

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

OPENING LEGAL SUBMISSIONS FOR DAVID AND BARBARA YZENDOORN

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MAY IT PLEASE THE PANEL

Introduction

1. These 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.
2. The extent of comment in the section 42A report for HCC is to note that a submission has been made as to SNA extent, and an acknowledgement that SNAs have “significant implications” for what can be done on affected land.¹ Similarly, HCC’s evidence in chief barely touches on the specific aspects of what is an unusual site, simply noting that it should be retained as notified.²
3. As outlined in planning evidence, the site is subject to a resource consent application for the construction of a duplex dwelling. The site has Natural Open Space (NOS) zoning which the submitter believes was put in place erroneously,³ and in addition to a current resource consent process, relief is being sought under PC12 to seek to have the site rezoned as residential. As the ecological expert evidence notes, the site was extensively assessed in 2020, and again in 2022, and it is established that there is a combination of planted indigenous vegetation and exotic grassland.⁴

Ecological Assessment and RPS Criteria

4. The expert ecological evidence of Ms Andrews for the submitter is that the site contains “likely (although not confirmed)” habitat for at risk lizards and bats.⁵ It is noted that criterion 3 of the RPS requires that an area be “currently habitat”, and it is submitted that it is not clear that this criterion is met. The evidence of Ms Andrews also notes that criterion 11 is met “in the context of the wider landscape”,⁶ though it is unclear what *other* site identified as significant that it is necessary to protect, as a close reading of criterion 11 requires.
5. The expert evidence of Ms Andrews also notes that if the planted indigenous vegetation is classified as an SNA, then even before mitigation measures, the ecological effects of the loss of some vegetation would be “low to moderate”.⁷ This evidence also notes that a peer review of the site assessment established “limited habitat value”, and that removal of some vegetation was unlikely to have a notable effect on terrestrial or aquatic values.⁸ Rebuttal evidence for HCC also accepts that in the context of

¹ Section 42A report, page 46.

² Evidence of Hamish Dean, page 78.

³ See submission.

⁴ Evidence of Phoebe Andrews, paragraphs 11-14.

⁵ Evidence of Phoebe Andrews, paragraph 22.

⁶ Evidence of Phoebe Andrews, paragraph 22.

⁷ Evidence of Phoebe Andrews, paragraph 23.

⁸ Evidence of Phoebe Andrews, paragraph 26, citing comments from the peer review.

proposals to develop the site, the ecological effects of removing 230m² of planted vegetation can be addressed.⁹

6. The evidence establishes that the exotic grassland is of “negligible ecological value”.¹⁰ Further, while HCC’s dataset refers to various other RPS criteria, there is no evidence that these apply in respect of the site.
7. Therefore, it is submitted that it is ultimately unclear as to whether any RPS criteria really apply.

Easement

8. The expert planning evidence for the submitter identifies that the site is subject to an easement that restricts planting.¹¹ HCC’s planning expert has acknowledged this, and agrees that SNA c26 should be amended to exclude the area subject to the easement.¹²



Figure 1: Approximate boundary of easement on 29 Petersburg Drive

9. It is submitted that this easement area should be removed from the SNA.
10. The easement is noted to be for a right to drain water.¹³ With respect to the planted indigenous vegetation around this easement area, it is unclear whether this was put in place in connection with artificial structures, which would place it within one of the key exemptions to the RPS criteria.¹⁴ This amplifies the submission that the applicability of RPS criteria remains unclear.

⁹ Rebuttal evidence of Hamish Dean, paragraph 12.

¹⁰ Evidence of Phoebe Andrews, paragraph 20.

¹¹ Evidence of Jacob Robb, paragraph 22.

¹² Rebuttal evidence of Laura Galt, paragraph 9.

¹³ Rebuttal evidence of Laura Galt, paragraph 8.

¹⁴ See Waikato Regional Policy Statement, APP5, and the comments in JWS1, paragraph 3.5.1.

Consent Application

11. The context of the site includes the extensive ecological assessment work that has already been done. Planning evidence establishes that a consent application for the site has been lodged, and is “well advanced”.¹⁵
12. This would clear some of the site for the construction of a duplex, with replacement vegetation.¹⁶ As noted above, there is a consensus of ecological evidence that this limited removal of vegetation would have minimal ecological effects, and those effects that did arise could be addressed.¹⁷

Factual Assessment

13. More broadly, the submitter questions whether this is really a “significant natural area”. The ecological evidence recognises that the site comprises both planted indigenous vegetation and exotic grassland, the latter with negligible ecological value. The suggested matters that meet RPS criteria are unconfirmed or uncertain – likely or potential, rather than actual. Case law is clear that determining whether an area that meets the requirements of section 6(c) of the RMA involves a factual assessment.¹⁸
14. 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”,¹⁹ 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”.²⁰ This approach leads to an impression that the view of HCC’s experts is 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.²¹
15. However, PC9 must “give effect to” the RPS. The RPS criteria of relevance are items 3 and 11. However, the extensive site specific evidence is largely non-confirming in respect of RPS criteria and broader ecological values, with habitat being “likely (although not confirmed)”, despite extensive site investigations in the context of a specific resource consent process, as opposed to the ‘broad-brush’ of HCC’s assessments.

¹⁵ Evidence of Jacob Robb, paragraph 16.

¹⁶ Evidence of Jacob Robb, paragraph 17.

¹⁷ Evidence of Phoebe Andrews, paragraph 23; rebuttal evidence of Hamish Dean, paragraph 12.

¹⁸ 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.

¹⁹ Evidence of Hamish Dean, paragraph 42(c).

²⁰ Evidence of Hannah Mueller, paragraph 28.

²¹ See eg the evidence of Hamish Dean, paragraph 47, and evidence of Hannah Mueller, paragraph 28.

16. It is submitted that a factual assessment of the site tells against an extensive SNA being imposed.

Comment

17. Putting these points together, it is apparent that:
- a. There is a consensus among the planning experts that the presence of an existing easement should be taken into account, and the SNA should be removed in respect of the easement area, as the presence of the easement means that planting should not have occurred.²²
 - b. The significance of the ecological values of the site remain somewhat uncertain. There is a consensus among experts that the exotic grass areas are not significant.²³
 - c. In relation to *planted* indigenous vegetation, the best evidence available is that in there *may* be habitat for indigenous cooper skink, and that bats *may* forage in this area: these are regarded as “likely (although not confirmed)”.²⁴ While expert evidence for Council is that the indigenous vegetation on the site “is significant”,²⁵ the extent of Council’s assessment is unclear. It must be remembered that RPS criterion 3 requires that the area is “currently habitat”. It is far from clear that this criterion is met, nor that criterion 11 is met, particularly with the SNA reduced by the easement area.
 - d. There is a consensus among the ecological experts that the removal of a part of the existing planting will have a “low to moderate” effect, potentially “very low”, and/or will not have a notable adverse effect, particularly (or perhaps as long as) if replacement planting is done to address effects.²⁶

Conclusion

18. These points appropriately feed into the decisions sought by the submitter.
19. First, it is a matter of consensus that the easement area identified in rebuttal planning evidence by HCC should be removed from the SNA and a decision to that effect is sought.

²² Evidence of Jacob Robb, paragraphs 22-24; rebuttal evidence of Laura Galt, paragraph 9.

²³ Rebuttal evidence of Mr Dean, paragraph 11; evidence of Phoebe Andrews, paragraph 20 and table 1.

²⁴ Evidence of Phoebe Andrews, paragraph 22 and table 1.

²⁵ Rebuttal evidence of Hamish Dean, paragraph 11.

²⁶ Evidence of Phoebe Andrews, paragraphs 23-25, and 26-28 (citing peer review); and rebuttal evidence of Mr Dean, paragraph 12.

20. Second, it is apparent that once this area is removed, few if any issues arise from the removal of that part of the SNA north of the easement area. This is particularly the case given that:
- a. The SNA will remain in place at the south of the easement area.
 - b. The ecological evidence relating to the site emphasises likely or potential but unconfirmed habitat, not actual or current habitat as RPS criteria 3 requires.
 - c. If that part of the SNA north of the easement area is removed from planning maps, there is expert consensus that any effects that might arise from the removal of such planted vegetation of that area are low and can be appropriately managed or addressed.
 - d. A resource consent process is currently underway, based on existing assessments and peer reviews.
21. As such, to the extent an SNA exists on its private land, the submitter seeks the removal of the SNA both in respect of the easement area, and in respect of that area north of the easement area.

Dated 17 May 2023



Thomas Gibbons
For D & B Yzendoorn