

**BEFORE THE INDEPENDENT HEARING PANEL**

IN THE MATTER of the Resource Management Act 1991

AND

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

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**OPENING LEGAL SUBMISSIONS FOR TE AWA LAKES UNINCORPORATED JOINT  
VENTURE, PERRY GROUP, AND HOROTIU FARMS LIMITED**

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**Thomas Gibbons**  
[thomas@gibbonslaw.co.nz](mailto:thomas@gibbonslaw.co.nz)  
021 675 091  
Panama Square, 14 Garden Place, Hamilton

**Thomas Gibbons Law**

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## **MAY IT PLEASE THE PANEL**

### **Introduction**

1. These legal submissions are made for Te Awa Lakes Unincorporated Joint Venture, Perry Group, and Horotiu Farms Limited (“TAL”), in relation to the separate submissions on Significant Natural Areas (“SNAs”) made for:
  - a. Horotiu East North (“HEN”); and
  - b. Horotiu East South (“HES”).
  
2. In summary, these submissions address:
  - a. The position as regards HEN, and in particular the existing consent to remove vegetation; and
  - b. The position as regards HES, and in particular:
    - i. Higher-order planning considerations, notably section 6(c) of the RMA;
    - ii. The application of the RPS criteria;
    - iii. The ecological evidence;
    - iv. The relief sought.

### **HEN – Existing Consent for Vegetation Removal**

3. Expert planning evidence for TAL confirms that TAL holds a resource consent for land development activities, including vegetation and tree removal, subject to compliance with consent conditions.<sup>1</sup> The section 42A report for PC9 sought further information on these consents, which is provided in this planning evidence.<sup>2</sup>
  
4. Because of the existing resource consent, the imposition of an SNA over HEN is unnecessary and valueless. As the section 42A report notes, “it is agreed that C59 should be removed off the site if all the vegetation in this area is consented to be cleared”.<sup>3</sup> As HCC’s evidence notes, the resource consents held to clear vegetation means there is “little point in mapping the area as an SNA”.<sup>4</sup> Similarly, HCC’s planning rebuttal evidence says that if vegetation is to be removed, the HEN SNA “serves little purpose”.<sup>5</sup> The expert consensus is clear.
  
5. In respect of HEN, TAL seeks the outcome on which there is alignment between relevant experts - that is:

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<sup>1</sup> Evidence of Stephen Gascoigne, paragraphs 9-10.

<sup>2</sup> Evidence of Stephen Gascoigne, Attachment 1.

<sup>3</sup> Section 42A report, page 46.

<sup>4</sup> Evidence of Hamish Dean, paragraph 65.

<sup>5</sup> Rebuttal evidence of Laura Galt, paragraph 23.

- a. The removal of SNA C59 (the pines) as it relates to HEN in its entirety; and
- b. The removal of SNA C76 as it relates to HEN to the extent the existing consent provides for vegetation removal.<sup>6</sup>

**HES:**

6. TAL also seeks a reduction in the size of the SNA applied to HES. HES is not subject to the resource consent in the same manner as HEN. Therefore, it is useful to explore some aspects of the planning hierarchy in respect of SNAs.

*Section 6(c) of the RMA*

7. First, while HCC's expert evidence puts some weight on section 6(c) of the RMA,<sup>7</sup> it is important to emphasise that section 6(c) is concerned with "areas of significant indigenous vegetation" and "significant habitats of indigenous fauna". These emphases on *significant* and *indigenous* need to be kept in mind, especially as HCC's expert evidence considers some SNAs important to avoiding "incremental dilution of the city-scale approach",<sup>8</sup> or has raised concerns that "[s]mall, incremental reductions in size of an SNA ... can have substantial effects on the habitat function", and that the "function" of SNAs is as habitat "across the city".<sup>9</sup>
8. Unfortunately, this approach creates (at the least) an impression that an approach has been taken by HCC that any area with any kind of potential ecological value must be maintained as it stands, regardless of whether it actually meets a threshold of significance, as *any* site, no matter how small, is cumulatively important.<sup>10</sup>
9. These may be valid ecological concerns, but they are not issues under section 6(c). Section 6(c) is concerned with protecting *significant areas*, as a factual exercise,<sup>11</sup> not incremental dilution or reduction across an entire city. The consensus of expert evidence is that TAL's site is dominated by exotic pines,<sup>12</sup> and put simply, this affects its significance, particularly in terms of indigenous species.

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<sup>6</sup> Evidence of Stephen Gascoigne, paragraph 14.

<sup>7</sup> Evidence of Hamish Dean, paragraphs 18-19.

<sup>8</sup> Evidence of Hamish Dean, paragraph 42(c).

<sup>9</sup> Evidence of Hannah Mueller, paragraph 28.

<sup>10</sup> See eg the evidence of Hamish Dean, paragraph 47, and evidence of Hannah Mueller, paragraph 28; the rebuttal evidence of Hamish Dean, paragraph 9, also focuses on concerns about "fragmentation", though this terminology is not in section 6(c) of the RMA nor in the RPS.

<sup>11</sup> See *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, relating to section 6(b); applied in relation to 6(c) in *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council* [2017] NZHC 1606.

<sup>12</sup> Evidence of Hamish Dean, paragraph 62; evidence of Chad Croft, memorandum, page 3.

10. Further, when HCC’s expert evidence asserts that any SNA which meets at least one of the RPS criteria “can be considered significant under s6(c) of the RMA”,<sup>13</sup> this is not a fair reading of section 6(c). As per case law, a factual assessment is necessary: in the context of section 6(b), this is based on the “quality of the landscape”;<sup>14</sup> and a similar approach must be taken to considering whether an area is in fact a “significant natural area”. While the RPS criteria themselves establish that meeting one or more of the criteria may establish significance,<sup>15</sup> a factual assessment is necessary to consider whether the test under section 6(c) of the RMA is met in the context of a particular site.

*Draft National Policy Statement – Indigenous Biodiversity (NPS-IB)*

11. The approach taken to the NPS-IB in some of HCC’s expert evidence is also questionable. An exposure *draft* of the NPS-IB has been circulated, but this does not have legal effect, and the final wording is acknowledged to be uncertain.<sup>16</sup> While expert evidence for HCC supports approaches that accord with this draft,<sup>17</sup> it is not a matter that PC9 must give effect to,<sup>18</sup> and cannot be given weight as a legal instrument.

*Waikato Regional Policy Statement (RPS) Criteria*

12. On the other hand, it is clear that a district plan must give effect to the RPS.<sup>19</sup> However, these criteria must be clearly understood, and applied factually.
13. The section 42A report noted that in respect of Te Awa Lakes, a site visit had not yet been undertaken,<sup>20</sup> and that this would be addressed in Mr Dean’s evidence following a site visit.<sup>21</sup> Mr Dean’s evidence confirms this site visit occurred on 6 April 2023,<sup>22</sup> some time after the date of the Technical Ecology Report contained in his evidence.<sup>23</sup> While Mr Dean’s evidence sets out a process for identifying SNAs, it is apparent that “ground-truthing of *selected* sites” (emphasis added) has been the very last step in the process, and in the case of Te Awa Lakes, has effectively occurred after HCC’s views were formed.<sup>24</sup> The importance of ground-truthing is shown by the acceptance in HCC’s evidence of a reduction in the area of the SNA within HES, as shown below.

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<sup>13</sup> Evidence of Hamish Dean, paragraph 25.

<sup>14</sup> *Man O’War Station Ltd v Auckland Council* [2017] NZCA 24.

<sup>15</sup> Waikato Regional Policy Statement, APP5.

<sup>16</sup> Evidence of Hamish Dean, page 65.

<sup>17</sup> Evidence of Hannah Mueller, paragraph 46.

<sup>18</sup> See section 75(3)(a), RMA would apply if it was in effect.

<sup>19</sup> Section 75(3)(c), RMA.

<sup>20</sup> Section 42A report, page 15.

<sup>21</sup> Section 42A report, page 47.

<sup>22</sup> Evidence of Hamish Dean, paragraph 60.

<sup>23</sup> This report is attachment 2 of his evidence, and is dated March 2023.

<sup>24</sup> Evidence of Hamish Dean, paragraph 22. The relevant dataset is dated 23 June 2022.

14. Following this ground-truthing, the extent of specific comment in Mr Dean's evidence appears to be as follows:

"I support a change to the SNA extent to remove areas that have recently been cleared of vegetation and the area that covers the track, but I do not support a reduction of SNA to only a 20m-wide corridor as there is no ecological reason for this amendment. This site is dominated by large mature pines but with an indigenous understorey and it provides habitat for 'At Risk' fauna including a skink and fish species. It also protects a stream which flows directly into the Waikato River, and long-tailed bats are known to utilise the river corridor and have been detected at the river edge of the site."<sup>25</sup>

15. Several aspects of these comments warrant attention.
- a. First, Mr Dean states that "there is no ecological reason" for the amendment sought by TAL. This shows that Mr Dean's evidence is focused on ecological concerns, not the extent to which the site (or part thereof) factually meets the RPS criteria.
  - b. Further, Mr Dean states that the site is "dominated by large mature pines": that is, dominated by a non-indigenous species. Returning to section 6(c) of the RMA, we see that this is focused on areas of "significant indigenous" vegetation and/or fauna habitat. The RPS criteria are similarly focused on indigenous vegetation and fauna.<sup>26</sup> Here, a factual assessment of the kind required by case law shows that the indigenous understory is clearly secondary to the *dominance* of exotics, undermining its significance in terms of both section 6(c) and the RPS criteria.
16. The habitat for skink and fish species is relevant to the RPS, as acknowledged in TAL's expert evidence. However, the evidence of Mr Dean refers to "potential bat habitat" in respect of HEN: the relevant part of Mr Dean's evidence refers only to HEN, and not HES.<sup>27</sup> It is acknowledged that the rebuttal evidence of Ms Mueller refers to "potential" for bat roosting in area 2 of HES.<sup>28</sup>
17. In any event, it must be noted that criterion 3 of the RPS refers to vegetation or habitat that is "currently habitat" for indigenous species that are threatened or at-risk, endemic to the Waikato, or at the limit of their natural range.<sup>29</sup> Criterion 3 of the RPS does not recognise "potential" habitat.
18. This is not to strain the meaning of the RPS, but to read it fairly, properly, and appropriately. Close attention to the RPS criteria is important, as shown in

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<sup>25</sup> Evidence of Hamish Dean, paragraph 62.

<sup>26</sup> Each of the criteria in the Waikato Regional Policy Statement, APP5, refers to "indigenous" vegetation, species, or habitat.

<sup>27</sup> Evidence of Hamish Dean, paragraphs 64-65.

<sup>28</sup> Rebuttal evidence of Hannah Mueller, paragraph 26.

<sup>29</sup> Waikato Regional Policy Statement, APP5, criterion 3.

Joint Witness Statement 1 (“JWS1”). There, it was noted that in respect of a site neighbouring HES, there is an exemption within RPS criteria where indigenous vegetation has been created in connection with artificial structures. JWS1 shows it was agreed between relevant experts that where such an exemption applies, an SNA should not apply.<sup>30</sup>

19. The implication is that while HCC’s expert evidence may be based on legitimate ecological concerns, such as avoiding incremental dilution or fragmentation on a city-wide basis,<sup>31</sup> to establish a “significant natural area”, ecological concerns must be considered within the context of the RPS criteria.
20. JWS1 makes it clear that HCC’s planning experts consider it appropriate for the RPS criteria to be read strictly. TAL seeks the same approach here.
21. Expert ecological evidence for TAL is that:
  - a. In respect of areas 2-5, no significance criteria in the Waikato Regional Policy Statement (“RPS”) are met.
  - b. In respect of area 1:
    - i. Criterion 3 of the RPS is met, in respect of the presence of copper skinks and giant kokopu.
    - ii. Criterion 11 *may* be met, because of connectivity to SNA C76.<sup>32</sup>
22. This expert evidence highlights that while HCC’s data set considers RPS criteria 3, 8, 10, and 11 to be met,<sup>33</sup> only one of these is a matter of proper consensus. The section 42A report noted that at that time, no site visit had yet been undertaken, and Mr Dean’s evidence contains very limited comments on HES, and none that are focused on the RPS criteria.
23. It is acknowledged that criterion 3 is met in area 1, because of the presence of copper skinks and giant kokopu.<sup>34</sup> Mr Dean’s evidence says that bats “are known to utilise the river corridor” and says they “have been detected at the river edge of the site”,<sup>35</sup> but it is not clear from these comments that area 1 is actually an area of *current* bat habitat, as criterion 3 requires, and the expert evidence for TAL refers only to “potential” bat habitat.<sup>36</sup>
24. In respect of criterion 8 and 10, HCC’s evidence does not show these are met, and in particular, it is not apparent that the “critical” aspect of criterion 8 is met, nor that criterion 10 is met, especially as (on a consensus of experts)

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<sup>30</sup> JWS1, paragraph 3.5.1.

<sup>31</sup> Evidence of Hamish Dean, paragraph 42; evidence of Hannah Mueller, paragraph 28.

<sup>32</sup> Evidence of Chad Croft, paragraph 7.

<sup>33</sup> Evidence of Chad Croft, paragraph 7d.

<sup>34</sup> Evidence of Chad Croft, paragraph 7.

<sup>35</sup> Evidence of Mr Dean, paragraph 62.

<sup>36</sup> Evidence of Chad Croft, attached memorandum, page 5. Mr Dean’s evidence, paragraph 65, also refers to “potential bat habitat”, and the rebuttal evidence of Hannah Mueller, paragraph 28, refers to “potential roosting”.

non-indigenous trees dominate, and there is nothing that is “not common” or “exceptional” about this area. There is expert acceptance that the requirements of criterion 11 *could* be met because of connectivity to SNA C76, but this comment is made within the context of an expert consensus that exotic/non-indigenous species are predominant at the site.

## Conclusion

25. TAL acknowledges the intent of PC9 to give effect to the RPS, as required by section 75 of the RMA. TAL also acknowledges the presence of relevant species on the site is a matter of expert consensus.
26. However, TAL’s submission is that HCC’s approach goes well beyond “giving effect to” the RPS, as reflected in the RPS criteria. Generally, HCC’s expert evidence shows an approach that is focused on protecting everything of potential ecological value across the city. This has meant that HCC has essentially come to see every vegetated area as “significant” because of concerns over the city-wide impacts of incremental loss, rather than taking an actual focus on what is “significant”. This has led to a misreading of section 6(c) of the RMA, and (at the least) an ‘over-reading’ of RPS criteria. HCC has read the RPS criteria very broadly, using concerns over incremental loss to see a large number of sites as “corridors”, whether this is factually correct in respect of individual sites or not.
27. TAL’s evidence highlights that within the context of a site dominated by aged exotic trees, there are limited species warranting protection within a limited area.
28. This reflects the ground-truthing of the site and what is actually “significant” about it in the context of the RPS, rather than a broader view which can be seen as aimed at protecting the entirety of all vegetated sites within the city because of concerns over incremental loss. While concerns over incremental loss may be reasonable from an ecological perspective, such concerns are not reflected in the RPS. HCC’s experts have been comfortable reading the RPS strictly in some situations, as reflected in JWS1. In other cases, including with Te Awa Lakes, the intent seems to be to protect areas that do not warrant protection.
29. Inevitably, those areas described as SNAs will be difficult, if not practically impossible, to develop. TAL’s expert planning evidence notes these development impacts.<sup>37</sup> The section 42A report acknowledges that SNA boundaries have “significant implications” for affected land.<sup>38</sup> It is acknowledged that “other planning imperatives” should not affect determination of areas that meet the requirements of section 6(c),<sup>39</sup> but case law to this effect also emphasises the importance of a proper factual

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<sup>37</sup> Evidence of Stephen Gascoigne, paragraph 24.

<sup>38</sup> Section 42A report, page 46.

<sup>39</sup> *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council* [2018] NZHC 1069.

assessment of such areas. TAL is willing to have those areas that actually meet the RPS criteria protected to the extent necessary – that is, the 40 metre corridor outlined in its submission. However, expert evidence and ground-truthing against a proper reading of the RPS criteria does not warrant greater protection.

30. Based on the evidence available, and the relevant planning instruments, TAL therefore maintains the position in its submission, that is:
  - a. That the SNA within HEN should be removed from planning maps, because there are existing consents to remove this vegetation; and
  - b. That the SNA within HES should be limited to a 20m corridor each side of the stream, this being sufficient to maintain species protection, and to recognise the “corridor” nature of this SNA.
31. TAL seeks for the relevant SNAs to be altered accordingly.

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Thomas Gibbons  
For Te Awa Lakes Unincorporated Joint Venture, Perry Group, and Horotiu Farms Limited