

**BEFORE A HEARING PANEL  
OF HAMILTON CITY COUNCIL**

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

**AND**

**IN THE MATTER** of Proposed Plan Change 5 to the Operative Hamilton City  
District Plan

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**MEMORANDUM OF COUNSEL FOR THE DIRECTOR-GENERAL OF  
CONSERVATION**

Dated 28 October 2022

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## MAY IT PLEASE THE PANEL:

### Introduction

1. We refer to the additional evidence filed on behalf of Hamilton City Council (**HCC**) on 11 October 2022 by:
  - a) Mr James Grant Sirl (**HCC's Supplementary Planning Evidence**); and
  - b) Mr Gregory Roderick Carstens (**HCC's Evidence on Funding Sources**).
2. The Director-General of Conservation (**DGC**) is disappointed with the approach that has been taken by HCC to the additional evidence. In particular, the DGC is concerned that we are left with an incompletely explained pathway for the delivery of the proposed compensation outcomes for the very high<sup>12</sup> residual adverse effects on the habitat of the threatened nationally critical long-tailed bat (**Pekapeka**).
3. The additional evidence indicates that there will need to be separate additional steps taken by HCC to address residual adverse effects via ecological compensation delivered on a landscape wide basis potentially involving land outside the HCC territorial boundary.<sup>3</sup> However, the additional evidence does not identify the location of the compensation sites and the additional evidence does not address the question as to how HCC could require actions on land that is outside the HCC territorial boundaries.
4. A key question that arises from the additional evidence is: *How does the Hearing Panel make a decision about what the Peacocke compensation programme will achieve when the Hearing Panel doesn't actually know what will occur?* The evidence provided by HCC does not provide any certainty as to what the proposed Peacocke compensation programme can actually

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<sup>1</sup> EIC of Gerry Kessels dated 2 September 2022, Attachment 1 - Plan Change 5 Technical Ecology Report (TER) dated 31 August 2022, first paragraph of section 4.3 at page 34: "...urbanisation within the PSPA development footprint, as currently proposed, will likely result in a 'Very High' level of residual adverse effect on the local long-tailed bat population."

<sup>2</sup> EIC of Matt Baber dated 2 September 2022, paragraph 24(a), page 27: "A landscape-scale approach is important in the PSPA because of the 'very high' level of adverse effect on the local population of the nationally threatened (nationally critical) long-tailed bat"

<sup>3</sup> HCC's Supplementary Planning Evidence at paragraph 7 and HCC's Evidence on Funding Sources at paragraph 9.

achieve<sup>4</sup> to address the very high residual adverse effects on the threatened nationally critical Pekapeka.

## Additional Evidence

### *HCC's Supplementary Planning Evidence*

5. Mr Sirl says that HCC could “*establish a policy on how to address the ecological compensation issues arising from the urbanisation of Peacocke*”.<sup>5</sup> Mr Sirl then explains that “[w]ith the policy in place, HCC staff could establish a management plan or strategy to deliver the policy outcomes in Peacocke.”<sup>6</sup>
6. In his primary statement of evidence dated 2 September 2022, Mr Sirl said that Plan Change 5 (**PC5**) proposes provisions for walking and cycling facilities and infrastructure to align with the Future Proof Strategy 2022 (**Future Proof Strategy**).<sup>7</sup> However, in the supplementary planning evidence, Mr Sirl has failed to identify the potential to align the proposed new policy and strategy with the existing Future Proof Strategy.<sup>8</sup> “Future Proof/Te Tau Tiitoki is a joint project set up to consider how the Hamilton, Waipā and Waikato sub-region should develop into the future”<sup>9</sup>.
7. The Future Proof Strategy has six fundamental guiding principles including “Protection of the natural environment”. This guiding principle aligns with part of the vision of the Future Proof Strategy which “*is the place where natural environments, landscapes and heritage are protected and a healthy Waikato River is at the heart of the region's identity*” (page 17 of the FPS).
8. The relevance of the threatened nationally critical Pekapeka to the Waikato Region's identity was recently acknowledged in the recent post-Covid makeover of the Hamilton Airport where holes and cutouts that represented the Pekapeka's roosting nests and sonar waves were used in both the airport's new branding and in the design of the terminal.<sup>10</sup>

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<sup>4</sup> EIC of Matt Baber dated 2 September 2022, at paragraph 41 on page : “*There needs to be certainty that compensation for residual effects can be achieved and that financial contributions are adequately managed.*”

<sup>5</sup> HCC's Supplementary Planning Evidence at paragraph 12.

<sup>6</sup> HCC's Supplementary Planning Evidence at paragraph 13.

<sup>7</sup> Mr James Grant Sirl Statement of Evidence dated 2 September 2022 at paragraph 30.

<sup>8</sup> The *Future Proof Strategy* is a 30 year growth management and implementation plan specific to the Hamilton, Waipā and Waikato sub-region (website link: “[Knowing our future by planning today – Future Proof](https://futureproof.org.nz)” at <https://futureproof.org.nz> accessed 26 October 2022)

<sup>9</sup> source: <https://futureproof.org.nz> accessed 26 October 2022

<sup>10</sup> See Waikato Times article dated 16 October 2022 (website link: [Check out the check-in - Hamilton Airport's \\$15m post-Covid makeover | Stuff.co.nz](https://www.stuff.co.nz/waikato-times/news/125454544/check-out-the-check-in-hamilton-airports-15m-post-covid-makeover))

9. The ecological evidence<sup>11</sup> that has been presented to the Hearing Panel confirms that the home range for the small population of the threatened nationally critical Pekapeka that are present within the Peacocke Structure Plan Area (**PSPA**) extends to the south of Hamilton City and into the Waipa District (not to the northern parts of Hamilton City) as shown in Figure 1.

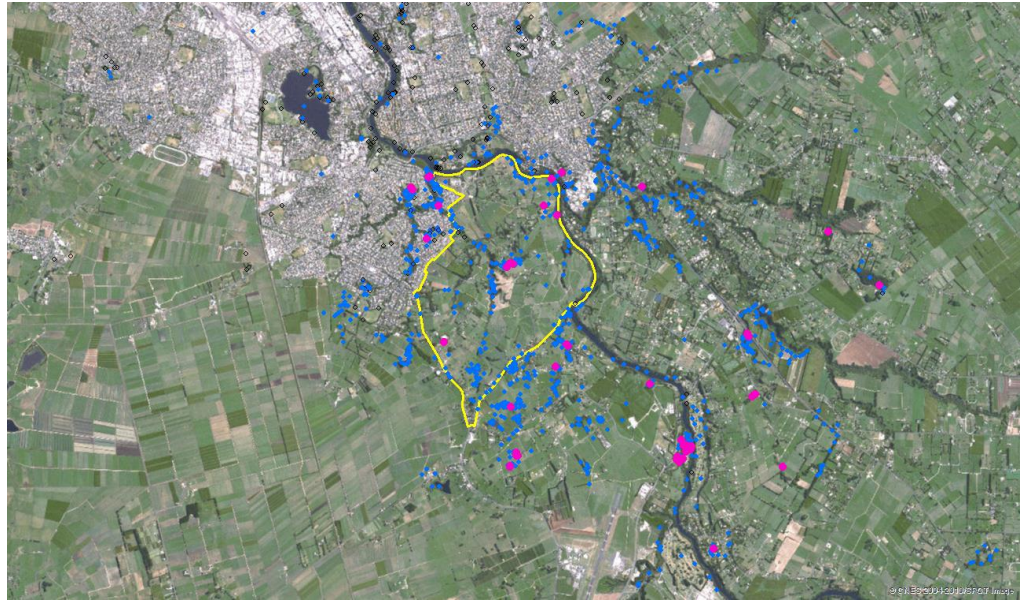


Figure 1 – Outline of the Peacocke area in yellow. Blue dots show where bats have been recorded, pink dots show roosts. Data from DOC bat distribution database and Aecom 2019 (*source*: EIC of Ms Pryde dated 16 September 2022, paragraph 7.2 on pages 16-17).

10. However, as noted at the hearing, the options for the local population of Pekapeka that are present in the PSPA are becoming limited due to the Pekapeka being highly philopatric<sup>12</sup> and the development pressures that are coming from the south. The most recent example of the development pressures coming from the south, is the notification on 26 September 2022 of Titanium Park Limited and Rukuhia Properties Limited's proposed private plan change to the Waipā District Plan (PC20) to rezone land to the north west of Hamilton Airport to enable further stages in the Titanium Business Park.<sup>13</sup>

<sup>11</sup> EIC of Moira Pryde dated 16 September 2022 at paragraph 7.2.

<sup>12</sup> EIC of Dr Kerry Maree Borkin dated 16 September 2022.

<sup>13</sup> Proposed Private Plan Change 20 to the Waipā District Plan was notified on 26 September 2022, with submissions closing on 28 October 2022.

11. The proposed expansion of the Titanium Business Park (PC20) is an example of the development pressures that are coming from the south on the home range of the same threatened nationally critical local population of long-tailed bats that are currently using the PSPA.
12. PC20 provides further development pressure on the bat habitat and further demonstrates the need for an integrated strategy for landscape-wide bat-habitat beyond council administrative boundaries. It is submitted that an integrated strategy should be done now and as stated at page 65 of the Future Proof Strategy below, *“it is critical that the guiding principles that underpin the settlement pattern are not compromised<sup>14</sup>... and remain the foundation of strategic growth and development in the sub-region”... A robust evidential basis for such changes will be needed in any given circumstance and will include the need to consider any implications that might exist for the wider sub-region*”. This would enable better consideration of cumulative effects and the management of s6(c) in concurrent plan change processes that are affecting habitat of the threatened nationally critical pekapeka.
13. Guiding Principle 3 of the Future Proof Strategy states the following:
- “3. Protection of the natural environment*
- 3.1 *Protect waahi toituu (places with enduring presence) from development in perpetuity, and only allow development on waahi toiora (places sensitive to development) with greatest care.*
- 3.2 *Restore, enhance and create important blue-green corridors for the protection and improvement of the natural environment.*
- 3.3 *Give effect to Te Ture Whaimana o Te Awa o Waikato (Vision and Strategy for the Waikato River) by restoring the health and well-being of the Waikato and Waipā rivers.”*

14. At page 65 of the Future Proof Strategy, it states the following :

*“When considering proposals for change, such as to the land uses identified in the settlement pattern or the timing and staging for land development set out in the Future Proof Strategy, or the possible inclusion of areas of land beyond those shown in map 6, **it is critical that the guiding principles that underpin the settlement***

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<sup>14</sup> The Future Proof Strategy has six fundamental guiding principles including *“Protection of the natural environment”*.

***pattern are not compromised*** [my emphasis]. *Despite any change in global, national, regional or local circumstances, these guiding principles remain the foundation of strategic growth and development in the sub-region* [my emphasis]. *Therefore, when considering any changes to land use or the timing and staging of land development from that set out in the strategy, or indeed to the Strategy itself, they form the basis of any criteria developed to assess the merits of particular proposals.*

***A robust evidential basis for such changes will be needed in any given circumstance and will include the need to consider any implications that might exist for the wider sub-region*** [my emphasis].”

#### *HCC's Evidence on Funding Sources*

15. Mr Carstens says that he considers “*that the two most suitable and likely forms of funding are via development contributions and rates*”. No section 32 analysis has been provided to support those recommendations and Mr Carstens has failed to consider whether it is appropriate, or even possible, to charge development contributions for the portion of the proposed compensation that will come in the form of pest control.
16. The basis on which development contributions may be required is set out in section 199 of the Local Government Act 2002 (**LGA**). It is clear from section 199 of the LGA that the focus of development contributions is not on the environmental effects of the development. Instead, the focus is on whether the development has the effect of requiring HCC to incur capital expenditure to provide: (a) reserves; (b) network infrastructure; or (c) community infrastructure.<sup>15</sup> Pest control is not a reserve, network infrastructure or community infrastructure.

#### **Actions to date**

17. The DGC submits that there is a disjoint between what is being said, and what is being done, for the protection and enhancement of the habitat of the threatened nationally critical Pekapeka.

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<sup>15</sup> See section 199 of the Local Government Act 2002.

18. The following table provides a brief timeline of some of the key events relating to the planning actions in and around the PSPA:

Date	Action
2002	Development of the Peacocke Structure Plan started. <sup>16</sup>
2017	HCC prepared a detailed business case to support the loan application to the Housing Infrastructure Fund. <sup>17</sup> The business case noted environmental issues (including bats) as a risk that may negatively affect the business case / delivery of projects and it listed “data collection master planning processes” as a risk management response.
2020	When deciding the appeals relating to the Amberfield Development which is located in the PSPA, the Environment Court said that it “ <i>comes as a surprise to the Court, in light of the warranted concern held for the future of the Long tailed Bat, that no commonly identified and generally agreed Bat Protection Area is currently contained in Schedule 9C</i> ” and that “[t]his was an unfortunate oversight ... requiring urgent redress”. <sup>18</sup>
24 September 2021	HCC publicly notified PC5.
June 2022	The updated Future Proof Strategy was adopted and replaced the 2009 version. However, HCC did not take this opportunity to use this Strategy as a vehicle to address the fact that threatened nationally critical Pekapeka are present in the PSPA. <sup>19</sup>
26 September 2022	Titanium Park Limited and Rukuhia Properties Limited notified a private plan change to the Waipā District Plan to rezone land to the north west of Hamilton Airport to enable further stages in the Titanium Business Park.

<sup>16</sup> EIC Sirl at paragraph 57.

<sup>17</sup> Hamilton-Pecocke Detailed Business Case Housing Infrastructure Fund November 2017 at page 111 as noted by the Court during the hearing for *Weston Lea Ltd & Director-General of Conservation v Hamilton City Council* [2020] NZEnvC 189.

<sup>18</sup> *Weston Lea Ltd & Director-General of Conservation v Hamilton City Council* [2020] NZEnvC 189 (interim decision) at [40-42].

<sup>19</sup> This Strategy provides a vehicle to give effect to Te Ture Whaimana o Te Awa o Waikato (Vision and Strategy for the Waikato River) and the Randerson Report which prompted the resource management reforms cited the Future Proof Strategy as an example of some neighbouring councils making progress with developing integrated and long-term spatial plans without a legislative framework. Resource Management Review Panel, 2020, “*New Directions for Resource Management in New Zealand: Report of the Resource Management Review Panel June 2020*”, point 4 on page 117.

	Titanium Park Limited is wholly owned by Waikato Regional Airport Limited which means that it is a council-controlled organisation of HCC and four other territorial authorities (including Waipā District Council).
11 October 2022	HCC filed additional evidence to the effect that it could create a new policy and a new strategy (subject to these documents going through their own yet to be completed decision making processes) to support HCC's case for PC5 to proceed on the basis of a direct pathway to compensation for adverse affects on the habitat of the threatened nationally critical Pekapeka.

19. The DGC submits that the Hearing Panel is not in a position to make a decision about what the Peacocke compensation programme will achieve. HCC's additional evidence does not tell the Hearing Panel what will actually occur and there is no certainty as to what the proposed Peacocke compensation programme can actually achieve.
20. There remains significant disagreement between the relevant experts, Dr Corkery and Dr Baber for instance, as to the appropriateness of any financial compensation to address significant residual effects on threatened species, and whether the Biodiversity Compensation Model (**BCM**) can accurately calculate the appropriate quantum.
21. Environmental compensation should not be used as a mechanism for displacing the primary obligations under section 5 of the Resource Management Act 1991 (**RMA**) to avoid, remedy or mitigate adverse effects of activities within the PSPA.
22. In circumstances where the adverse effects are on a threatened nationally critical species, the habitat that is being lost may be of such importance that no level of environmental compensation offered will be enough to offset or compensate the adverse effects of the loss.
23. The DGC submits that little weight can be given to the additional evidence that has been filed by HCC.



## Conclusion

24. The DGC considers that Mr Sirl's supplementary planning evidence that effectively states that HCC could create a new policy and develop a new strategy outside of PC5 (subject to these documents going through their own yet to be completed decision making processes) is far too uncertain and inappropriate for the management of the very high residual adverse effects on the threatened nationally critical Pekapeka.
25. This increases the importance of getting it right by protecting and enhancing the bat habitat that is within the PSPA through the inclusion of appropriate provisions in PC5 to ensure that:
- a) The areas within the PSPA that are to be protected from development are of a sufficient size and extent to provide functional and connected habitat for the threatened nationally critical Pekapeka<sup>20</sup>; and
  - b) The response mechanism to resource consent applications in the areas within the PSPA where urbanisation will occur requires:
    - (i) As much to be done as possible within the PSPA to avoid, remedy, and mitigate adverse effects on the bat habitat; and
    - (ii) A best practice approach to the effects management hierarchy; and
    - (iii) A cautionary approach to ensure that appropriate measures are put in place before the biodiversity is lost.



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<sup>20</sup> This includes requirement minimum corridor widths of 100m. See primary evidence and summary statement of Mr Gooding.