is also important for reducing the risk of management being seen to form too close a relationship with the private companies involved.

Overall public accountability

- 9.4 Ultimately, Auckland's elected councillors are publicly accountable for the Massey North development through Auckland Council's governing body, its committees, and the Henderson-Massey Local Board.
- 9.5 Public accountability requires keeping the public informed about important decisions, how a project is progressing, and what results are being achieved.

Project governance structure

- 9.6 Aspects of governance of the Massey North development at the relevant times were carried out by Auckland Council; two committees of the whole Council, namely the Finance and Performance Committee and the Auckland Development Committee; and the Henderson-Massey Local Board. Council management, particularly the City Transformation Projects⁵ and North West Transformation teams, manage and steer the development.
- 9.7 Much of the governance happens away from Auckland Council's governing body.
- 9.8 Although the Massey North development is not as financially significant as some of Auckland Council's other projects, it still involves considerable amounts of public funding (as we explain later in this Part) and has risks that need to be carefully managed and governed.

⁵ From late 2015, the City Transformation Projects team was renamed the Development Programme Office located within the Council's Infrastructure and Environmental Services division.

- 9.9 In our view, the project warrants greater oversight by Auckland Council's governing body, including its costs.

Project purpose and direction

- 9.10 Although the governors continuing with the project's original direction and purpose might be a function of inheriting the project through a transition process, it is important that the governors periodically stand back and consider whether changing circumstances mean that that direction and purpose needs to change.
- 9.11 Involving governors in the project is important not only for clarity of direction and purpose but also as a way of reducing the risk of management being seen to form too close a relationship with the parties involved. This is a particular risk for this development given the reliance on NZRPG.
- 9.12 In our view, the project's governors should seek a secondary level of assurance beyond information coming from those directly managing it. Auckland Council has told us that senior management provided some of this assurance because they were not involved in the day-to-day management of the project.

What are the reporting arrangements?

- 9.13 Reporting on the project should help the project governors maintain oversight of the project, emerging risks, and planned benefits. This is so that the governors can review and update the direction and purpose as necessary, and oversee the project's performance against plans.
- 9.14 Progress is reported through multiple streams. There is limited consolidated reporting at the overall project level to the governors.
- 9.15 There is the need to focus on the health of relationships with stakeholders, on contractor performance, and on the benefits delivered to date, as part of management monitoring and reporting on the project.
- 9.16 The Development Programme Office (formerly the City Transformation Projects team) in Auckland Council's Operations Division produces the monthly "Programme Status" reports for the project. These are included in the monthly capital expenditure reporting to the full Auckland Council.
- 9.17 The monthly "Programme Status" reports include a status overview; identification of budget and expenditure; key risks, issues, and milestones; and a risk assessment for each of the following dimensions of the project:
- overall status;
 - cost;
 - schedule;
 - scope;

- risk;
- issues;
- resource; and
- quality.

9.18 Monthly “Programme Status” reports in this format started in March 2014.

9.19 However, the monthly “Programme Status” reports we have seen include information about only some of the constituent projects making up the overall Massey North development. There is limited consolidation of all information about the Massey North project in these reports. Auckland Council has told us that this is because the reports focused only on work then being carried out and funded by Auckland Council, and did not routinely report on work already completed. Figure 6 identifies the reporting streams by frequency.

Figure 6
Sources of reporting to the project governors by frequency of reporting

Annual

Information from the Henderson-Massey Local Board on local capital projects is included in Auckland Council's annual report. This information is typically general and high level. For example, in September 2012, the report stated:

During the year construction of the new Metropolitan Centre at Westgate started. At this early stage infrastructure such as roads, stormwater and water reticulation are being constructed. In the future parks, a library, a community centre and a recreation centre will be built to service population growth in the area.

Half-yearly and as required

The North West Transformation Team (Steering Group) provides progress and specific update reports to the Henderson-Massey Local Board. In each of 2014 and 2015, there were only two specific update reports to the Local Board. The specific update reports cover topics about open space or community facilities that are part of the Massey North development.

Quarterly

The Finance and Performance Committee receives quarterly reporting on the whole of Auckland Council's performance. Individual projects, including the development, are not typically visible in this reporting. The report is produced by Auckland Council's staff.

Auckland Council's staff provide quarterly reporting to the Henderson-Massey Local Board on the performance of the Local Board.

Monthly

Capital expenditure analysis is included in monthly performance reports to the full Auckland Council. These reports are about 250 pages, with financial information on projects from the Council's Planning Division and from the Council's Operations Division. The reports can also include project-specific commentary. As an example, the February 2015 report included 12 bullet points of commentary about the Massey North development. The reports also identify an executive owner for each of the projects and a current and previous project status.

The reports we have seen include information about only some of the constituent projects making up the overall Massey North project. There is no consolidation of information about the Massey North development in these reports.

What are the management and project cost control structures?

9.20 A management structure and cost controls support the project.

Management structure

9.21 Strong management systems and processes are needed to support decision-making, sustain programme delivery, help to build and maintain important strategic relationships, and support accurate and complete reporting to the governors.

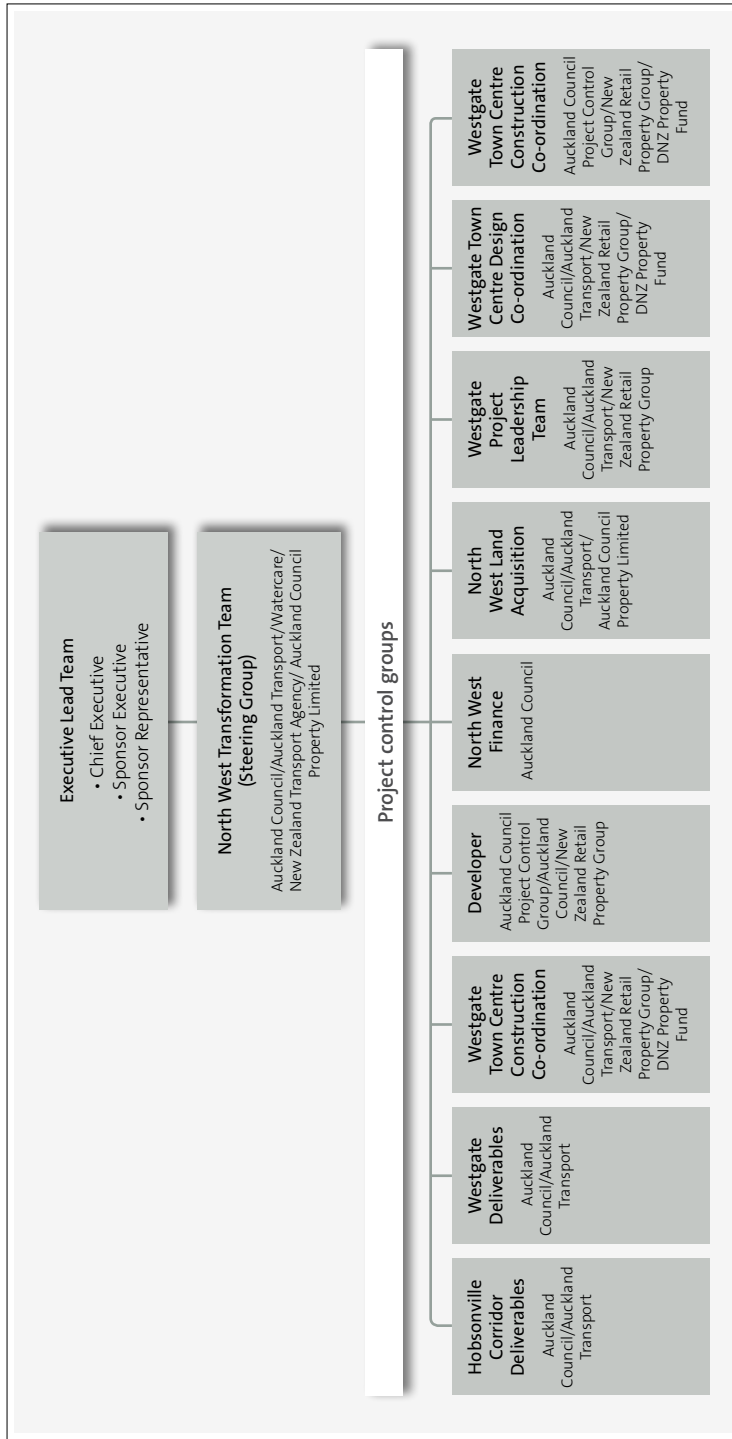
9.22 Figure 7 shows the management structure of the Massey North development.

9.23 Management accountability for the project rests with Auckland Council's Chief Executive and with the senior staff within Auckland Council with responsibilities for the project. These are the Chief Planning Officer (the Sponsor Executive) and the Manager Regional and Local Planning (the Sponsor Representative). The Chief Executive has a financial delegation of \$20 million but is expected to refer lesser-value items that are contentious or political to the governing body or its committees. This is the senior management level of the management structure for the project.

9.24 A 30-person North West Transformation Team reports to the Chief Executive and to the Henderson-Massey Local Board. It includes membership from a range of organisations, not all of which are part of Auckland Council. These organisations include:

- Auckland Council;
- Auckland Transport;
- Panuku Development Auckland (previously Auckland Council Property Limited);
- the New Zealand Transport Agency; and
- Watercare Services Limited.

Figure 7
Management structure for the Massey North development*



* The participation and description of parts of this structure may have changed in recent times.

- 9.25 The North West Transformation Team is the Steering Group for the project.
- 9.26 The Auckland Council staff of the North West Transformation Team represent a wide range of functional sections of the council involved with the project.⁶
- 9.27 A Project Leadership Team that has representatives from Auckland Council, Auckland Transport, and NZRPG reports to Auckland Council's senior management through the North West Transformation Team. We were told this team is responsible for \$32 million of the Works Development Agreement work.
- 9.28 It is one of nine different project control groups, as shown in Figure 7. Each of these groups has specific project management responsibilities.
- 9.29 There is comprehensive project structure reporting to each of the project control groups shown in Figure 7. Work on the project occurs within this comprehensive project structure.
- 9.30 Auckland Council has told us that it is not a simple task to get the right balance between governance and management in an organisation with the complexity and breadth of its work programme.

Project cost control

- 9.31 Cost management controls and processes are in place for the project. These include controls and processes for:
- understanding the nature and timing of the costs;
 - estimating, recording, and classifying the costs;
 - determining the budget; and
 - controlling the costs.

Budgeted cost

- 9.32 Waitakere City Council's 2009 budget for the project was \$205 million. This was out of an overall budget of \$325 million for Stage 1 of the Northern Strategic Growth Area projects (Hobsonville Point, Hobsonville Corridor, and Massey North Town Centre).
- 9.33 In April 2015, the overall budget recorded in Auckland Council's financial systems was \$197 million, with a small contingency (\$6 million) on top of that. This budget is essentially the same as in 2009.

⁶ A Northern Strategic Growth Area project steering group previously reported to the North West Transformation Team. However, this group no longer exists because the Northern Strategic Growth Area project is largely complete.

- 9.34 The largest component of the project's cost is roading. In Waitakere City Council's original budget, Auckland Transport's work was budgeted as being \$107 million, slightly more than half of the project's total cost.
- 9.35 The next largest component of the total cost are the direct costs to Waitakere City Council (and, later, Auckland Council). In Waitakere City Council's original budget, the direct cost to Waitakere City Council (and later Auckland Council) was \$90 million, slightly more than 40% of the total cost.
- 9.36 By far, most of this direct cost component is the cost of NZRPG contracts for Council works. We estimate that actual expenditure on NZRPG contracts will be about \$71 million. Figure 8 shows the estimated value of the individual agreements entered into with NZRPG. These agreements include contracts for the acquisition of land by the Council and contracts for the provision of construction services to the Council.
- 9.37 This cost breakdown does not include payment for work by Watercare Services Limited or the Council's contribution to relocating the power lines.

Figure 8
Our estimates of the contracted costs of the agreements with the New Zealand Retail Property Group

Agreement	Components	Cost to the Council (excl. GST) \$000
Westgate Street Sale and Purchase	Purchase of Westgate Street and relevant easements	6,000
Infrastructure Agreement	Purchase land for roads Purchase of town square, library site, and community park Interest in non-riparian open space Contribution towards construction of black roads and associated services	23,000
Works Development Agreement 1	Construction of certain road extensions and intersections Three waters (fresh, waste, storm) reticulation and services within the formed roads Construction of certain stormwater ponds Development of open space and landscaping associated with those roads and ponds	16,139

Works Development Agreement 3	Purchase additional town centre and library land Responsibility for at grade development of town square Cost savings for NZRPG due to clause 8 (scope of work reducing from the Infrastructure Funding Agreement) Bus interchange construction Improvements to Westgate Street Acquire additional land for stormwater Acquire encumbrance instruments in zone 5 of Precinct A (library car parks) and amend in zones 1 and 2	466
Works Development Agreement 4	Construction of Northside Drive Three waters (fresh, waste, storm) reticulation and services associated with the roads Construction of certain stormwater ponds Development of open space and landscaping associated with the roads and ponds	16,099
Works Development Agreement 5	<ul style="list-style-type: none"> • Enabling earthworks and bulk in-ground works for: • the town square/piazza, and shared space • the town park • certain parts of the riparian margin area • the buffer zone between the riparian margin and the road and precinct edge in Precincts A and B 	256
Works Development Agreement 6	Town square/piazza works	6,374
Works Development Agreement 7	Increased roading standard (as discussed in Work Development Agreement 3)	3,155
Total		71,490

9.38 We note that these costs do not include any additional cost to the ratepayer as a result of the deferred payment of NZRPG's share of relocation costs and the relief provided to NZRPG in relation to development contributions.

What has the project delivered to date?

9.39 As noted in Part 2, Waitakere City Council's vision was to create a self-contained town centre at Massey North where residents could live, work, and obtain services without needing to travel to other Auckland cities. The town centre is not yet complete.

9.40 Physical work on the town centre development began in 2010. Six years on, work on the infrastructure and significant earthworks has been done to prepare the site for the town centre (as dictated by the topography).

- 9.41 The infrastructure work on roads, stormwater ponds, and earthworks was largely complete by August 2015. Since then:
- the new NorthWest shopping mall opened in October 2015;
 - the town square was completed in October 2015 and renamed Te Pūmanawa; and
 - a supermarket and several large-format retail units have been completed.
- 9.42 A new library and community centre are planned for the western end of the square.
- 9.43 Auckland Council has told us that these aspects of the town centre development have brought employment but that the Council does not have figures on the number of permanent jobs created.
- 9.44 In our view, it is too early to definitively determine the extent to which Waitakere City Council's vision for the town centre will be achieved and the ultimate cost to be borne by the ratepayers to achieve that.

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