BEFORE THE COMMISSIONERS APPOINTED BY THE CENTRAL OTAGO DISTRICT COUNCIL

UNDER	the Resource Management Act 1991
IN THE MATTER	of RC230179 an application for a 33-lot subdivision at Rocky Point on Tarras-Cromwell Road (SH8)
BY	**TKO PROPERTIES LIMITED**
	Applicant

FINAL REPLY LEGAL SUBMISSIONS FOR THE APPLICANT

Dated: 13 July 2025

TODD & WALKER law
LAWYERS | NOTARY PUBLIC

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MAY IT PLEASE THE COMMISSIONERS:

Introduction

[1] This final reply of legal submissions is presented on behalf of TKO Properties Limited (**Applicant**) in respect of consent application RC230179 (**Application or Proposal**).

[2] The Applicant provided a substantive right of reply summarising the substantive legal and evidential issues of the application on 22 April 2025. This 'final' reply does not cover the same ground, but rather, only refers to the most pertinent matters of legal contention between the parties. It also addresses the matters set out in Minute 12 of the Hearings Panel, and the legal advice received from the Panel.[1]

[3] Specifically, the reply will address:

(a) the relevance of the Conservation Covenant (**covenant**) on the Panel's assessment of this application under s 104 of the Resource Management Act 1991 (**RMA**), and whether the covenant could or should play any role in determining whether consent should be granted;

(b) if it could play any such role, what its terms are;

(c) the *Friends of Conical Hill* case; and

(d) other matters replying to Minute 12.

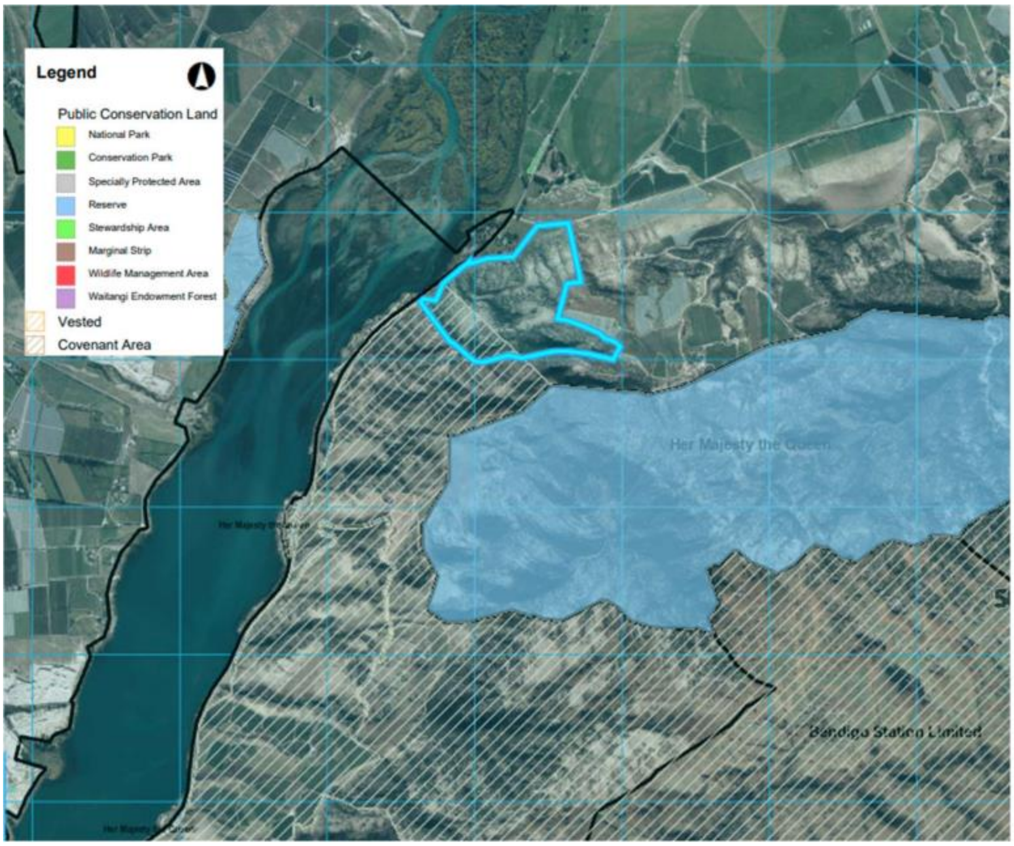
Is the covenant relevant?

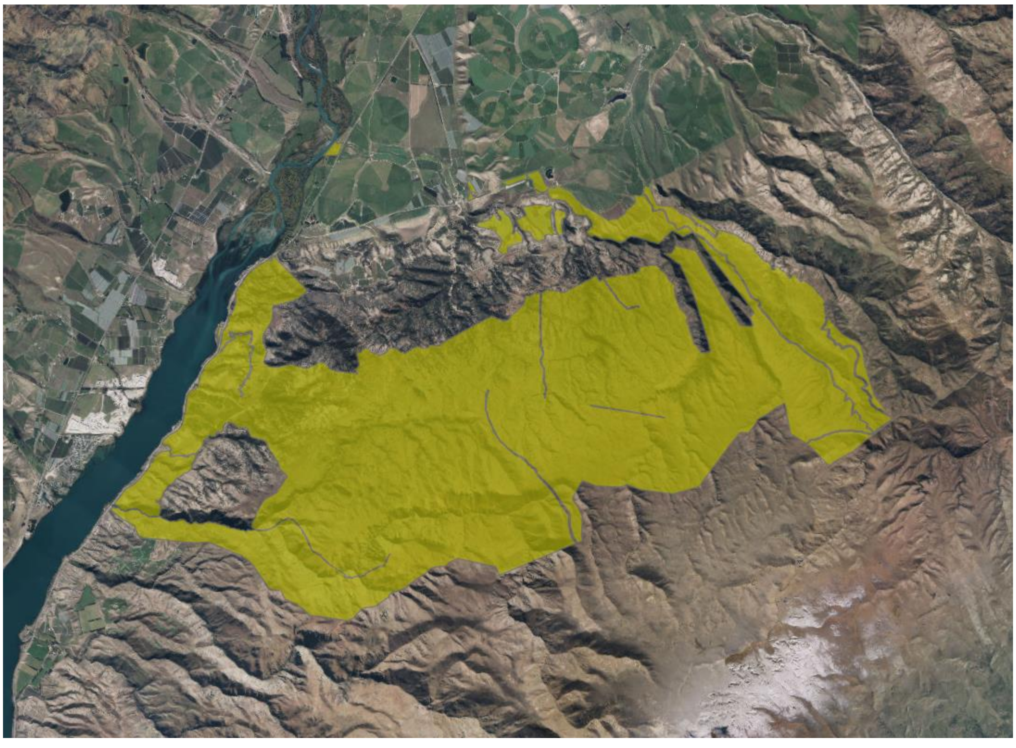
Area of the covenant

[4] It is respectfully observed that the Hearings Panel has been put in a somewhat difficult position through this hearing process, by receiving complex and multifaceted legal arguments from conflicting sides. The covenant has had significant airtime. This is despite the fact it applies to only a small portion of the development site (**Site**), within which only a

[1] Prepared by Ms Macdonald, dated 24 June 2025.

very small portion of woody vegetation will need to be removed. The broader covenant area however spans a much larger area of the district:





Terms of the covenant

[5] For convenience, the terms of the covenant are summarised again here, and provide:

(a) the landholders may graze the land to an extent consistent, in the opinion of the Minister, with the objectives of the covenant (which include the protection and enhancement of the natural character of the land);

(b) the landowners must keep the land free of noxious plants, rabbits, vermin, and unsightly material; and

(c) the landowners must obtain Minister approval, with such approval not to be unreasonably withheld, for:

(i) buildings and structures near historic sites;

(ii) earthworks and cultivation near historic sites;

(iii) tree planting near historic sites;

(iv) mining activities; and

(v) removal of woody vegetation.

Context of the covenant

[6] The context of the covenant includes, that the landholders are farmers and may farm the land.

[7] The landholders agree to protect the natural character of the land and its ecosystems, including by keeping the land free from noxious weeds and rabbits as far as practicable and in accordance with the terms of the covenant.

[8] The covenant makes specific provision for "…removal of some quantity of woody vegetation…" with the approval of the Minister such that applications for clearance were in the minds of the parties when entering into these reciprocal arrangements.

[9] Notably the covenant contains no specific prohibitions as such. Even the restricted activities may be undertaken with ministerial approval.

[10] Importantly, the conservation goals are in the context of grazing animals (typically sheep and cattle but possibly goats and alpaca) ranging across the land to forage for food and thereby creating grazing tracks across and about natural foliage with resulting changes to flora and surface soils. The expectation is for a typical Central Otago Upland Farming activity, including usual cultivation for winter feed or drought crops rather than a pristine natural environment of upland flora and fauna.

[11] Ms Macdonald's legal advice for CODC does not consider this crucial context.

The covenant as a relevant "other matter" under s 104(1)(c) of the RMA

[12] Both the Department of Conservation (**DoC**), and now Ms Macdonald in, consider the covenant to be a relevant "other matter" under s 104(1)(c). Ms Macdonald, like DoC, seeks to rely on the High Court case of *Congreve v Big River Paradise*,[2] which states that private property rights can be relevant matters under s 104(1)(c) for determination, but a decision maker will only make such determinations where that is relevant, and reasonably necessary to, resolving an issue under contention.[3]

[13] The Applicant's Right of Reply already acknowledged the *Congreve* case.[4] The CODC legal advice simply cites the same case, the same citation from the Court, and makes no reference to the other more recent authorities cited by the Applicant on the issue. It also, like DoC's submissions, fails to provide the complete passage from the case:

> [30] The principle that I take from these authorities is that in considering applications under the Act a consent authority may take into account, and also determine, private property rights to the extent that those rights are relevant to and reasonably necessary for the purpose of resolving an issue

[2] And DoC further relied on *Deegan Southland Regional Council* ENC Christchurch C110/98, 30 September 1998.

[3] *Congreve v Big River Paradise Ltd* High Court Auckland CIV-2005-404-6809, 4 August 2006 at [30].

[4] At [68]-[69].

> arising under the Act. **It will not do so, however, if the determination of such rights is not relevant and reasonably necessary to resolve such an issue.**[5]
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> [Emphasis added which was omitted by Ms Macdonald]

[14] It is notable and unusual that both counsel for DoC and Ms Macdonald omit the same important part of the quote and the context of the *Congreve* case which lead to this determination.

[15] The High Court in *Congreve* found the consent authority that determined the resource consent application in that case was correct to find it did not have to take a covenant into account when making its determination.[6] In making this finding, the High Court traversed previous case law on the issue which included:

(a) *Saunders v Northland Regional Council* 40/98, 27 April 1998;

(b) *Schmuck v Far North District Council* A26/2000, 10 March 2000;

(c) *Deegan v Southland Regional Council* C110/98, 30 September 1998.

[16] The only one of those three cases which did consider the terms of private property rights was the *Deegan* case, which was a very specific context where the Council's strike-out application rested on the terms of a private instrument. In that case the terms of a private agreement which pertained to approvals for an activity given was an 'issue' obviously necessary to resolve by the decision maker. It was not an issue of the private instrument being a relevant other matter under s 104(1)(c), but rather it constituting an approval under s 104(3)(a)(ii). This was identified at [70] of the Applicant's Right of Reply. Ms Macdonald and DoC have not explained the context of these cases.

[17] So, whilst *Congreve* does not (and respectfully could not, given the wording of s 104(1)(c)), rule out the possibility for a decision maker to determine private rights where the determination of such is relevant and

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5 This was also pointed out in the Applicant's Right of Reply at para [69] as a failing of the DOC submissions.

6 *Congreve* at [39]-[41].

reasonably necessary to resolve an issue, it is not authority for the proposition that private property rights are something that are in fact reasonably necessary for determining environmental effects or that they should be taken into account as a matter of course or as a mandatory matter.

[18] This point is emphasised by the significant body of case law subsequent to *Congreve* which generally dismisses the relevance of private or non-RMA instruments when determining resource consent applications. These include:

(a) The Court of Appeal in: *MacLaurin v Hexton Holdings Ltd* [2008] NZCA 570 (at [47]):

> What consent authorities are concerned with is the proposed activity's effects, not the nature of the applicant's legal rights or interest in the particular land.

(b) The Environment Court in: *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403:

> It has long been settled law that consent authorities and this Court on appeal are concerned with a proposed activity's effects, not the nature of an applicant's legal rights in respect to the particular land. Disputes about private property rights are outside the Environment Court's jurisdiction and are not generally considered in determining a resource consent application.

(c) The High Court in: *Action for Environment Inc v Wellington City Council* [2012] NZHC 1687:

> [24] …The general lawfulness of a proposed activity is not a matter referred to in s 104. Moreover ... there is also clear authority that questions relating to the right to use land in a particular way, as a matter of private property rights, are not issues which are properly the concern of the Environment Court.
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> …

> [27] The provisions of s 104(3)(c), which set out that resource consents may not be granted contrary to certain sections of the RMA itself, any Order in Council in force under s 152 of the RMA, any regulations under the RMA and any Gazette notice referred to in certain provisions of the Foreshore and Seabed Act 2004, provide further support for that interpretation.
>
> …
>
> [60] The argument for AtE was that the use of the words "stands, pavilions, gymnasiums and other ornamental buildings" in earlier legislation counted against the Council having the power to provide for the erection of a building such as Badminton Hall. Such a building does not come within the permitted types of buildings, as those are buildings directly associated with the use of Town Belt land for outdoor recreational purposes. That had been made clear by s 53(g) [Reserves Act 1977] with the specific reference to such buildings and structures as were "associated with and necessary for the use of the reserve for outdoor recreation".
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> [61] I acknowledge there would appear be something in that argument as a matter of interpretation. **However, I think at that level of detail those provisions are outside the proper scope of the Environment Court's matters for consideration under the RMA, as they are very clearly land use constraints found in legislation other than the RMA. Moreover, and as the Council fairly pointed out, at the end of the day and if that argument is right, the Council may pursuant to the proviso, approach the Minister for his consent to erect "buildings and structures for public recreation and enjoyment not directly associated with outdoor recreation".**[7]
>
> [Emphasis added]

[19] Ms Macdonald’s legal advice, simply adopting part of [30] of the *Congreve* case in isolation, with no context of the decision and no reference to the subsequent body of case law, does not assist the Commissioners further.

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[7] The Applicant noted in closing oral submissions contrasted the different type of references to the Town Belt Deed 1873 incorporated into the plan in question in *Action for the Environment*, as criteria for consideration in discretionary activities, compared to general background references to the tenure review process in the CODC Plan.

Covenant as a means of protecting s 6 values

[20] The DoC submissions and CODC legal advice draw inferences from introductory sections of Part 4.5 of the District Plan that the covenant becomes a relevant matter in this way, as a method to protect RMA s6(c) values.[8]

[21] Ms Macdonald then concludes, on the basis of these inferences, that the covenant "is a method envisaged by the Plan to protect s6(c) values".[9]

[22] The Applicants agree the covenant is a method envisaged by the Plan to protect s 6(c) values. What that does not mean, however, and where DoC and Ms Macdonald appear to have strayed in their reasoning, is that the covenant becomes some kind of de facto District Plan provision. The whole point of the District Plan permitting vegetation clearance and defaulting to protecting the effects of such clearance by way of private covenants is to remove issues relating to such effects from the resource consent process. Instead, the effects are dealt with via the separate covenant approval process (or whatever might be agreed between DoC and the owner of the property that has been converted from pastoral lease to freehold).

[23] As the *Forest and Bird* case expressly states, the drafters of the Plan intended to separate out that private process from the remit of the District Plan.[10] To read the covenant back into the Plan as a method at the consenting stage or through s 104(1)(c) would run contrary to both logic and that clear drafting intention.

[24] Further, if the Plan had intended for private covenants to apply as a Plan method, it would have done so more expressly rather than only by reference through introductory or explanatory statements.[11] The fact it

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8 S 6(c) RMA: the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

9 CODC legal advice, 24 June 2025 at 8.

10 Right of Reply, at [40] in reference to *Royal Forest and Bird Protection Society Inc v Central Otago District Council* ENC Auckland A128/2004, 23 September 2004 at [21] – [25] and [44]–[51].

11 From which Ms Macdonald can only derive inference.

did not do so, and as the *Forest and Bird* case shows, the separating out pastoral leasehold lands to be protected through separate and private mechanisms, was a deliberate and intentional extraction of such land from the Plan's section 6(c) regime.

Covenant as a means of assessing whether to apply the permitted baseline

[25] Ms Macdonald says:[12]

> While the Plan may exempt the covenant area from any requirement to obtain a resource consent for vegetation clearance per se, it does not follow that there is no legal constraint on vegetation clearance within the covenant land or a lack of protection of s6(c) values. As we discuss below, this is a matter of some relevance to the application of the permitted baseline, and with it, the Panel' s evaluation of the adverse effects of the removal of indigenous vegetation from the covenant area in particular.

[26] This point is understood to mean: even though the Plan permits vegetation clearance, there are other legal constraints on vegetation clearance which make it inappropriate to apply the permitted baseline.

[27] With respect, that cannot be correct in light of the wording of s 104(2which expressly refers to activities permitted by a National Environmental Standard (**NES**) or a Plan. It does <u>not</u> require an activity to be permitted in the context of other legal instruments. Accordingly, and as set out in the Applicant's Right of Reply, the concept of a permitted baseline is solely a question of what are permitted and non-fanciful activities per a national environmental standard or the Plan.[13]

[28] To examine whether such activities might be permitted in other contexts, beyond a Plan or an NES such as in a private covenant, is expressly contrary to the clear legislative drafting of s 104(2) and its codified intention to allow decision makers to have regard to permitted activities where comparative assessment of permitted verses adverse effects would be helpful.[14].

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12 CODC legal advice at 10.
13 Right of Reply, at [46] – [47].
14 Ibid, at [23].

[29] To suggest that a private covenant is relevant to a s 104(2) assessment as the CODC legal advice does, is not just a stretch of the limits of credibility but actually calls for a rewrite of the plain and ordinary meaning of the words of the section.[15]

The covenant as relevant to implementation of the consent

[30] At paragraph 15, the CODC legal advice further observes that the covenant may have relevance when considering the ability of the Applicant to give effect to conditions that propose replanting on the offsetting sites, given DoC's position is that the covenant does not permit the same and a third-party consent would be required.

[31] This runs contrary to the well-established practice under the RMA, alluded to in the case law above, that obtaining permissions required as a prerequisite to implementing a consent is not a barrier to the grant of consent under s 104. If an Applicant requires further and separate approvals in order to give effect to the consent, this does not change the assessment under s 104(1), it is simply a post-consent (and a risk for the Applicant) to ensure it obtains those approvals.

[32] The CODC legal advice neglects the authorities which support this accepted practice: for example *Action for Environment Inc v Wellington City Council* [2012] NZHC 1687 as cited above at [13], and relying on *Coleman* v *Kingston* HC AK API03-SWOO, Hammond J, 3 April 2001:

> [28] ... the Resource Management Act floats, rather like oil on water, across the top of ownership rights without affecting the underlying substance. The. Resource Management Act 1991 and the Property Law Act 1952 have different objectives and do not conflict.

[33] Applying the covenant at this stage to presuppose a later DoC approval process would also subvert the authority of that process in which the Minister's consent cannot be unreasonably withheld.

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15 Contrary to s 10(1) Legislation Act 2019.

Any other ways the covenant might be relevant?

[34] For the reasons explained, the covenant is not relevant to protecting indigenous vegetation values in the consenting context. Nor is it relevant to the permitted baseline. Nor is it relevant in terms of consent implementation where another statutory process applies. That leaves the question: if the covenant is something that is reasonably necessary to determine an issue (being the overall application and its environmental effects), then why? The Applicant says there is no good reason.

[35] Even if the Panel were to apply the covenant as a relevant other matter (which has no legal support), there is almost no explanation or analysis in the CODC legal advice as to how the covenant is reasonably necessary to determining an RMA issue in contention. In terms of determining effects on the environment under s104(1), the covenant does not assist with interpretation and application in any way, beyond the effects themselves, as traversed in evidence and the terms of the Plan, the National Policy Statement on Indigenous Biodiversity 2023, and purpose of the RMA.

The terms of the covenant

[36] The Applicant's Right of Reply set out 11 paragraphs of explanation as to the terms of the covenant, and why DoC's interpretation should not be favoured.

[37] By contrast, the CODC legal advice simply adopts the DoC interpretation of the covenant within two sentences and dismisses the Appellants' interpretation as "cursory" with no further explanation, analysis or weighing of the respective positions. Again, with respect, this does not take matters any further or assist the Panel in weighing the competing opinions it has before it.

[38] Given that the terms of the covenant is clearly a contentious issue (although to be clear, the Applicant says it is ultimately of no relevance to the Panel's assessment under s 104 for the reasons set out above) and to assist the Panel, further detail on the interpretation of the terms of the covenant is again set out below.

What is the plain and ordinary interpretation of its terms?

[39] Starting with the proper understanding of the empowering Act (the Reserves Act 1977), the Applicant's position is that s 77 is an enabling section, allowing landowners to enter a conservation covenant on specific terms to achieve conservation outcomes. These include 'to preserve the natural environment, or landscape amenity, or wildlife or freshwater-life or marine-life habitat, or historical value'. How the terms of the covenant are so agreed between the parties to achieve those outcomes is a key matter. That enabling section does not and cannot override the terms between the parties which impose rights, responsibilities, and restrictions.

[40] To what extent the land is preserved as referenced in s77(1) is an evaluative matter, not a bottom line to be applied as a prohibition over the terms of the covenant.

[41] Section 77(3) of the Reserves Act references the application of offence provisions in s 93-105 of the Act apply to the land. This is subject to a clear carve out within s 77(3) that such provisions are subject to the terms of any covenant:

> S 77(3) While any conservation covenant under this section remains in force, sections 93 to 105, as far as they are applicable and with the necessary modifications, shall apply to the land affected thereby in all respects as if it were a reserve, notwithstanding that the land or the interest of the lessee may be sold or otherwise disposed of:
>
> provided that in their application to any such land or interest sections 93 to 105 **shall be read subject to the terms and conditions set out in the conservation covenant.**
>
> [Emphasis added]

[42] The s 77(3) words, "…as far as they are applicable…" are relevant in the context of this covenant where restrictions are confined to places where there are historic sites or areas of woody vegetation (e.g. kanuka). They are the only places within the covenant area where the Reserves Act

offences (of s 94) could conceivably be imported but even then the terms of the covenant are to prevail.

[43] Section 94 refers to over 15 listed criminal offences for unauthorised activities on reserve land. It is one of the sections to be read subject to the terms of the conservation covenant. In that regard the listed offences only arise where there is no existing Ministerial approval. The offences themselves are wide ranging, from planting, to building, to lighting fires and vegetation clearance.

[44] No offence occurs however, where the Minister has given authority for such activities either explicitly or through limitations within a covenant. This covenant, for example only restricts the building of structures near historic sites. Elsewhere, the covenant is silent on the construction of structures and there would be no s 94 offence in respect of structures built away from historic sites.

[45] Similarly, the covenant only restricts cultivation near the same historic sites. The covenant is silent as to cultivation in other areas where it can occur without ministerial approval.

[46] In other words, the covenant does not set up a de facto reserve where s 94 offences might occur, other than where there is an existing historic site or where woody vegetation is growing.

[47] The DoC interpretation would mean that there is an express pathway for authorisation of buildings, fences, and trees near historic sites, and removal of woody vegetation, but not elsewhere on the covenanted land. Put another way, under the express terms of the covenant, one may erect buildings near historic sites subject to obtaining DoC approval not unreasonably withheld but would be prohibited by a s 94 offence to otherwise construct a building anywhere else on the Site without any proximity to historic sites. That interpretation is perverse. The link between s 77 covenants and the s 94 offences cannot reasonably have been intended to apply in that way.

[48] In short, it is untenable to suggest that the balance of the covenant land remote from woody vegetation or historic sites is to be treated as a de facto reserve.

Is this interpretation of the Covenant consistent with its objectives?

[49] DoC relies on the chapeaux of clause C of the covenant referencing the agreement with DoC to manage land for a range of conservation outcomes, including protecting and enhancing natural character and representative parts of ecological character. That is in the nature of general introductory text, and which must give way to the specific terms.

[50] By way of contrast, immediately below clause C the covenant states:

> … in accordance with s 77 of the Reserves Act 1977 the landholders and the Minister mutually covenant that the land shall be managed for the purposes and objectives listed in recital C above, **and in particular on the following conditions…**
>
> [Emphasis added]

[51] The conditions (or terms) go on to set out specific rights and responsibilities. It is a fundamental principle of interpretation that the general gives way to the specific when the specific is clearly expressed, and to read such conditions as subject to broader obligations inferred from the clause C 'standard form' headlines could effectively render those specific terms useless. On the DoC interpretation, there would be no point in landowners agreeing on certain limitations or approval processes if the overall interpretation was that, above and beyond those, activities were to be effectively prohibited by virtue of being captured in the list of offences set out at s 94 of the Reserves Act.

[52] Clause 3 of the covenant envisages a specific approval process which protects some, not all, ecological and heritage values of the Site. Ministerial approval in respect of those aspects must not be unreasonably declined. Notably, such approvals do not just relate to the expressly permitted activity of grazing. For example, one does not need to erect building structures near historic sites for grazing, nor does one need to prospect for minerals or coal, for grazing. For the covenant to express a pathway for such activity approvals, it is clear that activities beyond the expressly permitted grazing are not prohibited in any broader sense.

[53] As noted, s 94 of the Reserves Act lists criminal offences for certain activities on reserves. It does not state that Ministerial approval must not be unreasonably withheld. By way of contrast, the covenant does this at clause 3(4). The consequence of applying DoC's interpretation means that approvals for identified important historic and ecological values are somewhat easier to obtain than the trigger for any other broadly termed offences under the RMA. This cannot be the intention of the covenant.

[54] The DoC interpretation would also lead to a number of unusual consequences:

(a) A landowner is permitted to graze, but not permitted to plant any vegetation for animals to graze on.

(b) A landowner can undertake mining activities subject to approval, but it would be restricted from doing so separately through any other offences in s 94 of the Reserves Act, which would also be necessary for prospecting or mining.

(c) A landowner cannot enhance ecological values by planting woody vegetation, even though the clear intention of the covenant is to preserve the same vegetation.

(d) A landowner would commonly irrigate to allow pasture growth for grazing, however the issue of stormwater increasing exotic vegetation and displacing indigenous vegetation was a concern raised by DoC, but which is unlikely to be restricted by the covenant.

[55] DoC seeks to broaden the covenant by overlaying ss 93-105 of the Reserves Act to argue that reserve status is conferred. That can only be in respect of the actual areas or features that the covenant seeks to protect and even then, Ministerial approval cannot be unreasonably withheld. Therefore, to the extent that reserve status is conferred, it would have to be limited to the plain and ordinary meaning of the language used in the covenant. The covenant cannot have been intended to create a de facto reserve across the entire covenant area. To do otherwise would be to subvert the obvious intent of the covenant.

Is there any available alternative interpretation?

[56] The DoC interpretation of the covenant essentially flips a plain and ordinary reading of the terms on its head by treating those terms as clarification drafting rather than express restrictions and prohibitions.

[57] This is not consistent with:

(a) previous CODC consents which have been approved in the covenant area and subject to advice notes alerting consent holders to obligations to be achieved, or approved of, separately through the covenant process;[16] or

(b) DoC's previous approvals for woody vegetation clearance on the covenant land.

[58] On the latter, for example, on 18 May 2023 the Minister granted this Applicant an approval for removal of Manuka trees to construct a residential building platform on different land but within the same covenant area. The area of approved clearance is south of the Site but within the 68ha area "secondly referred to in the schedule" of the covenant – which pertains to removal of woody vegetation specifically.

[59] The approval letter (attached to this Final Reply) explicitly allows:

(a) removal of no more than 20 manuka trees, to allow for construction of a residential building platform within subdivision Lot 6 - Lot 2 DP 561457;

(b) subject to terms and conditions, which includes new replacement planting of Manuka trees; and

(c) a further warning that, pursuant to conditions 3 (1) (a,b,c,d) of the Conservation Covenant, no erection of any fence, building or other improvements, soil disturbance or tree planting near this site is to be undertaken without the Minister's prior approval.

[60] Had the DoC interpretation now advanced in this case been correct, it is unclear how or why the Minister could approve woody vegetation

[16] For example, RM210148 Bendigo Hills consent

clearance for a building platform, without also referencing the need to provide further approvals under s 94 of the Reserves Act. Instead, and as the Applicant says is logical, it only refers to the terms of the covenant as to restrictions on clearance of woody vegetation and historic sites.

[61] If the DoC interpretation of the covenant were reliable, this 2023 approval would also have had to expressly authorise further Manuka planting as an exception to the offences of s 94 of the Reserves Act but the Minister did not see a need for that, nor should he have.

[62] At the very least, the approval obtained demonstrates the Applicant's point above, that obtaining a separate Ministerial approval for implementation of the consent will be a necessary extraneous process for the Applicant to undertake to implement consent. And, if it does not go to the permitted baseline, and it is not a method of protection in the Plan, it does not assist the Commissioners in resolving an issue as to overall environmental effects under s104(1) RMA.

Conclusion on covenant

[63] To synthesise the Applicant's legal position in respect of the covenant, it is summarised that:

(a) The terms of the covenant are clear and concise; in relation to the Site, they provide a regime for landowners to keep land free from certain pest plant and animal species, free from rubbish and other material, without otherwise obtaining DoC approval a restriction on buildings, cultivation, or tree planting near historic places, restriction of mining activities, and for DoC approval of woody vegetation removal which will not be unreasonably declined.

(b) The covenant does not, beyond its specified terms, impose more stringent land management requirements enforced for reserves. Sections 77, and 93-105 of the Reserves Act 1977 are clearly subject to the terms of the covenant itself and to import the opposite would subvert the intention of the parties entering the covenant. It cannot logically be the intention of a covenant seeking to protect woody vegetation, that the same cannot be planted, as an ecological offset or enhancement.

(c) The covenant is not a relevant other matter in terms of s 104(1)(c) of the RMA in this case because the Plan has intentionally separated out a private management regime for free-holded land, rather than directing decision makers to read such 'back in' through decision making on environmental effects.

(d) Even if it were a relevant other matter and reasonably necessary to take into account to resolve an issue, it does not assist the Commissioners' determinations under s 104(1) because it would only be presupposing the DoC approval process that would subsequently be required by the consent holder. Furthermore, it does not water down the positive benefit of long term and strengthened protection of all of the Site (including the covenant area) by way of volunteered conditions to covenant the Site's 'protection areas'.

[64] As demonstrated in the previous approval granted to the Applicant in 2023, previous CODC consents issued, and the breadth of case law above, the Commissioners can be satisfied that issuing consent subject to obligations required to be adhered to in the covenant will send the Applicant down a requisite and separate approval pathway with DoC.

[65] That approval pathway provides for the Minister to enable woody vegetation clearance, or structures near historic sites, and such a decision calls for a reasonable approach, which would have to include the potential for biodiversity offsetting / compensation in relation to an overall neutral (no loss) outcome, as supported by the *Friends of Conical Hill Case* and Dr Wells' approach, which CODC legal advice agrees is consistent with the case law.

Friends of Conical Hill

[66] As set out in its Reply, the Applicant says Dr Wells' approach to avoiding or mitigating effects on indigenous biodiversity is consistent with the Environment Court's decision in *Friends of Conical Hill*.[17]

[17] *Friends of Conical Hill v Hurunui District Council* [2024] NZEnvC 324.

[67] Ms Macdonald agrees with this position but does not agree with the Applicant's criticisms of the DoC and CODC ecological experts' view that the activity should be avoided because offsetting is not available and the compensation is not sufficient.

[68] The Applicant maintains its submission that the Environment Court's approach to compensation and offsetting supports the position it and Dr Wells have taken. Significant lengths have been taken to either offset and / or compensate for the loss of indigenous vegetation on the Site. It is not correct to say, as Messrs Harding and Ewans do, that if offsetting cannot be achieved, the entire activity should simply be avoided.

Response to minute 12 points 3(a) and (b)

[69] The Panel sought the Applicant's response to the following matters:

> The information conveyed by Department of Conservation, and Kate Wardle, that resource consent application (RC 210148V2) has been granted with amended conditions on an adjoining site on Lakefront Terrace also owned by the Applicant. This increases the housing density on that site which hosts some of the proposed off-site compensation sites for Rocky Point. The Panel is interested to know how that consent including the amended condition 20, as well as the site layout and intended development on the site, affects the proposed mitigation being offered as part of the application we are now considering.
>
> The suggestion by Kate Wardle that the proposed Lots 4, 5 and 6 be deleted to protect the Nationally Critical *Ceratocephala pungens* habitat. The Panel is interested to know the Applicant's response to this suggestion.

Resource consent RC210148V2

[70] If this application is approved, there is a duty to undertake offset and compensation planting and maintain and protect cushionfield areas within the Bendigo Hills land (and the application Site) prior to Section 224c certification, as required by draft Condition 15.

[71] The Bendigo Hills consent as recently varied (RC210148V2) recognises this, and in the event that the Rocky Point consent is granted, requires the offset and compensation planting required by Condition 15 (a total of

6.2ha, plus the 0.57ha) be undertaken prior to Section 224c certification of the lots approved under RC210148V2, as per Condition 20 of that consent. In the event that RC230179 is not approved, Condition 15 requires a total of 1ha of planting be established on the site.

[72] Condition 20 of RC210148V2 states:

> *<u>Compensation Planting</u>*
>
> *Prior to Section 224(c) certification, the consent holder must provide evidence to the Chief Executive that compensation planting has been undertaken within the site consistent with either of the following circumstances:*
>
> > *In the event that RC230179 on the adjoining site at Rocky Point is granted and given effect to, the plantings required by the conditions of that consent have been undertaken and an additional 0.57ha of plantings established over exotic- dominant vegetation adjacent to the westernmost planting site referred to in that consent as "Hemlock Gully"; or*
> >
> > *A total of 1ha of plantings established over exotic-dominant vegetation in the westernmost planting site referred to as "Hemlock Gully".*
>
> *The compensation planting must be comprised of clustered plantings of diverse woody shrubland communities of the species listed below, with an approximate ratio of woody vegetation plantings to open ground cover of 65:35:*

[73] This condition requires either an additional 0.57ha of planting adjacent to the Hemlock Gully compensation planting area proposed as part of this application (if this application is granted) or in the event that this application is not granted, a total of 1ha of planting in Hemlock Gully. This condition does not affect the application.

[74] The approved subdivision layout (RC210148V2) involves a portion of a building platform (Lot 9) and part of driveways (existing right of way providing access to Lot 2 and Lot 8 and the driveway to Lot 4's building platform) within the compensation planting areas. If this application is approved, RM210148 can be varied to realign the driveways so that they do not extend into compensation planting areas. Again, this is an

implementation issue. A condition of consent requiring this may be appropriate and is acceptable to the applicant if required.

Removal of lots to protect Ceratocephala pungens habitat

[75] The Applicant does not consider it is necessary to remove lots 4, 5 and 6 and relies on Dr Wells' evidence that the net overall effects on indigenous biodiversity will be positive.

[76] Ms Wardle's evidence as to effects on this habitat was not tested at the hearing and respectfully should be given less weight than that of Dr Wells. Ms Wardle is not an expert witness in the case and did not have the benefit of attending expert witness conferencing. The Wildlands supplementary memo (February 2025) noted the presence of Presence of *C. pungens* species were widespread with a scattered across the surveyed area, with denser populations in localised areas. Lots 4,5,6 are entirely within the development zone.

[77] Kānuka is continuing to progressively colonise the Site, with recent establishment of seedlings and saplings particularly abundant in areas of cushionfield on gravelly hillslopes/toeslopes including within Lots 4-7.[18]

[78] The Wildlands Memo also notes that some vegetation communities with high numbers of At Risk/Threatened non-woody species are early successional and will largely be replaced by woody vegetation in the very near future. Considering these factors, an ecologically robust proposal for ensuring no net loss over a 35-year timeframe is the planting of diverse woody plant communities that reinstate ecologically important components to the ecosystem. The measures proposed by the Applicant include:

(a) off-site planting and habitat creation over a larger area than that impacted;

(b) on-site woody vegetation plantings;

[18] Wildlands supplementary memo, at page 4.

(c) on-site woody vegetation clearance to maintain cushionfield and At Risk/Threatened plant habitat;

(d) lizard habitat creation;

(e) pest plant and animal control (across the Site not just within the covenant area); and

(f) robust legal protection for conservation purposes of approximately 90% of the Site, which for the reasons set out by the Aplicant already, is not otherwise well protected under the Plan.

Response to conditions proposed by Mr Vincent

[79] The Applicant is grateful for Mr Vincent's thorough review of conditions and his suggested edits in respect of the same. The Applicant supports, and accepts, the revised conditions proposed by Mr Vincent, which align with the intention of the Applicant and further add to the robustness of the protection regime for the balance land overall.

Dated: 13 July 2025

……………………………………………
I M Gordon
Counsel for the Applicant

……………………………………………
R E M Hill / B B Gresson
Counsel for the Applicant

COU 5009824.9 COVENANT (ALL TYPE
CPY-01/02.PGS-007.02/10/00.16:51

DocID: 110111430

CONSERVATION COVENANT
(Section 77 Reserves Act 1977)

BETWEEN **JOHN CHARLES PERRIAM** of Lowburn Farmer and **HEATHER LORNA PERRIAM** his wife ("the Landholders")

AND **MINISTER OF CONSERVATION** ("the Minister")

WHEREAS

A Section 77 of the Reserves Act 1977 provides that:

i The Minister may agree with any owner or lessee of land that all or part of the land should be managed so as to preserve the natural environment or landscape amenity or wildlife or freshwater life or marine life habitat or historical value of the land.

ii The terms of such agreement may be recorded in a Conservation Covenant which is registered against the title to the land or the lease so as to bind the land or the lease and its owner or lessee to the performance of the terms of the agreement, in perpetuity or for such other period as the parties may agree.

B The Landholders are registered as proprietors of the land firstly described in the schedule ("the land") in the shares of 2/3 to the said John Charles Perriam and 1/3 to the said Heather Lorna Perriam.

C The Landholders and the Minister have agreed that the land be managed with the following conservation objectives:

i Protecting and enhancing the natural character of the land with particular regard to the natural functioning of ecosystems and to the native flora and fauna in their diverse communities and dynamic inter-relationships with their earth substrate and water courses and the atmosphere.

ii Protecting the land as an area representative of a significant part of the ecological character of the Dunstan Ecological District as referred to in the draft survey report for the Protected Natural Areas Programme for the Lindis Pisa and Dunstan Ecological Districts dated February 1987.

iii Maintaining the landscape values of the land as referred to in the "Application for exchange of property rights" submitted to the Commissioner of Crown Lands.

iv Maintaining the historic values of the land as referred to in "The rich fields of

AP

HP. 4

Bendigo" by Jill Hamel February 1993.

NOW THEREFORE THIS DEED WITNESSES that in accordance with Section 77 of the Reserves Act 1977 the Landholders and the Minister **MUTUALLY COVENANT** that the land shall be managed for the purposes and objectives listed in recital C above, and in particular on the following conditions:

1 **THE** Landholders may graze the land to an extent consistent, in the opinion of the Minister, with the objectives of this Deed and will maintain all fences and gates on the land and its boundary in a good stockproof condition in order to facilitate proper grazing control.

The Minister may at any time monitor native vegetation in order to determine what trends are occurring in the condition of native vegetation.

The Minister may also at any time monitor historic sites.

2 **THE** Landholders will, so far as is practicable:

a Keep the land free from gorse broom sweetbriar and all other noxious plants and in particular shall comply with the provisions of and any notices given under the Noxious Plants Act 1978 and the Biosecurity Act 1993.

b Keep the land free from rabbits and vermin and in particular comply with the provisions of and any notices given under the Agricultural Pests Destruction Act 1967 and the Biosecurity Act 1993.

c Keep the land free from rubbish and other unsightly or offensive material.

HOWEVER the Landholders may request assistance from the Minister in meeting these obligations if they impose a substantial burden in excess of the legal obligations that would have applied in the absence of this Deed.

3 (1) **SUBJECT** to the succeeding provisions of this clause the Landholders will not carry out or allow to be carried out without the Minister's prior approval:

a The erection of any fence building structure or other improvements near historic sites on the land whether for the Landholders' purposes or for other private or public purposes.

b Any cultivation earthworks or other soil disturbance on the land near historic sites.

c Any tree planting on the land near historic sites.

d Any prospecting or mining for minerals coal or other deposit on or under the land.

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(2) **IN** this covenant "historic site" has the same meaning as the words "historic place" in the Historic Places Act 1993.

(3) **THE** Landholders at any time may remove some woody vegetation on the land secondly described in the schedule but only after receiving the Minister's prior approval.

(4) **THE** Minister will have regard to the objectives of this Deed when considering any request for approval under this clause and will not unreasonably decline approval.

4 **THE** Minister may exercise his right to object to any mining licence application which conflicts with the objectives of this Deed.

5 **THE** Landholders will permit members of the public access through the land on the existing formed Thomsons Gorge Road and from Thomsons Gorge Road up to Mt Moka and the special lease area more or less along the alignment of the existing track on or about the legal road line.

6 **THE** Landholders grant to the Minister and any officer or duly authorised agent of the Minister a right of access onto the land with or without vehicles motor vehicles machinery and implements of any kind for the purposes of examining and recording the condition of the land or for carrying out restoration protection or maintenance work on the land consistent with the objectives set out in this Deed; **HOWEVER** in exercising this right the Minister and officers or agents of the Minister will consult with the Landholders in advance and have regard to all reasonable requests.

7 **THE** Landholders will meet all survey costs required to complete the registration of this Deed.

8 (1) **THE** Landholders will notify the appropriate Fire Authority (District Council or Minister as the case may be - see section 2 Forest and Rural Fires Act 1977) in the event of wildfire threatening the land.

(2) **IF** the Minister is not the Fire Authority for the land under threat the Minister will render assistance to the Fire Authority in suppressing the fire if requested to do so or if a formalised fire agreement under section 14 of the Forest and Rural Fires Act 1977 is in place between the Minister and the Fire Authority.

(3) **THIS** assistance will be at no cost to the Landholders unless the Landholders are

responsible for the wildfire through wilful action or negligence (which includes the case where the wildfire is caused by the escape of a permitted fire due to non-adherence to the conditions of the permit).

9 **WITH** regard to that part of the land thirdly described in the schedule known as the Rise and Shine Creek area:

a The Landholders will at all times allow the public to have foot access across that part of the land for the purpose of gaining access to historic mining sites located on it.

b The Lessees and employees of the Department of Conservation may at any time remove woody vegetation around any historic site located on it.

c The Minister may at any time erect interpretation signs on that part of the land but shall first consult the Lessees regarding the wording and position of the signs.

d The Landholders will not use that part of the land for forestry and will not construct tracks on it.

10 **IT** is acknowledged that the principal historic values outside the Rise and Shine Creek area comprise three stone buildings near Ardgour Road, stone yards near Shepherds Creek, the hotel foundations and environs and the bakery in the Town of Bendigo, the dam and dam keeper's hut at the head of Aurora Creek, various mining sites in Perrys Creek and the environs, and stone yards near Devils Creek.

11 **THE** Minister may:

a Provide to the Landholders from time to time and at any time upon request by the Landholders such technical advice or assistance as may be necessary or desirable to assist in meeting the objectives set out in this Deed.

b Change individual conditions of this covenant by mutual agreement with the Landholders should there be any change in circumstances in the future.

c Prepare in consultation with the Landholders a joint plan for the management of the land designed to implement the objectives of this Deed to the mutual satisfaction of the parties.

12 **FOR** the avoidance of doubt:

a The covenants contained in this Deed shall bind the Landholders and the Landholders' heirs executors successors and assigns in perpetuity.

b The Landholders will not be personally liable in damages for any breach of covenant committed after they have parted with all interest in the land in respect of which such a breach occurs.

c Where there is more than one owner of the leasehold or fee simple title to the land, the covenants contained in this Deed shall bind each owner jointly and severally.

d Where the Landholders is a company the covenants contained in this Deed shall bind a receiver liquidator statutory manager or statutory receiver. Where the Landholders is a natural person this Deed shall bind the Official Assignee. In either case this Deed binds a mortgagee in possession.

e The reference to any Act in this Deed extends to and includes any amendment to, or re-enactment of that Act.

f Any notice required to be given in terms of this Deed shall be sufficiently given if made in writing and served as provided in Section 152 of the Property Law Act 1952 and shall be sufficiently given if actually received by the party to whom it is addressed or that party's solicitor.

g Any notice required to be given by the Minister shall be sufficiently given if it is signed by the Conservator Department of Conservation Dunedin. Any notice required to be served upon the Minister shall be sufficiently served if delivered to the office for the time being of the Conservator Department of Conservation Dunedin.

h Any dispute which arises between the Landholders and the Minister in any way relating to this Deed may be resolved by referring the dispute to an agreed third party for decision or by arbitration under the provisions of the Arbitration Act 1996. If the Arbitration Act 1996 is used and the parties fail to agree on the person to be appointed as arbitrator the appointment shall be made by the president for the time being of the Otago District Law Society.

DATED the 18th day of August ~~1999~~ 2000

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SCHEDULE

FIRSTLY All those parcels of land situated in the Otago Land District containing A 4180.6398 hectares more or less being Sections 1, 2, 24, 29, 34, 36 and 38 SO 24641 and being all the land comprised and described in Certificate of Title Register No. (Otago Registry) and being B 3781.8363 hectares more or less being Sections 3/9 inclusive 11/16 inclusive 23, 27, 28, 37 and 39 SO 24641 and being all the land comprised and described in Certificate of Title Register No. (Otago Registry)

SECONDLY Section 2 SO 24641 containing 68.0339 hectares more or less

THIRDLY Sections 11 and 12 SO 24641 containing 490.3886 hectares

SIGNED by Ian Whitwell an officer of the Department of Conservation pursuant to a designation given to him by the Director-General of Conservation and dated the 30th day of June 1989 acting for and on behalf of the Minister pursuant to section 117 of the Reserves Act 1977 in the presence of:) I.R. H Whitwell

Witness: JUSTIN HENRY BEARD

Occupation: SOLICITOR

Address: DUNEDIN

SIGNED by the said **JOHN CHARLES PERRIAM** and **HEATHER LORNA PERRIAM** in the presence of:) J C Perriam H.L. Perriam

Witness: B.A. MacGeorge (B.A. MACGEORGE)

Occupation: Solicitor

Address: Waimate

GRANT of

CONSERVATION COVENANT

Correct for the purposes of the Land Transfer Act

Solicitor for the Minister

pursuant to section 77 of the
Reserves Act 1977

JOHN CHARLES PERRIAM and
HEATHER LORNA PERRIAM

Covenantors

to

MINISTER OF CONSERVATION

Solicitor
Department of Conservation
DUNEDIN

LEG\PERRIAM

Department of Conservation
Te Papa Atawhai

Ref: DOC-7345566

18 May 2023

Tim & Kirsten O'Sullivan
TKO Properties Limited
Brophy Knight Limited,
144 Tancred Street,
Ashburton

C/- Morgan Shepherd @ Morgan@brownandcompany.co.nz

Tēnā koe Tim and Kirsten,

LETTER OF AUTHORITY: APPROVAL TO REMOVE MANUKA TREES, TO CONSTRUCT A RESIDENTIAL BUILDING PLATFORM, WITHIN BENDIGO CONSERVATION COVENANT

Approval is granted to you, subject to the conditions outlined in Appendix A of this letter, under Section 77 of the Reserves Act 1977, to undertake the following activity:

1) To remove no more than 20 manuka trees, to allow for construction of a residential building platform within subdivision Lot 6 - **Lot 2 DP 561457**.

The above activity was considered as described in the application received on 9 November 2022.

This approval is specific to the application that is described above. It is not indicative of any other statutory approval which may be required from the Department in respect to future activities within the Bendigo Conservation Covenant.

Any change to the application will require that it be resubmitted to me for approval.

Please also be aware that a NZAA recorded archaeological site (G41/770) (E 1307714, N5016888), namely the remains of a stone wall, is located within the area known as Lot 6 of the subdivision plan. As per Condition 3 (1) (a,b,c,d) of the Conservation Covenant, no erection of any fence, building or other improvements, soil disturbance or tree planting near this site is to be undertaken without the Minister's prior approval.

Thank you for having regard to the interests of the Department of Conservation (Department).

Ngā mihi,

NHolmes

Nicola J. Holmes
Pou Matarautaki Operations Manager, Central Otago District
Pursuant to delegated authority

Action Required

A representative from TKO Properties Limited is to sign this letter, return it to the Department prior to the commencement of the activity, and keep a copy to confirm the conditions.

Representative from TKO Properties Limited

Name	**Signed**	**Date**
______________________	______________________	_______________

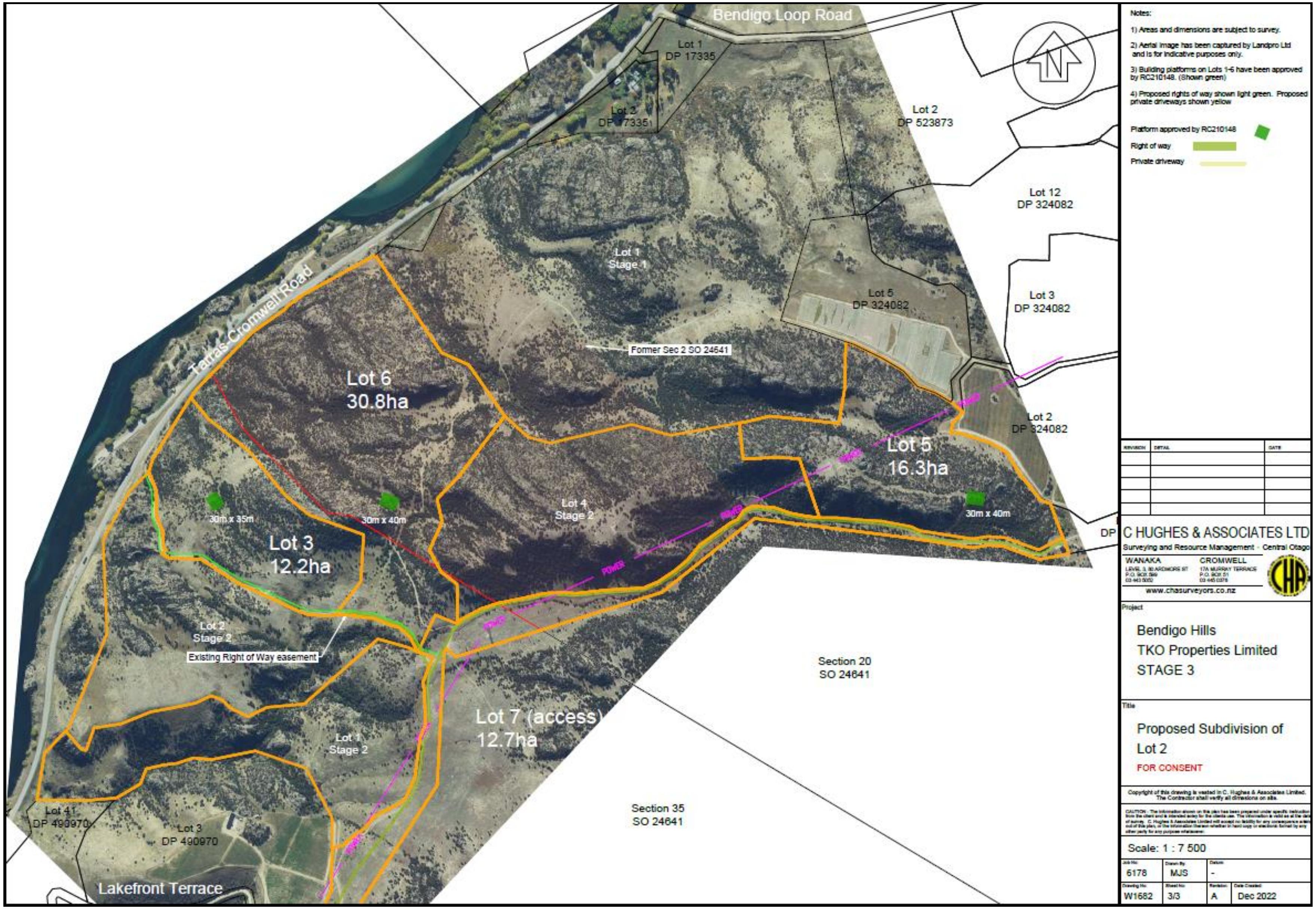
Position

____

Appendix A – Special Conditions

1. All necessary resource consents/council approvals associated with the construction of the residential building platform, must be obtained and conditions adhered to.
2. All machinery, tools and equipment must be steam cleaned so that it is free of weed seeds, plant fragments and mud prior to entering the land.
3. Machinery and equipment used on site must be maintained at all times to prevent leakage of oil and other contaminants on to the land.
4. No more than a total of 20 manuka trees are to be removed from the land.
5. Removal of manuka trees is restricted to the residential building platform area only, located within Lot 6 of the subdivision plan, as shown in Appendix B.
6. Equal new plantings of manuka plants must replace those removed from the residential building platform area and:
   - Manuka seed/plants must be locally sourced.
   - Plantings must be undertaken within 12 months of removal of existing manuka trees.
   - No existing native vegetation is to be removed or disturbed during planting.
   - New plantings must be maintained and monitored for success of establishment for five (5) years from the date of planting.
   - In the event of failure to establish of any individual plant within five (5) years of planting, replacement planting(s) must be undertaken within the next planting season.
   - Plantings must be conducted under the advice of a suitably qualified and experienced botanical specialist and in alignment with the objectives of the covenant.
7. At any time during construction of the residential building platform, in the event of any 'accidental discovery" of suspected archaeological material, including human remains, The Accidental Discovery Protocol must be followed and adhered to.
8. A summary record of the following must be submitted to the Departments Central Otago District Office (alexandra@doc.govt.nz) upon completion of the works:
   - Final number of manuka trees removed.
   - Photographic record of the area prior to the removal of the manuka trees and construction of the residential building platform.
   - Photographic record of the area post removal of the manuka trees and construction of the residential building platform.
   - Topographic location map of selected new manuka planting sites.
   - Photographic record and dates of new manuka plantings.

Appendix B – Lot 6 Residential building platform (green square) - (sourced from application)



Department of Conservation *Te Papa Atawhai*
Central Otago District Office
PO Box 176, Alexandra 9320
www.doc.govt.nz