

BEFORE THE HEARING PANEL

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

AND

IN THE MATTER of Proposed Plan Change 9 to the Operative Hamilton
City District Plan

LEGAL SUBMISSIONS OF COUNSEL FOR MARY LEE BURTON
17 May 2023

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MAY IT PLEASE THE COMMISSIONERS

Introduction

- 1 These submissions are on behalf of Mary Lee Burton (**Ms Burton**), who opposes the recommendation under Plan Change 9 to have the proposed Significant Natural Area C18 – Donny Park (the **proposed SNA**) listed over part of her property at 736A River Road, Hamilton (**the Property**).
- 2 In our submission, the justifications Council has relied on to map this part of the proposed SNA are flawed. There has not been sufficient evidence produced by Council to justify the Property being included as part of the proposed SNA.
- 3 We submit that it is inappropriate for SNA boundaries to extend onto private gardens and restrict the way that private landowners can use their land without there being a sound evidential basis.

Proposed National Policy Statement on Indigenous Biodiversity

- 4 While not legally binding, the National Policy Statement on Indigenous Biodiversity exposure draft (**NPS-IB**) provides guidance and indicates central government's current policy direction in regard to the objectives and policies to protect, maintain and restore indigenous biodiversity.
- 5 Clause 3.8 sets out how significant natural areas are to be assessed. The assessment criteria in Appendix 1 of the NPS-IB must be assessed in accordance with the following principles:¹
 - (a) Partnership: territorial authorities are to engage with landowners early, and share information about indigenous biodiversity;
 - (b) Transparency: territorial authorities are to clearly inform landowners about how information gathered will be used and make existing information, and draft assessments and other relevant information available to landowners for review;
 - (c) Quality: wherever practicable, the values and extent of natural areas are verified by physical inspection;
 - (d) Access: permission of the landowner is first sought if physical inspection is required;

¹ Proposed National Policy Statement on Indigenous Biodiversity, clause 3.8.

- (e) Consistency: the criteria is to be applied consistently;
 - (f) Boundaries: the boundaries of significant areas are determined without regard to artificial margins.
- 6 The lack of transparency in regard to how this Property has been assessed for significance is inconsistent with the proposed NPS-IB. Likewise there is a lack of evidence regarding the specific grounds for inclusion as a SNA. If private land is to be subject to regulatory burdens there should be clear and compelling evidence to justify that burden.

Waikato Regional Policy Statement 2016

- 7 The Waikato Regional Policy statement contains objectives and policies relating to “Ecosystems and indigenous biodiversity”. A district plan must give effect to a regional policy statement.²
- 8 The objective in relation to Ecosystems and indigenous biodiversity provides:

the full range of ecosystem types, their extent and the indigenous biodiversity that those ecosystems can support existing in a healthy and functional state

- 9 ECO-P1/Policy 11.1 provides:

Promote positive indigenous biodiversity outcomes to maintain the full range of ecosystem types and maintain or enhance their spatial extent as necessary to achieve healthy ecological functioning of ecosystems, with a particular focus on:

1. *Working towards achieving no net loss of indigenous biodiversity at a regional scale;*
2. *the continued functioning of ecological processes;*
3. *the re-creation and restoration of habitats and connectivity between habitats;*
4. *supporting (buffering and/or linking) ecosystems, habitats and areas identified as significant indigenous vegetation and significant habitats of indigenous fauna;*
5. *providing ecosystem services;*
6. *the health and wellbeing of the Waikato River and its catchment;*
7. *contribution to natural character and amenity values;*
8. *tangata whenua relationships with indigenous biodiversity including their holistic view of ecosystems and the environment;*
9. *managing the density, range and viability of indigenous flora and fauna; and*

² Section 75(3)(c) RMA.

10. the consideration and application of biodiversity offsets

- 10 ECO-P2/Policy 11.2 provides:

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.

- 11 ECO-P3/Policy 11.3 states:

Maintaining and enhancing indigenous biodiversity shall be promoted in an integrated and efficient manner including by working collaboratively with landowners, resource managers, tangata whenua and other stakeholders

- 12 Plan Change 9 provides that an area is to be assessed as a SNA if it meets one or more of the 11 criteria in the Waikato Regional Policy Statement 2016.³
- 13 These objectives and policies require an assessment of ecosystems in the context of overall health and habitat of indigenous biodiversity. The policies refer to regional significance and to the interconnection between significant habitats for vegetation and native fauna. These policy criteria are not aimed at private gardens that have been created to enhance steep slopes and to reflect the landscape preferences of particular landowners. They are there to retain **significant** habitat connections and to protect threatened species where they are known to be living.
- 14 This piece of created landscape around the Burton residence neither connects significant habitats nor is it significant in its own right in relation to any particular plant or animal species that is threatened regionally or nationally (or even locally). Nor has there been engagement with the landowner in relation to protection of significant habitat. That is because it does not encompass any identified significant and at risk habitat.
- 15 This garden is not a corridor. It leads to no significant habitat, whether that be indigenous vegetation or wetland. It is a created garden that has been designed to enhance and stabilise the steep bank and to provide a restful haven for the landowner, her family and adjoining neighbours.

³ Hamilton City Council Plan Appendix 9 Schedule 9C: Significant Natural Areas, page 1.

Criteria for assessing SNAs

- 16 Appendix 9 Schedule 9C of Plan Change 9 states the assessment method criteria for determining indigenous biodiversity.
- 17 Sites were assessed using the Waikato Regional Policy Statement's criteria and also assessed as to whether they are locally, regionally, or nationally significant.⁴
- 18 The proposed SNA has been identified as a cSNA (Corridor/indigenous fauna habitat SNA).⁵ Appendix 9 Schedule 9C states that a "cSNA" is an area that is able to be delineated by topographical or vegetation features (such as gully systems) which:⁶
 - (a) Provides significant fauna habitats (including steppingstone or corridor habitats), including regularly used habitats by nationally 'At Risk or Threatened' indigenous fauna species. For example, the area meets criterion 3 in the Waikato Regional Policy Statement 2016; or
 - (b) Provides ecological buffering to a regionally or nationally important SNA. For example, the area meets criteria 7,8,9,11 in the Waikato Regional Policy Statement 2016.
- 19 Hamilton City Council has assessed the Proposed SNA to meet the following Waikato Regional Policy Statement criteria for indigenous biodiversity: 1, 3, 4, 6, 8, and 11.⁷
- 20 We submit that these criteria do not apply to the Property and address each in turn. In doing so we challenge the application of the methodology to the site and not the methodology itself. We do not disagree that parts of the Proposed SNA are appropriate. Rather it is the extension of the SNA onto the Burton land in this blind corner of the gully system.

⁴ Appendix 9 Schedule 9C: Significant Natural Areas, page 1.

⁵ Appendix 9 Schedule 9C: Significant Natural Areas, page 3.

⁶ Appendix 9 Schedule 9C: Significant Natural Areas, page 1.

⁷ Plan Change 9 SNA Hamilton City Council Master Dataset 23 June 2022.

Criterion 1

- 21 4Sight has determined that the proposed SNA meets criterion 1 due to it being “partially protected at northern end by HCC reserve and a QEII covenant exists on private property at the northern part of the site”.⁸
- 22 The covenant referred to relates to 1A Wymer Terrace, which is 850m north of the Property. The distance between the two properties is shown in a diagram in Ms Burton’s statement.
- 23 This criterion does not apply to the Property. There is no link between this covenant and the justification as to why the Property meets criterion 1 as a result of it. The area of Ms Burton’s garden does not adjoin the HCC reserve either.

Criterion 3

- 24 4Sight Consulting has determined that the proposed SNA has:⁹
- Threatened – nationally critical mammal species (bats) and At Risk and Threatened fish and invertebrates have been recorded, as well as Threatened – Nationally Vulnerable plant species*
- 25 In *Weston Lea Limited v Hamilton City Council*, the Environment Court found that the Waikato Regional Policy Statement fails to identify the significant habitat of long tailed bats in Hamilton City.¹⁰ The Environment Court found that significant habitats are discussed very generally and without any spatial identification or focus.¹¹ Because of this, the Environment Court notes that this creates a gap in the Waikato Regional Policy Statement’s provisions relating to adverse environmental effects of activities on significant natural areas.¹²
- 26 4Sight Consulting’s report states that although Long-tailed bats have been recorded throughout Hamilton City, they do not use all areas regularly.¹³ The report states that an ecologist determined the threshold for habitat usage on a case-by-case basis.¹⁴ The level of significance is dependant

⁸ Plan Change 9 SNA Hamilton City Council Master Dataset 23 June 2022.

⁹ Plan Change 9 SNA Hamilton City Council Master Dataset 23 June 2022.

¹⁰ *Weston Lea Limited v Hamilton City Council* [2020] NZEnvC 189 at [34].

¹¹ At [34].

¹² 4Sight Consulting “Significant Natural Areas of Hamilton City District: Terrestrial Wetland Ecosystems” (June 2022) at [4.6.2].

¹³ At [4.6.2].

¹⁴ At [8].

on whether the bats are known to utilise the area on a regular basis or sporadically.¹⁵

27 4Sight Consulting states that Hamilton gully systems provide a habitat for threatened fauna.¹⁶ These include long-tailed bats that 4Sight states are common in the southern part of the city, but recorded less frequently across the rest of the city.¹⁷ Longfin eels are also stated to be found in the gully systems.¹⁸ 4Sight states that records of these species are limited and assumptions have been made about their likely distribution in assessing some SNAs.¹⁹

28 We submit that there is no evidence to suggest that these mammals, fish, invertebrate or threatened nationally vulnerable plant species exist on the Property or use the Property as a habitat to warrant it being part of the proposed SNA, nor meeting criterion 3 of the Waikato Regional Policy Statement.

Criterion 4

29 4Sight Consulting has determined that “under-represented wetland vegetation is present in the low-lying part of this site”.²⁰

30 As set out in Ms Burton’s statement, extensive planting has been undertaken on the Property with a variety of native, exotic and subtropical species.

31 We submit that Hamilton City Council has not provided any evidence of the wetland vegetation present on the proposed SNA over the Property to warrant meeting criterion 4. The type of wetland vegetation present on the Property has not been identified by Hamilton City Council or 4Sight Consulting and it is not apparent to the landowner. There is no different vegetation along the gully floor of the Property than exists at the foot of the neighbour directly across to the east. That property has not been included in the SNA, apparently due to the slip that has occurred and the lack of stabilisation and amenity planting in his garden.

¹⁵ At [8].

¹⁶ 4Sight Consulting “PC9 Technical Ecology Report for Hamilton City Council” (March 2023) at [3].

¹⁷ At [3].

¹⁸ At [3].

¹⁹ At [3].

²⁰ Plan Change 9 SNA Hamilton City Council Master Dataset 23 June 2022.

Criteria 6 and 8

- 32 Hamilton City Council/4Sight did not list the proposed SNA as meeting criterion 6 in the proposed SNA master dataset.
- 33 The recommendations version of Plan Change 9 lists that the proposed SNA also meets criterion 6 of the Waikato Regional Policy Statement criteria:
- It is wetland habitat for indigenous plant communities and/or indigenous fauna communities (excluding exotic rush/pasture communities) that has not been created and subsequently maintained for or in connection with:*
- *waste treatment;*
 - *wastewater renovation;*
 - *hydro electric power lakes (excluding Lake Taupō);*
 - *water storage for irrigation; or*
 - *water supply storage;*
- unless in those instances they meet the criteria in Whaley et al. (1995).*
- 34 No evidence has been provided as to how criterion 6 applies to the proposed SNA in its entirety, or how it applies to the proposed SNA over the Property. There is no evidence about why the Property is included but the neighbour to the east is excluded.
- 35 4Sight Consulting has also determined that the proposed SNA is a riparian corridor for a stream.
- 36 4Sight Consulting has stated that Hamilton gully systems contain a network of streams connecting directly to the Waikato River, which provide a habitat critical to aquatic fauna.²¹ That is a general comment.
- 37 Ms Burton's property does not contain a stream which connects to the Waikato River. As set out in Ms Burton's statement, stormwater has historically flooded the Property. Hamilton City Council agreed to put in an overland flow path to remedy the flooding. Any excess water or flooding found is directly linked to the stormwater issue. There is no stream.
- 38 We submit that the occasional excess stormwater flooding (from a piped system) is not a riparian corridor for a stream connecting directly to the Waikato River or a wetland to justify meeting criteria 6 and 8.

²¹ 4Sight Consulting "PC9 Technical Ecology Report for Hamilton City Council" (March 2023) at [3].

Criterion 11

- 39 4Sight Consulting has determined that the proposed SNA has a forested area that provides a buffer for wetland habitat and is a linkage for aquatic species and mammals.
- 40 4Sight Consulting stated that Hamilton's gully systems provide a corridor for indigenous species necessary to protect another SNA, or waterways which flow into the Waikato River. Again this is a general and non-specific comment.
- 41 We submit that Ms Burton's Property is in no way linked to the proposed SNA or the rest of Donny Park. It is an isolated garden at the end of a blind finger of gully and does not connect through to any other gully system to the north.

Ground truthing and assessments

- 42 In the report dated March 2023 4Sight Consulting made SNA extent recommendations on individual properties following ground truthing site assessments. 4Sight Consulting notes that decision-making was broadly based on the following criteria:²²
- (a) Have any areas of lawn, buildings, or orchards been misidentified;
 - (b) Is the location of the SNA justified based on the area of providing a corridor or buffer, including maintaining sufficient width and extent of gully arms to ensure they continue to function as habitat, and buffer habitat from urbanisation effects; and
 - (c) Is the location of the SNA required to avoid incremental dilution of the city-scale approach.
- 43 4Sight notes that "rapid" field visits were undertaken to complete this decision-making.²³ Field visit notes and photographs and are noted to also be available to landowners.²⁴
- 44 The criteria above do not come from the NPS-IB or the Waikato Regional Policy Statement. When site specific notes and assessments were requested, counsel was referred to 4Sight's technical reports.

²² 4Sight Consulting "PC9 Technical Ecology Report" (March 2023) at [1.2.3].

²³ Statement of Evidence of Hamish Alston Dean (14 April 2023) at [39].

²⁴ At [39].

- 45 We submit that Council have not acted in accordance with the NPS-IB or the Waikato Regional Policy statement in term of carrying out a fair and transparent process with landowners. Ms Burton has not been provided with sufficient information from Council to justify why the proposed SNA has remained over the Property. To carry out rapid field visits and not provide the results to landowners raises questions of the integrity of the proposed SNA mapping and assessment process used in Plan Change 9.
- 46 Hamish Dean notes in his statement of evidence that buildings, structures, lawns and gardens were avoided through the SNA assessment and mapping process.²⁵ Mr Dean notes that sites were considered as a whole and in the ecological context of the wider landscape and that if a property is part of a large gully it should be considered significant to reduce the cumulative effects of fragmentation of the site.²⁶ Mr Dean also notes that areas that have been designed as a cSNA include some “very modified habitats, but which provide important ecological functions and services”.²⁷
- 47 We submit that removing Ms Burton’s property from part of the SNA will not result in the fragmentation of the rest of the proposed SNA. The Property is an isolated peninsula, and does not form a corridor that would effectively “isolate” or “split” up the rest of the proposed SNA. The boundary of the proposed SNA stretches to Ms Burton’s deck and clothesline. This does not provide an important ecological function and service to the rest of the Proposed SNA. Removing the proposed SNA from the Property will not impact the ecological value of the proposed SNA.

Section 42A Report

- 48 The s 42A author has adopted the recommendation in the 4Sight report prepared by Hamish Dean that the part of proposed SNA is retained on the Property because the overall ecological value of the proposed SNA over the Property is consistent with the rest of the proposed SNA, despite having some “open grass areas”.²⁸

²⁵ At [43]

²⁶ At [44], [46], and [47].

²⁷ At [48].

²⁸ 4Sight Consulting “PC9 Technical Ecology Report for Hamilton City Council” (March 2023) Appendix A submission 270.3.

- 49 The proposed SNA over Ms Burton's property covers an area which is her private garden. As outlined in the her statement, Ms Burton has maintained and landscaped the section of the proposed SNA over the Property significantly since she has lived at the. In particular in the last five years, Ms Burton has undergone extensive planting of a mixture of native, sub-tropical and exotic species. She has also installed retained stairs, paths, a playground and trampoline. She has 1000 *Clivia* "divisions" ordered ready for further amenity and stabilisation planting below her decks.
- 50 The rest of Donny Park is not accessible to pedestrians from the Property, and has no linkage to the rest of the proposed SNA. We submit that the proposed SNA over the Property is an isolated garden that happens to adjoin a wider gully system.
- 51 No report has been provided or made available to Ms Burton with the results of the ground truthing site assessment carried by 4Sight Consulting. We submit that no evidence has been provided by Hamilton City Council which shows how and why the Property is justified as being listed as part of the proposed SNA, or how it contributes to the ecological value of the rest of the proposed SNA.
- 52 We submit that because of the individualistic way in which Ms Burton has designed and planted her garden, the Property does not contribute to the ecological value of the rest of the proposed SNA. As outlined in her statement, Ms Burton has planted a mix of exotic, sub-tropical and native species. The work Ms Burton has done is specific to her garden and does not in any way contribute to the wider gully system.
- 53 It is a significant burden for a landowner that has an SNA located on their private garden. Assessment of that garden for protection as SNA should not be done lightly and should rely on actual evidence. Ms Burton has purchased exotic bulbs to continue her enhancement planting of the gully for aesthetic and stability purposes. These rules will prevent her doing that work. These rules will require her to get resource consents for normal garden maintenance.
- 54 In her submission Ms Burton noted that she is happy for notable trees to be protected. Ms Burton is aware that protected trees also have rules associated with their maintenance and with root protection. She recognises that there are individual trees on the Property that warrant

protection. There has been no specific assessment on trees on her property in Plan Change 9.

Conclusion

55 It is submitted that the recommendation in the s 42A report that the proposed SNA is retained over the Property is rejected for the following reasons:

- (a) The proposed SNA over the Property consists of a garden entirely designed and constructed by Ms Burton. It does not contribute to or reflect the ecological value of the rest of Donny Park;
- (b) The proposed SNA over the Property has no connectivity to the rest of the proposed SNA over Donny Park to warrant its listing; and
- (c) There has been no separate assessment provided by Hamilton City Council provided to Ms Burton that shows the assessment carried out that the Property meets the criteria in the Waikato Regional Policy Statement required to be classified as an SNA.

56 We request that the Panel recommends reducing the extent of proposed SNA-C18 so it no longer includes any of Ms Burton's Property.

Dated: 17 May 2023



Dr J B Forret

Counsel for the Submitter