

BEFORE THE HEARING PANEL

IN THE MATTER of the Resource Management Act 1991

AND

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

CLOSING LEGAL SUBMISSIONS ON BEHALF OF HAMILTON CITY COUNCIL

Dated 4 November 2022

LACHLAN MULDOWNEY

BARRISTER

P +64 7 834 4336 **M** +64 21 471 490

Office Panama Square, 14 Garden Place, Hamilton

Postal PO Box 9169, Waikato Mail Centre, Hamilton 3240

www.lachlanmuldowney.co.nz

MAY IT PLEASE THE HEARING PANEL

INTRODUCTION

1. These closing legal submissions are filed on behalf of Hamilton City Council (**HCC**) in its capacity as proponent of Plan Change 5 (**PC5**). The submissions address the key legal and planning issues arising during the course of the hearing of submissions on PC5.
2. At the outset of the hearing, HCC signalled its alignment with the recommendations set out in the section 42A report dated 2 September 2022 (**section 42A report**). Its evidence presented at the hearing was directed towards supporting those recommended amendments to the notified version of PC5.
3. At the conclusion of the hearing on 3 October 2022, the section 42A authors presented an updated report which responded to the HCC and submitter evidence presented at the hearing (**updated section 42A report**). The updated section 42A report identified a number of further recommended amendments to the PC5 provisions.
4. HCC supports those further amendments recommended in the updated section 42A report.

KEY LEGAL AND PLANNING ISSUES

5. These submissions will address the key legal and planning issues arising in relation to:
 - a) The environmental management tools which will control the ecological impacts of PC5, particularly in relation to long-tailed bats and their habitat;

- b) The location of the Local Centre and its relationship with other centres; and
- c) The east-west transport corridor alignment.

ECOLOGICAL IMPACTS ON LONG-TAILED BATS AND THEIR HABITAT

The legally correct approach

6. Management of the impacts of urbanisation on the long-tailed bat and their habitat is a critical issue for the Panel. PC5 engages two important policy drivers; first the requirement to deliver a well-functioning urban environment which enables a growing population to provide for their housing needs¹, and secondly, the requirement to recognise and provide for the protection of areas of significant habitat of indigenous fauna.²
7. The Panel must strike the appropriate balance which reflects the Waikato Regional Policy Statement (**WRPS**) directives regarding the effects management hierarchy, but not in a manner which unnecessarily sterilises a much-needed housing supply which is integrated with a substantial public infrastructure investment.
8. Dealing first with the requirement to recognise and provide for the protection of areas of significant habitat of indigenous fauna, it is acknowledged that there are areas within Peacocke which meet the test for “significant habitats of indigenous fauna” as prescribed in Criteria 11A of the WRPS. HCC also accepts the definition of “bat habitat” as described by the Waikato Bat Alliance as a:³

collection of locations that provide the resources and conditions needed

¹ NPS-UD, Objective 1.

² RMA, s 6(c).

³ Discussion Document Waikato Bat Alliance: Framing A Bat Strategy For the Waikato Region - Themes, Outcomes and engaging stakeholders, 4 November 2021. Appendix A to EIC of Dr Borkin.

for bats to be present, and will include, but may not be limited to, areas that provide for breeding, roosting, foraging, and commuting.

9. Next, in preparing district plan provisions which recognise and provide for the protection of this habitat, there is no legal basis to justify the Panel departing from the policy framework established under the WRPS. Indeed, the Panel has an obligation to give effect to this policy framework⁴, which has been directly endorsed by the Environment Court as akin to an “instruction manual to the preservation and enhancement of the long-tailed bat”.⁵
10. The evidence for the Director-General of Conservation (**DOC**) signal a preference for applying the effects management hierarchy as set out in the National Policy Statement for Freshwater Management (**NPS-FW**) although in opening legal submissions, DOC indicates it has simply applied the definitions of offsetting and compensation within the NPS-FW to add clarity and to help fill the gaps where the WRPS is silent.⁶
11. Ultimately there is no dispute amongst the experts concerning these definitions, nor that in circumstances where accurately measuring offsets is difficult, compensation may be more effective. The critical issue for the Panel is the manner in which the effects management hierarchy in the WRPS is applied. DOC contends that the HCC approach to residual effects management gives more flexibility to go directly to the compensation stage, which it asserts goes against the intent of the higher order policy directives, and will lock in poor outcomes for biodiversity.⁷
12. This contention is flawed and misrepresents HCCs approach to residual effects management as being over reliant on ecological compensation due to avoidance and mitigation not having been optimised in the first instance.

⁴ RMA, s 75(3).

⁵ *Weston Lea Ltd v Hamilton City Council* [2020] NZEnvC 189 at [33].

⁶ Opening legal submissions of the D-G of Conservation, para 48.

⁷ Opening legal submissions of the D-G of Conservation, para 50.

13. To be clear, the WRPS Policy 11.2.2 effects management hierarchy, and the effects management hierarchy contained in the NPS-FW and draft National Policy Statement for Indigenous Biodiversity (**NPS-IB**), each prioritise avoidance of loss of habitat in preference to remediation or mitigation, but do not create an absolute requirement that avoidance options are fully exhausted before moving through the hierarchy. The effects management hierarchy in the NPS-FW and draft NPS-IB call for avoidance, *where practicable*, but without defining that term.
14. The Supreme Court in *Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Industrial Union of Workers Inc*⁸ has established that “practicable” is a word that takes its colour from the context in which it is used. In some contexts, the focus is on what is able to be done physically; in others, the focus is more on what can reasonably be done in the particular circumstances, taking a range of factors into account.⁹ Accordingly, the effects management hierarchy contains an inherent set of judgements about what, in the circumstances, is the appropriate level of avoidance, before moving further down the hierarchy.
15. Similarly, WRPS Policy 11.2.2 requires avoidance *in preference* to remediation or mitigation and requires that where any adverse effects are unable to be avoided, remedied or mitigated, more than minor adverse effects shall be offset to achieve no net loss. Accordingly, whether applying the effects management hierarchy from the NPS-FW, or Policy 11.2.2 of the WRPS, the Panel must determine whether PC5 progressively manages effects in a reasonable and practicable manner, having regard to the context.
16. The PC5 provisions addressing adverse ecological effects step through the hierarchy sequentially, prioritising avoidance of loss of habitat through the

⁸ [2017] NZSC 199.

⁹ At [65].

establishment of the Open Space Zones and associated Significant Bat Habitat Areas (**SBHA**) and Significant Natural Areas (**SNA**) for those areas of habitat that are identified as particularly high value. The spatial extent of these areas has been determined by the ecological experts for HCC as appropriate in order to provide for a *functional and connected habitat*, as sought by DOC.¹⁰ The ecological experts for both DOC and HCC agreed that this test, of whether the habitat was functional and connected, was the appropriate standard to apply when considering whether the habitat is protected.¹¹

17. The evidence for HCC establishes that these Open Space Zones, SHAs and SBHAs, each provide functional and connected bat habitat. The interface between these areas and areas for urbanisation are appropriately managed through setbacks, lighting controls and a bat buffer.¹² These provisions assist in providing a functional and connected habitat. Accordingly, to the extent that these areas have been mapped, the Panel can be satisfied that they are effective in avoiding loss of habitat.
18. The next critical issue for the Panel is to determine whether the spatial extent of these areas, and the related planning provisions, should be extended, to increase the avoidance of loss of habitat.
19. This requires a judgement to be made on whether the PC5 provisions appropriately steps down the effects management hierarchy in policy 11.2.2 of the WRPS, when it moves away from strict avoidance of loss of habitat, into remediation and mitigation of the effects of urbanisation on habitat outside these areas.
20. There is no argument that extending the Open Space Zone, SHAs and

¹⁰ Opening legal submissions on behalf of D-G of Conservation dated 27 September 2022, paras 17, 23.

¹¹ Evidence of Ms Pryde on behalf of D-G of Conservation dated 16 September 2022, para 7.12; Primary evidence of Dr Mueller on behalf of HCC dated 2 September 2022, paras 27, 44; Rebuttal evidence of Dr Mueller on behalf of HCC dated 22 September 2022, para 22; Rebuttal evidence of Mr Kessels on behalf of HCC dated 2 September 2022, para 9.

¹² Rebuttal evidence of Dr Mueller on behalf of HCC dated 22 September 2022, paras 7-11, 19.

SBHAs beyond their current spatial extent would contribute, at least to some marginal extent, to the further avoidance of adverse effects on bat habitat. But the Panel should consider, in terms of s 32 of the Resource Management Act 1991 (**RMA**), whether the benefits which accrue, and the costs arising, justify the approach. The ecological experts are in agreement that the areas beyond the proposed Open Space Zone, SHAs and SBHAs, while remaining important habitat for long-tailed bats in terms of flight paths for foraging and roosting, are nevertheless of lower ecological value due to their open pastoral nature.

21. Sterilising this land from urban development in order to avoid adverse effects on this lower value habitat would be a disproportionate planning response to the adverse ecological effects arising from urbanisation. As Dr Baber states, all practical measures to avoid effects have been exhausted.¹³
22. Notably, these effects avoidance measures are not simply limited to the establishment of the Open Space Zone, SHAs and SBHAs. Rather, through the development controls which are applied to any land use change, such as bat buffers, setbacks, lighting controls, vegetation clearance rules, and bat management plans, the management response of avoidance is a constant driver, even when land use change is enabled. These controls respond appropriately to the context of a land use transition towards urbanisation leading to housing supply for communities, supported by substantial public infrastructure investment. Recognising this context is critical to establishing what management tools are practicable, and when it is appropriate to move through the hierarchy.
23. In this context, the Panel can be satisfied that the PC5 provisions which transition from avoidance, to remediation, mitigation, and finally to compensation, are most appropriate in section 32 RMA terms.

¹³ Rebuttal evidence of Dr Baber on behalf of HCC dated 22 September 2022, para 7.

24. In terms of compensation, it is acknowledged that Policy 11.2.2 only identifies offsetting. The effects management hierarchy recognises compensation in situations where direct offsetting is unachievable or cannot be measured, and this transition from offsetting to compensation in such circumstances has been endorsed by the Environment Court in *Waka Kotahi NZ Transport Agency v Manawatu-Whanganui Regional Council*.¹⁴ Notably, the Environment Court held that despite compensation not being provided for in the relevant policy in the Regional Policy Statement as a step in the offsetting hierarchy, “its absence there does not affect the validity of its inclusion in the overall mitigation package proposed for the project”.¹⁵ As set out in Dr Baber’s evidence, offsets have not been “skipped”, but have been considered and ruled out on the basis that:¹⁶
- a) For bats the number of individual bats that are adversely affected cannot be determined and more notably the predicted number of extra bats that would result from the proposed compensation package cannot be predicted with a reasonable degree of certainty to ‘demonstrate’ or ‘claim’ an offset has been achieved at the plan change stage of this project;
 - b) A like for like (equivalent) habitat offset would require that pasture and the exotic vegetation within the pasture matrix is replaced which constitutes a poor ecological outcome relative to the trading-up approach proposed;
 - c) While the standard for offsetting based on quantitative loss and gain calculations is not applied, HCC’s proposed compensation is like for like, e.g. in exchange for impacts on bats HCC is proposing compensation that is expected to generate equivalent benefits for bats.

¹⁴ [2020] NZEnvC 192.

¹⁵ [2020] NZEnvC 192 at [187].

¹⁶ Rebuttal evidence of Dr Baber on behalf of HCC dated 22 September 2022, para 9.

25. DOC is also critical of the Biodiversity Compensation Model (**BCM**) applied by HCC. In part that is based on a challenge to the scores or inputs assigned by Mr Kessels. Mr Kessels addressed the panel on this point, explaining his methodology and demonstrating that his inputs were based on professional opinion underpinned by desktop and field investigations.¹⁷ Notably, the EclAG, BOAM, and BCM models have been accepted by the Environment Court as appropriate tools for assessing biodiversity offsets and compensations.¹⁸
26. DOC was also critical of the proposed compensation, suggesting it was inadequate.¹⁹ Again, this was addressed in the evidence of Dr Baber who noted that the compensation package was designed to address the loss of 488 ha of pasture habitat and 34 ha of mostly low stature exotic habitat. The compensation package constitutes a significant trade up in habitat value, and the package is expected to generate a net gain outcome for bats and other biodiversity values otherwise affected by the urbanisation of Peacocke.²⁰ Accordingly, the Panel can be satisfied that the proposed compensation is a proportionate response to the residual ecological effects.
27. HCC has presented supplementary evidence to illustrate how the compensation could be delivered over time. Mr Sirl's supplementary evidence sets out a blueprint for how the ecological compensation could be delivered, starting with a policy setting, which would inform a management strategy. That management strategy would then inform funding decisions, and practical operational responses, such as the Bat Ecology Panel.²¹ Mr Carstens set out the likely funding mechanisms to

¹⁷ Evidence provided orally in the hearing immediately following DOC's presentation.

¹⁸ *Waka Kotahi NZ Transport Agency v Manawatu-Whanganui Regional Council* [2020] NZEnvC 192 at [169] – [175].

¹⁹ Evidence of Ms Corkery on behalf of DOC dated 16 September 2022, para 14.24.

²⁰ Rebuttal evidence of Dr Baber on behalf of HCC dated 22 September 2022, paras 11-13.

²¹ Supplementary evidence of Mr Sirl on behalf of HCC dated 11 October 2022, paras 9-21.

implement this blueprint, and concluded that a development contribution charge and local government rate would be the most likely funding solutions currently available to HCC.²²

28. HCC makes one final point on the issue of compensation. It accepts that there is an element of uncertainty regarding these compensation outcomes, and the manner in which they will be delivered. It will require a landscape-based approach, led by HCC. In addition however, but management plans and mitigation measures established on a consent by consent basis will also be a significant method for delivery of these outcomes. One method to achieve greater certainty and measurability in terms of compensation would be to embed the necessary compensation outcomes identified by Dr Baber within land use and subdivision assessment criteria.²³ The assessment would examine the extent to which the development will contribute to the ecological compensation outcomes identified. This would create a measurable benchmark of expected compensation outcomes and would enable monitoring of the effectiveness of the PC5 provisions in delivering the compensation outcomes.
29. Currently, proposed assessment criteria P3 e), q) and r) go some way to addressing these matters, but do not squarely address the identified compensation needed to achieve no net loss/net gain. Express reference to this, and assessment against it, would create additional certainty. HCC would support this approach.

Response to DOC position set out in DOC memorandum of 28 October 2022

30. The memorandum of counsel for DOC dated 28 October 2022 (**DOC memorandum**) requires addressing. It contains legal and factual errors, and demonstrates a fundamental misunderstanding of resource management law, and the purpose and function of a district plan.

²² Evidence of Mr Carstens on behalf of HCC dated 11 October 2022, para 15.

²³ Primary evidence of Mr Baber on behalf of HCC dated 2 September 2022, para 36.

31. The memorandum identifies the following criticisms of HCC's position in relation to PC5:
- a) HCC has left the Panel with an incompletely explained pathway for the delivery of the proposed compensation outcomes and there is no certainty of what it will achieve²⁴;
 - b) PC5 fails to align with the Future Proof Strategy, in particular the principle of "Protection of the natural environment" and fails to consider the implications of Waipa District Council's PC20²⁵;
 - c) A failure to evaluate funding sources in terms of section 32 of the RMA and recognise the limits of development contributions²⁶;
 - d) A disjoint between "what is being said and what is being done"²⁷;
 - e) Unreliability of the BCM²⁸;
 - f) Displacing primary obligations under section 5 of the RMA with environmental compensation.²⁹

Incomplete pathway/uncertainty of outcomes

32. This criticism misapprehends the role and function of district plan making, which is not to establish, with certainty, the state of the future environment. The criticism is linked to the flawed question identified in paragraph 4 of the DOC memorandum as a *key question*; "How does the Hearing Panel make a decision about what the Peacocke compensation programme will achieve when the Hearing Panel does not actually know

²⁴ Memorandum of Counsel for D-G of Conservation, paras 2,19, 24.

²⁵ Memorandum of Counsel for D-G of Conservation, paras 6-7, 11-12.

²⁶ Memorandum of Counsel for D-G of Conservation, paras 15-16.

²⁷ Memorandum of Counsel for D-G of Conservation, paras 17-18.

²⁸ Memorandum of Counsel for D-G of Conservation, para 20.

²⁹ Memorandum of Counsel for D-G of Conservation, paras 22.

what will occur?".³⁰

33. This question demonstrates the fundamental error in the DOC approach. The hearing panel is not required to make a decision on what the compensation programme will achieve in order to approve PC5. Determining the final form of the compensation to be delivered over at least a 20-30 year timeframe is not the task of the Panel. Rather the Panel is required to determine the extent of residual adverse ecological effects likely to arise from the enabled land use changes under PC5, and be satisfied that a compensation programme, which addressed the effects to a no net loss/net gain outcome, is able to be implemented. On this basis the *key question* posed by DOC misses the point, and sets a threshold test for plan making which has no legal basis.
34. The correct approach is to evaluate the performance of the compensation programme as a mitigation strategy over time, and through adaptive management make changes to the programme, or consent conditions, if compensation is not being delivered at a rate, and in a manner, that delivers effective mitigation of residual adverse effects arising.
35. At this juncture it is helpful to pause and take a real world planning approach to the issue. Not all the modelled residual adverse effects arise on day one, nor must all of the compensation outcomes be delivered on day one. The practical reality is that Peacocke will be urbanised in stages, incrementally over time. Adverse effects and the concomitant compensation will similarly accrue over time.
36. DOC erroneously suggests that in order to approve the provisions of PC5 the Panel must know, with certainty, what ecological compensation will be delivered. This implies that decision makers on plan changes must be certain of the future environment in order to approve plan provisions. This is a nonsense. No district plan can accurately predict the exact manner in

³⁰ RMA, s 79(1).

which natural and physical resources will be used in the future, nor is that its function. As s 72 of the RMA states:

The purpose of the preparation, implementation, and administration of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of this Act.

37. That function, set out in section 31 of the RMA, is to *inter alia*, achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district. It is not to predict or control, with certainty, the future environment.
38. Rather, a district plan sets the framework for enabling development, but it cannot predict or control with certainty all of the consequential environmental outcomes. These outcomes manifest through the occurrence of permitted activities, and the implementation of resource consents which authorise land uses that are not expressly permitted. The potential outcomes are many and varied, and on occasion, may not be anticipated (such as non-complying activities). So just as the plan provisions cannot determine with certainty what *on site* mitigation outcomes will look like for a particular development, nor can they determine with certainty what *off site* compensation will occur, and exactly where it will occur. All the district plan can do is set the requirements.
39. What matters is that that district plan enables the urbanisation of Peacocke in a matter that accords with the section 5 sustainable management directive. This requires plan provisions which enable an adaptive management of the ecological issues as urbanisation progresses, recognising also that plan provisions must be reviewed within 10 years.³¹ The 10 year review of the PC5 provisions represents the necessary break point where the effectiveness of the compensation programme can be measured against the rate of residual adverse effects generated. If there is

³¹ RMA, s 79(1).

a misalignment, the plan provisions can be amended, to limit further urbanisation unless and until the compensation *deficit* is resolved. Across a likely development timeframe of 20-30 years, this represents a suitable breakpoint.

40. The critical question for the Panel is whether it is satisfied, on the balance of probabilities³², that the adaptive management regime and tools embedded within the PC5 consenting regime, including the requirement for a bat management plan, in combination with the landscape wide compensation programme as identified by HCC, will deliver the sustainable management of the resources within Peacocke. HCC contends that the Panel can be satisfied that PC5 will deliver this outcome.

Failure to align with Future Proof and impacts of Waipa District's PC20

41. This criticism appears to rely on the previous point, namely; the ecological compensation proposed is too uncertain. The DOC memorandum identifies that Future Proof has a guiding principle of "Protection of the natural environment". DOC is critical of Mr Sirl's supplementary evidence, stating that he fails to identify the potential to align the proposed compensation policy and strategy with Future Proof.³³
42. This criticism is unfounded and has no factual basis. HCC holds a key leadership role within Future Proof and has a track record of adhering to its Future Proof obligations through district plan making decisions. There is no reason to suggest that in formulating its compensation programme, and associated policy and strategies, that HCC would depart from these Future Proof obligations.
43. Linked to this criticism is a reference to Waipa District's PC20, which is a

³² Meaning 'more likely than not'. This is the evidentiary threshold for fact finding in a plan change context.

³³ Memorandum of Counsel for D-G of Conservation, para 6.

recently notified private plan change seeking to zone rural land immediately to the north of the Hamilton Airport as industrial land. DOC notes that the long-tailed bat is highly philopatric, with its home range extending to the south of Peacocke. DOC contends that development pressures from the south, such as PC20, will contribute additional threats to the population.

44. This topic was not addressed in DOC's evidence and HCC is prejudiced by DOC purporting to raise the issue in a reply memorandum. Nevertheless, the point DOC makes is that the long-tailed bat is under development pressure from the south also, and that:

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.

45. This point is not in dispute, nor is it disputed that like HCC, Waipa District Council will be required to give effect to the Future Proof principle of protecting the natural environment. In fact, PC20 creates the opportunity for an integrated strategy for landscape wide bat habitat protection to be developed. Again, PC20 serves to illustrate that HCCs territorial neighbours will be similarly motivated to address residual ecological effects through compensation. In fact, HCC has recently lodged a submission on PC20, noting the linkages to PC5, and the potential effects on long-tailed bats arising in PC20, and encouraging an integrated approach to effects management.

46. Accordingly, the concerns regarding PC20 and Future Proof identified in the DOC memorandum are misplaced and do not advance DOC's criticism of PC5 in any material sense.

Failure to evaluate funding sources under s32 and limits on DCs

47. The DOC memorandum is critical of Mr Carstens' evidence and an apparent failure to evaluate rates and development contributions as funding sources for the compensation programme under s 32 of the RMA. This criticism reveals a basic misunderstanding of the ambit of s 32 and its role in the plan making process.
48. Section 32 is confined to an evaluation of the *proposal*, which under s 32(6) is defined to be a proposed standard, statement, national planning standard, regulation, plan, or change for which an evaluation report must be prepared under the RMA. The compensation programme Mr Carstens refers to sits outside the district plan. It is not the proposal in s 32 terms. The legal tests associated with determining the suitability of these funding sources are described in the evidence of Mr Carstens, a recognised expert in this field.
49. The DOC memorandum also raises concerns regarding the scope of activities that can be funded via development contributions and suggests that addressing environmental effects is not a focus of the regime.³⁴ Again, DOC misapprehends the law.
50. Development contributions address the effects of growth, where a territorial authority is required to create new or additional assets or assets of increased capacity as a consequence of that growth. Those assets include reserves and community infrastructure, which includes land acquired, and development assets on land for the purpose of providing public amenities.³⁵ There can be no debate that land purchased by HCC and developed as natural open space to provide bat habitat and ecological compensation meets this definition.

³⁴ Memorandum of Counsel for D-G of Conservation, para 16.

³⁵ LGA 2002, s 197(2) LGA.

51. For any other aspect of the compensation programme which cannot be considered capital expenditure, such as ongoing pest control, rating revenue will be an available source of funding. In this respect DOC's concerns are again unfounded.³⁶

A disjoint between what is said and what is done

52. The DOC memorandum alleges that there is a disjoint between what is said and what is done for the protection of the long-tailed bat. In support, it sets out a table of key events.³⁷
53. The table provides no evidential basis for the allegation. For example, the notation at 2020 refers to the Environment Court's concern regarding the adequacy of the then operative district plan provisions in relation to the long-tailed bats. HCC has responded by publicly notifying PC5 and Plan Change 9 which substantially increases the extent of SNA within Hamilton. The notation at June 2022 criticises HCC for not using the revised Future Proof Strategy to address long-tailed bats. As the name suggests, the Future Proof Strategy is a 30 year growth management plan which includes, as one of six key interest areas, the protection of the natural environment. Protection of the long-tailed bat falls within that area of interest. It is unfair to suggest that because this broad spatial strategy did not lay out a specific plan for protecting the long-tailed bat, that it is flawed.
54. A close read of the other items within the table reveals that there is no substance to the allegation that there is a disjoint. The reality is that it is through the land use changes enabled under PC5, that the requirement for ecological compensation has arisen. It is unsurprising that HCC has not up until now taken any of the more substantial steps towards an ecological compensation programme. If there is any contrast, it is that which exists

³⁶ Memorandum of Counsel for D-G of Conservation, paras 15-16.

³⁷ Memorandum of Counsel for D-G of Conservation, para 18.

between a pre-PC5 environment, and a post-PC5 environment. Pointing to pre-PC5 actions as a representation of likely future action (or inaction) is grossly unfair.

Unreliability of the BCM

55. The DOC memorandum contends that there is significant disagreement between the relevant experts on whether the BCM can accurately calculate the appropriate quantum of compensation.³⁸ This has been a constant criticism levelled by DOC, and it has been squarely addressed through the evidence of Gerry Kessels and Dr Matthew Baber.
56. Fundamentally the DOC criticism of the BCM is based on what Dr Corkery describes as a model which is not fit for purpose for providing guidance on the quantum and type of compensation required.³⁹ Dr Corkery considers the BCM lacks transparency⁴⁰, and contends its inputs and outputs are subjective, use highly simplified evaluations of habitat type and are highly sensitive to input error.⁴¹ Notably, she presents no alternative evidence of what the compensation should be, only stating that not all residual effects are identified or managed, and those that have been identified will not be appropriately addressed.⁴²
57. In his rebuttal evidence, Mr Kessels has explained how the BCM allows for an approach where professional judgement on habitat quality, degradation of habitat quality and area over space and time, and likely gains through restoration and habitation enhancement for fauna over space and time are inputted into a model.⁴³ He states that the BCM is preferable to approaches where, as is often the case in New Zealand, ecologists apply multipliers through a 'horse-trading' approach, with no

³⁸ Memorandum of Counsel for D-G of Conservation, para 20.

³⁹ Evidence of Ms Corkery on behalf of DOC dated 16 September 2022, para 14.15.

⁴⁰ Evidence of Ms Corkery on behalf of DOC dated 16 September 2022, 14.17.

⁴¹ Evidence of Ms Corkery on behalf of DOC dated 16 September 2022, 14.19.

⁴² Evidence of Ms Corkery on behalf of DOC dated 16 September 2022, 14.24.

⁴³ Rebuttal of Mr Kessels on behalf of HCC dated 22 September 2022, para 23.

robust ecological process to account for what the multiplier should be, how to deal with the complex spatial and temporal matters in terms of habitat loss and habitat gain, or uncertainty of successful outcomes.⁴⁴

58. Mr Kessels rejects the alternative approach proffered by Dr Flynn, stating at paragraph 24 of his rebuttal:

Her evidence provides no solution to how the quantum of residual adverse effects on bats and their habitats will be addressed with any sense of scientific robustness, repeatability or transparency across PC5, nor does it address varying habitat bat usage of habitats or habitat attributes across the PSPA, and does not allow bespoke solutions or innovation by developers in terms of designing avoidance, remediation, or mitigation measures to reduce the extent of residual adverse effects on bat habitat before applying any type of 'horse-trading' agreement, multipliers or biodiversity accounting model.

59. Mr Kessels also explained why in his view the BCM was superior to this 'horse trading' or multiplier approach preferred by DOC's experts, noting that the BCM is;⁴⁵

- a) Transparent and repeatable regarding input and output metrics;
- b) Conservative to allow for uncertainty associated with the lack of quantitative data;
- c) Capable of being applied instantly, which is critical to PC5 and the consenting regime enabled.

60. In his rebuttal he also addresses Dr Corkery's criticisms of his assumptions related to the model, explaining how he has formed his conclusion that habitat creation will achieve a value of 3 in the BCM within 25 years.⁴⁶ Later, in his oral evidence he explained the values he assigned to the lost habitat inputted into the model, and confirmed they were based on his professional opinion underpinned by desktop and field investigations.

⁴⁴ Rebuttal of Mr Kessels on behalf of HCC dated 22 September 2022, para 24.

⁴⁵ Rebuttal evidence of Mr Kessels on behalf of HCC dated 22 September 2022, para 25.

⁴⁶ Rebuttal evidence of Mr Kessels on behalf of HCC dated 22 September 2022, para 27.

These values were provided to DOC in the previously released ecological reports, adding to the transparency of the modelling.

61. Dr Baber provides a comprehensive response to Dr Corkery's criticisms in his rebuttal evidence. First, he demonstrates that all practicable measures to avoid adverse effects have been deployed and where avoidance was not practicable, appropriately mitigated.⁴⁷ Next, he explains how he has considered offsetting before compensation, but ruled it out for good reason based primarily on the lack of like for like measurability.⁴⁸
62. Dr Baber then addresses Dr Corkery's criticism of the BCM, explaining that when biodiversity offsets cannot be claimed, the BCM is the most transparent and robust approach available. He goes on to explain why the BCM is to be preferred as the most reliable model available for PC5.⁴⁹
63. Ultimately, the Panel will need to make its own judgement on the evidence presented. HCC has produced evidence which explains how the model works, the input values attributed, and how that translates in the model to the quantum of compensation. HCC urges the Panel to review that evidence closely. In contrast, DOC has produced no robust evidence of an alternative approach for the Panel to consider, choosing instead to simply criticise the HCC approach. This failure to present any robust evidence to support an alternative approach has been the hallmark of its contribution to this plan making process.

Displacing primary obligations under section 5 of the RMA with environmental compensation

64. The DOC memorandum submits that environmental compensation should not be used as a mechanism for displacing the primary obligations under s 5 of the RMA to avoid, remedy or mitigate adverse effects of activities

⁴⁷ Rebuttal evidence of Dr Baber on behalf of HCC dated 22 September 2022, para 7.

⁴⁸ Rebuttal evidence of Dr Baber on behalf of HCC dated 22 September 2022, para 9.

⁴⁹ Rebuttal evidence of Dr Baber on behalf of HCC dated 22 September 2022, paras 14-15.

within Peacocke.⁵⁰

65. Again, the suggestion that HCC is approaching PC5 in this manner lacks any evidential foundation. The evidence clearly establishes that HCC has applied the effects management hierarchy set out in Policy 11.2.2 of the WRPS and has also met the requirement to move from avoidance to remediation and mitigation, once all practicable options are addressed.
66. The sustainable management directive in s 5 expressly enables development at a rate and in a manner which moves progressively through the effects management hierarchy. As discussed earlier, HCC has not prematurely progressed to compensation at the expense of the higher order management tools.
67. Overall, HCC encourages the Panel to look past DOC's broad assertions, and to examine the expert evidence presented by HCC's ecological witnesses. HCC is confident there is a strong evidential basis to approve the PC5 provisions which address these ecological matters.

LOCAL CENTRE ZONE

68. The ODP establishes a six-tiered business centres hierarchy. HCC's evidence and submissions have emphasised the need for the Peacocke Local Centre, equivalent to a tier three suburban centre, to service the suburbs of Peacocke without undermining the primacy, function, vitality, amenity or viability of the Central City or the other existing centres, as required by the District Plan policy framework. In light of the updated growth projections for the Peacocke area, HCC's evidence is that, even under high residential growth projections for Peacocke, the Local Centre Zone (**LCZ**) gross area of 7.8ha (which could provide for over 35,000m² of retail gross floor area) exceeds what is required to cater for the needs of Peacocke residents.⁵¹

⁵⁰ Memorandum of Counsel for D-G of Conservation, para 21.

⁵¹ Primary evidence of Mr Akehurst on behalf of HCC dated 22 September 2022, paras 56, 60.

69. There is broad agreement between the relevant parties that, based on the updated anticipated demand, the extent of the LCZ should not be expanded beyond the 7.8ha mapped in PC5. Further, there is no dispute with Mr Akehurst's recommendation to include a 20,000m² cap on commercial activity in the Local Centre, which will ensure that it does not operate beyond its role as a suburban centre and protection of the other centres within the hierarchy. Nor is there any quarrel with Mr Akehurst's conclusion that demand will (eventually) sustain two supermarkets in the LCZ and that both supermarkets could be accommodated on the eastern side of Peacockes Road.⁵²
70. There is also broad agreement that the general location of the notified LCZ is appropriate. The sole issue in contention is whether the LCZ should extend to the west of Peacockes Road as sought by Woolworths New Zealand Ltd (**Woolworths**), to include its 1ha site, and if so, on what terms. HCC and The Adare Company Ltd (**Adare**) maintain their opposition to the rezoning of the site owned by Woolworths from Medium Density Residential Zone to LCZ due to concerns raised by their urban design, retail economic, and planning witnesses.

Trade competition

71. Woolworths contends that Adare's concerns about its proposal raises trade competition matters, which under s 74(3) of the RMA, the Panel must not have regard to. Further, a trade competitor's ability to make a submission is limited to where it is directly affected and the effect does not relate to trade competition or the effects of trade competition.⁵³ Adare has rejected the assertion that it is a trade competitor, noting that it is not in the supermarket business, and while its land will be leased or sold to a supermarket developer, it does not have any affiliation with a supermarket

⁵² Primary evidence of Mr Akehurst on behalf of HCC dated 2 September 2022, paras 60– 64.

⁵³ RMA, Schedule 1, clause 6(3) and (4).

entity, and its focus is on ensuring that the appropriate size and location of the Local Centre stems from its genuine interest in establishing a high quality, functional and vibrant Local Centre.⁵⁴

72. In HCC's submission, there is no evidence to suggest that Adare stands to gain an advantage in trade competition in opposing Woolworths' relief, nor that Adare and Woolworths are commercial competitors. "Trade competition" is not defined in the RMA. However, the High Court has concluded that the words "refer succinctly to the rivalrous behaviour which can occur between those involved in commerce" and "planning law should not be used as a means of licensing or regulating competition".⁵⁵ The mischief the prohibition seeks to address is competition between traders of the same kind - for example between the two supermarket chains.⁵⁶ In HCC's view, Adare and Woolworths are not trade competitors in this sense. Rather, Adare and Woolworths are competing for the highest value use of their land. Such contests do not constitute trade competition.
73. Even if the Panel disagreed that Adare and Woolworths are not trade competitors, HCC has raised similar concerns to that of Adare and HCC is clearly not a trade competitor. HCC considers the relief sought by Woolworths raises real environmental concerns relating to urban design and the optimisation of the benefits associated with the Local Centre. The Panel is obliged to have regard to these matters in accordance with s 74(1) of the RMA.

Location of the LCZ – split or consolidate

74. HCC accepts that Woolworths' proposal, while split across the arterial corridor, is one viable alternative. The question for the Panel is which of

⁵⁴ Legal submissions on behalf of Adare, paras 73-74.

⁵⁵ *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [82] (HC).

⁵⁶ *Infinity Investment Groups v Queenstown Lakes District Council* [2010] NZEnvC 234 at [17] (EC) and *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* HC Invercargill CIV-2010-425-365, 14 February 2011 at [60] (HC).

the two options (split or consolidated) is the most appropriate when assessed in terms of giving effect to the relevant objectives. The Panel must consider the efficiency and effectiveness of the two options, including the costs and benefits.⁵⁷ Ultimately, the Panel's task is to obtain the optimum planning outcome, in light of these objectives, based on an evaluation of the totality of the evidence before it.

Objectives and policies of the LCZ

75. Objective 1 of Chapter 6D is that the Local Centre is intended to provide “a mixed-use environment” at an appropriate scale to service suburbs without “undermining the primacy, function, vitality, amenity or viability of the Central City”. As mentioned, the introduction of a cap on commercial activity will ensure that the Local Centre operates within its role as a suburban centre which is defined in the ODP as follows:⁵⁸

Suburban centres anchor the City's main residential areas and provide a range of activities and services that can reduce reliance on car travel for meeting day-to-day requirements. These centres provide multi-purpose destinations for customers. These centres are generally well served by passenger transport.

76. Objective 2 is directed to ensuring that the Local Centre is a “focal point” for a diverse range of activities needed by the community and that it is consistent with the Local Centre Concept Plan in Appendix 2. Objective 3 seeks “a high quality, attractive environment that incorporates quality urban design to establish an accessible, functional, safe and vibrant Local Centre”. Objective 4 seeks that the Local Centre is “integrated into the surrounding neighbourhood and the transport network and is able to be easily and safely accessed by active modes and passenger transport. The associated policies seek (relevantly):

⁵⁷ RMA, s 32.

⁵⁸ ODP, Section 6.2.

- a) A comprehensive, urban design-led approach to determine the form of the Local Centre intended to serve Peacocke (Policy 1);
 - b) A range of commercial and community activities are enabled that will service the needs of the Peacocke Community and are of a size and scale that will not undermine the centres hierarchy (Policy 2);
 - c) Development contributes to the overall form and function of the Local Centre by being in general accordance with the Peacocke Local Concept Plan and Structure Plan (Policy 3);
 - d) Development within the Local Centre is designed to provide a sense of identity and place (Policy 4);
 - e) A vibrant centre be facilitated by establishing activities that encourage pedestrian activity on the ground floor, with business, entertainment and residential activities enabled on upper floors (Policy 5);
 - f) Manage the location and design of buildings to ensure high-quality urban design outcomes (Policy 7);
 - g) Create a vibrant, high amenity, pedestrian focused, main street (Policy 10); and
 - h) A vibrant, attractive public plaza be created (Policy 12).
77. The notified version of the LCZ is more consistent with the objectives and policies identified above, and has greater benefits and efficiencies, for the following reasons:

- a) It is in accordance with the Peacocke Local Concept Plan;
- b) It will be adequately well-connected to the proposed school and passenger transport hub;
- c) There is ample sufficiency of land and locational choices for any businesses likely to want to locate in the Local Centre to the east of Peacockes Road, including two-supermarket offerings;⁵⁹
- d) Locals will be able to undertake multipurpose trips without having to cross a road (whether by foot or vehicle), which Mr Akehurst considers “is the very definition of economic efficiency within the urban hierarchy” and is in direct alignment with the primary purpose of a Local/Suburban Centre;⁶⁰
- e) In Mr Akehurst’s view, under the notified LCZ, a supermarket can have street frontage on Peacockes Road on the return journey side with left turn access to traffic. This ease of access along with integration with other shops and services and an easy exit will enable a supermarket that performs just as well on the eastern side as on the Woolworths site; and
- f) Retaining the consolidated, compact form on one side of Peacockes Road is a superior urban design outcome as it allows more supermarket visitors to be exposed to the main street and its businesses and gives them much more convenient access to the entirety of the main street;⁶¹ and
- g) It will enable a vibrant and cohesive centre with high-quality

⁵⁹ Rebuttal evidence of Mr Akehurst on behalf of HCC dated 22 September 2022, para 39.

⁶⁰ Rebuttal evidence of Mr Akehurst on behalf of HCC dated 22 September 2022, para 16.

⁶¹ Primary evidence of Mr Munro on behalf of HCC dated 2 September 2022, para 15 c);
Rebuttal statement of Mr Munro on behalf of HCC dated 22 September 2022, para 13.

amenity, close to the river, in a single contiguous area not bisected or fragmented by a major road, with good activation, well-served by passenger transport services and adjacent to a high-traffic area with the proposed education facility and medium density residential activity adjacent.

78. The crux of HCC's concerns with Woolworths' proposal, which are echoed by Adare, remains that extending the LCZ west of Peacockes Road will be an inferior outcome due to the adverse effects on the vibrancy and viability of the Local Centre and adverse urban design effects primarily caused by dividing the Local Centre with a minor arterial road, leading to greater costs and inefficiencies. These include:
- a) Splitting the Local Centre across Peacockes Road fragments patronage and leads to reduced activity in the centre overall;⁶²
 - b) Peacockes Road will be a significant barrier to cross, even with pedestrian crossings in place (refer to the estimated travel time for a pedestrian calculated by Mr Munro at paragraph 14 of his rebuttal evidence), and it will create two semi-isolated commercial 'islands' making casual movement across the centre more inconvenient;⁶³
 - c) The establishment of fine-grained/specialty retail on the western side of Peacockes Road would considerably undermine the intended main street and social focal point planned for the eastern side of the road and eventual link with the Waikato River;⁶⁴
 - d) Separating the supermarket visitors from direct exposure to the smaller-scale retail will directly limit its market appeal, and likely result in retail operators instead looking to locate alongside the

⁶² Supplementary evidence of Mr Akehurst on behalf of HCC dated 11 October 2022, para 20.

⁶³ Primary evidence of Mr Munro on behalf of HCC dated 2 September 2022, Attachment 2, para 27.

⁶⁴ Rebuttal statement of Mr Munro on behalf of HCC dated 22 September 2022, para 20.

supermarket on the western side;⁶⁵

- e) There is little incentive for shoppers to cross the main street area (unless they had a necessary planned trip), and vice versa.⁶⁶ In separated but proximate retail areas shoppers tend to drive between the areas rather than walk which is not in line with the outcomes sought for the LCZ;⁶⁷
- f) Locating one supermarket on the western side of Peacockes Road and one on the eastern side doubles the amount of carparking required which reduces land use efficiency and makes the centre as a whole, less vibrant, walkable and permeable;⁶⁸ and
- g) Expanding the Local Centre across Peacockes Road dilutes the number of shoppers who have the opportunity to cross shop, or to carry out multipurpose trips. Mr Akehurst's evidence is that "while it is a smaller share of supermarket shoppers, the ones that do, make up a high percentage of sales and visitation in the other shops".⁶⁹

79. Much of Woolworths' criticisms of the LCZ as notified relates to Adare's concept plans. Adare dismisses this criticism on the basis that they are not final development plans, they are representations of layout options. HCC has also identified transport-related issues with the plans.⁷⁰ However, HCC acknowledges that the plans are simply early illustrations showing that a variety of layouts are possible, with final design plans to be developed at a later stage. Fundamentally, the evidence demonstrates that there are no

⁶⁵ Primary evidence of Mr Munro on behalf of HCC dated 2 September 2022, Attachment 2, para 27.

⁶⁶ Rebuttal statement of Mr Munro on behalf of HCC dated 22 September 2022, para 17.

⁶⁷ Primary evidence of Mr Munro on behalf of HCC dated 2 September 2022, Attachment 2, para 27.

⁶⁸ Supplementary evidence of Mr Akehurst on behalf of HCC dated 11 October 2022, para 19.

⁶⁹ Rebuttal evidence of Mr Akehurst on behalf of HCC dated 22 September 2022, para 18.

⁷⁰ Rebuttal evidence of Mr Black on behalf of HCC dated 22 September 2022, para 45.

constraints about the location of a supermarket (or two supermarkets) in the LCZ as notified in PC5.⁷¹ Reliance on the shortcomings in the draft concept plans to justify the Woolworths proposal would be an error. They are draft concepts only.

80. HCC wishes to avoid having the Peacocke Local Centre develop in the likeness of the Rototuna Centre which is split by Thomas Road. Mr Munro's evidence is that the Rototuna Centre is one of the worst examples of an urban centre that he has ever seen.⁷² Much consideration and analysis has gone into identifying the location of the LCZ as notified in PC5 to avoid such a poor outcome in Peacocke.
81. Were the LCZ to be extended to cover the Woolworths site, HCC has serious concerns about the potential scenario in which only one supermarket establishes on the western side of Peacockes Road in the short and medium term. This would threaten the success of the Local Centre on the eastern side of Peacockes Road which is intended to be the focal point of the LCZ and is to feature the public plaza, community facility, public transport stops, and the main street with primary frontage. A supermarket as an anchor tenant on the eastern side of Peacockes Road is critical to the Local Centre's viability. Such a scenario, which sees the western side developed at a rate that impacts development on the eastern side, would not meet the objectives and policies of the LCZ.
82. Woolworths has not provided sufficient planning analysis of any consequential amendments proposed in the event its relief is granted, for example, to reduce the extent of the LCZ on the eastern side of Peacockes Road or to rezone part of it to, say, residential activity. Accordingly, it would be problematic for the Panel to approve Woolworths' relief in the absence of any robust planning assessment of the appropriateness of these options.

⁷¹ Supplementary evidence of Mr Akehurst on behalf of HCC dated 22 September 2022, para 15.

⁷² Rebuttal statement of Mr Munro on behalf of HCC dated 22 September 2022, para 23.

83. In HCC's submission, there are no planning provisions that would make the Woolworths proposal a more appropriate outcome than the PC5 notified option. Mr Akehurst's evidence is that the Woolworths land is better utilised for medium density residential activity, as notified, which will supply shoppers to the Local Centre and help to ensure its potential as a two-supermarket centre that operates efficiently to meet the retail needs of Peacocke residents.⁷³
84. Located at the intersection of the high-order road network, close to the river, in a single contiguous area not bisected or fragmented by a major road and well-served by passenger transport services, the PC5 location of the LCZ achieves greater consistency with the objectives and policies relevant to the LCZ and, in HCC's submission, is the most appropriate of the two options before the Panel and is the optimum planning outcome.
85. Ultimately, and despite the somewhat complex retail economic evidence, this issue is relatively straightforward; simply put, the sustainable management of the relevant land and associated resources is best served by consolidating the LCZ to the east of the arterial corridor, rather than splitting it across to the west. Despite the asserted merits of the Woolworths proposal, the option of the notified LCZ is simply better.

EAST WEST ARTERIAL CORRIDOR ALIGNMENT

86. Mr and Mrs Shaw (**Shaws**) own property along the alignment of the east-west arterial corridor designation (**Designation A106**). In the planning evidence presented by Mr Hook on behalf of the Shaws, Mr Hook identified that Designation A106 crosses proposed SNA 61 which is part of the Mangakotukutuku gully network (and SNA C87 identified in Plan Change 9).⁷⁴ Mr Hook contended that the identification of the SNA is incongruous

⁷³ Rebuttal evidence of Mr Akehurst on behalf of HCC dated 22 September 2022, para 35.

⁷⁴ Evidence of Mr Hook on behalf of M and M Shaw dated 16 September 2022, Figure 4.

and in direct conflict with the works enabled by Designation A106 and that construction of the works will require extensive vegetation removal, earthworks and a bridge/culvert construction.⁷⁵

87. Mr Hook contends that PC5 fails to give effect to sections 5, 6 and 7 of the RMA, because it does not address the conflict between the roading alignment under the Designation A106 and the other plan provisions. He goes on to state at paragraph 20:

I am not aware of alternative routes being considered by the roading authorities that would avoid the habitat damage and loss associated with roading works through the gully systems. However, in light of the recent recognition of the ecological and habitat values of the Mangakotukutuku Gully System it would be appropriate for Hamilton City Council to comprehensively review the alignment of the proposed roading network in order to avoid such significant adverse effects on the environment.

88. Mr Hook suggests that HCC give notice under s 182 of the RMA to surrender Designation A106 and that it be removed from the district plan. He also seeks that HCC defer decisions on the roading network on PC5 and comprehensively review all Southern Links alignments in light of the proposed SNAs and re-notify a new set of roading designations to replace the existing Southern Links designations.⁷⁶
89. In the legal submissions presented on behalf of the Shaws, counsel attempted to rely on *King Salmon*⁷⁷ to argue that WRPS Policy 11.2.2 requires that loss or degradation of significant indigenous vegetation should be avoided, and that this should be achieved through abandoning Designation A106 and determining an alternative roading alignment which does not transect the SNA.⁷⁸
90. This argument contains two fundamental flaws. The first is that the

⁷⁵ Evidence of Mr Hook on behalf of M and M Shaw dated 16 September 2022, para 16.

⁷⁶ Evidence of Mr Hook on behalf of M and M Shaw dated 16 September 2022, para 26.

⁷⁷ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38.

⁷⁸ Legal submissions on behalf of M and M Shaw dated 28 September 2022, para 12.

directive to *avoid* set out in Policy 11.2.2 is not unqualified, as it was in *King Salmon*.⁷⁹ In Policy 11.2.2 the directive is to avoid, *in preference to remediation or mitigation*.⁸⁰ Accordingly, the directive to avoid is not an absolute, and there is flexibility to move through the effects management hierarchy.

91. The second fundamental flaw is that the Panel has no jurisdiction to grant the relief sought. This was responsibly acknowledged by counsel for the Shaws in legal submissions where it was noted:

15. I accept that you do not have the statutory power in this process to require Council to revisit and amend the Designation and now taking account of the SNA and bat habitat.

92. To address the jurisdictional bar, it was suggested that the Panel issue an interim decision and make a recommendation to the Council that it review Designation A106. The powers of this Panel are established under a delegation from Council which does not extend to issuing interim decisions and recommendations of the nature proposed. To do so would be acting outside the delegated authority which is to hear and determine submissions on PC5.
93. The Panel has no jurisdiction to amend or rescind Designation A106, nor any power to recommend that it be amended or rescinded. There is no basis to issue an interim decision, given there is no power to make the recommendation proposed. The only available option for the Panel is that identified at paragraph 15(iii) of the Shaws' counsel's submissions, which is to record in the decision the Panel's evaluation of the Shaws' concerns.
94. To assist the Panel in that evaluation, it should be noted that the alignment of the proposed corridor within Designation A106, and the various alternative alignments, have already been the subject of judicial

⁷⁹ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38.

⁸⁰ Policy 11.2.2(b).

examination, and endorsement, in the Environment Court; see *Murray and Margaret Shaw v Hamilton City Council*⁸¹. In that case, concerning the Shaws' challenge to HCC's compulsory taking of land under the Public Works Act 1981 (**PWA**), the court was required to examine the adequacy of consideration given to alternative routes under s 24(7)(b) of the PWA. The court concluded:

- [120] The options evaluation process included consideration of project cost, constructability, road user benefits, road safety, noise and vibration, air, **effects on the Waikato River and streams, flora and fauna**, archaeology and heritage, geology, contaminated sites, hydrology, urban design, landscape design, property, community, severance issues, known cultural sites, cultural protocols, river crossings, connectivity (walking and cycling, private passenger vehicles, freight, public transport) and route security.
- [121] The MCA process was undertaken at each of the four stages as route selection was refined. Sensitivity testing was undertaken by varying the categories and weighting of marks, which demonstrated that clear networks emerged over others. The options considered for east-west routes near the Shaws' property were three locations at distances of approximately 100m, 600m and 1.8km to the south.
- [122] Having reviewed the evidence and documents as outlined above, and considered the matters raised by the Shaws, we are satisfied that:
- (a) **the options evaluation process was wide-ranging, comprehensive and robust and, in our view, was in accordance with recognised good practice;**
 - (b) **adequate consideration was given to ecological effects during the evaluation process;**
 - (c) the final network was selected because it ranked highest of the options compared;
 - (d) adequate consideration was given to routes south of the designated route at the time of the options evaluation;
 - (e) reconsideration of a southern route as proposed by the Shaws was undertaken to an appropriate level of detail using the same MCA process as the original options evaluation and scored negatively when compared against the designated alignment;
 - (f) moving the designation further to the south and away from the Shaw dwelling would result in multiple other issues arising and a transfer of effects from the Shaw

⁸¹ [2021] NZEnvC 175.

property to others; and

- (g) if the designation alignment was moved south it is likely that an equivalent (likely a collector road), would be required somewhere in the vicinity of the designated alignment.

[123] We are satisfied that the Council gave adequate and genuine consideration to alternatives, including the alternative identified by the Shaws.

(emphasis added)

95. Under this Environment Court decision, the acquisition of land within the route alignment of the east-west arterial road has been confirmed, land within the alignment acquired, and contracts let for its construction. The subsequent identification of a proposed SNA which intersects with part of the designation footprint is no basis for altering the designation. The new SNA will integrate with the land use within Designation A106, and the works required to give effect to Designation A106 will be undertaken in a manner that avoids loss of any significant indigenous vegetation in preference to remediation or mitigation, as required under Policy 11.2.2.

OTHER MATTERS

Staging and interim infrastructure

96. It is critical that the proposed staging plan is adopted by the Panel. This is linked to the efficient and sequential provision of public infrastructure. Submitters have sought a consenting pathway for out of sequence development, and the s 42A report authors have agreed to that through a series of amendments. It was agreed that an assessment matter be added which addresses out of sequence development.
97. In the updated s 42A report, it is recommended that an updated version of assessment item 1.3.3X(g) be added.⁸² This new wording is endorsed by

⁸² Updated s 42A report, para 13.

HCC.

Berm widths

98. Clarification was sought regarding the final position of HCC on the berm widths, in response to evidence from Mr Penny for Adare. A correction to Table 15-6b is recommended in the updated s 42A report.⁸³ HCC supports this amendment.

Early planting

99. There was agreement amongst the ecological experts that early planting of land areas identified as part of an ecological compensation programme is a beneficial and enhances the gains that are achieved.
100. A suitable plan provision which encourages this outcome would be located within the land use and subdivision assessment criteria. For example, at assessment criteria 1.3.3 P3 Development in the Peacocke Precinct, and P5 Subdivision in the Peacocke Precinct, could be amended by adding a criteria:
- x) the extent to which the proposal has taken steps, either onsite, or offsite, to compensate for the effects of development on SBHAs by implementing a planting programme enabling new bat habitat, including consideration of the age and development of that planting.

Provision for cyclist parking

101. The Panel enquired about the adequacy of provisions for cyclist parking and associated plan provisions. It was indicated that Plan Change 12 (**PC12**) (the IPI plan change) introduced a range of provisions addressing these matters as consequential changes arising from increased densities. PC12

⁸³ Updated s 42A report, para 16.

was publicly notified in August 2022.


102. PC12 proposes substantial changes to the Transportation Chapter 25, particularly around enhanced walking, cycling, and micro-mobility. This includes new proposed objectives 25.14.2.1 and supporting policies including policy 25.14.2.1i which requires provision of accessible, practical, secure, covered, end-of-journey facilities for all users as close as practicable to their journey destination, and policy 25.14.2 iv, and v which ensure secure covered parking for cyclists integrating with public transport.

CONCLUSION

103. In light of the evidence presented, HCC considers there is no impediment to PC5 being approved and that significant benefits will accrue if so approved. PC5 should be approved in accordance with the updated s 42A report and the further recommendations in these submissions.
104. Finally, on HCC's behalf Counsel would like to express their gratitude to the Panel for their careful consideration of the plan change proposal and the submissions. Counsel also wish to acknowledge and thank all stakeholders who have engaged constructively to work through and narrow the issues and taken the time to participate in this plan change process.

Ngā mihi nui,

Dated 4 November 2022



L F Muldowney / S K Thomas
Counsel for Hamilton City Council