

**BEFORE THE INDEPENDENT HEARING PANEL
APPOINTED BY THE HAMILTON CITY COUNCIL**

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

AND

IN THE MATTER of hearing submissions on Plan Change 5 to the Hamilton
City District Plan

BETWEEN **THE ADARE COMPANY LIMITED**

Submitter #53

AND **HAMILTON CITY COUNCIL**

Local authority

SUBMISSIONS OF COUNSEL FOR THE ADARE COMPANY LIMITED

Dated: 27 September 2022

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MAY IT PLEASE THE HEARING PANEL:

A. INTRODUCTION

1. Counsel appears for The Adare Company Limited (**Adare**).
2. Adare is a family-owned company, held by the Peacocke family to manage their landholdings. The Peacocke family have had a connection to the land in Peacocke since the 1880s.
3. Adare has a strong interest in PC5, due to its substantial landholdings (approximately 192 hectares) and experience obtaining resource consent for urban development of 105 hectares of land in Peacocke (known as Amberfield).
4. Adare's participation in PC5 reflects its interest in creating a legacy in Peacocke and contributing to a suburb that enhances Hamilton as a place to live. Adare also has an interest in ensuring that PC5 enables the appropriate development of Adare's other landholdings in Peacocke and does not cut across the outcomes anticipated by the Amberfield consent.
5. Adare has participated fully in the PC5 process, including through direct discussions with submitters and HCC, engaging witnesses to participate in conferencing and prepare detailed evidence. Through engagement in the process, many of the issues in Adare's submission and further submissions have been resolved.
6. I will address the key outstanding issues from Adare's perspective, which are:
 - (a) Enabling urban intensification and setting appropriate density targets.
 - (b) Resolving the tension between urban intensification and protecting the significant habitat of long-tailed bats, including how that protection is most appropriately achieved.
 - (c) The appropriate size and location of the Local Centre Zone to ensure a high quality, functional and vibrant Local Centre.

7. Adare will call the following witnesses:
- (a) Mr David Peacocke (Landowner and director of Adare).
 - (b) Mr Hamish Anderson (Development Management Consultant, The Development Room Limited).
 - (c) Dr Stuart Parsons (Zoologist, Walkingbats and University of the Sunshine Coast, Australia).
 - (d) Mr Andrew Blayney (Ecologist, Boffa Miskell Limited).
 - (e) Dr Sarah Flynn (Ecologist, Boffa Miskell Limited).
 - (f) Mr Wayne Bredemeijer (Urban Designer, Urbanismplus).
 - (g) Mr Richard Bowker (Retail Specialist, Terra Firma Group Limited).
 - (h) Mr Tony Penny (Traffic and Transportation Engineer, TP Consulting Limited).
 - (i) Mr Ray O'Callaghan (Civil Engineer, O'Callaghan Design Limited).
 - (j) Andrew Collins (Planning Consultant and General Manager – Urban Development, Harrison Grierson).

B. GLOSSARY OF ABBREVIATIONS/ACRONYMS

8. The abbreviations and acronyms employed in these submissions are:
- (a) Director-General of Conservation (**Director-General**).
 - (b) *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* (**King Salmon**).¹
 - (c) Evidence-in-Chief (**EIC**).
 - (d) Evidence-in-Reply (**EIR**).
 - (e) Hamilton City Council (**HCC** or **Council**).
 - (f) Hearing Commissioner Panel (**Hearing Panel** or **Panel**).
 - (g) Housing Infrastructure Fund (**HIF**).
 - (h) Increased Height Overlay (**IHO**).

¹ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38.

- (i) Intensification Planning Instrument (**IPI**).
- (j) Medium density residential standards (**MDRS**).
- (k) National Policy Statement Urban Development 2020 (**NPS-UD**).
- (l) Peacocke Structure Plan (**PSP**).
- (m) Resource Management Act 1991 (**RMA** or **Act**).
- (n) Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**).
- (o) Significant Natural Area (**SNA**).
- (p) Significant Bat Habitat Area (**SHBA**).
- (q) The Adare Company Limited (**Adare**).
- (r) Waikato Regional Policy Statement (**WRPS**).

C. NPS-UD & THE HOUSING SUPPLY AMENDMENT ACT

9. Hamilton is growing. The Future Proof Strategy predicts that Hamilton City will accommodate 14,300 households in the medium term (to 2030) and 41,300 in the long term (to 2050).² Peacocke has been identified as contributing as much as a third of Hamilton's housing needs in the medium term.³

C.1 Giving effect to the NPS-UD

10. Hamilton is identified as a high growth area and Tier 1 urban environment under the NPS-UD. PC5 must give effect to the NPS-UD.⁴
11. Among other things, the NPS-UD requires HCC to provide at least sufficient development capacity to meet expected demand for housing and business land over the short, medium and long term.⁵ PC5 seeks to achieve this by delivering medium to high density housing throughout Peacocke.

² Future Proof Strategy 2022, Housing and Business Assessment, Hamilton.

³ PC5 AEE, at section 2.1.

⁴ RMA 1991, s 75(3)(a).

⁵ NPS-UD, Policy 2.

12. There is an obvious tension between intensified residential land use and protecting the significant habitat of long-tailed bats. That tension is resolved through the provisions of PC5 and by paying close attention to what section 6(c) of the RMA and the relevant provisions of the WRPS (this is addressed under D).

C.2 Implementing the Housing Supply Amendment Act

13. As summarised in HCC's submissions, PC5 was prepared, consulted on and notified prior to the announcement of the Bill that ultimately became the Amendment Act.
14. HCC has sought to implement the MDRS through PC5 (and submissions seeking density that conforms with the intent of the Amendment Act). Adare supports HCC's approach.
15. The outcome sought by the NPS-UD and Amendment Act is the inclusion of the MDRS in the district plans of Tier 1 local authorities. Implementation of the MDRS through either a "standard" Schedule 1 or IPI process should achieve the same substantive outcome.
16. Irrespective of Schedule 1 of the IPI process, the Panel must "give effect" to the NPS-UD and other competing policy directions.⁶ An outcome must be evidentially found that rationalises policy direction on residential intensification with the protection of significant habitat of indigenous fauna.
17. The identification of policy directions that compete with residential intensification as "qualifying matters", simply narrows the usual range of considerations – it does not add to it. All roads lead substantively to Rome.

⁶ RMA 1991, ss 75(3) and 77I.

C.3 Remaining density issues

18. Adare agrees with HCC in relation to density issues. There are two outstanding issues advanced by Kāinga Ora:
- (a) The minimum overall net residential density target in Policy DEV01-PSP: P14 (now P8); and
 - (b) The spatial extent of the IHO and whether it should include Adare’s land known as “The Island”.

Density targets

19. Kāinga Ora’s planning witness supports setting the minimum overall net density target as a “reach” target of 35 dwellings per hectare,⁷ whereas Adare’s evidence supports 30 dwellings per hectare.⁸
20. Prior to 2014, it might have been appropriate to set “reach” targets in policies, as, it was common practice to read policies together and apply an overall broad judgment in resource consent decision-making.
21. However, the Supreme Court held in *King Salmon* that the differences in the way objectives and policies are expressed are important.⁹ An overall broad judgment is inappropriate in this context.¹⁰ In the post-*King Salmon* world, imprecision in policies can lead to unintended outcomes.
22. Setting a “reach” target that is higher than applicants are expected to achieve risks resource consents being declined if the minimum overall net density target cannot be met. Adare’s expert evidence indicates that there is a real risk of consents being declined on this basis.¹¹
23. Adare’s experts prepared a detailed master plan for its land known as the “West Block” to understand the implications PC5 and different density targets. The West Block is zoned Medium Density Residential. The land has topographical, ecological, and hydrological constraints which are

⁷ EIC of Ms Tait for Kāinga Ora, 16 September 2022, at para. [74].

⁸ EIC of Mr Anderson, Mr Bredemeijer and Mr Collins for Adare, 16 September 2022.

⁹ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, at para. [127].

¹⁰ *Ibid*, para. [150].

¹¹ EIC of Mr Bredemeijer for Adare, 16 September 2022.

representative of much of the land within Peacocke (incl. Adare's other landholdings).¹²

24. The master planning exercise established that the maximum overall net density that might be achieved is 29.1 – 31.1 dwellings per hectare.¹³

The extent of the IHO

25. Kāinga Ora's planning witness supports an extension of the IHO over the "The Island" on the basis that it is not topographically constrained and is near the Local Centre Zone and Waikato River.¹⁴
26. Mr Bredemeijer's EIC overlays the proposed IHO on top of topographical contours and an amenity reserve required to be vested as part of the Amberfield resource consent.¹⁵ The thrust of Mr Bredemeijer's evidence is that "The Island" has areas of steep high escarpments, which would need to be accommodated through engineered batters or costly retaining walls. This would make the density sought by Kāinga Ora difficult to achieve.¹⁶
27. A further practical consideration is that Adare already has resource consent to develop "The Island" into single lots between 404m² and 1534m².¹⁷ If "The Island" is subject to the IHO, there is a real possibility that Adare would develop to its consent typology, rather than incur the amenity and financial costs associated with achieving a greater density of 45 dwellings per hectare.¹⁸ This would result in much less dwellings per hectare than the 30 contemplated within the PC5 Medium Density Residential Zone.
28. I invite the Panel to ask Kāinga Ora's planning witness, Ms Tait, if she visited "The Island" to view its topography before preparing her evidence (or since).

¹² Ibid, para. [16].

¹³ Ibid, Appendix A, and at paras. [22]-[23].

¹⁴ EIC of Ms Tait for Kāinga Ora, 16 September 2022, at para. [70].

¹⁵ EIC of Mr Bredemeijer for Adare, 16 September 2022, Appendix C.

¹⁶ Ibid, para. [26].

¹⁷ EIC of Mr Anderson for Adare, 16 September 2022, at para. [26].

¹⁸ Ibid, para. [27].

D. ECOLOGY

D.1 Urban development & protecting significant habitats

29. PC5 must “give effect to” two high-order policies, respectively:¹⁹
- (a) enabling residential density to meet expected demand for housing within the PSP area,²⁰ which has earmarked for urban development since 1989; and
 - (b) protecting the significant habitat of long-tailed bats, a threatened - nationally critical native species, under s 6(c) of the RMA.
30. No party contends that the potential tension between enabling residential density and s 6(c) is insoluble.
31. The leading authority on resolving conflict between competing directives remains *King Salmon*. In that case, the Supreme Court found that the New Zealand Coastal Policy Statement gives substance to Part 2 of the RMA in the coastal environment.²¹
32. The Court acknowledged that there may be instances where some policies pull in different directions. However, the majority found that this is likely to occur infrequently, given the way that various policies are expressed. Tensions will typically dissolve if close attention is paid to the differences in wording.²²
33. There is no national direction, when considering Peacocke, that gives substance to s.6(c) of the RMA. Rather, direction is found in the next order of policy documents – under the WRPS.
34. The tension between policy directions for residential density and the protection of significant habitats of long-tailed bats is addressed under the WRPS.

¹⁹ RMA 1991, ss 75(3)(a) and 32.

²⁰ NPS-UD, Policy 2.

²¹ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, at para. [90].

²² *Ibid*, at para. [129].

35. I concur counsel for HCC that the question of whether an area of habitat is 'significant' requires a qualitative assessment of the area under consideration.²³
36. I further agree with counsel for HCC that Policy 11.2, and Implementation Methods 11.2.2 and 11.2.3, are the most relevant policy provisions in relation to the protection of significant bat habitat.²⁴ Criteria 11A provides a list of criteria based on ecological values to assist with the identification of areas of significant indigenous biodiversity.²⁵ Areas of significant biodiversity are protected as SNAs under the Operative District Plan.²⁶
37. Method 11.2.2(b) includes the direction to avoid the loss or degradation of significant habitats of indigenous fauna. The direction to avoid is qualified in various ways by the other methods under 11.2.2 which anticipate that adverse effects may be mitigated or remedied or otherwise engaged with in different scenarios.
38. The question in contention is not whether the term "avoid" should be applied to SNAs to achieve protection. Rather, it is what habitat should qualify as a SNA or a future SNA (i.e., SBHA).
39. The question of what constitutes significant habitat was considered in *Weston Lea*.²⁷ It was agreed that all areas within which a species can be found can constitute habitat. The question is not whether an area constitutes habitat. Rather, the question is whether the habitat is significant.²⁸

D.2 Long-tailed bats & integrated management at landscape-scale

40. The key difference between the parties comes down to whose evidential approach most appropriately protects the significant habitat of the long-tailed bats:

²³ Opening legal submissions on behalf of Hamilton City Council, Dated 23 September 2022, at para. [97].

²⁴ *Ibid*, at para. [99].

²⁵ *Ibid*, para. [100].

²⁶ *Ibid*, paras. [102] to [103].

²⁷ *Weston Lea Limited v Hamilton City Council* [2020] NZEnvC 189, at para. [10].

²⁸ *Ibid*, para. [22].

- (a) HCC's approach is to identify and protect significant habitat (or future significant habitat), using SNAs and SBHAs. The delivery of SBHAs, assessment of effects, and compensation for adverse effects that cannot be managed is to be addressed on a consent-by-consent as landowners develop different landholdings over the next 30 years.²⁹
 - (b) The Director-General's approach would widen the proposed SBHAs and add to assessment requirements under the consent-by-consent approach, with greater expectations placed on individual consent applicants.³⁰
 - (c) Adare's approach is to take an integrated management approach to long-tailed bats across a landscape-wide scale. Its approach does not avert individual responsibility, rather, it avoids a piecemeal response to issues that require a comprehensive solution at an appropriate spatial scale.
41. In its first interim decision on the Amberfield consent appeal, the Environment Court acknowledged the need to take a wider lens when considering long-tailed bats:³¹

We are satisfied that the conditions of this consent give a positive way forward to improve the habitat and prospects for the New Zealand Long Tail Bat in Hamilton. However, this is simply one part of a much wider catchment that needs to be addressed as a matter of urgency.

42. There appears to be consensus among ecological witnesses that the nature of the long-tailed bat means that landscape-scale management is required.³²

²⁹ These matters are principally controlled by the Ecological Rehabilitation and Management Plans and Bat Management Plans prepared consent-by-consent: s42A report Appendix B Chapter 1, 1.2.2.26 and 1.2.2.27.

³⁰ EIC of Mr Gooding for the Director-General, 16 September 2022, at section 8.

³¹ *Weston Lea Limited v Hamilton City Council* [2020] NZEnvC 189, at para. [125].

³² Joint Witness Statement in relation to Planning & Bats, 24 August 2022, at para. [3.3]; EIC of Dr Parsons, Mr Blayney and Dr Flynn for Adare, 16 September 2022; EIR of Dr Muller for HCC, 22 September 2022, at para. [15]; EIR of Dr Baber for HCC, 22 September 2022, at para. [19]; EIC of Mr Kessels for HCC, 2 September 2022, at Attachment 1, page 6; EIC of Ms Pryde for DOC, 16 September 2022, at para. [6.18]; EIC of Dr Borkin for DOC, 16 September 2022, at paras. [23.1]-[23.5].

43. In contrast to DOC and (to a lesser extent) HCC, Adare seeks a true landscape-scale approach. Adare proposes that:
- (a) SNAs and SBHAs are identified and protected, including through building setbacks and interface controls;
 - (b) The Ecological Rehabilitation and Management Plans and Bat Management Plans that are to accompany individual consent applications are streamlined to limit the obligations on landowners to: (i) vesting SBHAs in HCC; (ii) identifying potential roost trees; and (ii) assessing whether such trees can be physically and functionally retained; and
 - (c) HCC takes a leadership role by acquiring and enhancing SBHAs, and centralising monitoring and pest control.
44. This approach is much more likely to result in positive outcomes for long-tailed bats, because it will ensure:
- (a) Co-ordinated establishment and enhancement of SBHAs by a single entity, as opposed to a piecemeal approach with establishment and enhancement occurring at the time of subdivision of land adjoining SBHAs;
 - (b) Monitoring of long-tailed bats occurs at a meaningful scale, rather than on the basis of individual sites; and
 - (c) Pest-control is targeted to the highest value areas where it will have the greatest impact.
45. In essence, Adare's approach seeks for PC5 to provide HCC with policy guidance that SBHAs should be established and managed in the same manner as linear infrastructure projects. That involves identifying the best route (which it has done with the SBHA mapping), acquiring land, and developing the infrastructure prior to private development connecting to the infrastructure.
46. A piecemeal approach to linear infrastructure is not appropriate. Road networks are not delivered by requiring each developer to build just the part of the road adjoining its site. The network would be incomplete until the last landowner develop their land (which might never occur).

47. A piecemeal approach to SBHAs is similarly inappropriate. Ecological evidence demonstrates the importance of functional corridors to connect significant habitat areas.³³ Waiting for up to 30 years for all land in the PSP area to be developed (and therefore for SBHAs to be enhanced) is unlikely to result in functional corridors in an appropriate time frame.³⁴
48. Adare's approach does not avert individual responsibility. Developments must still be designed to protect SNAs and SBHAs (including through building setbacks and interface controls), and the removal of vegetation with potential roosting features must be carefully scrutinised.
49. HCC has the power and the tools it needs to implement a landscape-scale approach:
- (a) It has general competency under the Local Government Act 2002 and could acquire and establish SBHAs;³⁵ and
 - (b) It has access to funding tools, including financial contributions, development contributions, and rates. These tools can be applied to ensure that the expense of managing Hamilton's long-tailed bat population is fairly distributed across the city as a whole.

E. LOCAL CENTRE

E.1 A Local Centre of the right size, in the right location

50. The urbanisation of Peacocke will create demand for goods and services, including retail, offices, and other commercial services. PC5 responds by establishing a Local Centre Zone as a focal point, as well as a network of Neighbourhood Centres to provide day-to-day needs.
51. The role of the Local Centre Zone is neatly summarised in its first three objectives (which, apart from a minor clarification sought by Kāinga Ora to Objective 1, are unchallenged):

³³ EIC of Mr Blayney for Adare, at paras. [24]-[32].

³⁴ Ibid, paras. [25]-[26].

³⁵ Indeed, its own evidence confirms that funding is provided in the current Long Term Plan for some acquisition of SBHAs. EIC of Mr Sirl for HCC, 2 September 2022, at para. [209].

LCZ – PREC1 – PSP: O1

A ~~distribution of suburban~~ local centres that provide[s] a mixed-use environment with health-care services, goods, services and employment at a scale appropriate to suburban catchments, while not undermining the primacy, function, vitality, amenity or viability of the Central City.

LCZ – PREC1 – PSP: O2

The Peacocke Local Centre is the focal point for the Peacocke Community, providing a range of convenience, retail, employment and service activities and is the only location for a supermarket within the Peacocke Structure Plan area.

LCZ – PREC1 – PSP: O3

The Local Centre is developed to be consistent with the Local Centre Concept Plan and establish a high quality, attractive environment that incorporates quality urban design to establish an accessible, functional, safe and vibrant Local Centre.

52. After much consideration, HCC zoned 7.8 hectares on the eastern side of Peacockes Road as Local Centre Zone.
53. Woolworths opposes PC5's Local Centre Zone and seeks that its 1.7 hectare site west of Peacockes Road be rezoned from Medium Density Residential to Local Centre Zone so that it can build a supermarket.
54. Adare supports the Local Centre Zone notified under PC5. It is of the right size (perhaps slightly oversized) and in the right location.
55. The issue for the Panel's planning determination is the Local Centre Zone's size and location. It is not about which is the best site for a supermarket, nor who has come up with a better supermarket concept design.³⁶

³⁶ *Rational Transport Soc Inc v New Zealand Transport Agency* [2012] NZRMA 298 (HC). The most appropriate method is not necessarily the method that is superior in one respect, rather it requires an assessment as to what, on balance, is the most appropriate when measured against the relevant objectives.

56. Woolworths' criticisms of the concept plans prepared by Urbanismplus for the Local Centre are misplaced.³⁷ Those concept plans are not final development proposals. They simply illustrate options for accommodating the components of the Local Centre on the site (with land to spare). Notwithstanding, a concept plan has been prepared that shows that Woolworths' proposed layout could be achieved within the notified Local Centre Zone.³⁸

E.2 Peacocke needs a Local Centre, not a sub-regional centre

57. Objective 1 is clear that the Local Centre Zone is intended to service suburbs without undermining the primacy, function, vitality, amenity or viability of the Central City. Similar provisions are found throughout the District Plan, which has a six-tiered business centres hierarchy, designed to ensure that new centres do not undermine existing centres.³⁹
58. The concept of protecting existing centres is well-established. In *Discount Brands Ltd v Westfield (New Zealand) Ltd*, the Supreme Court confirmed that broader economic and social effects might flow if a proposal were to result in the decline of an existing centre to the extent that it would no longer be viable.⁴⁰ It is no secret, for example, that commercial development to the north of Hamilton City had a significant adverse impact on central city businesses.
59. The appropriate size of the Local Centre Zone has been carefully considered against the residential growth projected for Peacocke and the sustainable retail demand associated with that growth. The thrust of the evidence is that, even under high residential growth projections for Peacocke, the notified Local Centre Zone supplies more ground floor area (**GFA**) than is required to cater for the PSP area.⁴¹
60. Zoning an additional 1.7 hectares of land as Local Centre Zone would create a significant surplus of commercial land, and risk undermining the

³⁷ For example EIC of Mr Knott, Mr Sofo and Mr Shao for Woolworths, 16 September 2022.

³⁸ EIR of Mr Bredemeijer for Adare, 22 September 2022, at Appendix A.

³⁹ For example, Objective 6.2.1 regarding The Base and Chartwell as sub-regional centres and Objective 6.2.2 regarding suburban centres.

⁴⁰ *Discount Brands Ltd v Westfield (New Zealand) Limited* [2005] 2 NZLR 597 (SC), at [89].

⁴¹ EIR of Mr Akehurst for HCC, 22 September 2022, at para. [3.2] and Figure 1.

intent under Objective 3 of delivering a high quality, functional and vibrant Local Centre.⁴²

61. Woolworths' legal submissions and evidence have not engaged with Objectives 1 and 3, or the effect that a larger Local Centre Zone would have on the outcomes sought under those objectives. Woolworths' expert economist suggests demand for local centre GFA may be higher. However, his evidence is based on an error calculating how much retail expenditure will occur in the PSP area,⁴³ and a residential yield premised on a submission (unsubstantiated through evidence) that is no longer pursued by Kāinga Ora.⁴⁴
62. Woolworths' failure to engage with Objectives 1 and 3 appear to reflect its interest is in developing a supermarket on its land, as opposed to HCC and Adare's interest in the success of the Local Centre as a whole.

E.3 Sprawling the Local Centre to the west is an inferior outcome

63. Evidence has been provided both for and against allowing the Local Centre to sprawl to the west across Peacockes Road. In determining the most appropriate form of the PC5 provisions, the RMA directs the Panel to consider efficiency and effectiveness of reasonably practicable options, including benefits and costs of the provisions.⁴⁵ The optimal planning outcome is ultimately a matter for the Panel's judgement, having regard to the evidence.
64. The thrust of Adare's and HCC's evidence is that sprawling the Local Centre to the west will result in greater costs, including:
- (a) Adverse urban design effects such as dividing the Local Centre with a minor arterial road,⁴⁶ fragmenting the Centre;⁴⁷ and

⁴² EIC of Mr Bowker for Adare, 16 September 2022, at paras. [20] and [21].

⁴³ See EIR of Mr Akehurst for HCC, 22 September 2022, at paras. [7]-[10].

⁴⁴ EIC of Mr Heath for Woolworths, 16 September 2022, at para. [31]. Kāinga Ora's submission sought density targets of 50 dwellings per hectare in the Medium Density Residential Zone and 100 dwellings per hectare in the High Density Overlay, leading to a yield estimate of 16,000 dwellings. Kāinga Ora now supports density targets of 35 dwellings per hectare and 45 dwellings per hectare, respectively.

⁴⁵ Resource Management Act 1991, s 32.

⁴⁶ EIR of Mr Munro for HCC, 22 September 2022, at paras. [8]-[15] and EIR of Mr Bredemeijer for Adare, 22 September 2022, at paras. [19]-[22].

⁴⁷ EIR of Mr Munro for HCC, 22 September 2022, at paras. [16]-[22].

(b) Adverse effects on the vibrancy and viability of the Local Centre.⁴⁸

65. Those costs come without reciprocal benefits. An extension west does not improve the function⁴⁹ or amenity of the Centre⁵⁰ – it just makes it bigger.

E.4 Trade competition and Commerce Commission Report

66. Woolworths' solicitor argues that Adare's opposition to the extension of the Local Centre Zone raises concerns around trade competition and contradicts the Commerce Commission's Report on competition in the retail grocery sector. Both arguments are ill conceived and unpersuasive.

Adare is not a trade competitor

67. Clause 6 of Schedule 1 of the RMA empowers any person to make a submission on a proposed plan. However, 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.⁵¹
68. For Adare to be restricted by clause 6 of Schedule 1, it would need to be a trade competitor of Woolworths. That is not the case.
69. The Courts have found that landowners competing over the zoning of land can be said to be competitors, but it does not follow that they are in trade competition. In *Queenstown Central Ltd v Queenstown Lakes District Council* the High Court considered whether landowners contesting the zoning of land under a plan change to a district plan were trade competitors.⁵² In that case, the two competing companies were land developers, disputing whose respective landholding would be more appropriately zoned for retail development to enable (among other things) supermarkets.⁵³

⁴⁸ EIR of Mr Akehurst for HCC, 22 September 2022, at para. [39] and EIR of Mr Bowker for Adare, 21 September 2022, at paras. [7]-[9].

⁴⁹ EIR of Mr Akehurst for HCC, 22 September 2022, at para. [41].

⁵⁰ EIR of Mr Munro for HCC, 22 September 2022, at para. [22].

⁵¹ Resource Management Act 1991, Sch 1, cl 6(3) and (4).

⁵² *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815.

⁵³ See *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815, at [149] for a summary of the facts.

70. The High Court found that, in the absence of a statutory definition, the reference to “trade” in “trade competitor” needed to be understood by reference to the mischief it was trying to address: i.e., business trade competitors using RMA processes to prevent competition from rivals.⁵⁴
71. The High Court recognised that RMA processes can involve contests for the zoning of land, with multiple parties competing to get their land zoned for the highest value use.⁵⁵ It found that such contests are not trade competition and, if they were, numerous planning disputes would be wrongly categorised as trade competition.⁵⁶
72. As the High Court put it:⁵⁷
- Rather, trade competition presents as the use of RMA arguments to serve the ulterior purpose of retaining or obtaining market share in unrelated markets. So a supermarket as a trade competitor stops a rival building another supermarket in its customer catchment, and uses every available RMA argument to do so. This is a wholly different game from property owners competing for the best use of their land.
73. Woolworths is a developer and operator of supermarkets. Adare is a landowner in Peacocke with development aspirations. Adare has no interest in entering the supermarket game, rather part of its Local Centre Zoned land will be leased or sold to supermarket developer(s) / operator(s). As Mr Anderson can confirm, Adare does not have any affiliation with either member of the supermarket duopoly (nor any aspiring supermarket industry entrant).
74. Adare’s participation in PC5 is not for the ulterior purpose of obtaining market share in the supermarket business. Its approach to the appropriate size and location of the Local Centre stems from its genuine interest in establishing a high quality, functional and vibrant Local Centre.
75. Even if the Panel somehow finds that Adare is trade competitor of Woolworths, its submission remains valid. Adare’s expert evidence on the oversupply of Local Centre Zoned land, and extension west of

⁵⁴ Ibid, para. [156] referring to para. [145].

⁵⁵ Ibid, para. [160].

⁵⁶ Ibid, para. [160].

⁵⁷ Ibid, para. [161].

Peacockes Road, concern adverse effects those land uses would have on the viability of the Local Centre (incl. unoccupied or low occupancy retail, loss of employment opportunities, and reduced amenities to support higher density residential development).

The Commerce Commission Report does not support carte blanche supermarket development

76. Leaving aside the irony of Woolworths invoking the Commerce Commission Report, (as one of the duopolies the focus of anti-competitive practice under that Report), the Report has no material relevance that would justify ignoring the adverse urban design and economic effects of the rezoning sought by Woolworths.
77. The Commerce Commission Report was an exercise in understanding competition in the grocery sector. The Report has no special status under the RMA – Commerce Commission reports are not a relevant consideration when preparing a plan change under section 74 of the RMA.
78. At best, the Commerce Commission Report indicates concern with some RMA processes and how they can present a barrier to market entry. However, the Report is not before the Panel in evidence and its authors are not available to answer questions.
79. In any event, the Commerce Commission Report does not support the proposition implied by Woolworths: that supermarkets should be generally enabled under PC5. The Report identified that:
 - (a) planning regulation has the potential to impede or slow the ability of retailers to develop new stores;⁵⁸
 - (b) zoning can restrict the number of sites available, appeals against plan changes take time and notified consent processes (and challenge to notification decisions) can also slow entry;⁵⁹ and

⁵⁸ *Market study into the retail grocery sector – Final Report* (Commerce Commission, PRJ0044573, March 2022), at para. [6.63].

⁵⁹ *Ibid*, para. [6.65].

(c) the “Supermarket Wars” caused significant delay to the opening of competitor stores.⁶⁰

80. The Report recognises that the Government is reforming the RMA system and all of its recommendations on planning regulation relate to that reform.⁶¹ The Report does not purport to recommend that additional commercial land should be supplied through rezoning at all costs.
81. Finally, Woolworths’ suggestion that Adare’s position on the Local Centre Zone offends the Commerce Commission Report has a logical flaw. As notified, PC5 provides more Local Centre Zoned land than required, so much so that HCC has proposed a GFA cap to prevent it undermining other centres in Hamilton.⁶² Unlike the Woolworths’ site, Adare’s land would be available for supermarket development by Woolworths, Foodstuffs or any new market entrant. There can be no credible allegation of anti-competitiveness levelled at Adare.

E.5 Woolworths’ surprise at zoning

82. Woolworths’ legal submissions and evidence attempt to portray the notified location of the Local Centre as a surprise.⁶³
83. HCC’s witnesses will be able to address the Panel on the pre-notification consultation that occurred for PC5, including the workshops with the previous landowner on 11 December 2020 and 24 February 2021 regarding the Local Centre and any subsequent discussions.
84. The important point is that PC5 was notified on 24 September 2021 and by its own corporate evidence, Woolworths purchased the site two months later in November 2021.⁶⁴

⁶⁰ Ibid, para. [6.67].

⁶¹ Ibid, para. [9.35].

⁶² EIC of Mr Akehurst for HCC, 2 September 2022, at [60].

⁶³ Legal submissions for Woolworths, 23 September 2022, at [3.4] and EIC of Mr Shao for Woolworths, 16 September 2022, at [3.5].

⁶⁴ EIC of Mr Shao for Woolworths, 16 September 2022, at [3.2].

Dated this 27th day of September 2022

A handwritten signature in blue ink, consisting of two parts: 'RAMAGILL' and 'M J DOESBURG'. The signature is written in a cursive style and is positioned above a horizontal line.

Dr R A Makgill / M J Doesburg

Counsel for The Adare Company Limited

Appendix 1 – WRPS Provisions

Policy 11.2 Protect significant indigenous vegetation and significant habitats of indigenous fauna

Significant indigenous vegetation and the significant habitats of indigenous fauna shall be protected by ensuring the characteristics that contribute to its significance are not adversely affected to the extent that the significance of the vegetation or habitat is reduced.

Implementation methods

11.2.2

Protect areas of significant indigenous vegetation and significant habitats of indigenous fauna

Regional and district plans shall (excluding activities pursuant to [11.1.4](#)):

- a. protect areas of significant indigenous vegetation and significant habitats of indigenous fauna;
- b. require that activities avoid the loss or degradation of areas of significant indigenous vegetation and significant habitats of indigenous fauna in preference to remediation or mitigation;
- c. require that any unavoidable adverse effects on areas of significant indigenous vegetation and significant habitats of indigenous fauna are remedied or mitigated;
- d. where any adverse effects are unable to be avoided, remedied or mitigated in accordance with (b) and (c), more than minor residual adverse effects shall be offset to achieve no net loss; and
- e. ensure that remediation, mitigation or offsetting as a first priority relates to the indigenous biodiversity that has been lost or degraded (whether by on-site or off-site methods). Methods may include the following:
 - i. replace like-for-like habitats or ecosystems (including being of at least equivalent size or ecological value);
 - ii. involve the re-creation of habitat;
 - iii. develop or enhance areas of alternative habitat supporting similar ecology/significance; or
 - iv. involve the legal and physical protection of existing habitat;
- f. recognise that remediation, mitigation and offsetting may not be appropriate where the indigenous biodiversity is rare, at risk, threatened or irreplaceable; and
- g. have regard to the functional necessity of activities being located in or near areas of significant indigenous vegetation and significant habitats of indigenous fauna where no reasonably practicable alternative location exists.

11.2.3

Assess significance

Where regional and district plans require an assessment of significant indigenous vegetation and the significant habitats of indigenous fauna that have not been identified by Waikato Regional Council as part of [Method 11.2.1](#), the criteria in [Section 11A](#) shall be used. The identification of the characteristics of any area will be undertaken prior to any modification of the area or site and will inform the decision-making process as to whether the proposed activity or modification is appropriate. The characteristics that have contributed to an area being significant should also be communicated to the relevant landowners and kept on record by the local authority.

Appendix 2 – Objectives and policies sought by Adare on landscape-wide approach

[Black have been recommended by the s42A report, purple is still sought by Adare]

Objective:

DEV01-PSP-OX: Maintain and enhance a network of open space that support the ecological values of the Peacocke Structure Plan Area and contributes to the mitigation of the adverse effects of existing urbanization and future development on the habitat of the longtailed bat across all of Hamilton City

Policies:

DEV01-PSP-Pxx Recognize that the establishment of Significant Bat Habitat areas within Peacocke Structure Plan Area contributes to the mitigation of the adverse effects of existing urbanization on the long-tailed bat across all of Hamilton City

DEV01-PSP-Pxx: Establish a Bat and Habitat Enhancement Panel to advise on matters relating to the creation, restoration and enhancement of habitat for long-tailed bats, and the monitoring of long-tailed bat activity, within and beyond the Peacocke Structure Plan Area.