

BEFORE HAMILTON CITY COUNCIL

IN THE MATTER OF

The Resource Management Act 1991 (“the Act”)

AND

IN THE MATTER OF

Proposed Plan Change 5 to the Hamilton District Plan –  
Peacocke Structure Plan

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Legal Submissions on Behalf of  
Margaret and Murray Shaw

DATED 28 September 2022

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By Arrangement

**May it Please the Commissioners:****Introduction**

1. These legal submissions are made on behalf of the Shaw family. The Shaw family owns and operates Shaw's Bird Park in Hall Road, Peacocke.
2. Shaw's Bird Park is somewhat of a local icon and it is open to the public daily free of charge.
3. Over the past 30 or more years, the Shaw family have extensively planted both indigenous and exotic vegetation and created a network of wetland ponds on their property. The Park contains areas of habitat that is significant for the New Zealand Long-tailed bat, now classified as a Nationally Critical species. It is home to rare and endangered native birds, parrots and thousands of native and exotic trees.
4. Large parts of my clients' property are now notated as a Significant Natural Area under Plan Change 5 referenced 61/C87. This SNA is rated as being nationally significant because it is part of the Mangakotukutuku Gully Stream which is significant habitat for the long-tailed bat.
5. In addition, my clients have observed Dabchicks in their wetland. These are an At Risk species, now extinct in the South Island.

**Southern Links Arterial**

6. However, a designation for the Southern Links Arterial Road also transects my clients' property and goes through the SNA. This is referenced as designation A106. Its relationship to my clients' property and the SNA notated area is shown in Figure 4 of Mr Hook's evidence.
7. Council says that the Southern Links Arterial Road and its alignment is not part of this Plan Change. However, no explanation is given for that and I note that it has not been addressed in the Opening Legal Submissions of the Council. The only justification that does emerge is the Council's concern over costs already incurred in the designation and land acquisition process.
8. The difficulty with the Council's position, convenient though it may be for them, is that the evidence is such that there is an inherent conflict between protecting large areas of the environment as Significant Natural Areas, and in this case specifically providing habitat for a threatened species on one hand; yet bulldozing it to put a road through on the other. As Mr Hook says, this proposal is incongruous and in direct conflict with the works enabled by

Designation A106. The evidence also before you is that the Council had not assessed and identified the significance of this habitat at the time the Designation was progressed in 2014.

9. Consequently, I would venture to suggest that were the road designation and the presence of significant habitat for long-tailed bats considered today, as one, in an integrated fashion as the Act suggests should be done then your decision would be much more difficult. Quite possibly, the designation in its current alignment through this SNA, would not succeed. That, is the basis of my clients' submission that the Designation should now be lifted, or alternatively revisited and altered.
10. Whilst the Council strongly resists any suggestion that the Southern Links alignment is under discussion in Plan Change 5, that, in my view, is convenient and disingenuous.
11. I say that because the Regional Policy Statement gives a clear and explicit policy direction that activities should *avoid* the loss or degradation of areas of significant indigenous vegetation and significant habitats of indigenous fauna, in preference to remediation or mitigation<sup>1</sup>.
12. The *King Salmon* line of authority<sup>2</sup> is well understood and means quite simply that these policy directives must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way such as this creates an environmental bottom line which must be satisfied. Here, the Regional Policy Statement is clear in that effects on SNAs must be avoided. That is even more so where that habitat as in this instance is home to a nationally threatened species.
13. The submission and evidence of The Department of Conservation before you clearly highlights their concerns with the approach taken in Plan Change 5 and the importance of this bat habitat. I rely on that evidence in many respects but the simple point is that you have before you a conundrum you must resolve.
14. How then do you address this issue?
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. However, you can do the following:

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<sup>1</sup> Policy 11.2.2(b).

<sup>2</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Co Limited* [2014] NZSC38.

- (i) Recommend to Council that they review the Designation through my client's property in light of these issues, and the inherent conflict between the SNA and the Designation;
- (ii) Issue an Interim Decision highlighting this issue as one that needs to be addressed further;
- (iii) In any event, you will need to record specifically your evaluation of my client's concerns.

## Conclusion

16. Frankly, it is disingenuous of the Council to suggest that the alignment of the Southern Links Road cannot be an issue in this process. The only justification that Council advances for that is that it has already expended money on land acquisition and planning. However, the Act of course, allows for the alteration of designations and we need only look at the government to its fairly recent abandonment of roads of national significance due to economic and political pressures.
17. Last week, my clients submitted a petition to this Council requesting that the alignment of the Southern Links Road be revisited and that destruction of the park and the significant habitat be avoided. That petition is currently under consideration and will come before the new Council once elected. However, it has been signed by some 55,000 people, more than 9000 of whom explicitly identify as residing in Hamilton City. In comparison, some 38,000 people voted in the 2019 Hamilton City Council election'.
18. I expect this will be a difficult decision for the Committee and it is clearly apparent that the Council does not want you to consider the impact of the Southern Links designation much less any possibility that it may now be inappropriate. However, in my submission the direction of the Regional Policy Statement if not Part 2 of the Act itself is such that there is an obvious and

Irreconcilable conflict between the identification of this area of SNA and allowing the designation to remain in its current alignment.

A handwritten signature in blue ink, appearing to read 'J. Dawson'.

Julian Dawson – Barrister for M and M Shaw