

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

**FURTHER LEGAL SUBMISSIONS FOR DAVID AND BARBARA YZENDOORN –
NATIONAL POLICY STATEMENT FOR INDIGENOUS BIODIVERSITY**

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MAY IT PLEASE THE PANEL

1. These further legal submissions are made for David and Barbara Yzendoorn, in relation to HCC proposals for the imposition of a Significant Natural Area (“SNA”) on their property at 29 Petersburg Drive, in light of the passage of the National Policy Statement for Indigenous Biodiversity 2023 (NPS-IB). These further submissions are addressed to issues arising from the NPS-IB.
2. The passage of the NPS-IB, and HCC’s response to it, highlights that PC9 was rushed through by HCC before it was ready. A number of submitters have raised concerns about the way in which HCC has assessed properties as being subject to SNAs, and the way in which HCC has applied the methodology in the WRPS.¹ While HCC has claimed that it took the draft NPS-IB into account when preparing PC9, there are clearly issues with HCC’s methodological approach.
3. The further evidence of Ms Galt, for example, suggests that “if mapping is to occur strictly in accordance with the methodology set out in the NPS-IB”, then the property at 29 Petersburg Drive (and the Fonterra Te Rapa site) should “qualify as SNA”.² This comment arises *after* expert conferencing on PC9 has reached a consensus that under the RPS criteria, Fonterra’s site should fall under the exemption for vegetation created in connection with artificial structures;³ and *after* HCC’s planning experts recommended that an easement area be excluded from the proposed SNA on the property at 29 Petersburg Drive, presumably on the basis of the same exemption.⁴ It is understood that no further expert conferencing on SNAs has been called as a result of the introduction of the NPS-IB.
4. Most of the obligations in the NPS-IB fall on local authorities. However, where private land is involved, the ultimate consequences of private land being designated as a Significant Natural Area is that the potential use of the land is significantly impacted. The NPS-IB contains strict language in places. In

¹ It could be surmised that PC9 has been brought forward in this way because of its implications for PC12.

² Supplementary statement of evidence of Ms Buckingham dated 1 September 2023, para 7.

³ JWS Ecology and Planning, 14 March 2023, para 3.5.1.

particular, section 3.10(2) contains strong “avoid” provisions, subject only to limited exceptions.⁵

5. Consistent with this strong “avoid” language is a need for a robust assessment of individual properties and SNAs. Earlier legal submissions have raised issues with HCC’s approach, which is essentially based on concerns about incremental loss, rather than recognition of areas that are actually “significant” and/or “natural”. The mere presence of indigenous fauna and/or flora on a site is not enough to make it an SNA.
6. That is clear from section 3.8(1) of the NPS-IB, which requires a “district-wide assessment” of land in a district, in order to “identify areas of significant indigenous vegetation or significant habitat of indigenous fauna that *qualify* as SNAs”.⁶ Not everything will “qualify as SNA”. There must be significance to an area in terms of the NPS-IB methodology (as well as under the WRPS).
7. Notwithstanding the comments of Ms Galt, it is clear that HCC has *not* mapped SNAs “strictly in accordance with the methodology set out in the NPS-IB”.
8. While policy 6 of the NPS-IB requires the identification of SNAs “using a consistent approach”,⁷ and section 3.8(2)(c) requires verification by inspection “wherever practicable”, it is clear from HCC’s own evidence that this has not occurred. Some sites were assessed by desktop. Some were visited. Mr Dean notes in his evidence, the identification of SNAs was a “largely desktop-based assessment”, and few properties were visited prior to notification: “by no means were all sites comprehensively assessed on the ground”.⁸

⁴ See supplementary statement of evidence of Ms Buckingham dated 1 September 2023, para 21; Statement of rebuttal evidence of Ms Galt dated 12 May 2023, paras 8 – 9.

⁵ Primarily, those in section 3.11 of the NPS-IB, along with various other limited exceptions not applicable to most privately owned land. Needless to say, while the nature of the term “avoid” the NPS-IB has not just been considered, the nature and implications of “avoid” language are discussed in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, including at [93] and [96].

⁶ NPS-IB, section 3.8(1).

⁷ NPS-IB, section 2.2, Policy 6.

⁸ Supplementary statement of evidence of Mr Dean dated 1 September 2023, paras 16-18.

9. Notification then occurred, with the proposed SNAs having immediate effect. By its own accounts, HCC had not undertaken an assessment in accordance with the NPS-IB. But following notification, the onus was placed on landowners to challenge HCC's inconsistent and arguably self-justifying assessments. As we have seen, many submitters have raised serious concerns about how HCC came to identify parts of their property as SNA. "Notify first, ask questions later" seems an apt summary of HCC's approach.⁹
10. Then, expert conferencing determined that some sites fell outside the WRPS methodology used by HCC in its "assessments".¹⁰ HCC has now taken a different view on the application of the exceptions in the WRPS methodology, at the same time as it raises new exceptions within the NPS-IB, and how site-specific SNA provisions could recognise the unique nature of some sites.¹¹
11. That is, it is at this late stage that HCC's experts such as Ms Buckingham raise that other provisions of the NPS-IB may be relevant.
12. For example, it is observed that section 3.11(4) of the NPS-IB applies to the Fonterra site.¹² The same is presumably the case for the proposed SNA adjoining and incorporating the Yzendoorns' property at 29 Petersburg Drive: the broader area outside the property at 29 Petersburg Drive was established as part of the infrastructure associated with a residential subdivision; and the only reason there is vegetation and potential indigenous fauna within the property at 29 Petersburg Drive is because of benign neglect of the site since that time. HCC does not appear to have properly assessed these elements in determining the proposed SNA, presumably because it started as a desktop-based exercise.
13. The NPS-IB also emphasises that the assessment must be done in accordance with principles described in the NPS-IB, including "partnership" with landowners and "transparency" with landowners during the assessment

⁹ Again, this supports the submission that PC9 was notified very shortly before PC12 with the intent of avoiding the intensification that PC12 was supposed to enable.

¹⁰ See eg JWS Ecology and Planning, 14 March 2023, para 3.5.1.

¹¹ Supplementary statement of evidence of Ms Buckingham dated 1 September 2023, para 23.

¹² Supplementary statement of evidence of Ms Buckingham dated 1 September 2023, para 23.

process, including providing draft assessments.¹³ However, many submitters have emphasised that this partnership and transparency with landowners is not what has occurred in Hamilton. Rather, HCC is seeking to impose SNAs, which are of immediate legal effect, without having properly assessed them; and in a manner which means that *after* expert conferencing and hearings has occurred, HCC is seeking to change the basis of its methodology and approach.

14. It is notable that the identification of exceptions (such as that identified by experts in relation to the Fonterra site in the relevant JWS, and those identified in Ms Buckingham's supplementary evidence) was *not* part of HCC's assessments prior to notification. That again shows the serious limitations of HCC's assessment process.
15. Further points that support the Yzendoorns' property at 29 Petersburg Drive *not* qualifying as SNA are outlined in earlier submissions. However, it is no longer clear on what basis, under the methodology in the NPS-IB, that HCC has assessed the Yzendoorn's property as SNA. As such, it remains unclear whether SNA criteria actually apply to the site. However, it is acknowledged that if the Yzendoorns' property at 29 Petersburg Drive is left out of the adjacent proposed SNA, then that will not be the end of the matter. Any development of the site that has adverse effects on indigenous biodiversity will need to be managed under the effects management hierarchy set out in the NPS-IB.¹⁴
16. Given the methodological issues that have arisen across PC9, and the delays with PC12, the best way forward would be for HCC to withdraw PC9, review its methodology and approach, and start again.
17. Failing this, the submitter seeks the exclusion of any SNA from the site.

¹³ NPS-IB, sections 3.8(2)(a) and (b).

¹⁴ NPS-IB, section 3.16(1).

18. The methodological failings of HCC, including:

- a. HCC's failure to properly undertake a district-wide assessment of SNAs before notification;
- b. HCC's failure to apply the principles of partnership and transparency under the NPS-IB;
- c. HCC's failure to properly verify areas by physical inspection;
- d. HCC's failure to apply methodology consistently; and
- e. HCC's failure to properly take into account exceptions applying to sites;

all tell against the proper application of the NPS-IB requirements, and against any SNA being applied to this site. That is, the relief sought by the Yzendoorns is that there be no SNA on their site at 29 Petersburg Drive, Hamilton.

Dated 1 November 2023

A handwritten signature in blue ink, consisting of several fluid, overlapping strokes that form a stylized, elongated shape.

Thomas Gibbons
For D & B Yzendoorn