IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI TE ŌTAUTAHI

Decision No. [2024] NZEnvC 324

IN THE MATTER	of an appeal under s 120 of the Resource Management Act 1991
BETWEEN	FRIENDS OF CONICAL HILL INCORPORATED
	(ENV-2022-CHC-7)
	Appellant
AND	HURUNUI DISTRICT COUNCIL
	Respondent
AND	HANMER SPRINGS THERMAL POOLS AND SPA
	Applicant

Court:	Environment Judge L J Semple, Commissioner R M Bartlett Commissioner D J Bunting
Hearing:	27 February – 3 March 2023 and 7 March 2023 at Christchurch 18 March – 22 March 2024 at Hanmer Springs
Last case event:	11 June 2024
Appearances:	G Cleary for the Appellant J Silcock and E Everingham for the Council J Appleyard and K Jacomb for the Applicant
Date of Decision:	6 December 2024
Date of Issue:	6 December 2024

INTERIM DECISION OF THE ENVIRONMENT COURT

A: The appeal is declined. The consents are upheld.

B: A further set of agreed conditions is to be provided to the Court in accordance with the Court's direction.

C. Costs are reserved.

REASONS

Introduction

[1] In February 2021, the Applicant, Hanmer Springs Thermal Pools and Spa (HSTPS) lodged an application with the Hurunui District Council (the Council) for the construction and operation of a gravity-based recreation activity (the Flyride) on Te Tihi o Rauhea/Conical Hill at Hanmer Springs.

[2] Te Tihi o Rauhea/Conical Hill has a predominantly exotic forest cover and its summit is accessed by popular walking tracks that lead to a lookout and historic plaque. The Flyride is proposed to begin at a 'start station' near the existing lookout and traverse down the western side of Te Tihi o Rauhea/Conical Hill via a number of switchbacks, finishing at a 'stop station' uphill from the dwellings on Oregon Heights.

[3] The Flyride experience is provided by suspended trolleys fitted to a 520 m cable system erected on seven poles situated along the route. The Flyride would have a maximum capacity during fast rides of 50-60 passengers per hour which would result in a forecast usage of around 47,000 rides per year. Access to and from the Flyride is proposed to be via walking tracks.

[4] The application for resource consent was processed as a publicly notified application at the Applicant's request with 55 submissions received. Consent to the application was granted by the Council on 18 February 2022. Friends of Conical Hill Incorporated (FOCH) subsequently appealed the Council's decision. The general reasons given in the Notice of Appeal include that the Decision:[1]

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1 Notice of Appeal dated 12 March 2022 at [11]-[12].

(a) Is inappropriate because it fails to protect a 'significant habitat of indigenous fauna', under s. 6c of the Act, most notably the site of the proposal contains four species of native herpetofauna, of which one is nationally endangered and three are at risk. Conical Hill Reserve also is a habitat for native falcons;

(b) Fails to protect 'historic heritage' under s. 6f of the Act, as Conical Hill and its walkway are central to the heritage and historic fabric of Hanmer Springs. The Flyride proposal will result in profound changes to the natural and historic character of the Conical Hill Reserve, resulting in effects to the Hill as an experiential whole that will be significant;

(c) Is erroneous in accepting that the compensation measures offered by the Applicant form part of the assessment of whether the effect is significant or not and, as a consequence, errs in concluding that the Applicant did not need to consider alternative sites pursuant to the Fourth Schedule to the Act. More specifically:

    (i) Compensation does not fit within the avoid-remedy-mitigate (ARM) hierarchy of the RMA. Offset was added as a 4th option in 2017, only when none of the first three is possible. Compensation, by definition, neither offsets nor mitigates the effect for which it compensates. Compensation accepts that there will be an effect and offers compensatory (not remedial) measures.

    (ii) Accordingly, to include compensation in the assessment of whether the effects of the proposal will be significant or not circumvents the hierarchy of the RMA.

(d) Erroneously considers 'all measures' offered as per under s. 104(1) (ab) of the Act, even those measures [that] are demonstrably inconsistent with regional, national, and international provisions regarding the adequacy and/or appropriateness of biodiversity compensation and lizard protection;

(e) Does not address concerns of submitters, most notably in the matters of geckos, falcons, noise, privacy, and amenity values of Conical Hill Reserve itself;

(f) Will not enable social and cultural well-being of local residents and generations of future visitors to the iconic Conical Hill; and

(g) Is inconsistent with the purpose of Conical Hill Reserve and the provisions of the Reserves Act 1977.

In addition to the above, the Decision is flawed on the basis that consent was granted without key documents being made available to the Commissioner, in particular the Lizard Management Plan and associated Covenant proposed by the Applicant to address inevitable fatalities to, and habitat disturbance of, endangered and at risk indigenous fauna on Conical Hill.

[5] The FOCH appeal was heard by the Environment Court during two hearings,

the first held in Christchurch in February and March 2023 and the second held in Hanmer Springs in March 2024. Much of the hearing was conducted with the public excluded as a result of confidentiality orders issued by the Court to protect sensitive information regarding lizard species and their habitat.

Background

[6] Mr Graeme Abbot is the General Manager of HSTPS. He explained in evidence that HSTPS is operated as a separate business unit of the Council with profits from its operations being returned to the Council and invested in the physical reserves of the wider Hurunui District.

[7] The longer-term management of Te Tihi o Rauhea/Conical Hill reserve has been delegated from the Council to the HSTPS Management Committee. The Committee is required to manage the reserve in a manner consistent with the provisions of the Reserves Act 1977 and the Hanmer Springs Thermal Pools Reserve Management Plan.

[8] Mr Abbot explained that the decision to locate the Flyride on Te Tihi o Rauhea/Conical Hill was based on its location being within easy walking distance of the township, its suitable incline for a gravity ride, its mature trees and its economic viability given the land was already in Council ownership. Other sites the Council had investigated included Jacks Pass Road, Thomas Hanmer Drive, the Chatterton River Track area, and forestry owned land near the Old Fire Lookout on Jollies Pass Road, however these sites were in private ownership and would need to be purchased. Council sites at Dogstream Reserve and Sports Reserve were discounted as neither of these reserves had a suitable incline.

[9] Ahead of the resource consent application being lodged, Mr Abbot advised that two community consultation meetings were held. The first of these was attended by more than 60 people with concerns raised regarding noise on the walkway and at neighbouring properties, the effects of using trees as supports for the ride, tree fall risk and the potential impact on birds.

[10] In response to matters raised during this round of consultation, the proposed route of the Flyride was changed to the western side of the Te Tihi o Rauhea/Conical Hill to avoid impinging on the existing walkway and to reduce noise exposure for nearby residents.

[11] A second public meeting was held in November 2020 and was attended by around 20 people. As a result of additional feedback from this meeting, the original design was further changed to incorporate steel towers as supports for the Flyride rather than using trees. A third public meeting was held shortly after the initial resource consent application was lodged in February 2021.

[12] During this period, HSTPS also engaged with Te Rūnanga o Kaikōura who confirmed that they were supportive of the proposal and the proposed plan for lizard management and with the Department of Conservation (on a Wildlife Act permit process).

[13] Negotiations with adjacent forestry owners, Ngāi Tahu Forestry and Rayonier Matariki Forests resulted in access rights to Te Tihi o Rauhea/Conical Hill being granted to HSTPS and its contractors for the construction and operation of the Flyride.

Statutory Framework

[14] The Flyride sits within that part of the site zoned Open Space in the Hurunui District Plan (District Plan). As a recreational activity the land use is permitted provided certain standards are met. In this instance, the Flyride breaches height, noise, carparking and design (materials) standards. In addition, the proposal requires the removal or trimming of several trees within a Land Instability Area which requires resource consent as a discretionary activity. Overall, the planning witnesses were agreed the proposal falls to be considered as a discretionary activity under ss 104 and 104B of the Act.

[15] Section 104 requires that, subject to part 2, the Court must have regard to the actual and potential effects on the environment of allowing the activity, any proposed

offset or compensation for adverse effects, any relevant plan provisions including any national or regional policy statement, together with any other matter the Court considers relevant and reasonably necessary to determine the application.

[16] We turn first then to consider actual and potential effects of the proposal on the environment.

Section 104(1)(a) - Effects on the Environment

[17] The parties were generally agreed that the matters at issue in these proceedings related to ecological effects (specifically related to effects on herpetofauna (lizards) and the eastern New Zealand falcon/kārearea), heritage effects and amenity effects (generally comprising the effects of noise and traffic).

[18] We consider each of these matters in turn.

Effects on Herpetofauna

[19] Expert evidence on the potential effects of the Flyride on herpetofauna was provided by Dr Mandy Tocher for the Applicant, Dr Marieke Lettink for the Council and Professor Shaun Ogilvie for FOCH. In addition, the Court heard evidence from Professor Ann Brower who holds qualifications in ecology and environmental science. Professor Brower owns a property near to Te Tihi o Rauhea/Conical Hill Reserve and is the Chair of FOCH. As such, Professor Brower accepted that she was not an independent expert in accordance with the Code of Conduct for Expert Witnesses. Accepting that limitation, the Court did, however, find her evidence to provide a useful contribution to our understanding of biodiversity compensation and offsetting which assisted in our decision making.

[20] By way of introduction and important context, we record that the Council holds a Wildlife Act Authority from the Department of Conservation (DOC) dated 13 May 2022 (Wildlife Permit 93084-FAU) in relation to the Flyride at Te Tihi o Rauhea/Conical Hill Reserve. This permits Dr Tocher and personnel under her supervision to catch alive, hold in possession, liberate and kill Southern alps gecko, Pygmy gecko, Canterbury grass skink and rough gecko within the period 1 December

2022 to 30 April 2027 subject to various conditions including adherence to a Lizard Management Plan[2] (DOC LMP) dated January 2022.

[21] We were advised by Dr Tocher[3] that the overarching objective of the DOC LMP supporting the wildlife permit is to:

> manage the lizard values of the Flyride footprint to achieve an overall positive outcome locally, post works, i.e., populations of the four species of indigenous lizards found over the footprint and adjacent areas are expected to be the same or enhanced following successful implementation of the mitigation package relating to the project.

and that it was on this basis that the Wildlife Permit was issued.

[22] Dr Tocher outlined in her evidence that in preparing the Wildlife Permit application and accompanying DOC LMP, she had undertaken two lizard surveys on Te Tihi o Rauhea/Conical Hill in February and April 2021 and reviewed two earlier lizard surveys she had previously undertaken.[4] In outlining the results of those surveys she advised that she had:

> ….detected four lizard species over the surveys, including one species not previously recorded on Te Tihi o Rauhea/Conical Hill: Southern Alps gecko, *Woodworthia* "Southern Alps". Rough gecko, south Marlborough grass skink and pygmy gecko were also detected during surveys.
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> I considered rough gecko habitat to be widespread on Te Tihi o Rauhea/Conical Hill, whilst habitat for the south Marlborough grass skink, pygmy gecko and Southern Alps geckos was relatively more limited in extent and centred on the summit. These field observations of the Te Tihi o Rauhea/Conical Hill summit were supported by anecdotal reports I received from other herpetologists, including Dr Lettink, ahead of my field assessment.

[23] As part of her evidence to this Court, Dr Tocher summarised the assessment she had included in the DOC LMP[5] regarding the actual and potential effects of the construction of the Flyride Project on lizards if there were no avoidance or mitigation measures taken. She summarised these unmitigated effects as including the

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2 We refer to this as the Department of Conservation Lizard Management Plan (DOC LMP) to distinguish it from the Lizard Management Plan which forms part of the resource consent application.

3 Tocher EIC at [56].

4 Tocher EIC at [8] and [9].

5 DOC LMP, Section 10, Table 4.

disturbance, death, serious injury, minor injury and/or displacement of resident rough geckos, Canterbury grass skinks, pygmy geckos and Southern Alps geckos. Her analysis estimated that the number of lizards affected could include 0-11 rough geckos, 10-26 Canterbury grass skinks, 10 – 25 pygmy geckos and 10-40 Southern Alps geckos.

[24] With respect to these estimates, which she accepted were very crude, she said that:

(a) if 14 rough geckos were to be displaced or otherwise affected, the viability of the wider Te Tihi o Rauhea/Conical Hill rough gecko population may be significantly affected;

(b) for Canterbury grass skinks, up to 60 per cent of the population within the 11.7 ha Te Tihi o Rauhea/Conical Hill Reserve could be affected with another 10 per cent being indirectly affected;

(c) the potential loss of up to 5 per cent of the resident pygmy population was unlikely to adversely affect the wider Te Tihi o Rauhea/Conical Hill population;

(d) for Southern Alps gecko, less than 5 per cent may be directly affected with another 5 per cent being indirectly affected.

[25] She went on to say that in the absence of the extensive mitigation proposed under the DOC LMP (as discussed below) the adverse effects generated by the Flyride would be significant.

Mitigation

[26] Given the assessment of significant adverse effect without mitigation, section 12 of the DOC LMP sets out a number of avoidance, mitigation and offsite compensation measures required to exercise the permit. Dr Tocher outlined these in her evidence as follows:

Avoidance

- A lizard survey of test anchor sites, ahead of works.
- The use of known and trusted contractors to construct the Flyride.
- The retention of existing native plants at the summit.
- The ongoing maintenance of encroaching vegetation to deter recolonisation by rough gecko.
- Avoiding the existing bulldozed track between Towers 1 and 4 during construction.
- Avoiding rough gecko habitat at the summit.
- Careful felling and pruning of exotic trees and indigenous trees overseen by a qualified arborist.
- The examination of alternative routes for access trails to Towers 2, 3/5 and 6 to avoid quality lizard habitat.

Remediation/rehabilitation

- Areas of the Flyride footprint that are cleared either fully or partially are subject to stringent rehabilitation.
- Rehabilitation of affected areas will only use eco-sourced indigenous plants suitable as habitat for rough gecko and/or south Marlborough grass skinks.
- A rigorous and lengthy maintenance regime to ensure woody weeds cannot get established in favour of indigenous species.
- A rehabilitation target of 90 per cent indigenous cover at five years from initial disturbance, at any site rehabilitated.

Mitigation

- An intensive salvage of rough geckos and south Marlborough grass skinks ahead of works.

- The creation of *c.* 1.1 ha of new habitat for rough gecko, south Marlborough grass skink, Southern Alps geckos and pygmy geckos adjacent to the footprint, including the restoration of important linkages between rough gecko indigenous shrubland habitat inside and outside the Te Tihi o Rauhea/ Conical Hill Recreation Reserve.

- Creation of new habitat to involve a mix of indigenous plantings and the provision of new rock habitat, a scarce resource over unshaded areas of Te Tihi o Rauhea/Conical Hill. One such new habitat site, near the summit of Te Tihi o Rauhea/Conical Hill, will be used as a release site for salvaged south Marlborough grass skinks. This site will be restored and augmented with 6 m^2 of rock, ahead of salvage.

- Rodent monitoring to be undertaken across Te Tihi o Rauhea/ Conical Hill Recreation Reserve including new habitat sites to inform decisions, in the future and as required, regarding the need to carry out rodent control. Notwithstanding this rodent monitoring, short-term rodent control to be undertaken over the south Marlborough grass skink habitat to help establish the salvaged population.

- Wasp control implemented over Te Tihi o Rauhea/Conical Hill, indefinitely. Wasps are a predator of juvenile lizards, with arboreal species such as the rough gecko likely to benefit most from this control.

[27] As a result of an updated threat classification for pygmy gecko and Southern Alps gecko (discussed below), Dr Tocher also recommended a further 6 m^2 of rocky habitat, to be created under the supervision of a qualified herpetologist, be added to the above measures.

[28] In addition to these on-site measures, a 6-ha conservation compensation site

over rough gecko habitat on private land in a different location has been secured by the Applicant with its purpose being to address significant residual effects of the proposal, primarily on rough gecko. The compensation site is on land zoned rural, and is intended to be protected in perpetuity by a QEII Covenant. On Dr Tocher's calculations, at 6 ha in area, the compensation area provides some 43 times the area of rough gecko habitat affected by the Flyride.

[29] Dr Tocher confirmed that, in her opinion, the mitigation package including the off-site conservation covenant meets the objective of the DOC LMP to manage the lizard values of the Flyride footprint to achieve an overall positive outcome for the four species of indigenous lizards.

[30] Dr Lettink was engaged by the Council to peer review the DOC LMP and provide advice on the potential adverse effects of the Flyride on lizards. Consistent with Dr Tocher, it was Dr Lettink's opinion that the Flyride proposal would have significant potential adverse effects on the four native species and their habitats without mitigation. "Of greatest concern" to Dr Lettink was the impact on the Nationally Endangered rough gecko.[6]

[31] Dr Lettink confirmed to the Court that in her expert opinion the DOC LMP "appropriately acknowledges these effects and associated uncertainties" and aims to achieve a "no-net-loss outcome for lizards through various mitigation measures plus a compensatory covenant".[7] Her evidence was that the full mitigation package including the covenant area was "both appropriate and necessary" and that without it "the Flyride proposal will have significant residual effects on lizards". While the covenant site was not in Dr Lettink's preferred location, she confirmed that she agreed with DOC (in granting the Wildlife Permit) and Dr Tocher, that it provided "adequate compensation".

[32] Professor Ogilvie provided evidence on behalf of FOCH. While Professor Ogilvie generally agreed with the effects assessment undertaken by Dr Tocher and the

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6 Lettink EIC at [4.1].
7 Lettink EIC at [4.2].

peer review of Dr Lettink, he identified several issues with the DOC LMP that caused him concern including the "considerable uncertainty around the effects on lizards, and on the likelihood of success of the on-site remediation actions proposed". Professor Ogilvie also queried whether applying outdated 2015 threat classifications in the final version of the DOC LMP would have affected the assessment of the significance of effects from the construction of the Flyride.

[33] Putting those matters to one side, it was Professor Ogilvie's opinion that "[b]ecause the effects without the covenant will be significant", it was crucial that the covenant area provided adequate and appropriate compensation. In Professor Ogilvie's opinion, it did not, principally due to its location some distance from Te Tihi o Rauhea/Conical Hill, the dated information regarding its existing rough gecko population, and the uncertainty as to whether it would confer benefit for all four lizard species. Professor Ogilvie also expressed some doubt as to whether QEII covenant status would confer any greater protections than the current District Plan and Wildlife Act rules and regulations.

Threat Classifications

[34] As set out above, some criticism was levelled at Dr Tocher for continuing to use the DOC 2015 New Zealand Threat Classification System (NZTCS) in the DOC LMP when these had been updated in December 2021 as follows:

Species	***2015***	***2021***
Pygmy gecko	*not threatened*	*at risk - declining*
Southern Alps gecko	*not threatened*	*at risk - declining*
Rough gecko	*Threatened - nationally vulnerable*	*Threatened - nationally endangered*
Canterbury grass skink (clade 4)	*at risk - declining*	*at risk - declining*

[35] In response, Dr Tocher said that while she had adopted the 2015 classifications in the January 2022 final version of the DOC LMP, DOC had, in fact, considered the 2021 classifications when processing the Wildlife Act Permit application. Moreover, she confirmed her understanding that there was no mandate to assign a level of significance of effects as being "high" or "low" based on the NZTCS or any other external regime and that fauna habitat either met the threshold for significance or it did not. As such, she did not consider that her effects assessment

had been undermined by using the 2015 classifications.

[36] She advised that the NZTCS is a DOC led initiative and is not directly referred to in either the Wildlife Act or in s 6(c) of the RMA which reads:

> the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

[37] Irrespective of the evaluative tool used, Dr Tocher was clear that the presence of a single "At Risk - declining" lizard triggered significance and that her evidence was that the overall actual and potential effects generated by the Flyride would be significant in the absence of the proposed mitigation/compensation package.[8] That was not changed by the updated threat classification.

[38] That said, Dr Tocher accepted, that she did need to "consider the updated threat rankings and provide a reassessment of residual effects" as they related to the pygmy gecko and the Southern Alps gecko. In doing so, she recommended the creation of a further 6 m^2 of rocky habitat as part of the Flyride Proposal and a condition requiring monitoring of the re-colonisation of such areas. On the basis of this additional mitigation, Dr Tocher was satisfied that the mitigation package was "sufficient to achieve 'no net loss'".[9]

[39] Further evidence on the question of significance was provided by Dr Lettink in her Supplementary Statement.[10] She advised that habitats for indigenous fauna are significant if they meet one or more of the criteria used to assess ecological significance under the National Policy Statement on Indigenous Biodiversity (NPS-IB) these being representativeness, diversity, and pattern, rarity and distinctiveness and ecological context. She explained that the assessment of the significance of effects was based on the professional experience and judgement of the ecologist, informed by science and based on DOC guidance for assessing ecological values or the Environment Institute of Australia and New Zealand Guidelines (EIANZ) for ecological impact assessment. She noted that the EIANZ guidance was not universally

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8 Tocher EIC at [164] – [165].
9 Tocher EIC at [143].
10 Lettink supplementary statement at [7.1(b)].

accepted among New Zealand ecologists (including by herself and Dr Tocher) as it had not been through rigorous peer review, and that an alternative methodology (the Norton-Roper-Lindsay criteria) was also subject to extensive criticism. As such, she preferred the DOC guidance as used by Dr Tocher.

[40] For New Zealand lizards, she said that it was most often the presence of an At Risk or Threatened species (under the 'Rarity and Distinctiveness' criterion) that leads to habitats being deemed significant in the RMA context and this criterion was clearly triggered by the Flyride proposal given the presence of one Nationally Endangered and three At Risk lizard species. She agreed with Dr Tocher's threshold based on DOC guidance that "one lizard damaged or killed" triggered significance under both the Wildlife Act and the RMA and as such the updated threat classification did not alter the effects assessment.

[41] On the basis of the above, we do not consider that there is any particular weight to be placed on the use of the 2015 threat classifications over the 2021 update. We are satisfied that Dr Tocher has appropriately identified the habitat as significant in terms of s 6(c) of the Act and that this has informed her assessment of effects and the development of the mitigation package proposed.

Certainty/Uncertainty of Effects Assessments

[42] As noted by Professor Brower in answer to questions in cross examination "[Dr] Tocher, [Dr] Lettink or [Professor] Ogilvie, all three have accepted that there is a high level of uncertainty and I respect their honesty in declaring that".[11]

[43] In her evidence, Dr Tocher noted that "[a]ccurate assessments of effects are simply not possible for lizards. However, any such assessment is improved by being conducted by an expert in herpetology".[12] She then referenced her 30 years of surveying lizards in New Zealand and pointed out that both DOC and Dr Lettink also had a "wealth of herpetological experience"[13] and neither had challenged the findings

11 NOE 21 March 2024 at 346.
12 Tocher EIC at [94].
13 Tocher EIC at [95].

of her assessment. She further confirmed that she was confident that the assessment was reasonable and that it would provide a solid base for informing the design of the mitigation package.[14]

[44] In peer reviewing the DOC LMP, Dr Lettink records a similar position saying:[15]

> I am unable to quantify how significant these effects will be due to uncertainties regarding both the numbers of individuals affected in relation to local (Te Tihi o Rauhea/Conical Hill Reserve) population sizes and the effectiveness of the proposed mitigation (Paras 39-58). This is a generic problem for New Zealand lizards because it is very difficult to obtain the necessary data (i.e. robust estimates of population sizes) and response to management is largely unknown.

[45] As we understood the evidence before us, it was this uncertainty, partly around the lizard numbers likely to be affected by the construction of the Flyride but more pertinently around the impact of the avoidance and mitigation measures proposed, and the potential for a "time lag" between the loss of up to 2,000 m^2 of habitat during construction and the replacement of (and extension to) such habitat post construction which led Dr Tocher to propose the addition of compensation by way of the QEII covenant site.

[46] In that regard, we note that Dr Tocher agreed with Professor Brower that a biodiversity compensation package was irrelevant to the question of the significance of effects and that the proposed biodiversity compensation under the QEII covenant had not been considered in her effects assessment. She also agreed that without the extensive mitigation package proposed, the actual and potential effects of the Flyride would be significant[16] and that even with the mitigation package in place, significant residual effects may remain (driven principally by issues of uncertainty) which would need to be managed through the design of the compensation package proposed under the QEII covenant.[17] In confirming that she had proposed the compensation package to DOC (rather than vice versa) she added that the residual effects would weigh most heavily on rough gecko and that DOC had agreed with the emphasis being on this

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14 Tocher EIC at [93] – [95].
15 Referenced in Tocher EIC at [97].
16 Tocher EIC at [100].
17 Tocher EIC at [105].

species in the compensation proposal as a result.[18]

[47] Having said this, Dr Tocher opined that if there was highly effective wasp control at Te Tihi o Rauhea/Conical Hill as she recommended, she expected that the residual effects would "almost evaporate". Conservatively, however, she remained uncertain that this would be the case[19] and as such, considered the compensation proposal to remain an important component of the package. Dr Lettink differed slightly, maintaining the position that irrespective of the wasp control there was a prospect of residual effects. In both Dr Tocher's and Dr Lettink's opinion, that uncertainty was most appropriately resolved by the addition of the requirement to establish the covenant site.

[48] With the proposed QEII covenant compensation package in place, Dr Tocher's assessment was that no significant residual effects would remain.[20] Dr Lettink's opinion was that "inclusion of the covenant is an essential and appropriate part of the mitigation and compensation package".[21]

[49] While Dr Lettink could not satisfy herself that the proposed mitigation and compensation package would have a no-net-loss outcome for lizards, she did agree with Dr Tocher's statement that "the QEII covenant and the implementation of its management plan may or may not fully address residual effects….there really is no means of knowing with certainty, but my expert opinion is that it does, and then some".[22] In her supplementary statement Dr Lettink re-confirmed the "proposed covenant remains appropriate and adequate as compensation".[23]

[50] Professor Ogilvie agreed with Dr Tocher and Dr Lettink that there would "still be significant residual effects with just the on-site mitigation" and as such considered that the matter came down to "securing a sizeable covenant over an appropriate site

18 NOE 3 March 2023 Tocher at 370.
19 NOE 3 March 2023 Tocher at 371.
20 Tocher EIC at [106].
21 Lettink EIC at [8.29].
22 Lettink EIC at [9.25].
23 Lettink supplementary statement at [11.2].

that supports a viable population of rough geckos".[24] Where Professor Ogilvie parted company from Dr Tocher and Dr Lettink was in the assessment of whether the compensation proposed would achieve that outcome.

[51] Specifically, it was Professor Ogilvie's evidence that there was too much uncertainty as to whether the covenant site would benefit all four species of lizard, not just the rough gecko, whether the rough geckos observed at the covenant site were the same species, whether the distance between Te Tihi o Rauhea/Conical Hill and the covenant site was too great to confer benefit on the Te Tihi o Rauhea/Conical Hill population and whether the establishment of a QEII covenant conferred any greater benefit than those afforded by the existing District Plan and Wildlife Act protections.

[52] In answer to those concerns, Dr Tocher confirmed that she had initially sought a closer covenant site but was unable to achieve this. That said, she was satisfied that the covenant site was not so distant from Te Tihi o Rauhea/Conical Hill as to undermine its benefit. It was her evidence that the covenant site was "within the geographic range of the rough gecko" and the habitat occupied at both sites was similar.

[53] Dr Tocher also considered there to be an absence of "substantial genetic structuring within populations of rough gecko". Consultation with Dr Rod Hitchmough, a gecko expert, confirmed there was "no scientific evidence at this point in time that rough geckos, anywhere across their circa 300,000 ha geographic range, represent different species", indicating it was unlikely the covenant site supported a different species.

[54] This was subsequently confirmed as a result of a tail-tip biopsy collected by Dr Lettink at the covenant site under the terms of a wildlife permit. That biopsy confirmed to Dr Tocher that the:[25]

> … species at the covenant site is rough gecko, *Naultinus rudis*, the same species that is affected by the Flyride proposal on Te Tihi o Rauhea/Conical Hill

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24 Ogilvie EIC at [4.26].
25 Tocher second supplementary statement at [113].

> Reserve. Moreover, the genetic results confirm that the rough geckos at the covenant site are genetically aligned (clustered) with the populations of the southern/southeastern cluster that includes Te Tihi o Rauhea/Conical Hill Reserve. These results affirm my stance that 67km is "close" to the impact site.

[55] It was also Dr Tocher's evidence that pygmy geckos and Southern Alps geckos are likely to be present at the covenant site given the rocky habitat favoured by these geckos exists around the covenant site and that the Southern Alps gecko, in particular, is known to be widespread over the eastern South Island. Given this, it was Dr Tocher's opinion that the covenant site would also address residual effects for these species if there were any.

Protections Offered by the District Plan and Wildlife Act

[56] As previously outlined, Professor Ogilvie expressed concern that the creation of a QEII covenant would confer no greater protections or advantages for lizard species than the combination of the existing District Plan protections in relation to the site and the provisions of the Wildlife Act. Having taken advice from counsel, Professor Ogilvie identified that the covenant site was within an area of "significant landscape" within the relevant Plan and, as such, earthworks were limited to 5 per cent of any 5 ha of land every 3 years. In addition, much of the site was in indigenous forest for which there were rules restricting its clearance other than in particular circumstances which Professor Ogilvie did not expect to apply. Furthermore, the site was now recorded by DOC as containing absolutely protected herpetofauna meaning a Wildlife Act permit would be required for any habitat disturbance. It was Professor Ogilvie's opinion that the combination of these various provisions meant that the "development threat to the proposed covenant site is limited"[26] and as such there was a "correspondingly limited additional conservation benefit".

[57] Ms Jane Whyte provided planning evidence on behalf of HSTPS in relation to this matter. It was her evidence that the covenant site has an underlying rural zone which permits a number of activities including *inter alia* farming, residential activities, aquaculture and forestry. Ms Whyte confirmed that "[w]hile restrictive, the permitted

[26] Ogilvie EIC at [5.33].

activity rules do provide for some indigenous forest and indigenous vegetation clearance as a permitted activity"[27] and also provide for some limited permitted earthworks as outlined by Professor Ogilvie. Further, she outlined that there were no provisions in the relevant plan which limited stock access. Dr Tocher confirmed in her evidence that the key threats to the covenant site were cattle and invasive woody weeds.

[58] In reviewing Ms Whyte's evidence and considering the activities that could occur as of right at the covenant site, Dr Tocher confirmed that she "was (and remain[s]) confident that applying the QEII [sic] at the … site was adding an additional layer of protection that was not currently provided".[28]

[59] Moreover, and we consider importantly, she made the point that the QEII covenant would be a permanent protection as opposed to plan protections which are subject to alteration. In her words "any protection offered to the site now by the District Plan can be retracted over the next iteration of the plan".[29] We accept that distinction. Dr Tocher also pointed out that the DOC decision records that the provision of the covenant was a "tipping point" in issuing the wildlife permit.

[60] We are satisfied that the establishment of a QEII covenant with requirements for exclusionary stock fencing and weed management does provide protections for herpetofauna over and above those provided by the existing provisions of the relevant District Plan and the Wildlife Act. Moreover, we note the proffered condition from HSTPS requiring a similar covenant to be registered in favour of DOC should the QEII covenant not proceed for any reason within two years of the exercise of the consent. We consider this provides adequate contingency.

Overall finding on herpetofauna effects

[61] We are satisfied that a thorough and robust evaluation of the effects on threatened lizard species and their habitats has been undertaken by Dr Tocher and

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27 Whyte EIC at [131].
28 Tocher EIC at [227].
29 Tocher EIC at [228].

been subject to review by both DOC in issuing the wildlife permit and by Dr Lettink in providing a peer review for the Council.

[62] We accept the evidence of Dr Tocher and Dr Lettink, as very experienced and well regarded herpetologists that, provided the mitigations included within the LMP, including the provision of the covenant site to address residual effects, are complied with, the objective of the DOC LMP will be met, that is, that the "populations of the four species of indigenous lizards found over the footprint and adjacent areas [that includes the area of the covenant] are expected to be the same or enhanced".

[63] We accept that there are issues of uncertainty in assessing effects on a cryptic species such as lizards but consider that these have been appropriately identified and assessed by Dr Tocher and Dr Lettink in their respective evaluations and by DOC in issuing the Wildlife Permit.

[64] Moreover, we agree with counsel for HSTPS that the RMA is not a "no-risk" statute. As a decision maker, this Court is required to evaluate the evidence and determine an acceptable degree of risk in each case. In this instance, we rely on the evidence of Dr Tocher and Dr Lettink and their considerable experience and expertise in these matters.

[65] Although counsel for FOCH made much of the evidence provided by all experts in terms of uncertainty in his closing submissions, we consider that such matters must be tempered by a careful review of the totality of the evidence. It was the position of both Dr Tocher and Dr Lettink that they expected the on-site mitigations proposed to be effective in identifying and protecting lizards from construction work and recreating appropriate habitat and conditions (including wasp control) once construction had been completed. However, prudently they alerted the Court to inherent difficulties in being precise about such matters due to the cryptic nature of such species. It was this remaining uncertainty that led to the compensation proposal being recommended by Dr Tocher and accepted by Dr Lettink and DOC as appropriate in the circumstances. We did not understand Dr Tocher to be suggesting in any way that residual effects on rough gecko were a foregone conclusion and thus

the compensation package was essential but rather that she could not provide absolute certainty regarding the mitigation package despite her informed expectation that it would be successful.

[66] On that basis we are satisfied in determining that the risk to the four species of indigenous species is appropriately managed by the mitigation actions proposed and that any residual risk is generously compensated (as Dr Tocher puts it) by the creation of the QEII covenant.

[67] We return to these issues further when we consider the planning environment and specifically, the provisions of the NPS-IB.

New Zealand Eastern falcon / kārearea

[68] Dr Tocher provided evidence on the status of the New Zealand falcon/kārearea in the vicinity of Te Tihi o Rauhea/Conical Hill. The species is classified At Risk – recovering under the New Zealand threat classification system.

[69] The 'Eastern' falcon/kārearea, occupies the central part of the South Island and, based on the sighting information available, Dr Tocher considered a healthy local breeding population to be present in and around Te Tihi o Rauhea/Conical Hill. Falcons nest on the ground, and as such are open to predation during nesting and if disturbed may abandon a particular nesting site/scrape. It was Dr Tocher's opinion that the scrubby regrowth vegetation on Te Tihi o Rauhea/ Conical Hill rendered it suitable as foraging habitat but less suitable for nesting. That said, she accepted that she had previously acknowledged that nesting had occurred there and agreed that it could again. She did not consider instances of the birds seen acting aggressively at or near Te Tihi o Rauhea/ Conical Hill recently to be conclusive in terms of the likelihood of their nesting there currently, though accepted that local residents had said they had observed nesting behaviour.

[70] On that basis, and to minimise the potential for disturbance to the species from the construction and operation of the Flyride, Dr Tocher recommended actions to be taken by the Applicant including best practice for plantation forestry operations

when nests are present. This aligns with DOC practice in other locations where the species is present. Her recommendations are reflected in the proposed conditions of consent and Dr Tocher was confident that those actions would protect the falcon should any choose to nest on Te Tihi o Rauhea/Conical Hill during construction or use the area once the Flyride is operational. Professor Ogilvie also noted he was "fairly comfortable" with the way the falcons were to be managed.

[71] We are accordingly satisfied that the conditions provide sufficient actions to minimise disturbance to the birds, their scrapes/nests and their offspring.

Heritage

[72] Evidence on the heritage status of Te Tihi o Rauhea/Conical Hill was provided by Mr David Pearson for the Applicant and Dr Jeffrey Dalley for the Appellant.

[73] Mr Pearson holds a Bachelor of Architecture qualification, is a registered architect and an Associate of the New Zealand Institute of Architects. He heads a 13-person architecture firm which he describes as specialising in heritage and conservation architecture.

[74] Dr Dalley holds a Doctor of Philosophy in Management, a Master of Business Administration and a Post Graduate Diploma in Tourism. He is currently employed as a Principal Advisor, Social Monitoring and Evaluation by DOC. In addition, Dr Dalley advised that he has held a number of roles in the Hanmer Springs community including being the President of the Hanmer Springs Business Association, the Chair of the Hurunui Trails Trust, the Chair of the Hanmer Heritage Forest Trust and a member of the Hurunui Tourism Board. As a resident of Hanmer Springs since 2007 and a member of FOCH, Dr Dalley confirmed that he was not giving evidence as an independent expert.

Mr Pearson's Evidence

[75] Mr Pearson set out in some detail in his evidence the history of Te Tihi o Rauhea/Conical Hill. By way of a relatively brief summary, we heard that in October

1903 the Canterbury Land Board acquired 20 ha of land from St Helens Station. This land included Te Tihi o Rauhea/Conical Hill (then known as Majuba Hill) as well as an additional area to provide access from the Hanmer Springs township to Conical Hill itself.

[76] By the end of 1903 a zig zag track had been constructed to the top of Conical Hill by Mr Duncan Rutherford a pastoralist and well know resident of Hanmer Springs. Seats were provided at each corner of the track. A primary use of the track at that time was to provide monitored exercise for invalids from the nearby Hanmer Springs Sanatorium. In the years immediately following the construction of the track some 5,000 trees were planted on the hill and a shelter was constructed at the summit.

[77] Following his death in 1917, a memorial plaque was installed at the summit (and unveiled by the then Prime Minister Hon George Forbes) commemorating Mr Rutherford's contribution to the development of Hanmer Springs. The original shelter, having fallen into disrepair, was replaced by the current shelter/lookout in 1970.

[78] The Hurunui District Plan lists the Te Tihi o Rauhea/Conical Hill lookout and the memorial plaque as items of historic heritage (Item H101) in Schedule 14.1 Historic Buildings and Structures. The walkway and Conical Hill itself are not listed as scheduled heritage items.

[79] It is noted that the Heritage New Zealand Pouhere Taonga list of historic places in the Hanmer Springs area does not include the Te Tihi o Rauhea/Conical Hill lookout nor the plaque (nor for that matter the walkway or Conical Hill itself).

[80] There appeared to be little dispute that neither the lookout nor the plaque itself would be adversely affected by the proposal. Rather the focus was on the wider area of Te Tihi o Rauhea/Conical Hill and the walkway.

[81] As set out by Ms Judith Batchelor in her planning evidence for the Council, Policy 14.4 of the Hurunui District Plan provides a policy basis "[t]o recognise and provide for the relationship that a historic heritage resource may have with the land

surrounding it". Her view was that it was appropriate to consider the impact of the Flyride on the immediate environment of the heritage resource, and she considered whether the Flyride activities would restrict access to the plaque or obstruct access or views to or from the lookout. She concluded that the proposal would not adversely affect either and that the proposal was not inconsistent with Policy 14.4.

[82] Although not listed, it was Mr Pearson's evidence that Te Tihi o Rauhea/Conical Hill itself may have social values given its use for leisure activities over a number of generations together with contextual values given it is a well-known and recognised landmark in the area. He accepted, however, that such recognition would require a full assessment and evaluation before any possible inclusion in Schedule 14.1 of the District Plan and disagreed with Dr Dalley that the heritage status that applied to the plaque and the lookout implicitly extended to Te Tihi o Rauhea/Conical Hill itself and the walkway.

[83] It was Mr Pearson's assessment that the Flyride would have some impact on Te Tihi o Rauhea/Conical Hill's contextual and aesthetic values, noting that the start station and the first section of the cable track (while positioned some distance from the summit) would be visible from the lookout and the last section of the track and the stop station would be visible from the township.

[84] In order to reduce the impact of the Flyride at these locations, Mr Pearson explained that it was proposed that the Flyride's timber structures be left to weather naturally or stained with an appropriate colour with the steelwork being painted in a dark recessive colour. The area of the stop station would also be planted with native vegetation. On the basis of these mitigation actions, it was his opinion that, over time, the presence of Flyride would be obscured in the landscape in the same way that the track had become obscured once the planted vegetation had matured.

[85] The installation of interpretive material along the track and at the summit which had been recommended in the Te Tihi o Rauhea/Conical Hill Management Plan would, in Mr Pearson's view, increase the historical values of Hanmer Springs and Te Tihi o Rauhea/Conical Hill.

[86] Considering all of those matters, it was his overall opinion that the Flyride could be viewed as an extension to the leisure activities which already exist on Te Tihi o Rauhea/Conical Hill and that once installed it would involve minimal change to the character of an already extensively modified landscape. As a result, it was his expert opinion that the impact of the Flyride on the potential heritage values of Conical Hill would be minor.

Dr Dalley's Evidence

[87] While Dr Dalley agreed that the District Plan designated only the plaque and the lookout as historic heritage features, his opinion was that these two features were inextricably linked to the hill they sat on and the history of the walkway that leads to them.

[88] He quoted a number of extracts on heritage from the Canterbury Regional Policy Statement (CRPS) including the following:

> In some cases, significant historic heritage items, places or areas are not identified within regional or district plans and, as such, their historic and cultural values are not adequately protected. The loss and/or degradation of significant historic heritage features results in the diminishing of an important and finite regional resource.

[89] It was Dr Dalley's view that the Te Tihi o Rauhea/Conical Hill area was not adequately protected under the Hurunui District Plan and in that regard he drew the Court's attention to the nine CRPS matters of significance which he said should be considered when determining the significance of values of historic cultural or historic heritage landscapes. It was Dr Dalley's position that seven of the nine matters might be applied to Te Tihi o Rauhea/Conical Hill, being:

- heritage fabric;
- time depth;
- natural science value;
- legibility and evidential values;
- shared and recognised value;
- aesthetic value;

- historical and cultural importance.

[90] That said, Dr Dalley accepted in answer to questions that he had not undertaken any analysis of Te Tihi o Rauhea/Conical Hill against the CRPS matters of significance, although he considered that had he done so, he would have been able to provide evidence in support of his contention.[30]

[91] In response to another question from counsel, he agreed that the additional number of users of the existing zig zag walking track from the operation of the Flyride would not have any negative impact on the heritage fabric of the Te Tihi o Rauhea/Conical Hill[31] and that the operation of the Flyride itself could be regarded as an extension of the recreation or leisure activity that Te Tihi o Rauhea/Conical Hill currently offers.[32]

[92] When asked if he had made any submission to the District Council requesting the extension of the heritage coverage of Te Tihi o Rauhea/Conical Hill when the Council had last reviewed its District Plan (made operative in 2018)[33] he said that he had not.[34]

Discussion and Finding on Heritage

[93] Both Dr Dalley and counsel for the Appellant were critical of Mr Pearson for not having carried out an in-depth assessment of the heritage values of Te Tihi o Rauhea/Conical Hill, claiming that in the absence of such assessment Mr Pearson's evidence was of limited, if any, assistance to the Court.[35]

[94] On the basis of that criticism, counsel for the Appellant submitted that it was within the Court's power to decline the consent based on s 104(6) RMA[36] while at the

30 NOE 27 February 2023 at 21.
31 NOE 27 February 2023 at 30.
32 NOE 27 February 2023 at 18.
33 This was the year referred to by counsel for the Applicant when questioning Dr Dalley.
34 NOE 27 February 2023 at 19.
35 Cleary opening legal submission at [3.30].
36 RMA, s 104(6) A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

same time noting that in the circumstances this discretion should be exercised reasonably and proportionately.

[95] We decline to exercise that discretion in this instance. As set out by Ms Whyte, we must consider the Flyride proposal within the context of the Hurunui District Plan with the latest version of this Plan becoming operative in January 2022.[37] We were not provided with any background information or evidence explaining why the Council had decided to include only the plaque and the lookout shelter in its District Plan Schedule 14.1 – Historic Buildings and Structures however that is the plan as we find it.

[96] As Mr Pearson told us, and we concur, in order to confirm whether the heritage coverage should be extended to include the walkway and Te Tihi o Rauhea/Conical Hill itself, a full heritage assessment would be required followed by a plan change if it was determined that it met the threshold for inclusion as an historic heritage site in accordance with Schedule 14.1 of the District Plan.

[97] We do not understand that the extension of the existing heritage coverage has been raised during District Plan reviews or via any other process previously. Nor do we have sufficient evidence before us which would allow us to speculate on the outcome of such an application if it were made. As Dr Dalley confirmed, the assessment required to support such an extension has not been undertaken by the Appellant or any other entity.

[98] In the absence of expert evidence to the contrary, we accept Mr Pearson's evidence that the impact of the Flyride on the heritage values of Te Tihi o Rauhea/Conical Hill will be minor and the evidence of Ms Batchelor regarding consistency with the District Plan.

Acoustic Effects

[99] Expert evidence on the noise effects from the proposed Flyride was provided by Dr Jeremy Trevathan for the Applicant, Associate Professor Dr John Pearse for

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37 Whyte EIC at [13] – [14].

the Appellant and Mr Gary Walton for the Council.

Noise Sources

[100] Starting with existing noise sources, the experts all agreed that these would come from users of the Reserve, from domestic and commercial activity in the township (including the hot pools) and from natural sounds, all of which would vary during the day and at different receiving locations in the Reserve.

[101] Against that background, the dominant noise source from the Flyride activity is expected to be vocalisation noise (shouts and cheers) from users of the ride. There will also be noise from vehicles transporting users along Te Tihi o Rauhea/Conical Hill Road, noise from walkers going up and down the Te Tihi o Rauhea/Conical Hill pathway, noise from the Flyride trolleys running along the track and noise from the ride's electric motor and gearing of the trolley return system.

[102] In assessing the effect of such noise, it was noted that the noise limits in the Hurunui District Plan when measured at or outside the boundary of the Reserve are:

> 55 dB LAeq (1 hour) between 7am – 7pm daily
> 45 dB LAeq (1 hour) between 7pm – 7am daily
> 75 dB LAFmax between 10pm and 7am

[103] The same limits apply in the Residential Zone and for activities undertaken in the Rural Zone when measured at the notional boundary of any dwelling.

[104] However, the three acoustic experts were agreed that an LAeq (1 hour) noise metric would be inappropriate for assessing the effects of Flyride noise (and in particular vocalisation noise) because the calculation is undertaken on the basis of a one-hour average which does not fully account for the presence of transient louder noise sources such as intermittent vocalisations from Flyride users.

[105] Instead, the experts agreed that 45 dB LAFmax should apply when measured at dwellings as this metric would better capture the loudest noise events from the Flyride and reflect their "emergence" over other sounds. Utilising this approach

would limit Flyride noise to below existing ambient noise sources which generate noise levels at or exceeding this limit.[38]

[106] Dr Trevathan confirmed that noise at 45 dB LAFmax would be perceived as half as loud as the other occasional louder noise events which already occur regularly in this environment. He added that a noise limit of 45 dB LAFmax within bedrooms is the limit recommended by the World Health Organisation to prevent awakening during night-time and that he was not aware of any other guidance which recommended a more conservative approach.

[107] Mr Walton agreed that this limit was significantly lower than the District Plan's night-time limit, lower than any commonly used criteria for day or night-time noise effects and as far as he was aware lower than any daytime maximum noise limit in any other district plan in New Zealand. He added that while noise from users of the Flyride might be audible on occasions, in his opinion, the 45 dB LAFmax would provide for a level of amenity appropriate to the surrounding residential area.

[108] Apart from vocalisation noise, Dr Trevathan recommended (with no disagreement) that all other noise from the Flyride activity (including voices in normal conversation, transient mechanical noise associated with the ride mechanism, any mechanical equipment noise and vehicle noise) should be assessed using the methodology outlined in NZS 6802:2008 (Acoustics – Environmental Noise) against the daytime noise limits in the District Plan. This is because all of this other noise would be typical of the types of noise likely to be encountered in normal urban environments.

Noise Modelling

[109] Dr Trevathan described the computational approach he had used for the noise modelling which he said had taken into account the LiDAR sourced topography of the area, the worst-case down-wind conditions, and the sound power levels of the noise sources. For the Council, Mr Walton confirmed that he supported the noise

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[38] Note that Dr Pearse agreed to this limit during cross examination – see NOE 1 March 2023 at 201.

assessment methodology used by Dr Trevathan (and his staff) and accepted that the LiDAR sourced topographical data input was of high quality and appropriate and that overall, the outputs of the modelling could be accepted as being reliable.

[110] Starting with the level of vocalisation noise, Dr Trevathan said that this had been based on noise measurements taken at the nearby hot pools "*Conical Thrill*" ride and from values reported in international literature on the audibility of female screams. From these sources, a *sound power level* of 118 dB LwAFmax[39] had been adopted by Dr Trevathan in his modelling under worst-case meteorological conditions.

[111] The modelling results had shown that if there was vocalisation noise at this sound power level at the final corner or along the final span of the Flyride, then noise levels in excess of the proposed 45 dB LAFmax limit would be received at the outdoor living area to the north-west of the windows of the house at 17 Oregon Heights.

[112] To ensure the 45 dB LAFmax limit is met at all residential locations. Dr Trevathan recommended that specific operational control measures be included in any conditions of consent to ensure that the vocalisation sound power levels at these locations were limited to no more than about 90 – 95 dB LwAFmax (which he said would be equivalent to "very loud" to "shouting" voice levels). On our review of the most recent conditions of consent proposed by the Applicant we can see no condition that addresses this point. Such a condition is to be included.

Flyride Mechanism Noise

[113] With respect to the level of noise generated by the ride mechanism of the Flyride (as opposed to vocalisation noise), Dr Trevathan said that he had visited the Flyride test track in Christchurch to observe and measure track/trolley noise. While the proposed Te Tihi o Rauhea/Conical Hill Flyride may have some different features from this Christchurch installation, he said that he had been advised by the

[39] Dr Trevathan explained that *sound pressure levels* were the sound levels measured at a particular point and space in time identified by the metric LAFmax (NOE 1 March 2023 at 224) whereas the level generated at the source of the sound was identified as the *sound power level* and the metric LwAFmax.

manufacturers that the Christchurch installation should be suitably representative of what was being proposed for Te Tihi o Rauhea/Conical Hill.

[114] Modelling based on the noise measurements taken at the Christchurch installation indicated that the noise generated by the track/trolley along Span 8 (the last span of the Te Tihi o Rauhea/Conical Hill Flyride) would be less than 35 dB LAeq (5 sec) which Dr Trevathan said was lower than the existing ambient level measured in these areas.

[115] For the fixed external plant associated with the start and stop stations, Dr Trevathan said that these could be designed, installed, and operated to comply with the District Plan noise limits. Likewise, if a generator was to be installed at the start station, it was his evidence that this could also be located and designed to comply with the District Plan noise limits.

[116] Dr Trevathan advised that the operation of the Flyride might cause non-compliances with the District Plan noise limits at the northern and western site boundaries of the Reserve as these are relatively close to the proposed ride route and there is no shielding. In his opinion, it would be unlikely that these non-compliances would result in any adverse effects as his understanding was that these areas are infrequently occupied. We did not hear any evidence to the contrary.

Noise in the Reserve

[117] Dr Trevathan was asked a number of questions regarding the potential levels of annoyance and disturbance for track users from "frequent and continuous screaming" compared with the status quo if the Flyride was to operate at its full capacity for up to nine hours a day.

[118] In response Dr Trevathan confirmed that noise logging had been undertaken within the Reserve in conjunction with attended observations to measure and assess the ambient noise levels under the status quo and compare those with the noise levels generated from the Flyride noise modelling. That work had identified that noise was already being experienced by existing users of the Reserve at over 65 dB LAFmax and

that apart from birdcall, daytime noise within the Reserve was dominated by anthropogenic sounds generated primarily from the Hanmer Springs township, typically from raised voices and shouts and from children playing.

[119] While the noise modelling had identified that noise levels in the range of 66 to 72 dB LAFmax could be expected in the Reserve from peak user vocalisation when passing the corners of the Flyride closest to the location of the upper logger, it was Dr Trevathan's opinion that track users would need to be in "the right place at the right time" to hear any Flyride user screaming.[40]

[120] Information sourced from the attended noise observations had also shown that only a very small percentage (1 to 2 per cent) of existing users of the Reserve appeared to fall into the category of those seeking "tranquillity" with most users engaging in conversation which ranged from relaxed to animated.

[121] Based on all of the above, Dr Trevathan's overall conclusion was that existing users of the Reserve are already generating noise at around the same levels and character as those predicted to be generated by users of the Flyride and that annoyance levels from Flyride noise would be low.[41]

[122] Mr Walton said that he supported the Flyride noise assessment methodology used by Dr Trevathan (and his staff) and accepted that the trial noise measurements were plausible. While no noise limit was proposed to protect other users of the Reserve, in Mr Walton's opinion, noise emissions from the Flyride would be in keeping with the existing character of the area and the presence of the existing vocalisation noises.

[123] For FOCH, Dr Pearse disagreed with the opinions expressed by Dr Trevathan and Mr Walton and outlined his view that the vocal and other noise generated by the Flyride may not be minimal because the noises would not be of similar character to existing noises in the Reserve.

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40 NOE 1 March 2023 at 229-230.

41 NOE 1 March 2023 at 235.

Tranquillity Rating

[124] In support of his position, Dr Pearse introduced the concept of Tranquillity Rating as a method for determining the limit which should apply for controlling noise from the operation of the Flyride. To quote from this evidence:

> 3.8 Tranquillity is a human experience and its measure should be used as a yardstick over that of the standard LA_{EQ}. Tranquillity is the state of calmness experienced by humans when remote from man-made disturbances, and parks and reserves should offer a refuge and an opportunity to experience tranquillity. The Department of Conservation is one organisation which has recognised this and is moving towards using tranquillity in [its] park management policies.
>
> 3.9 Tranquillity is rated on a 10-point scale where excellent tranquillity has a rating of 8 or higher, and zero represent the absence of tranquillity. The graph in Figure 2[42] shows the relationship between the LAeq and tranquillity for a New Zealand reserve setting. For Conical Hill, the existing environment as measured in the vicinity of the nearest residential properties is rated at a TR of around 6 and higher. If the consented activity results in a district plan level of 50 dBA then the tranquillity will fall to around a TR of 2.

[125] Although Dr Pearse agreed with the other experts[43] that this general explanation was not applicable here as it dealt with changes in LAeq level, he pointed out that there were other applications of the Tranquillity Rating based on the dB LAFmax metric that could be used.

[126] Dr Trevathan was not supportive of using the Tranquillity Rating at Te Tihi o Rauhea/Conical Hill. He pointed out that Dr Pearse's definition of tranquillity was "the state of calmness experienced by humans when remote from man-made disturbances" and that Te Tihi o Rauhea/Conical Hill could not be described as an environment "remote from man-made disturbances". Generally, Dr Trevathan considered that a Tranquillity Rating approach was only appropriate where a decision maker was considering the introduction of anthropogenic sounds into a natural environment which was not the case here.

[127] Mr Walton agreed, saying the Tranquillity Rating metric was not defined in

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42 Figure 2 of Dr Pearse's evidence.
43 Joint Witness Statement.

any commonly used national or international acoustic standard and that most of the New Zealand-focussed research had been undertaken in national park settings such as Aorangi/Mt Cook and Westland Tai Poutini and mostly around helicopter/aviation noise in those settings. He agreed with Dr Trevathan that most of these environments are not analogous to the Hanmer Springs township and Te Tihi o Rauhea/Conical Hill Reserve which are urban and urban-adjacent settings.

[128] Dr Trevathan dismissed Dr Pearse's concerns about the effects of Flyride noise on wildlife in the area in a similar vein, reconfirming that there is already existing persistent anthropogenic noise in this area and that this was directly relevant to the likely significance of any effects of the Flyride noise on the biota.

Findings on Tranquillity Rating

[129] While we appreciate that a Tranquillity Rating may be of use in some circumstances where new anthropogenic noise sources are proposed to be introduced into quiet natural environments we do not consider that its use is appropriate here where the area is on the fringe of a busy urban area with all of the resultant noise that such an environment generates.

Construction Noise

[130] There was agreement among the experts that construction noise should be assessed against and comply with the noise standards in NZS 6803:1999 "Acoustics – Construction Noise" with Dr Trevathan (and Dr Pearse) accepting that the long term (more stringent) limits should apply while Mr Walton said that he did not have enough knowledge of the proposed construction methodology to comment on this.

Overall finding on noise effects

[131] We are satisfied that the effects of noise emanating from the construction and operation of the Flyride are minor and can be appropriately managed by way of consent conditions. With respect to the noise (vocal) effects of people using the Flyride we are persuaded by Dr Trevathan's evidence, supported by Mr Walton, that

the impacts of such noise will be similar to that which occurs now and will not adversely impact the existing noise character of the area. We also accept Dr Trevathan's evidence that annoyance levels from Flyride noise are likely to be low. Overall, we are satisfied (subject to finalisation of conditions which we have addressed separately in this decision) that such effects can be appropriately managed.

Traffic/Transportation Effects

[132] Planning evidence on the relevant transportation provisions in the Hurunui District Plan was provided by Ms Kelsey Bewley, Team Leader Planning for the District Council and Ms Whyte for the Applicant.

[133] Ms Bewley identified[44] Objective 8.1, Policy 8.1 and Policy 8.5 as being relevant to the Flyride proposal and while she conceded she had not undertaken a detailed evaluation, she was satisfied that the Flyride proposal was consistent with these objectives and policies.

[134] Ms Whyte agreed that these were the relevant provisions of the District Plan and provided her opinion that the Flyride proposal did not create any tension with any of these provisions. Her understanding was that there were no outstanding transportation matters relating to the appeal.[45]

[135] We accept the evidence of the two planners on these transportation/traffic planning matters which was not disputed and have focused our evaluation of the transportation/traffic generated effects from the Flyride primarily on the way in which it is proposed to manage these effects through the implementation of the proposed conditions of consent.

[136] The proposed traffic conditions focus primarily on managing any effects on street parking which is to be monitored by an independent and suitably qualified and experienced transportation engineer prior to the Flyride coming into operation and thereafter three times over the following two years. Monitoring is to be undertaken

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44 Bewley EIC at [9.18].
45 Whyte EIC at [55].

at specified locations between the hours of 10am and 2pm on a fine weather day when there are no special events occurring at Hanmer Springs.

[137] Following the baseline monitoring, commencement monitoring (or monitoring once the Flyride is operational) is to be undertaken:

- during school term time in the period from September to November (inclusive) on one weekday and on one weekend day;
- during a school holiday week between December and February (inclusive) on one weekday and on one weekend day;
- during a public holiday weekend between September and February (inclusive).

[138] The results of the baseline and each commencement monitoring event are to be provided to the Council in a report within 20 working days of the monitoring being completed. Each of these reports is to include details of on-street parking space occupancy levels and any changes in demand for these spaces between the latest commencement monitoring and the baseline monitoring.

[139] The report is required to: confirm that there were no special events taking place at the time of the monitoring; identify any changes in parking space availability since the previous monitoring; provide booking data for the Flyride activity for the monitoring period; identify the likely demand for parking spaces and comment on any illegal parking observed in the monitoring area.

[140] If the second year of monitoring identifies an on-street parking occupancy rate of 75 per cent or more in aggregate across Oregon Heights, Te Tihi o Rauhea / Conical Hill Road and Thomas Hanmer Drive, the Council may initiate an on-street parking review. This authorises the Council to serve notice of its intention to review the conditions of consent in relation to parking (and noise) to:

- respond to "… any adverse effect on the environment … which it is appropriate to deal with at a later stage";

- require the consent holder to adopt the best practicable option to mitigate any adverse effect on the environment and ensure that the conditions are effective and appropriate in managing the effects of the activities authorised by the consent.

[141] If the second year of monitoring identifies an on-street parking occupancy rate of 75 per cent or more along Acheron Heights, the Council may initiate an equivalent review and if it does, commencement monitoring for Acheron Heights is to continue for a minimum period of 12 months following this review. This further monitoring may cease if the occupancy rate falls below 75 per cent.

[142] There is also a requirement for the installation of a pedestrian crossing of Te Tihi o Rauhea / Conical Hill Road in the vicinity of Thomas Hanmer Drive if the parking occupancy rate on the first 120 m of Thomas Hanmer Drive exceeds 50 per cent. A wayfinding plan is to be prepared and submitted for certification to the Council prior to the activity commencing and if this plan requires signage to be installed, installation of this signage must be completed prior to the activity commencing.

[143] Overall, we find (subject to some minor amendments being made to the conditions which we address later in this decision) that the traffic and transportation effects of the Flyride can be appropriately managed.

Overall Conclusion on Effects

[144] On the basis of the evidence before us we are satisfied that there will be adverse effects generated by the Flyride proposal but that these will be appropriately avoided, remedied, mitigated and compensated for by the proposal before us. While we have some residual concerns regarding the precise wording of some conditions, which we address later in this decision, we are satisfied that these matters can be resolved and do not prevent the grant of consent.

Section 104(1)(b) - Relevant Plans and Policy Statements

[145] Planning evidence was provided by Ms Whyte for HSTPS and Ms Bewley and Ms Batchelor for the Council.[46]

[146] Ms Bewley provided a comprehensive assessment of the proposal against the relevant objectives and policies of the District Plan and the CRPS. It was her opinion that "the Flyride overall will be generally consistent" with those objectives and policies.

[147] Ms Whyte undertook a similar assessment for HSTPS, determining that "the Flyride is not contrary to the objectives and policies of the Hurunui District Plan and the CRPS".

[148] No planning evidence was called by FOCH, however in legal submissions counsel submitted "that the Flyride proposal does not achieve the relevant objectives and policies of either the CRPS or the HDP",[47] principally on the basis that the "policy intent of protecting this area of significant indigenous biodiversity is simply not achieved".[48]

[149] The FOCH position was, and remained throughout the hearing, that the risk of loss to the Conical Hill population of lizards was so significant as to fail to meet the relevant plan provisions. We have already addressed the question of effects on herpetofauna earlier in this decision.

[150] Policy 13.3(d) and (e) of the District Plan provide that when considering resource consent applications, a decision maker must:

> (d) provide for consideration of biodiversity offsets where it has been demonstrated that the adverse effects have been avoided as far as practical in the first instance, minimised when total avoidance is impracticable, and any remaining adverse effects are remedied or mitigated and where the adverse effects cannot be avoided, remedied or mitigated it is demonstrated that, with the offset, that will achieve no net loss; and…

46 We record that Ms Bewley was on maternity leave when the hearing resumed in 2024 and as such, Ms Batchelor provided evidence during this portion of the hearing.

47 Opening submissions at [2.33].

48 Opening submissions at [2.28].

(e) provide for conservation lots to be created, or reduced site areas to be considered, where significant indigenous biodiversity is protected.

[151] FOCH's third opening submission was that, as an offset was not considered appropriate and therefore not attempted, the proposal does not protect the significant resource that is Conical Hill, nor achieve the no net loss objective of Policy 13.3(d).

[152] We note that the promulgation of the NPS-IB has overtaken this policy (and similar policies in other plans prepared before the NPS-IB came into force in August 2023) and that the NPS-IB clearly recognises the role of biodiversity compensation in circumstances where it is not possible to develop a measurable offset. Moreover, we heard evidence from Ms Batchelor that at the time the District Plan was developed that the terms offset and biodiversity compensation were often used interchangeably. The Court is itself aware of the mixed use of these terms in the recent past.

[153] We accept Ms Batchelor's evidence and caution against applying the definitions now contained in the NPS-IB to planning documents prepared before the promulgation of that document, particularly given the manner in which the terms offset and compensation have been used in the past.

[154] In this instance, and as previously outlined, we accept the expert ecological evidence that it is not possible to provide an offset in this instance because cryptic species such as lizards are extremely hard if not impossible to monitor such that the necessary quantification of a net gain or net loss in strict offset terms cannot be undertaken. It is for this reason that off-site compensation rather than an offset has been proposed.

[155] That said, we are satisfied on the basis of Dr Tocher's and Dr Lettink's evidence that the populations of lizards will be the same or enhanced following the implementation of conditions. While that comes in the form of a compensation proposal rather than an offset we agree with Ms Batchelor and Ms Whyte that the intent of the District Plan, which is a no net loss objective, is met.

[156] With respect to the District Plan objectives and policies on **historic heritage,** we have previously noted that Schedule 14.1 of the District Plan (Historic Buildings

and Structures) does not list Conical Hill itself, nor does HNZPT. That said, we accept that District Plan Policy 14.4 provides a policy basis to recognise and provide for the relationship that an historic heritage resource may have with the land around it.

[157] Mr Cleary's second opening submission referred to *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, in which the Court quoted the Board of Inquiry saying:

> [557] The protection given by Section 6(f) extends to the curtilage of the heritage item and the surrounding area that is significant for retaining and interpreting the heritage significance of the heritage item. This may include the land on which a heritage building is sited, its precinct and the relationship of the heritage item with its build context and other surroundings.

[158] It was Ms Batchelor's view, which we accept, that the proposed activity will not impact on the access to, or enjoyment of, the listed heritage items, namely the plaque and the lookout. On the evidence before us we are satisfied that the presence of the Flyride does not affect the interpretation of the broader history and context of the plaque and lookout, when in close proximity to them, or when looking at the view from the lookout, a view which encompasses both the historical and ongoing development of the area, of which the Flyride would become a part.

[159] On the basis of the above we accept the planning evidence of Ms Whyte, Ms Bewley and Ms Batchelor and accept their findings that the Flyride proposal is generally consistent with the relevant objectives and policies of the CRPS and the District Plan.

National Policy Statement on Indigenous Biodiversity

[160] By virtue of s 104(1)(b)(iii) of the Act the Court is also required to have regard (subject to Part 2) to any relevant national policy statement.

[161] The NPS-IB came into effect on 4 August 2023 (part way through this matter being heard) with the single objective of maintaining indigenous biodiversity across Aotearoa New Zealand "so that there is at least no overall loss in indigenous

biodiversity" after that date. This is to be achieved:

- through recognising the mana of tangata whenua as kaitiaki of indigenous biodiversity;
- recognising people and communities, including landowners, as stewards of indigenous biodiversity;
- protecting and restoring indigenous biodiversity as necessary to achieve the overall maintenance of indigenous biodiversity;
- while providing for the social, economic, and cultural wellbeing of people and communities now and in the future.

[162] In this instance the NPS-IB also serves a purpose under s 104(1)(ab) which requires the Court to "have regard to…any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity".

[163] Appendix 4 of the NPS-IB provides a framework for assessing and designing biodiversity compensation, in response to "the need for a regulatory framework to support the consistent and appropriate use of biodiversity compensation and minimise the risks to indigenous biodiversity".[49] As recorded in the Joint Witness Statement – Scientists, dated 13 October 2023, the ecology experts agreed that the principles set out in Appendix 4 of the NPS-IB provide an appropriate framework for assessing the QEII covenant in this case. We return to that matter shortly.

[164] As set out in Part 3, Subpart 2 the identification of significant natural areas (SNAs) forms part of the implementation process designed to give effect to the NPS-IB objective. Where an SNA has been identified the NPS-IB requires specific actions to be taken to avoid adverse effects of subdivision, use and development on such areas (cl 3.10) with different actions to be taken with respect to subdivision, use and

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49 Ministry for the Environment, Recommendations and Decisions Report on the NPS-IB (Recommendations Report) at 73.

development in areas that fall outside SNAs (cl 3.16).

[165] As set out in supplementary opening submissions for the Respondent, all of the expert witnesses were in agreement that Te Tihi o Rauhea/Conical Hill Reserve meets the criteria to qualify as an SNA.[50] However, the definition of an SNA in the NPS-IB relates only to an area "that, after the commencement date, is notified or included in a district plan as an SNA following an assessment of the area in accordance with Appendix 1" or which has already been "identified in a policy statement or plan as an area of significant indigenous vegetation or significant habitat of indigenous fauna".

[166] While Te Tihi o Rauhea/Conical Hill Reserve may meet the qualifying criteria for an SNA, it is not an existing area of significant indigenous vegetation or significant habitat of indigenous fauna identified in a policy statement or plan, nor has it been through the appropriate process to identify it as an SNA in the District Plan. On that basis, we accept the evidence of the planning witnesses that Te Tihi o Rauhea/Conical Hill Reserve does not meet the definition of an SNA in the NPS-IB and accordingly cl 3.10 is not applicable.

[167] We acknowledge that the evidence adduced in this hearing related to the significance of habitat on Te Tihi o Rauhea/Conical Hill Reserve for indigenous fauna, does trigger cl 3.8(6) which provides that:

> If a territorial authority becomes aware (as a result of a resource consent application, notice of requirement or any other means) that an area may be an area of significant indigenous vegetation or significant habitat of indigenous fauna that qualifies as an SNA, the territorial authority must:
>
> (a) conduct an assessment of the area in accordance with subclause (2) as soon as practicable; and
>
> (b) if a new SNA is identified as a result, include it in the next appropriate plan or plan change notified by the territorial authority.

[168] That is, however, a process independent of our enquiry. Our enquiry must therefore consider cl 3.16 of the NPS-IB which relates to adverse effects on

50 Supplementary opening submissions at [30].

indigenous biodiversity outside of an SNA. In that case significant adverse effects of a development must be managed by applying the "effects management hierarchy" and all other effects managed to give effect to the objectives of the NPS-IB.

[169] The term effects management hierarchy is defined in the NPS-IB as follows:

> **effects management hierarchy** means an approach to managing the adverse effects of an activity on indigenous biodiversity that requires that:
>
> (a) adverse effects are avoided where practicable; then
>
> (b) where adverse effects cannot be avoided, they are minimised where practicable; then
>
> (c) where adverse effects cannot be minimised, they are remedied where practicable; then
>
> (d) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, biodiversity offsetting is provided where possible; then
>
> (e) where biodiversity offsetting of more than minor residual adverse effects is not possible, biodiversity compensation is provided; then
>
> (f) if biodiversity compensation is not appropriate, the activity itself is avoided.

[170] Biodiversity compensation is further defined as meaning "a conservation outcome that meets the requirements in Appendix 4 and results from actions that are intended to compensate for any more than minor residual adverse effects on indigenous biodiversity after all appropriate avoidance, minimisation, remediation, and biodiversity offsetting measures have been sequentially applied".

[171] Appendix 4 reinforces the effects management hierarchy still further by emphasising as Principle 1 that biodiversity compensation "should be contemplated only after steps to avoid, minimise, remedy, and offset adverse effects are demonstrated to have been sequentially exhausted".

[172] A common, and in our view, mistaken approach to an effects hierarchy such as this is to argue that avoidance is always possible if one abandons the use or activity sought. In our view such an argument fails to grasp the point of such a hierarchy which is to direct the applicant to first and foremost seek to avoid the effect in

question, not the activity or use applied for. We find support for this approach in the wording of the NPS-IB effects management hierarchy which provides that it is only after avoidance, remediation and mitigation of effects, offsetting and compensation are exhausted, that the activity itself to be avoided.

[173] Dr Tocher sets out in some detail in her evidence, and more fulsomely again in the LMP, the measures proposed to avoid the effects of the Flyride on lizards and their habitat. Those actions include, inter alia, ensuring no construction work takes place in the bulldozed track between towers 1 and 4 or within the rough gecko habitat at the summit. The LMP then records measures to mitigate against loss of lizards and their habitats including salvage and release of lizards, the development of new habitat via planting of indigenous species and providing additional rock habitat, and enhancement of existing habitat over Te Tihi o Rauhea/Conical Hill before moving to measures to remediate and rehabilitate areas of lizard habitat post-construction.

[174] During the first stage of hearing the Court asked a number of questions of Dr Tocher as to whether there were options for additional mitigation on Te Tihi o Rauhea/Conical Hill over and above that provided in the LMP.[51] After some discussion with the Court, Dr Tocher considered that possum trapping might usefully be added to the mitigation measures proposed and some consideration could be given to the felling of exotic trees. She could think of nothing else at that time which might supplement the proposed mitigation actions.

[175] At the resumed hearing Dr Tocher returned to the question and advised that she had reconsidered the question of exotic tree felling and had determined that it could result in "extending and increasing effects on rough gecko whilst removing shade from habitat of other species"[52] and therefore should not be pursued. Reflecting on the proposed package of mitigations it was Dr Tocher's opinion "that the actions proposed are exhaustive".[53]

[176] Dr Lettink also considered whether there were other mitigations that might be

51 NOE 3 March 2023 at 358-360 and 366 - 367.
52 Tocher second supplementary statement at [32].
53 Tocher second supplementary statement at [33].

included in the package in her supplementary evidence dated 26 July 2023. She too considered the felling of exotic trees and reached a similar position to Dr Tocher stating that the "complexities do not appear to make it feasible as additional mitigation".[54]

[177] Dr Lettink also gave consideration to pest control (mammal and wasp) and expressed strong views that such controls should not be implemented without appropriate monitoring, something that she considered to be very difficult to achieve for lizard populations. Dr Lettink also pointed to research demonstrating that predator control designed for birds is "not only insufficient but harmful to lizards". Dr Lettink was further concerned that without adequate monitoring unintended consequences such as increases in mouse and bird populations might have deleterious impacts on lizards. While Dr Lettink was supportive of wasp control, she noted that while she expected it to have benefits, she did not consider it would be "possible to conduct robust outcome monitoring" and therefore "conditioning outcome monitoring as additional mitigation is unwise due to a very high likelihood of failure".[55]

[178] Dr Lettink concluded by saying she "cannot think of any other options for additional mitigation not already considered by Dr Tocher".[56] On that basis Dr Lettink "continue[s] to support the proposed compensation covenant and see[s] it as vital".[57]

[179] We accept the evidence of Dr Tocher and Dr Lettink that actions to avoid, remediate, and mitigate effects on indigenous biodiversity on Te Tihi o Rauhea/Conical Hill have been sequentially exhausted in accordance with the provisions of cl 3.16, the definition of the effects management hierarchy and Principle 1 of Appendix 4 of the NPS-IB. Those provisions set a high evidential bar which must be met before off-setting or compensation can be considered. We are satisfied

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54 Lettink supplementary statement at [9.3].
55 Lettink supplementary statement at [9.15].
56 Lettink supplementary statement at [9.17].
57 Lettink supplementary statement at [9.17].

that evidential burden has been met in this instance.

[180] Pursuant to the effects mitigation hierarchy referred to in cl 3.16, the next step is to assess whether "more than minor residual adverse effects" remain despite the mitigation measures proposed.

[181] It was Dr Tocher's evidence that, provided all of the mitigation measures proposed worked as she anticipated then no residual effects that were more than minor would ensue. That said, Dr Tocher accepted that there was some remaining uncertainty about the efficacy of those measures, and perhaps more critically, there was a time lag between the effects of construction and the reestablishment and recolonisation of new habitat. It was for this reason that Dr Tocher determined that more than minor residual effects remained and needed to be offset or compensated.

[182] Dr Lettink was more circumspect, considering that even if the mitigation actions were effective there might be some remaining more than minor residual effects. In her opinion compensation remained vital. Professor Ogilvie was more cautious again, also considering that more than minor residual effects for rough gecko remained after the mitigation measures were deployed.

[183] In many respects the difference in expert opinion is immaterial to our consideration given Dr Tocher proposed biodiversity compensation in any event and the Wildlife Permit requires it. That said, we record here that the only residual effect appeared to us to be a two-to-three-year time lag between the period of construction and recolonisation of the rehabilitated area by the lizards, which we struggle to find to be more than a minor adverse effect. While we note Dr Tocher's degree of uncertainty as outlined above, her emphatic verbal response during the hearing as to the effect on rough gecko gives us confidence. She said " I strongly believe they will be fine. They are not going to not recover".

[184] In accordance with the effects mitigation hierarchy our attention now turns to biodiversity offsetting which is to be "provided where possible". The Joint Witness Statement-Scientists records the views of both Dr Tocher and Dr Lettink that off-setting is not possible, as follows:

> Dr Tocher and Dr Lettink agree that biodiversity offsetting is not possible for New Zealand lizards at present because losses and gains cannot be robustly quantified. This means compensation is appropriate.

Professor Ogilvie's opinion is also recorded, as follows:

> Professor Ogilvie is not convinced the QEII covenant is appropriate to address residual effects. He would prefer an offset calculation was provided that gave more assurance of a no net loss outcome.

[185] Dr Lettink explained further in answer to questions of cross examination:

> I don't have any faith that we can do an offset on lizards any stage soon and the problem about that is the gains and losses both have to be measurable and quite often it's really hard to work out what you've got to start with but it's even harder to quantify how you're going to improve the numbers so I can't give you a recipe that says "I can double your population with this level of predator control." So both those things have to be met. We don't have that. I think there's widespread agreement in our Lizard Technical Advisory Group that we think, as more information about management strategies comes available people should try it but right now no one, it hasn't passed the test in Court as far as I'm aware and I don't think we can do an offset so it leaves compensation as the last, effectively the last place where you can actually have an opportunity for positive gains.

[186] Professor Ogilvie stated in his evidence that "no net loss, or preferably net gain, is the goal" but that he understood that the biodiversity compensation offered in this instance "accepts net loss in a way that offsetting does not tolerate". This supported his view as recorded in the JWS. Professor Ogilvie accepted however in answer to questions of cross examination that he:

> accepted the discussions that I'd had that with species like this it's really difficult to monitor them through time and so the idea to be able to actually measure no net loss, or net gain, or however you want to word it, is technically tricky…...

[187] As a matter of principle, we accept, as the Court did in *Te Rūnanga o Ngāti Whātua v Auckland Council*[58] that:

> Situations arise in which the outcome of an offset activity cannot be quantified, such as when fauna species are difficult to survey and enumerate in advance of the effect occurring or to monitor after an offset activity has been applied, or if their response to a certain habitat cannot be predicted. Cryptic and/or very mobile species, such as the frogs, lizards, bats and invertebrates that are found on the Waste Management site, are typical of such situations. In those

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58 *Te Rūnanga o Ngāti Whātua v Auckland Council* [2023] NZEnvC 277 at [719].

> circumstances **compensation** may be available.

[188] Moreover, we accept the evidence of the ecological witnesses that designing an offset in this circumstance would be at best "technically tricky" but more likely impossible given the inability to accurately measure gains and losses. For that reason, we find that in accordance with the effects management hierarchy, offsetting under (d) is not possible and accordingly the next step is to consider compensation under (e).

[189] Biodiversity compensation is defined in the NPS-IB as meaning "a conservation outcome that meets the requirements in Appendix 4….". As previously noted, in terms of the effects management hierarchy "if biodiversity compensation is not appropriate, the activity itself is [to be] avoided".

[190] Appendix 4 opens by stating "[t]hese principles apply to the use of biodiversity compensation for adverse effects on indigenous biodiversity" and then sets out 13 principles.

[191] The NPS-IB is newly minted and there was a considerable divergence of opinion between both ecology and planning witnesses and counsel as to what "meets the requirements in Appendix 4" means (including whether all 13 principles are required to be met), and as such, whether the conservation covenant proffered here met the definition of biodiversity compensation.

[192] As a starting point, we note that the JWS-Scientists records that:

> Full adherence to all principles is ideal but there may be valid ecological reasons why full adherence to one or more of the principles cannot be achieved. Those reasons should be fully documented and available to the decision maker.

[193] Counsel for FOCH also accepted that not all 13 principles might be relevant to a particular compensation proposal but argued, citing *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*[59] that "… where a principle is relevant, its requirements must be applied according to their terms". It was his position that "[f]or a proposal to be biodiversity compensation it must "meet" [all of the relevant]

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59 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 e.g. at [146].

principles in Appendix 4 NPSIB".

[194] Counsel for the Council produced a table in closing submissions setting out how Appendix 4 was referenced throughout the NPS-IB. As with counsel for FOCH, she noted that the definition of biodiversity compensation in cl 1.6 refers to a conservation outcome that "meets the requirements" in Appendix 4. However, she also noted, as the Court had done in its questions of various witnesses, that in cl 3.10(4)(b) which deals with managing adverse effects in SNAs rather than outside an SNA as is the case here, an applicant must demonstrate that they have "complied" with Principles 1 – 6 and "had regard" to the remaining principles, "as appropriate".

[195] This can be contrasted with Appendix 4 itself which states the principles "apply" and cl 3.24 which deals with changes local authorities must make to their plans to require that applications for activities that would have a more than minor adverse impact on indigenous biodiversity are not considered unless accompanied by a report which inter alia sets out how the "relevant principles in Appendix 4…have been addressed".

[196] It was the Council's position that given the principles have "multiple component parts and include ecological terms that are included within a glossary of ecological concepts…which are also capable of multiple meanings and/or outcomes", it is "not workable to approach the principles as "requirements" or to require "compliance" with principles 1 to 6 in all proposals under Clause 3.10, let alone proposals – such as this one – which are outside SNAs and managed by Clause 3.16".

[197] Counsel for HSTPS referred us to case law regarding the application of Treaty of Waitangi/ Te Tiriti o Waitangi principles[60] and argued that:

> as principles rather than rules, they must be applied appropriately in context, including in relation to and, generally, consistent with other provisions of the NPSIB; and
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> the Court must weigh all of the competing considerations and ultimately make

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60 *The Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2020] NZEnvC 180 at [94]. *Chief Executive of the Ministry of Agriculture and Forestry v Waikato Regional Council* EnvC Auckland A133/06, 17 October 2006 at [53].

> a value judgment on the principles as a whole.

[198] We were also referred to the "Recommendations and decisions report on the NPS-IB" (Recommendations Report) which we found to be a helpful aid to interpretation (albeit at times creating more confusion than enlightenment).

[199] We acknowledge that given the NPS-IB is secondary legislation,[61] its meaning must be ascertained from its text and in the light of its purpose and its context.[62] All counsel referred to the Recommendations Report, and counsel for the Council submitted that the Recommendations Report is a permissible extrinsic aid to the purposive interpretation of the NPS-IB.[63] We accept that.

[200] The purpose of the NPS-IB is set out in its objective, which is:

> (a) to maintain indigenous biodiversity across Aotearoa New Zealand so that there is at least no overall loss in indigenous biodiversity after the commencement date; and
>
> (b) to achieve this:
>
> > (i) through recognising the mana of tangata whenua as kaitiaki of indigenous biodiversity; and
> >
> > (ii) by recognising people and communities, including landowners, as stewards of indigenous biodiversity; and
> >
> > (iii) by protecting and restoring indigenous biodiversity as necessary to achieve the overall maintenance of indigenous biodiversity; and
> >
> > (iv) while providing for the social, economic, and cultural wellbeing of people and communities now and in the future.

[201] Seventeen policies then follow of which Policy 8, among others, has specific relevance to the case before us. It provides that "[t]he importance of maintaining indigenous biodiversity outside SNAs is recognised and provided for". We have already identified that this is given effect to by cl 3.16 which requires the application of the effects management hierarchy to indigenous biodiversity outside of an SNA. Appendix 4 forms part of the effects management hierarchy by providing the

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61 Resource Management Act 1991, s 52(4).

62 Legislation Act 2019, s 10.

63 Council closing legal submissions at [27], referring to *Bredmeyer v Chief Executive of the Ministry of Social Development* HC Wellington CIV-2007-485-105, 20 September 2007.

principles of biodiversity compensation.

[202] The Recommendations Report provides helpful insight into the intended purpose of Appendix 4. It sets out concerns raised in submissions on the draft NPS-IB as to whether the principles should be "standards, requirements or criteria". The Recommendations Report response to that is somewhat helpful, stating:

> We agree the principles outline what is expected of an offsetting or compensation proposal but do not agree they are considerations. The term 'considerations' implies there is a choice to consider them or not, which would weaken the design and success of compensation proposals.

[203] The Recommendations Report notes that "[s]everal submitters on the exposure draft also commented that complying with the principles was not always appropriate or achievable". We heard similar evidence from the ecological witnesses before us, with Dr Lettink stating "[m]y preliminary observations are that the NPS-IB generally reflects sound ecological principles although I do have some concerns about its application in the context of indigenous fauna, particularly lizards" and "the NPS-IB is not clear on whether all … principles must be complied with, have had regard to, or some mixture of both". Dr Tocher agreed and added that with respect to the exposure draft:

> I was, however, frustrated with what I considered to be poor drafting of some of the principles. In particular, I noted that the omission of key definitions, such as *'irreplaceable* and *vulnerable',* left Principle 2 open to broad and potentially inappropriate interpretation. … In my opinion, the definitions for *irreplaceability* and *vulnerability* included in the operative NPS-IB provide little additional clarity.
>
> [footnotes omitted]

[204] Relevantly, the Recommendations Report notes that:

> Further discussions with DOC have indicated there are six matters that must be considered in all instances for a proposal to be acceptable as a biodiversity offset or compensation. The other principles should be applied as relevant to the proposals.

[205] This is consistent with the wording of the operative NPS-IB cl 3.10 for SNAs which specifies that Principles 1 -6 are complied with and regard has been had to the remaining principles, but this is not replicated in the wording of cl 3.16 for indigenous

biodiversity outside of SNAs which refers simply to the application of the effects management hierarchy.

[206] We also note slightly different wording on page 63 of the Recommendations Report which states "the four principles in Appendix 4 about 'scale of biodiversity compensation', 'additionality', 'leakage' and 'long term outcomes' must be complied with in every case" and "all other principles in Appendices 3 and 4 must be considered". This would result in only Principles 3 – 6 requiring compliance which appears inconsistent with the operative cl 3.10 as drafted (which requires Principles 1 – 6 to be complied with).

[207] In this regard, we note that Principle 1 is simply a restatement of the effects management hierarchy reiterating that biodiversity compensation is only to be contemplated when the balance of the steps have been sequentially exhausted. As such, it must have already been complied with for Appendix 4 to be in play and thus can be removed from our consideration.

[208] Principle 2, however, is somewhat more complex. It provides that "[b]iodiversity compensation is not appropriate where indigenous biodiversity values are not able to be compensated for" and then provides three examples of such circumstances. At least for matters being considered under cl 3.10, this principle seems clear on its face. It must be complied with and where, for example, the indigenous biodiversity affected is "irreplaceable or vulnerable" biodiversity compensation is not appropriate. The effects management hierarchy then makes it clear that where biodiversity compensation is not appropriate, the activity itself must be avoided.

[209] We record some disquiet with the application of this principle. Although not determinative, the Recommendations Report did not identify Principle 2 as one of the principles which <u>must</u> be complied with. Moreover, in response to the exposure draft where some submitters wanted "reassurance that Principle 2 would not prevent the use of biodiversity compensation" while others "wanted it made explicit that, if the limits were triggered, biodiversity compensation would be inappropriate", the

Report's response was to state:

> The principle states a decision-maker has discretion to determine if a proposal for biodiversity compensation is appropriate, using matters such as those listed in Principle 2(a) – (c) to inform their decision. It is not the intent of the principle to provide an absolute limit. Essentially, the more irreplaceable or vulnerable the indigenous biodiversity, the higher the burden of proof required for a biodiversity compensation proposal.

[210] For completeness we note that throughout the Recommendations Report, it is acknowledged that a "specific guidance document should be developed alongside the effects management hierarchy and Appendices 3 and 4". The Court is not aware of such guidance being produced as yet.

[211] Given all of the above, we are faced with a situation in which we must apply the NPS-IB as we find it. While the Recommendations Report provides some assistance it is not determinative, particularly given some of what appears to have been intended in the Recommendations Report does not translate into the operative provisions of the NPS-IB, or at least not in a clear and unambiguous manner.

[212] Clause 3.16 requires a proposal to apply the effects management hierarchy. The application of the effects management hierarchy requires other options for avoidance, remediation and mitigation of effects and offsetting to be sequentially exhausted and demonstrably so. It will not be enough to say it has been done. It will need to be proven. If a biodiversity compensation proposal is then an available option for consideration it will need to meet the requirements of Appendix 4 which in turn requires each principle to be "applied" by the decision-maker.

[213] There is a clear, albeit possibly unintended, distinction between applying Appendix 4 to indigenous biodiversity within an SNA and to indigenous biodiversity outside of an SNA. As such, at a minimum, a decision maker applying Appendix 4 under cl 3.10 is required to ensure compliance with Principles 1 – 6 and have regard to the balance. We can find no interpretation under which every principle must be complied with, even for indigenous biodiversity in an SNA under cl 3.10.

[214] Nor can we find any rationale for applying a higher standard to compliance

with respect to indigenous biodiversity outside an SNA. On that basis we find no reason to suggest every principle in Appendix 4 must be complied with when considering a biodiversity proposal to which cl 3.16 applies. That said, we are not entirely satisfied that, other than the wording difference, there is a strong substantive basis for applying the principles of Appendix 4 differently as between a proposal under cl 3.10 and one under cl 3.16. This is particularly so when one considers the operation of cl 3.8 which provides a mandatory process of assessment for areas of indigenous biodiversity identified outside SNAs which may lead to their inclusion in an SNA.

[215] Principles 2 – 6 go to the heart of designing a biodiversity compensation proposal that meets the objective of the NPS-IB which is to maintain indigenous biodiversity within Aotearoa New Zealand so that there is no overall loss. On that basis we consider that compliance with these principles is necessary in any proposal, be it under cls 3.10 or 3.16.

[216] That said, we do not think that "meeting the requirements", "applying the principles" or even "complying with" Appendix 4 can or should be reduced to a "tick box" or simple yes/no exercise. The inter-relationship of complex ecological terms within the principles, some of which are defined and others which are not, means even determining "compliance" will require the careful application of judgement based on a thorough analysis of the expert evidence available to a decision maker.

[217] In our view, the NPS-IB requires the decision maker to carefully consider each principle, evaluate the evidence before it and reach a judgement on whether the proposal overall constitutes a compensation proposal that will assist in maintaining indigenous biodiversity so that there is no overall loss in Aotearoa New Zealand in accordance with the NPS-IB objective.

Analysis of the NPS-IB principles against the evidence

[218] Within that context, we now turn to consider the evidence as to the application of each of the Appendix 4 principles on the compensation proposal before us.

[219] **Principle 1** constitutes a restatement of the effects management hierarchy. For the reasons set out previously, we are satisfied that the other options set out in the effects management hierarchy have been sequentially exhausted and a more than minor residual effect remains which cannot be offset such that a biodiversity compensation proposal can be considered. Accordingly, this principle is met.

[220] **Principle 2** requires consideration as to whether the indigenous biodiversity values in question are able to be compensated for. The principle sets out circumstances in which compensation may not be appropriate as including where:

> a) the indigenous biodiversity affected is irreplaceable or vulnerable;
>
> b) effects on indigenous biodiversity are uncertain, unknown, or little understood but potential effects are significantly adverse or irreversible;
>
> c) there are no technically feasible options by which to secure a proposed net gain within acceptable timeframes.

[221] The NPS-IB provides definitions of vulnerability and irreplaceability:

> **Irreplaceability** is a measure of the uniqueness, replaceability and conservation value of biodiversity and the degree to which the biodiversity value of a given area adds to the value of an overall network of areas. It interacts with vulnerability, complexity and rarity to indicate the biodiversity value and level of risk for a given area.
>
> **Vulnerability** is an estimate of the degree of threat of destruction or degradation that indigenous biodiversity faces from change, use or development. It is the degree to which an ecosystem, habitat or species is likely to be affected by, is susceptible to or able to adapt to harmful impacts or change. It interacts with the irreplaceability, complexity and rarity to indicate the biodiversity value and level of risk for a given area.

[222] Dr Tocher and Dr Lettink both noted in their evidence that they found these (and other definitions in the NPS-IB) unhelpful, and expressed reservations as to how the terms are to be applied in practice. As will be apparent within this decision, the Court also considers that there are issues arising in applying the definitions as provided. Specifically, we note that the definitions conflate actual definitions with directions on how to apply such definitions and in some instances appear inconsistent with well-established ecological principles and practice.

[223] In undertaking her assessment of the biodiversity compensation proposal

against the principles in Appendix 4,[64] Dr Tocher considered overall that the Flyride compensation proposal adheres to Principle 2. In relation to the three clauses of Principle 2, she said biodiversity at the site is neither irreplaceable nor vulnerable, the adverse effects of the Flyride proposal on lizards are certain, known and understood, and the compensation proposal will achieve the proposed gains within acceptable timeframes.

[224] In reaching her conclusion she set out and rejected various possible definitions of irreplaceability previously applied in New Zealand, explained why she rejected them, and as noted above, expressed reservation about the NPS-IB definition.

[225] She assessed irreplaceability on the basis that "it relates to biodiversity (species and habitats) of a given area (in this case Te Tihi o Rauhea /Conical Hill Reserve) and the conservation value it contributes to the viability of surrounding and connected areas (complementarity)".

[226] Her assessment is that the remaining habitat and species total population size is vast compared to that remaining on Te Tihi o Rauhea /Conical Hill. The approximately 1,406 m^2 of lizard habitat within the 2000 m^2 site is a small part of the 11.7 ha Te Tihi o Rauhea /Conical Hill Reserve. Fewer than 105 animals across the four species may be affected, a miniscule proportion of the overall population size over the geographic range of the affected species. The habitat is degraded and of low quality at Te Tihi o Rauhea /Conical Hill and it was her opinion that any loss there will make very little difference to the full range of diversity. She agreed with Dr Lettink's comments that the four species are found at a number of other sites in larger populations and /or habitats.

[227] Dr Lettink considered irreplaceability to be about how many other units (of a particular species) are available. In this case, she said there are plenty of other populations of the three at-risk declining species and even of the rough gecko, where

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64 Second supplementary statement dated 18 August 2023.

the population is in greater numbers and/or has more, better-quality habitat.[65]

[228] Dr Lettink was asked in questioning whether such an approach meant no lizard species would ever fall under the 'irreplaceable' label because they all existed in other locations. We paid particular attention to Dr Lettink's responses to such questions and it was clear to us that Dr Lettink was not saying she considered a species would not qualify as irreplaceable simply because it was found on other sites, but rather that there were other parameters to be taken into account such as population trend in making such a judgement. She was clear that a species *might* be irreplaceable if it was found in a very limited number or size of locations or in habitat that is unique.

[229] She reiterated that making such an assessment depends on context, the proportion of habitat, the population, the value actually affected and residual effects. Some lizards' species and habitats are very restricted and irreplaceability may be an issue there. It was her expert opinion however that the habitat in this case was not irreplaceable.

[230] In relation to vulnerability, Dr Tocher and Dr Lettink both considered that the definition of 'vulnerability' provided in the NPS-IB does not explicitly exclude threatened species from proposals for biodiversity compensation.

[231] Dr Tocher considered various meanings and uses of the term 'vulnerability' but was of the opinion that Principle 2 refers to "a baseline vulnerability of the biodiversity on Te Tihi o Rauhea/ Conical Hill Reserve outside of any potential effects generated by the Flyride proposal". She looked at whether the lizard species and habitats are vulnerable now, without the Flyride, and what the impact of the proposal would be if the Flyride was constructed.

[232] She explained that she had considered whether there were any threats from use and development of the land to the species and habitats currently (other than those presented by the Flyride) and found that the greatest effect on the biodiversity was likely to have been the historic (pre-1900) clearance of beech forest. Given the

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65 NOE 19 March 2024 at 110 line 3-8.

four lizard species have persisted despite that clearance work, had rapidly colonised the rock habitat, and that rough gecko appear able to take advantage of a range of habitat types, Dr Tocher was of the view that the development of forestry tracks had been of lesser consequence and that the degree of existing threat in the absence of the Flyride was negligible.

[233] Dr Tocher reiterated that the Flyride compensation proposal adheres to Principle 2(a) because it neither impacts habitats that are irreplaceable nor affects species or habitats that are vulnerable.

[234] Counsel for FOCH was of the view that under Principle 2(a) and (b) compensation was not appropriate in this case, because under (a) rough gecko are vulnerable and irreplaceable and under (b) the effectiveness of the mitigation is deeply uncertain and the effects unknown to the point that local extinction cannot be ruled out. He cited Professor Ogilvie's opinion that vulnerability was about the degree of risk for a particular species because of its situation or its biology.

[235] This echoed Dr Tocher's and Dr Lettink's view, albeit using different terminology which occasioned further questioning. The situation and biology for the rough gecko were therefore explored at some length during the hearing, particularly in relation to the impoverished nature of the population of that species on Te Tihi o Rauhea/ Conical Hill. Both Dr Tocher and Dr Lettink agreed that the population is impoverished and that the degraded nature of the habitat made them at higher risk of an adverse impact than the other species. However, the evidence in relation to the limited degree of risk to the species and habitat, given their previous resilience and current distribution, satisfied Dr Tocher and Dr Lettink that the vulnerability of the species and habitat do not disqualify the proposal from biodiversity compensation.

[236] We find that determining whether a compensation proposal triggers the Principle 2 (a) definitions of the terms 'irreplaceable' and 'vulnerable' requires careful and expert analysis. In any circumstance it will be necessary to understand both the threat and the sensitivity of the species, ecosystem or habitat to that threat. The degree of vulnerability will depend on the level of threat and the risk it presents, and various

parameters of the species, habitat or ecosystem including for example, threat status, rarity, replaceability, physiological sensitivity, ease of reproduction, geographical spread and connectivity, and the like.

[237] Ultimately determining adherence to the principle relies on the experience, knowledge and analytical capabilities of the ecologists applying it in any particular situation. Dr Tocher and Dr Lettink both analysed the terms at some length and applied them based on their professional experience and expertise. Each reached the same conclusions independently. We were satisfied with the breadth of their thorough evaluation and agree with their conclusion that the proposal is not excluded from biodiversity compensation by either the vulnerability or irreplaceability of the species, habitats or ecosystems.

[238] Under **Principle 2(b)** biodiversity compensation is inappropriate if the effects on indigenous biodiversity are uncertain, unknown or little understood, and the potential effects are significantly adverse or irreversible. Counsel for FOCH argued that there is a fundamental uncertainty with the proposal because it is not known with certainty whether the mitigation package will benefit the rough gecko at all, such that adverse effects might be significantly adverse.

[239] Dr Tocher was clear that the effects are known and that the uncertainty inherent in the proposal related to the effectiveness of the on-site mitigation measures which were more than compensated for by the provision of the compensation site.

[240] We have previously found, in our overall conclusions on the effects on lizards, that while there are issues of uncertainty in quantifying effects on cryptic species such as lizards, those issues have been appropriately identified and taken into account by the expert ecologists (as well as by DOC in issuing a Wildlife Act permit). We are satisfied that the mitigation and compensation proposed is likely to improve the status of rough gecko and accordingly accept the evidence of Dr Tocher and Dr Lettink that biodiversity compensation is not inappropriate under Principle 2(b).

[241] **Principle 2(c)** would disqualify the proposal from biodiversity compensation if there are no technically feasible options by which to secure a net gain within

acceptable timeframes.

[242] The proposed compensation package provides the size, location and management methods for the covenant area. Dr Tocher explained that the works to implement the covenant such as the fencing, removal of cattle, woody weed control and indigenous plantings will commence with urgency if the project is allowed to proceed. We have seen no suggestion that these works are not feasible.

[243] In relation to securing a net gain within acceptable timeframes we understand that the registration of the QEII covenant may take one to two years to implement but the gains for rough gecko will commence when the physical enhancements to the site are carried out which we understood to be immediately on giving effect to the consent.

[244] With respect to securing a "net gain" we note that this is a term more often used in relation to a measurable result achieved under an offset. As Dr Lettink noted the fact that a net gain cannot be robustly measured is a reason for seeking compensation so it makes limited sense to include it in the assessment of a compensation proposal.[66] That said, we accept that the proposal is for lizard habitat improvement over a much larger area than the habitat that will be destroyed. Improved habitat quality over the compensation area is predicted to improve the lizard population. While a net gain cannot be measured in the same way it would need to be under an offset, we consider that it can be inferred as a result of the improvement expected to accrue from the compensation package. This is the evidence of the expert herpetologists and we accept that evidence.

[245] For the reasons set out above we do not find the compensation proposal is disqualified under Principle 2.

[246] **Principle 3**, regarding the **scale of compensation**, requires that the indigenous biodiversity values lost are addressed by positive effects to indigenous biodiversity that outweigh adverse effects (including when indigenous species depend

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[66] NOE 20 March 2024 at 197.

on introduced species for their persistence). Dr Tocher noted that her evidence in relation to Principle 4 'Additionality' also covers much of the reasoning as to why the Flyride adheres to Principle 3, adding that Principle 3 and Principle 6 cannot be met unless additionality (Principle 4) can be demonstrated.

[247] The evidence before us was that the positive effects on biodiversity of on-site compensation would result from the improved habitat (both in scale and quality) and the proposed wasp control. With respect to the offsite components of the compensation proposal, the evidence established that the covenant area, known to support rough geckos, was approximately 43 times larger than the area of lizard habitat affected by the proposal. Other measures including fencing, the removal of woody weeds and protection in perpetuity add to the scale of the compensation. Principle 3 has been appropriately addressed.

[248] **Principle 4, 'additionality'**, requires biodiversity compensation to achieve gains in indigenous biodiversity above and beyond the gains that would have occurred in the absence of compensation, and that are additional to any minimisation, remediation or offsetting undertaken in relation to the adverse effects of the activity.

[249] Dr Tocher's evidence was that to achieve additionality the improvement in the condition of the covenant area habitat needs to be commensurate with or exceed the residual effects on biodiversity at the Te Tihi o Rauhea /Conical Hill site. Where management is being undertaken to improve the condition of a covenant area habitat, gains are locked in by actively managing threats to biodiversity. Dr Tocher advised that she considered cattle to be the primary threat, through both grazing and trampling and by stripping out understorey shrubs that provide habitat and food for lizards. She outlined that the current situation or 'business as usual' in the covenant area is heavy tracking and pugging by cattle, stripping of the understorey and a threat of vegetation clearance for grazing and potentially for carbon farming. She therefore considered the protection offered via the covenant to be providing an 'averted loss' by preventing any further clearance.

[250] Professor Ogilvie disagreed saying that he was not sure he could agree that

there would be a gain in biodiversity at the covenant site,[67] and had a 'gut feeling' that the improvements (from fencing cattle, weed management and planting) might be quite minor.[68] He had not visited the site and apart from his own assertions did not provide any other evidence as to why that should be the case.

[251] There was also some argument from Professors Brower and Ogilvie, and in the closing submissions of FOCH, as to whether the threat of clearance was realistic, given that the territorial authority's vegetation clearance rules would apply to the site. Ms Whyte agreed the rules were restrictive and that a Wildlife Act permit would be required for vegetation clearance. We accept that. However, as we have set out previously, we accept the evidence of Dr Tocher that overall the degree of protection afforded to lizard habitat by the covenant is not provided for by the District Plan or the Wildlife Act.

[252] We prefer the evidence of Dr Tocher and Dr Lettink and find that the provision of the 6 ha covenant area, managed with the techniques proposed, will provide habitat for rough gecko additional to that which might have developed under the current grazing regime.

[253] **Principle 5, 'leakage'**, refers to the biodiversity compensation design and implementation and requires that it avoid displacing harm to other indigenous biodiversity in the same or any other location. Dr Lettink did not consider the proposed management of the covenant to displace indigenous biodiversity at the same or other sites.

[254] Dr Tocher considered the only potential for leakage, in its broadest sense, was the possibility that there could be increased poaching of rough geckos from areas surrounding the covenant site if the site became known as a result of these proceedings. The Court has restricted knowledge of the location of the site to named participants in this hearing via extensive confidentiality arrangements. We are aware that lizard poaching is an ongoing issue in New Zealand but do not consider it more

67 NOE 20 March 2024 at 265 line 9.
68 NOE 20 March 2024 at 265 line 25 to 266 line 6.

likely to occur at the compensation site than anywhere else within the known range of the species we are concerned with. We do not consider that leakage will occur as a result of the compensation proposal.

[255] Under **Principle 6**, **'long-term outcomes'** biodiversity compensation is to be managed to secure outcomes of the activity that last at least as long as the impacts, and preferably in perpetuity. The QEII covenant area is to be protected in perpetuity and as such the compensation proposal meets this principle.

[256] **Principle 7**, **'landscape concept'** requires biodiversity compensation to be undertaken where this will result in the best ecological outcome, preferably close to the impact site or within the same ecological district. The action considers the landscape context of both the impact and compensation site, taking into account interactions between species, habitats and ecosystems, spatial connections and ecosystem function.

[257] This principle was of particular relevance in determining the location of the proposed compensation area. We understood from the evidence of Dr Tocher and Dr Lettink that significant attempts were made to secure, as a compensation site, an unprotected site containing rough gecko closer to Te Tihi o Rauhea /Conical Hill. Those attempts did not bear fruit and as a result the compensation site chosen is at some distance from Te Tihi o Rauhea /Conical Hill. The distance between the sites was of concern to Professors Brower and Ogilvie, as the sites are not within the same ecological district, and it was considered possible that the rough geckos at Te Tihi o Rauhea /Conical Hill and the other site were genetically distinct. As previously set out, that is not the case. The lizards at both sites are within the populations of the genetically aligned southern/southeastern cluster of rough geckos. This confirms Dr Tocher's opinion that the compensation site is ecologically 'close' to Te Tihi o Rauhea/Conical Hill.

[258] Dr Lettink noted the value of proximity and connectivity in the international guidance on offsetting but said no maximum distance has been provided. She preferred to seek the best ecological outcome available, even if further away, rather

than being constrained by a desire for close proximity.

[259] Counsel for FOCH argued in closing submissions that Principle 7 says 'best ecological outcome', not 'best available covenant' and that the best ecological outcome is close to the site of impact or in the same ecological district. We note the principle has a 'preference' for close proximity or the same ecological district but does not impose this as a mandatory requirement.

[260] Dr Lettink considered the best ecological outcome was the management and protection in perpetuity of a sizable tract of high-quality habitat that supports a viable population of rough gecko and at least one grey gecko species next to an area of protected forest that is not inundated with wasps or infested by weeds. That describes the compensation site well.

[261] In addition, we note that both Dr Lettink and Dr Tocher considered that using ecological district boundaries to define an area within which a compensation habitat for lizards must be placed did not make sense, as the ecological district boundaries are based on vegetation distribution rather than fauna distribution, and do not necessarily match or express lizard distribution with any accuracy.

[262] We do not agree that in choosing the best ecological outcome an applicant must find the best, proximate ecological site and if it is not available must abandon compensation, as suggested by counsel for FOCH. The evidence from Dr Tocher is that the sites are 'close' in terms of the rough gecko genetics. Our understanding is that even if the local site that both Dr Tocher and Dr Lettink considered to be a candidate for a compensation site was available, there were issues around proximity to the urban environment (presence of cats and other predators) and also a large wasp population, factors which are less likely to be present at the compensation site. We find that the compensation site has been selected taking the landscape into consideration as far as possible in the circumstances and that the proposal appropriately applies Principle 7.

[263] **Principle 8** concerns the **'time lag'** or delay between loss of, or effects on, indigenous biodiversity at the impact site and the gain or maturity of indigenous

biodiversity at the compensation site, which should be minimised so that the calculated gains are achieved within the consent period or, as appropriate, a longer period (but not more than 35 years).

[264] Dr Tocher's evidence is that finalising the covenant document may take a year or two[69], however she said the management of the compensation habitat would commence immediately, such that gains in habitat quality will be in progress before the Flyride is operational. She and Dr Lettink both consider it may be two to ten years before there is an increase in gecko numbers depending on the management.

[265] Our understanding is that the much larger size of the compensation area compared to the impact area addresses any concern about the quantum and timeliness of habitat quality gains and as such compensates for residual effects.

[266] We find that Principle 8 has been addressed.

[267] If **'trading up'**, **Principle 9,** is to be met as part of a compensation proposal, the indigenous biodiversity gains must be demonstrably greater or higher than those lost. The proposal must show that the values lost are not to Threatened or At Risk (declining) species or to species considered vulnerable or irreplaceable.

[268] Dr Lettink gave an example of trading up as accepting the losses of individuals and habitats of a non-threatened species at an impact site in exchange for gains to a Threatened lizard species elsewhere. This 'like-for-unlike' compensation is not what is in question here, which is 'like-for-like' where the values lost and gained are for the same biodiversity, that is, rough gecko habitat (with likely rough gecko population gains).

[269] Given the above, Dr Lettink was of the view that this principle does not apply to the Flyride project.

[69] We note condition Condition 43 requires the QEII Covenant to be registered as soon as reasonably practicable but no later than 2 years from the exercise of this consent.

[270] We find that the compensation proposal was not designed as a trading-up proposal and this Principle has been considered but is not relevant.

[271] **Principle 10** sets out that a **financial contribution** is only considered if (a) there is no effective option available for delivering biodiversity gains on the ground and (b) it directly funds an intended biodiversity gain or benefit that complies with this rest of these principles. We find that there is an effective option available for delivering biodiversity gains and there is no financial contribution required as part of the proposed compensation. Principle 10 is therefore not relevant.

[272] **Principle 11 Science and mātauranga Māori** requires that the design and implementation of biodiversity compensation is a documented process informed by science and mātauranga Māori. Dr Tocher explained in some detail the scientific input to this project, including site surveys at the impact and proposed compensation sites, catch-per-unit data, as well as the expert knowledge both she and Dr Lettink bring to the project. This has led to the development of the LMP at a high level of detail.

[273] DOC consulted with Te Rūnanga o Kaikōura (Ngāti Kuri) in relation to the application for a Wildlife Act permit, and Dr Tocher was part of that consultation. Ngāti Kuri strongly preferred that the lizards captured remain on Te Tihi o Rauhea /Conical Hill, with which she concurred and which forms part of the proposal. Dr Tocher provided information about Ngāti Kuri's response to the wildlife permit application which she said demonstrated that Ngāti Kuri were comfortable with the DOC LMP and the mitigation measures and conditions to protect taonga, such that they supported the Flyride proposal.[70] She was aware that there had been regular liaison between Te Rūnanga and the Applicant throughout the planning of the Flyride. Dr Lettink observed that DOC was satisfied with the iwi liaison process and had said "[t]hroughout the iwi consultation process there has been complete transparency and efforts to reduce confusion around technical aspects".[71] She did not know whether the consultation was informed by mātauranga Māori and did not profess expertise in that area but considered that connections and relationships between humans and

70 Tocher second supplementary statement at [127]-[130].
71 Lettink supplementary statement at [8.46].

other biodiversity would be vital.

[274] We find that a great deal of scientific effort has been put into the project, including in developing as detailed an understanding as practicable of the biodiversity on Te Tihi o Rauhea /Conical Hill and of the proposed compensation site. The DOC LMP contains a wealth of information about the species involved and their proposed management for the project, and it has met the requirements of the Wildlife Act application process. We are satisfied that efforts were made to ensure tangata whenua were consulted and kept informed of the development of the compensation proposal. Principle 11 has been appropriately addressed.

[275] **Principle 12 'Tangata whenua and stakeholder participation'** requires the compensation proposal to demonstrate the opportunity for the effective and early participation of tangata whenua and stakeholders when planning for biodiversity compensation, including in its evaluation, selection, design, implementation and monitoring.

[276] FOCH was strongly of the opinion that this principle could not be met and neither could **Principle 13 'Transparency'** which is that the design and implementation of the biodiversity compensation and communication of its results to the public is to be undertaken in a transparent and timely manner.

[277] FOCH's submissions particularly focussed on what it considered to be the very late provision of information about biodiversity/ lizards on the Te Tihi o Rauhea /Conical Hill site together with the details of the compensation proposal. They said that the application for consents as notified did not describe either the significant effects on rough gecko or the compensation proposed and although the application included an undertaking not to undertake physical works unless a Wildlife Act permit was obtained, this was taken to mean that there was some uncertainty as to whether lizards were present or not.

[278] FOCH submitted that it was now apparent that the Applicant was aware of the presence of lizard species at a much earlier stage, evidenced by the fact that the DOC LMP was developed prior to the application being notified. It was submitted

that this meant no opportunity was provided for effective and early participation, in breach of Principle 12, and information about the project was not communicated in a transparent and timely manner in breach of Principle 13.

[279] It is clear that FOCH did not see the LMP until after the independent commissioner made his decision. At that point it received a redacted version, with Professor Ogilvie receiving an unredacted copy some months after the appeal was lodged. Mr Abbot said this was because DOC had advised HSTPS not to release the information to protect geckos from poaching risk. FOCH disputed this saying that information provided to Professor Brower indicated this was not the case.[72]

[280] In reviewing the evidence, we are satisfied that DOC did ask that the unredacted version of the LMP be withheld (and that the Applicant complied with that direction in good faith) but had indicated that a redacted version of the LMP could be released. The question then is whether this breaches Principles 12 and 13.

[281] Dr Tocher addressed Principle 12 by accepting there was not a high level of adherence to this principle, but considered that the concern about illegal poaching was a valid reason for withholding information. Against that she noted the involvement of tangata whenua from an early stage including in the application for the Wildlife Permit, and pointed out that her summary of evidence as presented at the council hearing described the progress that had been made on the compensation proposal. She considered that this provided submitters with an opportunity to participate in the evaluation, selection, design, implementation and monitoring of the compensation covenant via that hearing. It was her view that the hearing process and the appeal proceedings meant that FOCH had "actively participated in evaluation, selection and design of the covenant, by providing a comprehensive critique of the Applicant's proposal".

[282] Dr Lettink considered that 'stakeholders' included the Applicant, its herpetologist Dr Tocher, the Hurunui District Council, Department of Conservation, iwi, QEII National Trust and the landowner of the covenant site. She acknowledged

72 NOE 20 March 2024 at 285 lines 1-10.

that parties such as FOCH, local residents and recreational users may have an interest in the biodiversity on Te Tihi o Rauhea /Conical Hill but considered such parties were not routinely if at all involved during the processing of Wildlife Act applications and as such it was not clear that the obligations of Principles 12 and 13 extended that far.

[283] The NPS-IB came into effect on 4 August 2023, after the appeal hearing had commenced and significantly after the LMP was confirmed by DOC as part of the Wildlife Permit. FOCH accepts that the principles were not technically in play prior to that time but argues that since Dr Tocher had sought to adhere to the draft principles at a very high level, the Applicant must also have been aware of the principles and should have given effect to them.[73]

[284] Further, they submit that there were ways to meet Principles 12 and 13 without exacerbating poaching risk. As a result FOCH was strongly of the opinion that whether the lack of transparency was conscious on the part of the Applicant or not, the lack of transparency and timing of the release of information had an enduring effect on the consenting process which could not be overcome by the later release of the material. The Applicant accepted at the hearing that its approach, rightly or wrongly, was to wait until the Wildlife Act permit was in place before engaging on the topic with other stakeholders.

[285] We accept that the release of information has been problematic for FOCH but as a matter of law the NPS-IB was not in force until August 2023, some six months after this hearing commenced. The decisions made by the Applicant and its advisors in relation to the timing and release of information, stakeholder participation and transparency which are being analysed under the principles of Appendix 4 now were simply not subject to those principles at that time.

[286] The Applicant cannot be required to adhere to principles which were not in place at the time the compensation proposal was being developed. Further, we consider that any lack of transparency or stakeholder involvement in the early stages of developing the compensation proposal has been cured by the significant

73 FOCH closing submission at [6.79].

transparency and stakeholder involvement which has happened subsequently.

[287] We have had the benefit of a substantial volume of expert evidence and fulsome submissions at hearing from all parties. FOCH has also had the benefit of that material. While we understand that FOCH is aggrieved that the process of obtaining timely information has been difficult, FOCH has been afforded transparent and inclusive access to the compensation proposal before it is finalised by way of this hearing process. Through its involvement in the council and court processes it has had the opportunity to help shape the compensation proposal and on that basis we find that Principles 12 and Principle 13 have been appropriately addressed within the context of this particular application.

Summary

[288] As set out previously, the inter-relationship of complex ecological terms within the principles requires the careful application of judgement based on a thorough analysis of the expert evidence available. We have conducted a careful and thorough review of all of the evidence before us against the principles of the NPS-IB as set out in Appendix 4 and consider that the proposal constitutes a compensation proposal that will assist in maintaining indigenous biodiversity so that there is at least no overall loss in Aotearoa New Zealand in accordance with the NPS-IB objective. On that basis we consider the proposal to be consistent with the NPS-IB.

Positive Effects

[289] Mr Abbot, the General Manager of HSTPS, tourism experts Mr Craig Wilson and Professor David Simmons and recreation expert Mr Rob Greenaway all provided evidence on the expected benefits of the Flyride proposal for both Hanmer Springs and the wider Hurunui District.

[290] Both Mr Abbot and Mr Wilson spoke to the need for Hanmer Springs to retain market competitiveness as a tourism destination by enhancing its existing offering. Mr Abbot set out that the objective of the Flyride was to "create a viable and robust tourist attraction that will complement the character of the Hanmer Springs area".

His evidence was supported by work undertaken by Mr Wilson in which he identified a gap in the existing market "for a slightly more adventurous activity at a price point under $100 per adult". It was Mr Wilson's position that a "Flyride attraction will enable greater promotion of Hanmer as an eco-friendly destination by combining existing walking and biking activity options with a new healthy outdoor adventure". Dr Simmons concurred noting that "[c]ontinued refreshment of visitor attractions and experiences is advocated by central government and market experience as essential to destination area competition and evolution". It was his view that "[t]he Flyride proposal has the potential to be a leading example of regenerative tourism in New Zealand".

[291] As carefully pointed out by Mr Cleary in closing submissions however, none of the experts went so far as to say they expected the Flyride to necessarily increase visitor numbers to Hanmer Springs, nor could the witnesses be sure that the Flyride would result in existing visitors staying longer in Hanmer Springs or in the wider District. Although Mr Abbot outlined that the Flyride was expected to inject $4 million into the local economy in its first five years, he accepted in answer to questions that against a current credit card spend of $84.7 million per year, that potential increase was "very small". We accept, as Professor Simmons noted in answer to questions of cross examination, that the Flyride will add to "a suite of attractions and experiences that continue to attract the visitor" to Hanmer Springs and the wider region, that a small number of additional jobs will be created and that a small increase in visitor spend is likely to ensue. While these are all positive effects, we accept that they are reasonably modest in magnitude.

[292] In addition, we accept that there are likely to be positive effects for kārearea/NZ falcon and ultimately with respect to lizard habitat and lizard species and these matters have formed part of our assessment. Had there been significant adverse effects of the proposal, these modest positive effects may not have outweighed them however we have found the adverse effects in this case to have been appropriately managed and/or compensated.

Decision of the Hearing Panel

[293] In determining this appeal, we are required under s 290A of the RMA to have regard to the decision that is subject to the appeal.

[294] Submitters in opposition to the construction and operation of the Flyride at the Council hearing raised concerns about the following effects of the proposal:[74]

- visual effects and landscape character;
- impacts on amenity values;
- parking and traffic congestion;
- increased noise;
- impacts on recreation character;
- impacts on biodiversity, in particular the native NZ Falcon/Kārearea and a range of geckos and the Canterbury Grass skink;
- the risk of fire;
- the impact on horse trails;
- the risk of natural hazards;
- property devaluation.

[295] In the Council's decision to grant consent with conditions each of these effects was assessed and found to be appropriately managed. Our findings on the effects of the proposal are consistent with those reached by the Council[75] as is our decision to grant consent for the Flyride.

Conclusion

[296] We are satisfied that the effects of the proposal are able to be appropriately managed and that the proposal is generally consistent with the relevant planning documents including the District Plan and the NPS-IB. We consider that the grant

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74 Decision of the Hurunui District Council on Application Reference RC210098 dated 18 February 2022 at [10].

75 Note that we did not receive evidence on the risk of fire, the impact on horse trails, the risk of natural hazards or property devaluation.

of consent with appropriate conditions will meet the purpose of the Act.

Conditions

[297] The Court was provided with a set of conditions dated 13 May 2024. While our preliminary view is that the conditions are generally appropriate and consistent with our decision, the Court has some questions of clarification with respect to the specific wording of the conditions proposed. The Court will issue a minute with specific queries and direct the Applicant and the Council to agree a final set of conditions and provide that to the court within 15 working days of the date of the Minute. Should agreement in full not be achieved we will receive and review submissions on any differences before issuing a final decision.

Costs

[298] Costs are reserved with a timetable to be set once the Court has issued final conditions.

For the Court:

LJ Semple

L J Semple
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CIV-2021-425-000005
[2021] NZHC 1474

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for review of the decision under the Resource Management Act 1991
BETWEEN	MURRAY NEIL FROST First Applicant
AND	WILLIAM ALAN NICHOLAS BROWN Second Applicant
AND	JENNIFER DIXON MUNNS Third Applicant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL First Respondent
AND	DAVID CLARKE AND PAULA CLARKE AND PKF GOLDSMITH FOX TRUSTEES #3 LIMITED Second Respondents

Hearing: 2 June 2021

Appearances: P J Page and R A Crawford for Applicants
L F de Latour and J S J Aimer for First Respondent
M R Walker and B B Gresson for Second Respondents

Judgment: 21 June 2021

JUDGMENT OF DUNNINGHAM J

This judgment was delivered by me on 21 June 2021 at 4 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] Penrith Park is an attractive suburb in the lakeside town of Wanaka. It is located on a peninsula to the north of the town centre, and is zoned Penrith Park Special Zone (the Zone) in the Queenstown Lakes District Council's Operative District Plan (ODP). The objectives of the Zone include to:

(a) enable the creation of a low density residential development in a rural setting which is relatively close to Wanaka town centre; and to

(b) conserve the visual amenity of the locality to a significant degree.

[2] The second respondents, David and Paula Clarke and PKF Goldsmith Fox Trustees # 3 Ltd (the Clarkes), own two adjacent sections in Penrith Park. At the relevant time, these comprised Lot 61 which had frontage on to Penrith Park Drive, and Lot 60 which had access from Briar Bank Drive.

[3] In October 2018, the Clarkes applied for resource consents to develop a substantial home in an elevated position on Lot 60. Specifically, they sought:

(a) land use consent to construct a residential dwelling at the site and to undertake related earthworks, landscaping and vegetation removal; and

(b) consent to cancel consent notice 982581.5 which was registered on the title to Lot 60;

(the application).

[4] In a decision issued on 10 December 2018, the Queenstown Lakes District Council (the Council) decided to process the application on a non-notified basis,[1] and to grant the requisite consents.

[5] The applicants all own properties in Penrith Park. None are directly adjacent to the Clarkes' property, but all have views of the house which is now under construction. They consider the Council erred in making the notification decision and

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[1] Pursuant to ss 95A-95F of the Resource Management Act 1991 (RMA).

the substantive decision and the consents should be set aside and reconsidered following (at least) limited notification.

Grounds of review

[6] Section 104(3)(d) of the Resource Management Act 1991 (R MA) prohibits the granting of a resource consent if the application should have been notified and was not. The applicants submit the Council erred in assessing the application for public notification under s 95A and for limited notification under s 95B. Consequently the consent should not have been granted. Had it been assessed correctly it would have been notified.

[7] The specific errors which are alleged are:

(a) The Council failed to consider all relevant adverse effects, and in particular;

(i) adverse effects on the public environment within the Zone; and

(ii) adverse effects on the applicants and on other affected persons with views of the site from Briar Bank Drive and Penrith Park Drive.

(b) The Council failed to correctly assess the effects of removal of vegetation, and in particular:

(i) it determined that native vegetation removal at the subject site "could be expected" and failed to consider r 12.7.3.3(ii)[2] which provides that removal of vegetation in this area is a discretionary activity;

(ii) it failed to consider the assessment criteria in r 12.7.6(iii) relating to vegetation removal;

2 All rules in this judgment are rules from the Penrith Park Special Zone section of the Queenstown Lakes District Council's Operative Plan (ODP).

(iii) it failed to obtain adequate reliable information to make an assessment of the effects of removal of vegetation; and

(iv) it applied the wrong statutory test to conclude limited notification was not required.

(c) The Council failed to properly consider the height rule found at r 12.7.5.2(i), and treated the maximum building height for a controlled activity of seven metres as a baseline for assessing the effects of a non-complying building with a maximum height of 8.9 metres.

(d) The Council erred by assessing the proposed activity as if it was a discretionary activity using the r 12.7.6(ii) assessment matters, rather than as a non-complying activity where all adverse effects were relevant.

(e) The Council erred when it allowed the removal of the consent notice on the title to Lot 60, relying on a conclusion that r 12.7.5.1(ii) was sufficient to ensure effects on the environment would be equivalent to condition 2 of the consent notice, when condition 2 requires complete invisibility from the Lake Wanaka shoreline of any structure on the property, while r 12.7.5.1(ii) is simply a site standard, and can be departed from.

The relevant ODP provisions

[8] The application site falls within the Penrith Park Special Zone of the ODP. Furthermore, all of Lot 60, and part of Lot 61 are located within the Penrith Park Visual Amenity Area of the ODP, and parts of Lot 60 and Lot 61 are within Penrith Park Vegetation Area A in the ODP. These areas attract specific Zone rules relating to visibility of buildings, visual amenity and vegetation removal.

[9] As already stated, the first objective of the Zone is "to enable the creation of low density residential development in a rural setting which is relatively close to

Wanaka town centre".[3] The other Zone objectives focus on conserving visual amenity of the locality, encouraging a high standard of building design, appearance and landscape and avoiding adverse effects on the environment. The environmental results anticipated include provision "of an appropriate visual transition between the open space margins of Lake Wanaka and the more intensively developed Wanaka town centre",[4] and protection "of the natural amenity without preventing development."[5]

[10] The Zone rules do not allow construction of a building as a permitted activity. Instead, buildings are controlled activities if they "comply with all the relevant Site and Zone Standards".[6] The matters the Council has reserved control over, as listed in r 12.7.6.(i), are:

> (a) Whether the building breaks the line and form of the landscape with special regard to skylines, ridges, hills and prominent slopes when viewed from the shoreline.
>
> (b) Whether the building is visually obtrusive from any public road, recreation area or public place.
>
> (c) Whether the colours of the roofs and walls are of low reflectivity and derived from the landscape, with bright accent colours or highly reflective colours used only in small areas for visual interest.
>
> (d) The extent to which the proposed building reflects the alpine characteristic of the Wanaka area as represented by the pitched roofs with dormer windows.
>
> (e) Whether the road access and internal driveways are situated in the most appropriate position and avoid excessive cuts and fills, and do not compromise the visual amenity of the site.
>
> (f) Whether the exterior walls are built of materials commonly found in the environs of the site.
>
> (g) The extent to which the building preserves the existing mass of vegetation.

[11] There are then further matters listed at 12.7.6(ii) for consideration if the building is a discretionary activity, for example, if it exceeds the site standard of a maximum height of seven metres, and these focus on the visibility of the building and its effect on visual amenity.

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3 ODP r 12.6.3.
4 Rule 12.6.4.
5 ODP r 12.6.4.
6 Rule 12.7.3.2.

The application

[12] The application for land use consent sought to construct a large two storey, architect-designed residential dwelling and to undertake associated earthworks landscaping and vegetation clearance. It was assessed as a non-complying activity under the ODP. The particular elements which required resource consent were as follows:

(a) construction of a new residential dwelling – controlled activity;

(b) construction of a dwelling within Activity Area (1) that intrudes into the skyline – restricted discretionary activity;

(c) construction of a dwelling within Activity Area (1) that will be visible from any public place within 50 metres of the shoreline (excluding the surface of Lake Wanaka) – restricted discretionary activity;

(d) undertaking earthworks exceeding 100 m^3 in volume, 200 m^2 in area, with a maximum cut height exceeding 2.4 metres – restricted discretionary activity;

(e) removal of vegetation and the disturbance of land in Activity Area (1) – discretionary activity;

(f) exceeding the maximum height limit of seven metres – non-complying activity;

(g) retaining wall located within six metres of the site's eastern boundary – non-complying activity.

[13] The second aspect of the application was to seek the removal of a consent notice registered on the title to Lot 60. The relevant condition in the consent notice provided as follows:

> That the screening profiles proposed for Lot 60 be planted, maintained and enhanced if necessary to ensure that dwellings on those Lots cannot be seen from the landward 50 metre strip from the shoreline of Lake Wanaka. "Shoreline" being defined as the water/land boundary at RL 277.27 above MSL.

The consent notice also attached plans to demonstrate where the screening vegetation was intended to be located on the Lot, along with profile drawings to show how it would screen buildings from the shoreline area as defined.

[14] The conclusion to the application stated that "the relevant condition [in the consent notice] replicates Penrith Park site standard 12.7.5.1(ii)(d)". That site standard provides:

> No part of any building located in Activity Area (1) of the Penrith Park Zone Plan 'A' north of the visual amenity line shall intrude into the skyline when viewed from any public place, excluding Lake Wanaka and any road or walkway within the zone.
>
> "The Skyline" means the line at which the landforms within Activity Area (1) of the Penrith Park Zone Plan 'A' and the sky appear to meet, provided that landforms are inclusive of any existing vegetation to be retained, earthworks or landscaping, the purpose of which is to reduce the visibility of buildings on a site and which is the subject of or forms part of any resource consent granted in respect for the site by the Council.

The application also noted the consent condition "does not need to be recorded as a consent notice" and "would make it difficult to build upon this site".

The decision

[15] It is not necessary at this point to discuss the decision in detail, as the relevant aspects of it will be discussed in the following sections. However, the application was accompanied by a comprehensive AEE. That was reviewed and adopted by the Council in its decision, albeit with additional comments. The Council concluded that neither public nor limited notification was required for either consent. It granted the land use consent subject to conditions, and the application to remove the consent notice.

Approach on judicial review

[16] There was no dispute between the parties as to the applicable principles on an application for judicial review. It is sufficient to note the observations made in *Coro Mainstreet (Inc) v Thames Coromandel District Council* regarding the Court's function on review:[7]

> [40] It is not the function of the Court on an application for review to substitute its own decision for that of the consent authority. Nor, will the court assess the merits of a resource consent application or the decision on notification. The enquiry the Court undertakes on an application for review is confined to whether or not the consent authority exceeded its limited jurisdiction conferred by the Act. In practice the Court generally restricts its review to whether the Council as decision maker followed proper procedures, whether all relevant and no irrelevant considerations were taken into account, and whether the decision was manifestly reasonable. The Court has a discretion whether or not to grant relief even if it is persuaded that there is a reviewable error.

First ground of review – failure to consider all adverse effects

Submissions for the applicant

[17] The applicants submit both the AEE, and the subsequent decision of the Council, failed to consider effects on properties to the north and west of the subject site, including the applicants' properties.

[18] All three applicants give affidavit evidence attaching photographs which show the dwelling which is now under construction is visible from their property. Mr Brown says it is the only house that breaks the skyline when viewed from his property. Similarly, Mr Frost attaches photographs showing the dwelling from certain rooms in his property and says these demonstrate the visual impact is clearly not less than minor. Ms Munns, too, says she can see the property from her front door and the construction of the dwelling is "very prominent". She also notes that when walking around the Penrith Park area using the road network and the lake-shore at Beacon Point, there is a "clear view of the house under construction from these public locations". She says

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7 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZHC 1163, [2013] NZRMA 442 (footnote omitted); upheld on appeal; *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2013] 17 ELRNZ 427; and see *O'Keeffe v New Plymouth District Council* [2021] NZCA 55, (2021) 22 ELRNZ 506 at [59].

"[t]he house certainly appears to be much taller, and less well screened, than any of the existing houses within the Visual Amenity area of the Penrith Park Zone".

[19] All three applicants say if they had the opportunity to submit on the application, they would have sought to ensure the proposed dwelling complied with the Zone policies and rules, in particular, the maximum height for controlled activities of seven metres, and that the (then) existing protected kanuka on the site was retained so that screening vegetation could serve its intended purpose.

[20] The applicants say the application is completely silent as to effects on properties to the north and west of the subject site, including their properties. They say no reasons are given as to why they were not deemed to be affected. Instead, the Council had a "fixation" on properties to the east of the subject site. In particular, the Council refers to five properties sited to the east of, and above the proposed dwelling, and satisfies itself that their views, as shown in Drawing Sk 1.5 to the application, are not comprised. It then concludes "[n]o other persons are considered affected by the proposal".

[21] While s 4.3.3 of the AEE states profile poles were erected to indicate the maximum height of the house, and that visibility was assessed using these poles, the photos which are taken of the poles only show views from the east. Images of other views, including from Penrith Park Drive and Briar Bank Drive, do not form part of the application or the Council's subsequent assessment of the application.

[22] The applicants acknowledge that s 7.0 of the AEE says the house would be visible from the west, but that other houses in the foreground, and trees, will draw attention away from the house. However, the applicants rely on the evidence of Ms Steven, a landscape architect, to contradict that conclusion. She attaches photographs to her evidence which she says demonstrate the existing houses and trees do not diminish the visual effects of the proposed activity when viewed from the west, in the way asserted in the AEE.

[23] The applicants submit the failure to identify persons affected by the activity is a procedural fault which undermines the validity of the notification decision. They

point out that in *McMillan v Queenstown Lakes District Council*, Mander J observed that:[8]

> If the applicant fails to identify persons affected by the activity, or to sufficiently inform of consultation that has taken place, that may be reflected in the standard of the decision achieved. The resulting inadequacy in the decision will be able to be traced to that procedural fault.

[24] Finally, the applicants are critical of the Council filing evidence from Ms Stagg, the Council planner who reviewed the application and made the decision, who says she did consider the actual or potential effects of the proposal on the applicants. The applicants suggest that evidence is self-serving and not credible in light of the Council's obligation to give reasons for its decisions.[9]

Submissions for the Council

[25] The Council does not accept that effects of the building on persons in the environment to the north and west were overlooked or not assessed. Ms de Latour says the decision expressly adopted the assessment in the AEE. This covered effects under three headings: neighbourhood character, visibility, and views and outlook.

[26] The effects of the proposal were considered in the context of the neighbourhood and, having regard to matters such as the character of the environment and the design of the particular dwelling, and concluded that effects on neighbourhood character would be less than minor. In terms of visibility, the AEE acknowledged that the building was visible from various locations to the west of the site, but considered that those effects would be partially mitigated by the surrounding existing development. The AEE concluded the design of the dwelling and its location within existing and proposed vegetation would reduce the visual amenity effects of the building and its visibility effects would be less than minor.

[27] The Council says it had adequate information to assess the visual effect of the dwelling. The AEE addressed the visibility of the application from various aspects including from the north and west of the site, and plans showed the height of the

8 *McMillan v Queenstown Lakes District Council* [2017] NZHC 3148, [2019] NZRMA 256 at [34].
9 *Lewis v Wilson & Houghton Ltd* [2000] 3 NZLR 546 (CA) at [54].

building from all aspects. Together, the application and the decision contain an assessment of the effects of the building from:

(a) Beacon Point Road;

(b) public roads, recreation areas and public places in the Zone; and

(c) public and private properties to the west of the site.

Furthermore, Ms Stagg confirms both she, and the consultant planner assigned to process the application, visited the site, and the site was viewed from various points including Penrith Park Drive, Briar Bank Drive and Beacon Point Road which is close to the shoreline of the lake.

[28] While Council officers say they considered adverse effects from all sides of the site, it considered those who were located to the east of the site were likely to be most directly affected because the dwelling had the potential to affect views towards Lake Wanaka for those properties. That is why they gave greater attention to the viewpoints from those dwellings, where there would be a view of the new dwelling when looking out towards the lake.

[29] Ms de Latour says the Council did not need to then go on and specify there were less than minor effects on each person who could potentially see the proposed building. It was clear from the context of the decision that the effect of the building on persons who could potentially see it, was assessed to be less than minor. She points out the Council is not required to expressly refer to every relevant consideration that has been taken into account as this would be an impossible burden.[10]

Submissions for the Clarkes

[30] The Clarkes endorse the Council's submission, saying the AEE contains an assessment of the proposal on visual amenity from various locations to the west of the

[10] *Duggan v Auckland Council* [2017] NZHC 1540, (2017) 20 ELRNZ 31 at [79].

subject site and concludes those effects would be less than minor, and this conclusion was adopted in the decision.

[31] While the applicants, and their expert planner may have different views as to the merits of the conclusion reached, it was made in accordance with the law and was not unreasonable.

Discussion

[32] I accept the AEE provided an assessment of effects on neighbouring properties. This is particularly evident in the section assessing effects on neighbourhood character. That section concludes that:

> The proposed scale and design of the dwelling is consistent with that of other dwellings throughout the Zone. The dwelling has been designed to a high standard and recessive materials with low reflectivity have been selected to allow the dwelling to be absorbed by the surrounding landscape. A landscaping plan is also proposed to mitigate any potential effects the built form may have on the surrounding environment.

[33] Similarly, the AEE discusses the visibility of the house saying it will be "visible from various locations to the west of the site", but that the effect:

> Will be partially mitigated by the presence of dominant dwellings in the foreground adjacent to and [to] the west of, Penrith Park Drive that will attract attention to the foreground, rather than the proposed house in the background.

Having regard to the photographs provided in evidence, that conclusion is understandable.

[34] I also consider the evidence of Ms Stagg, which attaches photographs taken by both the consultant planner and herself, supports the view that a range of views were considered. I do not consider such evidence to be objectionable where it simply reports the range of enquiries undertaken, to counter a suggestion they were not undertaken, rather than to retrospectively justify a decision made.

[35] I do not consider the Council failed to consider public and private views from the west and north as alleged and this ground of review is not made out.

Second ground of review – failures in assessing effects of vegetation removal

Submissions for the applicants

[36] The applicants raise several issues in respect of the Council's assessment of the effects of vegetation removal.

[37] First, they say the Council did not have the information required to reach its conclusion that effects relating to vegetation removal would be temporary in nature, and would be mitigated by conditions of consent. The applicants say that, at a minimum, the Council needed to have the following information to fully assess the adverse effects of vegetation removal:

> (a) the existing plantings, their ecological value and what screening they provide;
>
> (b) the proposed removal, its ecological cost, the effects associated with the removal and the duration of those effects; and
>
> (c) any proposed mitigation of the effects of removal, its ecological value and how long the mitigation will need to ameliorate the removal effects.

[38] The applicants say that the effects of removing existing plantings cannot be restricted to the construction period when like for like replacement of the removed kanuka vegetation is not proposed, and there is no assessment of the temporary adverse effects while the replacement vegetation takes effect. In short, it said the Council does not appear to have a clear understanding of the duration or nature of the effects of vegetation removal. Furthermore, it operated from an erroneous premise that some vegetation removal "could be expected".

[39] The applicants provide their own evidence from Ms Steven who discusses the relevant provisions in the ODP in regard to vegetation and then provides her own assessment of the effects of vegetation removal, noting in particular, that the dwelling under construction is "uniquely prominent" on the skyline, from both public and private aspects. She is critical of there being no expert landscape evidence included in the application or sought by the Council, and no alternatives offered to protect the skyline, which was previously defined by kanuka.

[40] Finally, the applicants submit that the assessment of effects on persons of vegetation removal for the purpose of limited notification uses the wrong statutory test. The Council concludes that the effects of vegetation removal are "not considered to be more than minor", when the test for affected persons under s 95E(1) of the RMA requires any effects on them to be less than minor. Accordingly, the Council could not lawfully conclude there were no affected persons in relation to the proposed activity because it had not established that effects were less than minor on anyone.

Submissions for the Council

[41] The Council rejects the suggestion it had inadequate information to assess the effects of vegetation removal. It points out that an application for resource consent must include an assessment of the activity's effects on the environment that:[11]

> [I]nclude[s] such detail as corresponds with the scale and significance of the effects that the activity may have on the environment.

The information provided does not need to be all encompassing,[12] and must be proportional to the scale and significance of the proposal.[13]

[42] The Council points out the application proposed the removal of approximately 640 m^2 of kanuka and, following completion of the construction of the dwelling, would provide 428 m^2 of structural planting, including kanuka and other native plants. The kanuka coverage across the application site was approximately 6,500 m^2 and so only 10 per cent of the existing kanuka on the site was proposed to be cleared.

[43] The application was accompanied by a series of plans, including a building plan and a landscape plan. The landscape plan showed:

(a) the location and extent of kanuka proposed to be retained;

(b) the location and extent of kanuka to be removed;

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11 RMA sch 4 cl 2(3)(c).
12 *Palmer v Tasman District Council* HC Nelson CIV-2009-442-331 at [105].
13 *Mawhinney v Auckland Council* [2017] NZEnvC 162 at [53].

(c) the additional landscaping proposed once construction of the building was completed; and

(d) the existing and proposed contouring at the site.

[44] The application also contained a full assessment of the effects of the removal of vegetation, which included a consideration of it against the assessment matters in r 12.7.6(iii). In addition, the site was visited by both the consultant planner and by the decision maker.

[45] The Council considers the key effect caused by the removal of vegetation is visual amenity effects. The screening effect of the vegetation and its impact on visual amenity was clearly set out in the application and (as Ms Stagg stated in her affidavit), those effects were capable of being competently assessed by the planners in this case. The Council points out that this Court has previously accepted that expert landscape input is not required in similar situations.[14] The information provided here was sufficient for the Council to understand the effects of the activity and it was entitled to rely on it in this case.

[46] Both the application and the decision acknowledged the dwelling would not be entirely screened by vegetation and would be seen from various locations within the Zone. However, the Council (through adopting the AEE in its decision) assessed that, given:

(a) the limited extent of kanuka proposed to be removed from the western, more visible site of the dwelling;

(b) the fact that only 10 per cent of the existing kanuka on the site was to be cleared;

(c) the combination of house design, vegetation to remain and vegetation to be replaced; and

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14 *Duggan v Auckland Council*, above n 10 at [64].

(d) the residential context within which the dwelling was composed

the effect of vegetation removal would be less than minor.

[47] The Council also relies on my observation in *Trilane Industries Ltd v Queenstown Lakes District Council* to respond to the evidence given by the applicants' landscape architect on the magnitude of effects:[15]

> [53] In addressing the question of whether the adverse effects of the proposal were all minor or less than minor, I take no account of the expert evidence subsequently filed to suggest that the landscape and visual effects were either more, or less severe than were outlined in Ms Mellsop's report which the Council accepted. It is not appropriate, on an application for judicial review of a notification decision under the RMA, to produce further expert evidence to support or reject the evidence relied on by the relevant consent authority. If the Council relied on evidence which was prepared by someone with appropriate expertise, and expressed a view that was reasonably available to that person on the proposal before them, the Council will not have erred.

[48] The Council says that Ms Stevens' evidence of the adverse effects of the removal of vegetation, where she reaches a different view, should be discounted for the same reasons. In effect, the applicants are seeking to challenge the merits of the decision which is inappropriate on judicial review.

[49] The Council also rejects the allegation it failed to have regard to temporary effects. It says these were addressed in the decision where it discussed the temporary nature of the vegetation removal and the mitigation proposed. While the applicants rely on the decision in *Trilane Industries Ltd v Queenstown Lakes District Council*, it can be distinguished. In *Trilane* the Council accepted there would be moderate temporary effects, but then ignored that for the purposes of notification on the grounds that they would be mitigated in due course.[16] Here, the application concluded that all the effects of the removal of vegetation would be less than minor.

[50] The Council also notes the applicants criticise the Council for not expressly addressing the assessment matters in r 12.7.6(iii). The Council rejects this claim (and

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15 *Trilane Industries Ltd v Queenstown Lakes District Council* [2020] NZHC 1647, (2020) 21 ELRNZ 956.

16 At [59].

notes this is inconsistent with the separate alleged error that the Council wrongly considered the discretionary assessment criteria in relation to height breaches), saying s 4.3.3 of the AEE contained an assessment of the removal of vegetation against the criteria in r 12.7.6(iii). While those criteria were not expressly mentioned in the decision, the decision expressly adopted the AEE and the effects of the removal of vegetation were considered at s 3.3.3 of the decision.

[51] Finally, the Council responds to the (belated) argument that the assessment of effects on persons failed to establish that the effects of vegetation removal are less than minor as required under s 95E(1) of the RMA.[17] This argument relies on the sentence used in the limited notification assessment at s 4.3.2 of the decision where it is said that "[r]esultant effects [of vegetation removal] are therefore not considered to be more than minor".

[52] While the Council acknowledges that the language used in its limited notification assessment, is not the language used by s 95E, it says it is important to read the decision as a whole. In that regard, it relies on *Millar v Ashburton District Council*, where the Court found that although the application wrongly referred to the test for avoiding notification as met because the adverse effects were minor or no more than minor, it was clear when the supporting evidence to the application and the decision were read as a whole, that the effects had been assessed as less than minor.[18]

[53] In this case, s 7.0 of the AEE concludes that the effects of the removal of vegetation are less than minor and the AEE was expressly relied on and adopted by the Council. The decision also provides clear reasoning regarding the effects of the activity and these reasons flow into the limited notification assessment where the Council concluded that no persons would be affected by the proposal. Accordingly, although the limited notification section of the decision wrongly refers to the test for public notification, it is clear from the decision when considered as a whole, that the Council considered the effects of removal of vegetation were less than minor and, so concluded there were no affected persons.

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17 This ground of review was not pleaded in the application for judicial review, but was traversed in submissions.
18 *Millar v Ashburton District Council* [2016] NZHC 3015 at [62]-[66].

Submissions for the Clarkes

[54] Again, the Clarkes support the submissions of the Council. In particular, they say the information before the Council was adequate for it to conclude the effects associated with removal of vegetation would be less than minor. The Council's adoption of the AEE, which concluded that effects on persons from vegetation removal would be less than minor, must be taken as informing the Council's conclusion that there were no adversely affected persons for the purpose of limited notification, despite the incorrect reference to the test of "no more than minor".

Discussion

[55] Although the applicants have raised a number of criticisms regarding the Council's assessment of the effects of vegetation removal, in the end, they focus most squarely on the Council's assessment that the effects of vegetation removal were "no more than minor", when the test for deciding who is an affected person for the purposes of limited notification is that the effects on that person are "less than minor". As Mr Page submits, this is not "simply some linguistic peccadillo; it is the legal standard required by the Act."

[56] As already outlined, the Council explains this by saying the decision is in error when it refers to the test for avoiding public notification, and I should look instead to the AEE and the conclusion. However, that is difficult to square with the actual wording of the decision. At s 4.3.2 of the decision, the decision maker draws different conclusions on the effects of the height breach and on the effects of vegetation removal and earthworks. The former is considered to be "less than minor" on owners and occupiers of neighbouring properties. The latter are considered to be "not to be more than minor". That conclusion reflects the earlier conclusion in the decision on the effects of vegetation removal when considering whether public notification set out at s 3.3.3 of the decision.

[57] I do not think this can be overcome by saying the Council also expressly adopted and relied on the AEE supplied by the applicants. It did so, but with the proviso that it made "additional comments" and it is in these comments that its conclusion on the effects of vegetation removal are reached. While it is possible that

was in error, that would seem surprising, particularly when at the start of s 4.3.2, the decisionmaker expressly addresses the requisite test for limited notification.

[58] In my view, the decision maker intended to reach her own conclusion on the effects of vegetation removal, which was that they were "no more than minor", and simply did not explain why no owners or occupiers of neighbouring properties were therefore considered to be unaffected by the proposal.

[59] Accordingly, this ground of review is upheld.

[60] As a consequence, I do not need to discuss in detail the other criticisms of the Council's decision on vegetation removal. It is sufficient to say that I accept the Council's submissions on these points and do not consider that the applicants raise any other error that is amenable to judicial review.

Third ground of review - incorrect use of building height rule

[61] The applicants point out that the Zone is unusual in that all buildings require resource consent. There are no permitted effects which can be disregarded under s 95E(2) RMA. In the present case, the proposed building would have a maximum height of 8.9 metres in one corner of the building which breached the maximum building height for controlled activities by 1.9 metres.

[62] The applicants acknowledge the decision states: "in this case, there was no permitted baseline relating to buildings, given that all buildings within [the Zone] … require a resource consent …". However, they say that the Council effectively treated the seven metre height limit as a permitted activity, the effects of which could be disregarded for the purposes of notification.[19] This was borne out by:

(a) the Council adopting what was said at s 7.0 of the AEE: that a "complying" house could be built more visibly on the site; and

[19] Under Resource Management Act, ss 95D(b) and 95E(2)(a)

(b) drawing SK 1.6 in the AEE containing sightline section drawings that show effects on views from the east and compare these to effects of a seven metre building which is labelled as "complying".

[63] The applicants say because all buildings in the Zone require resource consent, it is misleading to describe a building as "complying", in the sense of being permitted without the need for resource consent. Furthermore, even if a building complies with the maximum height standard, it must still be assessed against the objectives and policies of the Zone, including that it be "sited on the property in an unobtrusive manner in harmony with the natural forms and features of the landscape".[20] Thus, despite acknowledging there is no permitted baseline for buildings in the Zone, the applicants submit that by adopting the "seven metres as complying" reasoning, the Council either benchmarked the proposed activity to an unrealistic scenario (for example, a seven metre tall house further up the slope), or otherwise treated a seven metre building as representing a de facto permitted baseline and therefore wrongly disregarded the effects of such a building.

Submissions for the Council

[64] The Council rejects these allegations. Not only did the decision expressly acknowledge there was no permitted baseline, s 4.3 of the AEE contained a detailed consideration of the effects of the building against the controlled and discretionary assessment matters for building. Furthermore, s 7.0 of the AEE and s 3.3.3 of the decision, contained a full assessment of the visual effects of the building. There was nothing in the AEE or the decision that limited the buildings effects solely to the parts of the building above seven metres.

[65] The Council acknowledges that, at s 4.3.2 of the decision, it says "… the effects of the proposed height breach are less than what would otherwise be permitted by a compliant building located closer to the eastern boundary", and says it would have been better to use the word "anticipated", rather than "permitted". However, the Council submits, when read in context, it is clear that neither the application, nor the decision implied that the development could concur as of right, or that the seven metre

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20 ODP 12.6.3(4).

height limit could be relied upon as a type of permitted baseline. That said, the application had to be assessed in the context of a zone which sought to enable creation of low density residential development, subject to controls on the effects of that development. It was not an error to consider the effects in the context of what was anticipated in the Zone.

Submissions for the Clarkes

[66] The Clarkes make similar submissions to the Council. In particular, they reject the suggestion that the word "complying" used in both the AEE and in the decision when assessing the effects of the building height, was misleading. They say "complying" in this context means complying with the standards of the Zone. It does not mean permitted under the ODP. Thus, a seven metre high building is not a permitted baseline, but is a relevant consideration in terms of establishing the effects of buildings and whether such buildings should be declined consent or notified on the basis of their height.

Discussion

[67] The RMA provides that when considering the actual and potential effects on the environment of allowing an activity, the consent authority may "disregard an adverse effect of the activity on the environment if … the plan permits an activity with that effect".[21] Similar provisions apply in ss 95D and 95E when deciding whether a person is an affected person because of the activity's adverse effects on the person.[22] While it is common ground that the Council understood there was no permitted baseline relating to buildings, the applicants criticise it for allegedly treating site standards such as the height limitation as a baseline for assessing the effects of the proposed dwelling.

[68] I do not consider the Council treated the site standard as a permitted baseline and ignored its effects. What it has done is used the Zone objectives, and the site standards to give some context to the assessment of effects. In my view, this is sensible. Effects must be assessed in context, and in light of what exists, and is

21 Resource Management Act, s 104(2).
22 Sections 95D(b) and 95E(2)(a).

anticipated in the zone. For example, leaving aside any permitted baseline considerations, the erection of a concrete tilt slab building would have different effects in a commercial zone from what it would have in a low density residential area, or in an outstanding natural landscape. It would be entirely artificial to assess effects without considering what exists and what is anticipated in the zone. In my view, that is all the Council has done here.

[69] Consequently, this ground of review is not upheld.

Fourth ground of review – using irrelevant assessment criteria

Submissions for the applicants

[70] The applicants criticise the Council for assessing the proposed activity with reference to the assessment criteria for controlled activities in r 12.7.6(i), and for discretionary activities in r 12.7.6(ii), when the proposed activity was non-complying. Although the planning evidence for both the Council and the Clarkes claim these matters are relevant considerations, the applicants say that r 12.7.6 does not set any matters for the Council to have regard to when assessing a non-complying activity, and accordingly, the Council is required to consider all adverse effects on the environment of the activity.

[71] Because controlled and discretionary activities are less restrictive activity statuses than non-complying activities, they have less stringent assessment criteria and the assessment of them can be properly limited in scope. Where activities do not comply with standards in the ODP, as here, there is no basis for assuming that policies are being implemented by using assessment criteria for controlled or discretionary activities, and the Council must apply greater scrutiny to all adverse effects of the activity.

[72] In short, it is an error of law to evaluate a non-complying activity by applying assessment criteria that guide decisions on controlled or discretionary activities. By way of example, the applicants say that using the assessment matters led to the Council's failure to observe that residents of Penrith Park, such as themselves, may be potentially affected parties. This is because the Council wrongly limited assessment

to public views from the lake shoreline. As a result, the Council failed to correctly determine the notification decision.

Submissions for the Council

[73] The Council, however, says it was both lawful and appropriate to consider the assessment matters in rr 12.7.6(i) and (ii), but that it did not limit its consideration to these matters. Furthermore, it is unclear exactly what effects the applicants say had not been assessed by the Council, save for the allegation it limited assessment of visual effects to views from the east and the shoreline, which has already been addressed under the first ground of review.

[74] The Council says the relevant rules for the Zone, such as the assessment matters in rr 12.7.6(i) and (ii), provide the Council with legitimate guidance to the approach to take in assessing the effects of the proposed building. It is through these rules that the objectives and policies of the ODP are implemented. More importantly, though, the Council says it did not limit the scope of its assessment matters contained in the ODP, nor did it fail to consider any relevant effects. As can be seen, the full effects of the building were considered in both the application and the decision.

[75] The reality is, when stripped back, the applicants' submission is that the Council did not put enough weight on certain effects when it assessed the visibility of the building, but that is inviting the Court to embark on a merits-based decision which is not appropriate on judicial review.

Submissions for the Clarkes

[76] The Clarkes reject the suggestion the use of the assessment matters for discretionary activities in the Zone materially narrowed the Council's assessment, saying there is no difference between non-complying and discretionary matters in terms of the degree of effects the Council may consider. The only difference between discretionary and non-complying activities is the latter must go through an additional statutory hurdle under s 104D of the RMA to be granted consent. It was lawful for the processing planner to treat the discretionary activity assessment matters as relevant considerations when assessing the proposal.

Discussion

[77] This ground of review can be addressed quickly. It was clearly both lawful and appropriate to consider the assessment matters in rr 12.7.6(i) and (ii). As the Council says, these provide the Council with legitimate guidance to the matters which are most relevant in assessing the effects of the proposed building in light of the objectives and policies of the ODP. However, the Council did not limit its consideration to these matters. For example, as already discussed, it did consider views from neighbouring properties. I accept too, that apart from the allegation that views from neighbouring properties were not considered, the applicants do not raise any other relevant consideration which it says was ignored.

[78] In conclusion, the assessment criteria the Council used were relevant, but the Council did not confine itself to these. This ground of review is not made out.

Fifth ground of review – removal of consent notice

Submissions for the applicants

[79] The applicants submit the Council failed to identify the distinction between the consent notice and r 12.7.5.1(iii)(b).[23] The consent notice is a mandatory legal obligation. While in force, it requires the dwelling on Lot 60 to be screened from the defined area of shoreline in perpetuity. Compliance cannot be excused because it is difficult, or because it might disappoint the land owner's development aspirations.

[80] The applicants say the Council decision maker wrongly characterised the obligations under the consent notice (to comply) and the rule (which triggers the need for consent) as equivalent mechanisms. Without enquiring into what development of the site that complied with the consent notice might entail and what its relevant effects on the public and affected persons might be, she could not make an appropriate assessment of the effects of removing it.

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[23] This is another site standard from r 12.7.5 of the ODP which states: "no building on any allotment affected by the building line shall be visible when viewed from any public place within 50 m of The Shoreline, excluding the lake surface, and referred to on Penrith Park Zone Plan 'A' as the Beach". This rule was not referred to in the AEE or the decision.

Submissions for the Council

[81] The Council says it set out its understanding of the legal nature of the consent notice in the decision saying: "this consent notice was imposed so that future lot owners were aware of their obligations." The Council says there is no error in its understanding of the legal nature of the consent notice and it is consistent with descriptions of the purpose of a consent notice in similar cases.[24]

[82] The Council then goes on to say the effects of removing the consent notice were considered in s 3.3.3 of the decision under the subheading "Visual Amenity". Although the consent notice was not referenced directly, the decision maker concluded the level of visibility of the proposed building would be mitigated by the use of recessive materials and existing and proposed vegetation such that the adverse effects would be not more than minor. In any event, the Council says that given the effects of the consent notice and the rules both fall to be considered as discretionary activities, there was no error in its approach.

Submissions for the Clarkes

[83] The Clarkes also do not agree that the Council erred in its assessment of the application to cancel the consent notice. It says in the circumstances, and given the relevant matters Council had to consider, it was reasonably open to it to deem that if the effects of the breach of the site standard were acceptable, so too, were the effects of cancellation of the consent notice.

Discussion

[84] The Clarkes' application sought the cancellation of the consent notice registered on the title to Lot 60 which required screening planting to be planted, maintained and enhanced if necessary, to ensure that the dwellings on Lot 60 could not be seen from the landward 50 metre strip from the shoreline of Lake Wanaka.

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24 *Foster v Rodney District Council* [2010] NZRMA 159 at [129]; *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009, (2018) 20 ELRNZ 645 at [67].

[85] Consent notices must be imposed by a territorial authority when granting a subdivision consent where there is a condition to be complied with on a continuing basis by the subdividing owner and subsequent owners.[25] The consent notice creates an interest in the land, can be registered under the Land Transfer Act 2017 and will bind subsequent owners. The purpose of a consent notice is to ensure future land owners have notice of, and are bound by, subdivision consent conditions that have ongoing effect.

[86] Section 221(3) of the RMA allows an owner to apply to a territorial authority to vary or cancel any conditions specified in a consent notice. Any such application is subject to the same process that applies to applications for variation of resource consents under s 127 RMA. An application to change or remove a consent notice is a discretionary activity and will be considered in accordance with s 104(1) of the RMA.

[87] In *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council*, I discussed relevant case law on the purpose of consent notices and the approach to be taken in respect of their removal.[26] For example, in *McKinlay Family Trust v Tauranga City Council* the Environment Court stated:[27]

> … we have concluded that the ability of people and communities to rely on conditions of consent proffered by applicants and imposed by agreement by consent authorities or the Court when making significant investment decisions is central to the enabling purpose of the Act. Such conditions should only be set aside when there are clear benefits to the environment and to the persons who have acted in reliance on them.

[88] I also cited *Foster v Rodney District Council*, where the Court said:[28]

> [129] Accordingly, we consider that the purpose of the existing consent notice is to provide a high level of certainty to public and owners as to the obligations contained within that notice. It is intended to protect the environmental values of the soil reserve …
>
> [130] … In our view nothing has changed which justifies changing the original consent notice and there is no proper basis for a Variation of it at this

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25 Resource Management Act, s 221(1).

26 *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council* [2019] NZHC 2844, (2019) 21 ELRNZ 428 at [41]-[45].

27 *McKinlay Family Trust v Tauranga City Council* 6 EnvC Auckland A119/08, 29 October 2008 at [52].

28 *Foster v Rodney District Council*, above n 24.

> stage. Accordingly, we would in any event refuse the Variation or cancellation of the consent notice …

[89] In *Ballantyne Barker Holdings Ltd*, I reached the following conclusion:[29]

> [45] The case law makes it clear that because a consent notice gives a high degree of certainty both to the immediately affected parties at the time subdivision consent is granted, and to the public at large, it should only be altered when there is a material change in circumstances (such as a rezoning through a plan change process), which means the consent notice condition no longer achieves, but rather obstructs, the sustainable management purposes of the RMA. In such circumstances, the ability to vary or cancel the consent notice condition can hardly be seen as objectionable.

[90] In the present case, the application was made on the basis the consent notice condition was "essentially a repeat of the District Plan rule [12.7.5.1(ii)(d)] and so does not need to be recorded as a consent notice". It then goes on to say that "due to the topography of the site this rule would make it difficult to build upon the site".

[91] These statements are contradictory. The first suggests that the rule provides the same protection as the consent notice by referring to the equivalence of the consent notice and the rule. That is, not correct. First, the rule referred to relates to intrusions into the skyline whereas r 12.7.5(ii)(e) seems more relevant as it addresses visibility of the building from the shoreline. A building could be sited below the skyline but still be visible from the shoreline. In any event, whichever rule is intended, they are site standards. Unlike the condition in the consent notice, there is no obligation to comply with a site standard. A departure from a site standard, and the degree of adverse effects flowing from that departure, is simply a matter to be considered in deciding whether it is appropriate to grant a resource consent.

[92] The second statement says it would be difficult to develop the site while still complying with the consent condition. That suggests the purpose of removal is to give the land owner flexibility to adopt less stringent screening than is required by the condition, which means an equivalent environmental outcome is not intended to be achieved.

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29 *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council*, above n 26.

[93] However, the real issue is not what the application said but whether the decision maker correctly assessed the effects of removal. In this regard, I consider the error in the AEE was perpetuated by the decision maker assuming that r 12.7.5.1(ii)(d) was equivalent to the condition. As already pointed out, r 12.7.5.1(ii)(e) most closely relates to the effects addressed by the consent notice. More importantly, the consent notice does not, as the decision maker assumes, simply require an assessment of the visibility of the development from within 50 metre landward of the shoreline of Lake Wanaka. It is a positive requirement to plant and maintain vegetation so a dwelling would not be visible from the defined area of the shoreline.

[94] The Council's decision wrongly assumes that the "existing provisions of the District Plan are sufficient to ensure compliance with [this rule]", but then goes on to say "or any effects from non-compliance are assessed". There is no appreciation that removal of the consent notice removes the certainty the general public have that the requisite vegetation screening will be in place. Instead, it makes the level of screening a matter of assessment on a case by case basis, where residents may or may not have a say. That is, in itself, an effect on the environment and there is no assessment of its magnitude.

[95] Given the failure to appreciate the distinction between the mandatory nature of a consent notice, and the discretion to depart from a site standard such as found in r 12.7.5.1(ii)(d) or (e), I consider the Council made its decision as to notification on an incorrect factual and legal basis.

[96] Accordingly, its conclusion that no persons are considered affected by the proposal to remove the consent notice was reached in error and this ground of review is also upheld.

Discretion to grant relief

[97] Having found that there was an error in the decision not to notify the land use consent and in the decision not to notify the application to cancel the consent notice on Lot 60, I go on to consider the discretion to grant relief.

[98] Although I have a discretion whether to grant relief where an error of law has been made out, the starting point is that relief should be granted and there must be "extremely strong reasons" not to do so.[30] A range of factors are relevant to whether relief should be denied, including whether an applicant has delayed issuing proceedings,[31] whether innocent third parties would be unduly prejudiced, or whether other remedies are available. However, each case needs to be looked at on its own facts, and the starting point is that relief should follow unless there are good reasons to decline it.

Submissions for the applicants

[99] The applicants say they have acted promptly to challenge the decisions. Mr Frost says he was unaware consent had been granted on a non-notified basis on 10 December 2018. He only became aware of it when construction started in mid-September 2020, pre-fabricated concrete wall panels were installed, and he reviewed the Council's consenting records for the site. In late October 2020, he obtained legal advice that satisfied him he and his neighbours could reasonably have expected to be notified of the Clarkes' resource consent application. His lawyers were instructed to write to the Clarkes asking them to cease construction so that "a resolution might be found before matters progressed too far" and they did so in a letter dated 10 November 2020.

[100] On 10 December 2020, Mr Frost's lawyers wrote to the Council and the Clarkes' lawyers identifying the errors they considered were made in processing the Clarkes' application. While construction paused over the Christmas break, it commenced again in January 2021. Mr Frost says:

> I have, along with the other two applicants in this proceeding, moved as quickly as I possibly could to alert Mr and Mrs Clarke to our concerns when it became apparent what the scale of the building that they were proposing to build was. I asked Mr and Mrs Clarke to stop construction, but they have continued on despite knowing that we considered their resource consent to be flawed and that we proposed to ask that the High Court quash it.

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30 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60]-[61].
31 At [66].

[101] The applicants point out that the respondents were on notice of the applicants challenge from at least 10 November 2020. By continuing construction, they accepted the financial risks associated with their choice.

[102] The applicants also point out they were under no obligation to seek interim relief. In *Murray v Whakatane District Council*, Tipping J approved the High Court's conclusions that there was no obligation on the plaintiffs to seek interim relief, noting that the affected party "made a commercial decision to carry on with the subdivision knowing that it was under challenge".[32] While the applicants accept the second respondents have spent almost $1,500,000 on construction, they say it is not clear how much of that was incurred after being put on notice of the challenge. In any event, the extent and nature of the Council's non-notification breach weighs in favour of granting relief.

[103] Mr Page points out that the applicants have not sat on their rights. They pro-actively engaged with the Council and the Clarkes as soon as they became aware of the decisions and they initiated this proceeding when it became apparent the matter could not be resolved. Nothing has occurred to displace the presumption that relief should be granted.

Submissions for the Council

[104] The Council does not specifically comment on the discretion to grant relief except to point out that since the consent was granted, a further resource consent was granted on 12 November 2019, authorising a boundary adjustment between the two land parcels that make up the subject site. New certificates of title have been issued in reliance on that resource consent. The consent notice was registered on the title to Lot 60 DP 27493. However, as the result of the implementation of the boundary adjustment consent and the issue of new certificates of title, Lot 60 DP 27493 no longer exists. Instead, the property at 28 Briar Bank Drive is now contained within Lot 2 DP 547764. The Council therefore queries whether there is any practical ability to reinstate the consent notice which applied to the title of Lot 60 DP 27493.

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32 *Murray v Whakatane District Council* [1999] 3 NZLR 276 (CA) at [22].

Submissions for the Clarkes

[105] If grounds of review have been made out, the Clarkes submit this Court should exercise its discretion to decline relief. Mr Gresson points out the Clarkes are an innocent party who will be substantially prejudiced if the Court grants the relief sought by the applicants.

[106] The facts relied on to support this submission are set out in Mr Clarke's affidavit. He says when they received notice of the challenge to the consent in November 2020, approximately 33 per cent of construction had been completed and $1,365,000 spent. If the building had to be taken down, the cost which would be incurred would be over $2,000,000. In addition, he says his contractors had not taken on any new jobs on the basis they would dedicate their time to this project. If work was to cease, this would have a direct financial impact on them.

[107] Finally, the Clarkes obtained expert engineering advice in November 2020, which is before the Court, which says if the Clarkes ceased work in November, there would have been potential structural, financial and environmental impacts. The Clarkes say if any error is established, the gravity of it would be slight in comparison to the financial impact on them if the consent was set aside and the dwelling declared unlawful. They also point out the correspondence they received in November 2020 related to just two of the now five grounds under review. For the applicants to succeed in their submission that the Clarkes were on notice from that point, logically one or both of those grounds would need to be successful.

[108] The Clarkes also point out the circumstances here are very different from those in the cases relied on by the applicants. In *Ririnui v Landcorp Farming Ltd*, the purchaser of the farm was on notice of the potential challenge at the time it entered into the sale and purchase agreement and indeed the terms of the agreement recognised and provided for the risk of such a challenge.[33] In *Murray v Whakatane District Council*, the High Court found the owner "was not in a position to act upon the consent" until three months before the proceedings were filed and there was no

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33 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

suggestion it "altered its position in any way to its detriment" in that time.[34] In *Green v Auckland Council*, the financial cost to the landowner as a result of the relief was $187,000.[35] In *Beach Road Preservation Society Inc v Whangarei District Council*, building work had only just begun and the associated costs were only "in the thousands".[36] Mr Gresson points out that unlike those cases, the Clarkes had incurred significant costs before a challenge was received. He points to cases where the Court has declined relief where there has been real prejudice to the Council or the parties.[37]

[109] In conclusion, Mr Gresson submits that the applicants will suffer a degree of prejudice from not having been able to participate in the consent process. However, when that is measured against the significant impact on the Clarkes, a decision to decline relief should be made.

Discussion

[110] As I indicated to the parties during the hearing, both the Clarkes and the applicants have acted in good faith, and neither has done anything which would have a particular bearing on the exercise of the discretion. I consider the applicants have genuine concerns about the visual impact of the building and acted promptly once aware of what had been authorised by the resource consent. Equally, I do not consider there are grounds to criticise the Clarkes. They acted in good faith in relation to their application for resource consent and had expended approximately $1,300,000 by the time the Clarkes' concerns were raised. Significantly, the issues raised in the 10 November 2020 letter, were not the issues which were subsequently introduced in the litigation and where I have found there was an error.

[111] The Clarkes are well advanced in constructing the building, having now spent $1,500,000 on it, and there would be considerable detriment to them, both in cost and delay, if the Court were to grant the relief sought by the applicants and require the consent to be reconsidered. I do not accept that the lack of evidence on the overall

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34 *Murray v Whakatane District Council*, above n 32, at 321.
35 *Green v Auckland Council* [2013] NZHC 2364, (2013) 17 ELRNZ 737 at [147].
36 *Beach Road Preservation Society Inc v Whangarei District Council* [2001] NZRMA 176 at [56].
37 *Videbeck v Auckland City Council* [2002] 3 NZLR 842 (HC) at [71]; and *John Curtis Developments Ltd v Christchurch City Council* HC Christchurch CP45/01, 26 November 2001 at [25].

financial position of the Clarkes undermines their case. There are inevitable adverse effects flowing from the land use consent being quashed even if the consent is subsequently confirmed on the same or similar terms.

[112] A further consideration is that the primary effects raised are impacts on visual amenity. The house is visible from the applicants' properties, and that is obvious in the photographs produced in evidence, albeit that its visibility is amplified by the significant level of scaffolding erected around the building. Its visibility, and hence its impact on visual amenity, is dependent on the degree of vegetation screening that is required around the property. Had the consent notice requirement been adhered to, requiring vegetation screening to be planted and maintained to prevent the house being visible from the landward 50 metres of the lake's shoreline, it seems inevitable that the visual prominence of the building would be reduced from locations to the west and the north of the building, including the applicants' properties.

[113] In my view, in the particular circumstances of this case, most of the applicants' concerns can be addressed if I limit relief to setting aside the decision cancelling the consent notice. That can then be reconsidered, on the correct basis, which is that it is not the equivalent of site standard r 12.7.5.1(ii)(d).

[114] I do not consider the subsequent boundary adjustment is an impediment to the consent notice being reinstated, and its removal reconsidered. The boundary adjustment simply enlarged what was Lot 60 and reduced what was Lot 61. The obligation to maintain screening for the building on what was Lot 60, but now Lot 2, can still apply, notwithstanding the slight increase in area which has been achieved by the boundary adjustment.

[115] It may well be that the consent notice is cancelled, whether on a notified or non-notified basis, in light of the change of circumstances which has been created by the construction of the Clarkes' residence. However, in that process, consideration can be given to the extent that any alternative proposed (whether through variation of the land use consent condition or implementation of an alternative consent notice) achieves the objectives of the original consent notice condition.

[116] In any event, I reserve leave for the parties to return to the Court should any practical difficulties arise in implementing this aspect of the relief.

Result

[117] In respect of the decision to grant land use consent on a non-notified basis, I make the following declaration:

(a) The limited notification decision on the application for land use consent was made on the wrong legal basis, being that effects of vegetation removal were minor when the requisite statutory test was that the effects were less than minor.

(b) However, in the special circumstances of that case, I decline to grant relief as sought.

[118] In respect of the decision to cancel consent notice 982581.5 on Lot 60 DP 27493:

(a) the notification decision on the cancellation of consent notice 982581.5 on Lot 60 DP 27493 was made in error by assuming the consent notice condition and site standard 12.7.5.1(ii)(d) in the ODP were equivalent provisions;

(b) the notification and substantive decisions on the application to cancel consent notice 982581.5 are quashed;

(c) consent notice 982581.5 is reinstated on the record of title for 28 Briar Bank Drive, being Lot 2 DP 547764;

(d) I reserve leave for the parties to revert to the Court should practical issues arise in implementation of the above decisions.

Costs

[119] I have not heard from counsel on the issue of costs and I reserve the issue of costs.

[120] I record that the applicants have been successful, albeit not on issues that they raised in advance of the litigation with the Clarkes and counsel, and they have been partially successful in obtaining relief. My preliminary view is that they are entitled to costs on a 2B basis. If costs cannot be resolved by agreement, the following timetable will apply:

(a) any memoranda seeking costs is to be filed and served on or before 2 July 2021;

(b) any memorandum opposing costs is to be filed and served on or before 9 July 2021;

(c) any memorandum in reply is to be filed and served on or before 16 July 2021.

[121] Costs will be determined on the papers unless I request to hear from the parties.

Solicitors:
Gallaway Cook Allan Lawyers, Dunedin
Todd & Walker Law, Queenstown

Copy To:
L F de Latour, Queenstown Lakes District Council

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE

CIV-2024-441-017
[2024] NZHC 3322

BETWEEN	THE MAHORA RESIDENTS SOCIETY INCORPORATED Applicant
AND	HASTINGS DISTRICT COUNCIL First Respondent
	NEW ZEALAND HOUSING GROUP HASTINGS LTD Second Respondent

Hearing:	17 September 2024
Appearances:	M B Lawson for Applicant M Casey KC for First Respondent M J Slyfield for Second Respondent
Judgment:	8 November 2024

JUDGMENT OF CHURCHMAN J

Introduction

[1] The Mahora Residents Society Inc (Society) seeks judicial review of decisions made by the Hastings District Council (the Council) not to notify, and to grant, resource consents to NZ Housing Group Hastings Ltd (NZ Housing Group) to undertake a 10-unit residential development in Mahora, Hastings.

Grounds of review

[2] The applicant's amended statement of claim runs to some 32 pages. As identified by the respondents, the statement of claim does not comply with a number

of the requirements for a statement of claim as set out in *Reay v Attorney-General.*[1] Despite these issues, the respondents have expressed a preference for the matter to be disposed of without undue delay, and thus are content to proceed with the existing statement of claim.

[3] The applicant has advanced 10 grounds of judicial review, some of which overlap or are repetitive. The grounds can be summarised into the following main points:

(a) the Council acted illegally and/or for an improper purpose in applying a permitted baseline to its notification decision and resource consent decision when no such permitted baseline existed;

(b) in considering its notification decision and resource consent decision, the Council acted under a mistake of law by having regard to an alternative development scenario that was not a controlled activity;

(c) the Council had regard to an irrelevant consideration, namely the permitted baseline when no such permitted baseline existed, in making its notification decision and resource consent decision;

(d) the Council acted unreasonably in making its notification decision and resource consent decision by pursuing an improper purpose, failing to take into account relevant considerations, taking into account irrelevant considerations, and/or acting under a mistake of law; and

(e) the Council made a mistake of law and/or a mistake of fact in applying the maximum number of vehicle movements for the access road under standard 7.2.5M of the District Plan.

[4] These grounds give rise to three primary issues to be determined:

(a) Whether the Council erred in its application of the permitted baseline;

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1 *Reay v Attorney-General* [2016] NZCA 519; [2016] NZAR 1672 at [16].

(b) Whether the Council erred in its use of the alternative development scenario; and

(c) Whether the Council erred in its application of standard 7.2.5M of the District Plan concerning traffic generation.

The RMA application

[5] In its application, NZ Housing Group sought a land use consent to establish a residential development comprising 10 residential dwelling units that exceeded the General Residential Zone Density Standards of the Operative Hastings District Plan as a discretionary activity under r GR28. It also sought a subdivision consent to undertake a fee simple subdivision as a non-complying activity under r SLD25 to create 11 lots, comprising 10 residential lots and one jointly owned access lot (JOAL), which did not comply with the minimum lot size. Lastly, a resource consent was needed under reg 10 of the NES for Assessing and Managing Contaminants in Soil to Protect Human Health[2] as a restricted discretionary activity.

[6] The 10 residential dwelling units proposed comprised:

(a) Two two-bedroom, one-storey duplex units of 78 m^2 Gross Floor Area (GFA) per unit, facing toward Rimu Street, each with a single vehicle park located at the rear of unit accessed via the JOAL; and

(b) Three two-bedroom, two-storey duplex units of 41 m^2 per unit, located to the rear of the single level units, with one onsite carparking space and accessed via the JOAL.

[7] In addition to the proposed development, the application also sets out an alternative development scenario. This is a five-lot controlled activity subdivision, with each lot able to support a primary and supplementary residential dwelling and a complying outdoor living space and a single carparking space with reverse manoeuvring within the JOAL access. This alternative development scenario is

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2 Resource Management (National Environmental Standard for Assessing and Managing Contaminants in soil to protect Human Health) Regulations 2011.

envisaged to be able to support up to 22 bedrooms, consistent with the scale of residential occupancy proposed, which is 20 bedrooms. The application states that this alternative development scenario would result in development at a similar intensity of use across the subject site but with a lesser degree of integrated design and attention to outcome as has been applied to the proposal.

Legal principles

[8] Under s 95 of the Resource Management Act 1991 (RMA), a consent authority that has received a resource consent application must decide, in accordance with ss 95A and 95B whether to give public notification or limited notification of the application.

[9] One of the considerations that the consent authority must have regard to in deciding whether to publicly notify is whether the activity proposed by the application will or is likely to have adverse effects on the environment that are more than minor.[3] Section 95D(b) provides that in deciding whether an activity will have or is likely to have adverse effects, the consent authority may disregard an adverse effect of the activity if a rule or national environmental standard permits an activity with that effect.

[10] When determining whether to give limited notification of a resource consent application, the consent authority must determine whether there is an affected person under s 95E,[4] in which case that person must be notified of the application. A person is an affected person if the consent authority decides that the activity's adverse effects on that person are minor or more than minor.[5] When assessing the adverse effects on a person, the consent authority may disregard an adverse effect of the activity on that person if a rule or national environmental standard permits an activity with that effect.[6]

[11] Section 104(1)(a) of the RMA provides that when considering an application for a resource consent, the consent authority must have regard to any actual and potential effects on the environment of allowing the activity. Section 104(2) states

3 Resource Management Act 1991, s 95A(8)(b).
4 Section 95B(8).
5 Section 95E(1).
6 Section 95E(2)(a).

that when assessing the actual and potential effects on the environment, the consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the district plan permits an activity with that effect.

[12] Sections 95D(b), 95E(2)(a) and 104(2) codify an approach to determining a resource consent application called the "permitted baseline".

[13] Orthodox principles of judicial review apply in this case. These principles were summarised in *Coro Mainstreet (Inc)*[7] as follows:

> [40] It is not the function of the Court on an application for review to substitute its own decision for that of the consent authority. Nor, will the court assess the merits of the resource consent application or the decision on notification. The inquiry the Court undertakes on an application for review is confined to whether or not the consent authority exceeded its limited jurisdiction conferred by the Act. In practice the Court generally restricts its review to whether the Council as decision maker followed proper procedures, whether all relevant and no irrelevant considerations were taken into account, and whether the decision was manifestly reasonable. The Court has a discretion whether or not to grant relief even if it is persuaded that there is a reviewable error.

[14] The aims and purposes of the RMA do not justify a more intensive standard of review of a non-notification decision than would otherwise be appropriate for a Court when exercising its powers.[8]

Issue One: the permitted baseline

[15] The applicant has raised three main issues with how the Council applied the permitted baseline. These are:

(a) The unbundling of the subdivision consents from the land use consents which allowed the Council to apply a permitted baseline to the land use consents, knowing there is no permitted baseline for subdivision.

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7 *Coro Mainstreet (Incorporated) v The Thames-Coromandel District Council* [2013] NZHC 1163 at [40] footnote omitted.

8 *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu* [2013] NZCA 221 at [56], [2013] ELHNZ 211 at [56].

(b) The application of a "partial" permitted baseline by only having regard to the effects over and above that of a permitted activity.

(c) The conflating of the concepts of "permitted baseline" and "the environment".

The "unbundling" of consents

Submissions

[16] Mr Lawson, for the applicant, submits that the requirement to consider the effects of "activities" and not individual "consents" on the environment has resulted in a long-established principle that the effects of the whole activity should be considered together on the basis of the most restrictive activity. He submits that the Council should have determined the activity to be examined was the subdivision of the land into 10 lots on which 10 new homes would be built, and assessed whether there was an activity permitted by a NES or rule in the District Plan that permits an activity with the same effects as a 10-lot subdivision with 10 new homes.

[17] He argues that instead of following this approach, the Council unbundled the consents and applied a permitted baseline only to the land use consent component. Mr Lawson submits this runs counter to the long-established principles behind bundling of consents as well as s 88 and the provisions of sch 4, and ss 95D, 95E and 104 which all require consideration of "activities" and envisage that multiple consents may be required for those activities.

[18] Mr Casey KC for the Council submits that the applicant's argument overlooks the purpose of the permitted baseline, which is to assist with the assessment of effects of the proposal as a whole, rather than being an activity-by-activity comparison of its component parts. Mr Casey submits that it is commonly observed in RMA decisions that subdivision itself often does not involve adverse effects on the environment, but rather it is the activities that can be undertaken on the resultant lots that have the potential to cause such effects. If similar effects can be generated without any

subdivision occurring, then those effects can form part of the permitted baseline. Counsel relies on *Rawlings v Timaru District Council* as supporting this approach.[9]

[19] Mr Slyfield, counsel for NZ Housing Group, submits the Council did not unbundle the consent, which would have meant it would have assessed the individual components of the proposal according to their distinct activity classes, but instead identified and applied a permitted baseline.

[20] In response to the applicant's contention that it was impermissible for the Council to apply a permitted baseline to land use but not subdivision, Mr Slyfield submits bundling does not impose limits on how the permitted baseline is applied, rather it remains open to a consent authority, when assessing effects, to identify and disregard any effect if the plan permits an activity with that effect. Mr Slyfield states the applicant's concern with "unbundling" does not in fact relate to bundling but the general practice of assessing a proposal in a combined, overall or holistic way.

[21] Mr Slyfield agrees that subdivision is an integral part of the project but argues the applicant's focus on this is misguided because it is the land uses that generate the potential adverse effects of the project, not the subdivision. The subdivision merely alters the boundaries internally within the subject land. If NZ Housing Group had applied for the same land uses without applying for consent to subdivide, all material effects on neighbours and on the wider environment would be exactly the same. Although the subdivision does create non-compliance with the standard for height in relation to the boundary, this was assessed and it was found the shading or overshadowing was generally limited to carparking or access areas, away from identified outdoor living spaces and main living areas.

Analysis

[22] In *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council,*[10] the Court of Appeal cited with approval the description of "bundling" in *Protect Aotea v Auckland Council:*[11]

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9 *Rawlings v Timaru District Council* [2013] NZEnvC 67 at [18].
10 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598 at [132].
11 *Protect Aotea v Auckland Council* [2021] NZEnvC 140 at [17].

> Bundling, in the context of resource management in New Zealand, refers to applications for two or more resource consents being considered together, it denotes a practice of how to assess the class or status of the bundled activities overall. Where the activities involved are of different classes in terms of s 87A of the Act and any relevant regulation, national environmental standard or plan rule, the applicable class for the bundled application may be the most stringent class. For example, if a proposal involves some activities which are classed as discretionary and some as non-complying, the whole proposal may be assessed as non-complying.

[23] This appears to indicate that "bundling" concerns the consideration of activities together, rather than the consideration of resource consents. Since different activities often need their own consents, this may require the consideration of consents together as well. However, as submitted by Mr Lawson, the focus is on whether adverse effects will result from "activities". This is clear from the wording of the requisite sections:

> **95D Consent authority decides if adverse effects likely to be more than minor**
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> A consent authority that is deciding, for the purpose of section 95A(8)(b), whether an ***activity*** will have or is likely to have adverse effects on the environment that are more than minor—
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> …
>
> (b) may disregard an adverse effect of the ***activity*** if a rule or national environmental standard permits an ***activity*** with that effect; and
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> …
>
> **95E Consent authority decides if person is affected person**
>
> (1) For the purpose of giving limited notification of an application for a resource consent for an ***activity*** to a person under section 95B(4) and (9) (as applicable), a person is an **affected person** if the consent authority decides that the ***activity***'s adverse effects on the person are minor or more than minor (but are not less than minor).
>
> **104 Consideration of applications**
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> (2) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2 and section 77M, have regard to—
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> (a) any actual and potential effects on the environment of allowing the ***activity***; and
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> …
>
> (2) When considering an application for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the

> ***activity*** on the environment if a national environmental standard or the plan permits an ***activity*** with that effect.
>
> (Emphasis added)

[24] As observed in *Protect Aotea,* bundling is a rule of practice and not a requirement of the RMA itself, although it does act to implement a number of provisions of the RMA, namely ss 30(1)(a), 31(1)(a), 103 and 270.[12] In particular, s 103 provides that:

> (1) Where 2 or more applications for resource consents in relation to the same proposal have been made to a consent authority, and that consent authority has decided to hear the applications, the consent authority shall hear and decide those applications together unless—
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> (a) the consent authority is of the opinion that the applications are sufficiently unrelated so that it is unnecessary to hear and decide the applications together; and
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> (b) the applicant agrees that a combined hearing need not be held.

[25] The assessment report clearly records that the Council did bundle the activities and applied the most stringent class, namely the non-complying activity class that the land use and subdivision activities fell within. This is demonstrated on the first page of the report where the "Assessment of Status" is stated to be "Non-Complying Activity (as bundled)".

[26] It is accepted by all parties that there is no permitted baseline for subdivision. However, the potential adverse effects envisaged by the applicant, which appear to relate to residential character and amenity, do not arise from the subdivision itself, but from the consequential construction of buildings and other land use activities that arise from the associated land use consent.[13] Such effects are not dependent on the subdivision consent being granted, as demonstrated by the permitted baseline itself. Under the District Plan, it is possible for five buildings to be constructed without the need for the site to be subdivided. As submitted by Mr Slyfield, the subdivision consent merely alters the boundaries internally within the subject site. I accept the reasoning of Mr Casey that since similar effects can be generated without any subdivision occurring, those effects can form part of the permitted baseline.

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12 *Protect Aotea v Auckland Council* [2021] NZEnvC 140 at [18].
13 *Rawlings,* above n 9, at [18].

[27] When examining the wording of the assessment report, there is nothing to indicate that the reporting officer "unbundled" the activities and assessed each of them according to their individual classes. Rather, she focussed on the land use activities, which were those that have the potential to cause adverse effects that are more than minor. The applicant has not been able to identify any effects caused by the subdivision that the Council failed to have regard to. I consider that the reporting officer did not err in focussing on the land use activities when applying the permitted baseline, and consequently the Council did not err in relying on those findings when making its notification and resource consent decisions.

Application of a "partial" permitted baseline

<u>Submissions</u>

[28] Mr Lawson submits that irrespective of whether four or five residential dwellings plus a supplementary residential building are permitted as of right, that is not the same as the effects of 10 residential buildings as proposed. He states the limited jurisdiction under the RMA does not allow a consent authority to disregard a percentage of effects on the basis that such percentage or proportion might arise from permitted activities and only consider the effects over and above the effects that are disregarded. Mr Lawson argues that, having disregarded the effects associated with an erroneous permitted baseline, the assessment report adopted by the decisions undertook a limited analysis of the effects on the environment.

[29] With respect to the applicant's assertion that there was no permitted baseline that could be applied, Mr Casey submits this is fundamentally wrong and refers to the description of permitted baselines in *Arrigato Investments Ltd v Auckland Regional Council,* namely:[14]

> … The permitted baseline … is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count … It is part of the permitted baseline in the sense that it is deemed to be already affected the environment … it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought into account.

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[14] *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 at [29].

[30] Mr Casey submits that the applicant's approach ignores the final sentence of the above extract, as it argues that if there are other or further adverse effects compared to a permitted activity, the permitted baseline cannot be applied. He submits the correct and well-accepted approach to permitted baselines is to identify a non-fanciful activity that could occur on the site without needing resource consent, consider the effects such an activity would have, and compare those effects with the effects of the proposed activity. He refers to *Empire Entertainment v Ellzin Trust,* where the High Court stated:[15]

> … When working through the s 104 process, the task would be to identify additional adverse effects (if any) resulting from a larger floor area and hence more patrons than would be allowed as a permitted activity.

[31] Mr Slyfield submits that the application of what is described as a "partial" baseline is exactly what the permitted baseline allows. He states the statutory provisions authorise the Council to disregard an effect of the activity if the plan permits an activity with that effect. He provides the example of a 12-metre house in a residential zone where 10 metre houses are permitted, and points out that the focus is on the effect of the top two metres.

[32] Mr Slyfield relies on *Auckland Regional Council v Living Earth Ltd* as supporting the view that what the applicant describes as a "partial" permitted baseline is neither improper nor invalid.[16] In that case the Court of Appeal expressed its view that "precise correspondence between effects permitted under the baseline and those associated with a proposal is not fundamental to the application of the permitted baseline test".[17] Mr Slyfield argues that the applicant submits that precise correspondence between the proposal and the baseline is required when it argues that the discretion to consider a permitted baseline did not arise because no permitted activity allows for a 10 unit residential land use at the densities proposed.

[33] Mr Slyfield further submits the proposal does not actually involve 10 residential buildings as stated by the applicant, rather it involves only five residential buildings, each comprising a pair of townhouses with a common wall. He notes that

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15 *Empire Entertainment v Ellzin Trust* [2010] NZRMA 525 at [58].
16 *Auckland Regional Council v Living Earth Ltd* [2008] NZCA 349, (2008) 14 ELRNZ 305.
17 At [62].

all of the proposed townhouses are of modest size, being two-bedroom units with a floor area of either 77.9 m^2 or 79.3 m^2, with the overall dimensions of each of the five buildings being comparable to a standard three or four-bedroom family home. These buildings are also designed and located within the site so that they comply with all permitted standards for height, side and rear setbacks, height in relation to boundary (HIRB) and building coverage. Even if scale was a relevant consideration to the application of the permitted baseline (contrary to *Living Earth),* it is submitted that the scale and design of the structure is not in fact significantly different from a permitted development of the site for five family homes.

<u>Analysis</u>

[34] The use of permitted baselines is an approach to assessing the likely effects on the environment of activities that originated with the Court of Appeal's decision in *Bayley v Manukau City Council.*[18] In *Bayley,* Blanchard J referred to a statement of Salmon J in the case *Aley* in which Salmon J stated "…a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists".[19] Blanchard J expanded on this statement adding that the assessment of effects was to be not only on the environment as it exists but also "as it would exist if the land were used in a manner permitted as of right by the plan".[20]

[35] In further decisions such as *Smith Chilcott Ltd, Arrigato Investments Ltd,* and *Dye,*[21] the Court of Appeal clarified the concept of permitted baselines, and made clear it meant the consent authority was only entitled to have regard to adverse effects of discretionary and non-complying activities that were "other or further" than those adverse effects permitted as of right.[22] After concerns were raised around the mandatory direction to disregard permitted effects, which appeared to conflict with s 104 of the RMA which required consideration of the effects of the activity, amendments to the RMA were introduced in 2003. These codified the permitted

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18 *Bayley v Manukau City Council* [1991] 4 ELRNZ 461 (CA).
19 At 473 citing *Aley v North Shore City Council* [1998] NZRMA 361 at 377.
20 At 473.
21 *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473 (CA); *Arrigato,* above n 14; and *Dye v Auckland Regional Counil* [2002] 1 NZLR 337.
22 Stephen Blakeley *Environment Handbook* (online ed, Thomson Reuters) at [PB3].

baseline approach but made it clear consent authorities were not compelled to disregard permitted effects, but rather had a discretion to do so.[23]

[36] The factors to consider in determining whether the consent authority should have exercised the discretion to apply a permitted baseline were set out in the *Lyttelton Harbour* decision.[24] These were:[25]

> - Does the plan provide for a permitted activity or activities from which a reasonable comparison of adverse effect can conceivably be drawn?
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> - Is the case before the Court supported with cogent reasons to indicate whether the permitted baseline should not be invoked?
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> - If the parties consider that the application of the baseline test will assist, are they agreed on the permitted activity or activities to be compared as to adverse effect, and if not, where do the merits lie over the area of disagreement?
>
> - Is the evidence regarding the proposal, and regarding the hypothetical (non-fanciful) development under relevant permitted activity, sufficient to allow for an adequate comparison of adverse effect?
>
> - Is a permitted activity with which the proposal might be compared as to adverse effect nevertheless so different in kind and purpose within the plan's framework that permitted baseline ought not to be invoked?
>
> - Might application of the baseline have the effect of overriding Part 2 of the RMA.

[37] The current provisions codifying the permitted baseline, namely ss 95D(b), 95E(2)(a) and 104(2), provide that when considering the effects of a proposed activity to decide whether to notify or grant a resource consent, the consenting authority may "disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect".

[38] It appears clear that, as submitted by the respondents, the application of a "partial" baseline is in fact the correct application of the permitted baseline test. The purpose of a permitted baseline is to simplify the resource consent process by allowing the consenting authority to focus only on those effects that exceed the effects of those

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23 At [PB4].

24 *Lyttelton Harbour Landscape Protection Association Inc v Christchurch City Council* [2006] NZRMA 559.

25 At [21].

activities that are permitted under a district plan or national environmental standard. As made clear by the Court of Appeal in *Arrigato,* it is only those adverse effects "over and further" than those within the permitted baseline that are brought into account.[26] The reporting officer undertook an orthodox approach in disregarding those effects that were considered within the permitted baseline, in other words effects that would have resulted from a permitted activity such as the construction of five residential dwellings and a supplementary residential building.

[39] With respect to the question of whether five residential dwellings and a supplementary residential building was an appropriate permitted baseline, I accept the submission of Mr Slyfield that, as found in *Living Earth,* precise correspondence between the effects permitted under the baseline and those associated with the proposal is not necessary. The permitted baseline applied was one with which a reasonable comparison could be made. Although the development is for 10 units, these units are housed in five buildings and are each of a relatively small size. The assessment report in fact noted the permitted baseline had a greater building site coverage of 908.55 m^2 compared to 602.32 m^2 for the proposed development. I consequently do not consider that, as alleged by the applicant, an erroneous permitted baseline was applied.

Conflating permitted baseline with the environment

<u>Submissions</u>

[40] Mr Lawson submits that the Council in undertaking an assessment of the application and in accepting the recommendation of the assessment conflated the concept of a permitted baseline with the environment and did this in a way that is not permitted by the permitted baseline concept. He submits the Council's approach extended the environment to include applications that might be made in the future or as an alternative on the subject site, which resulted in double discounting of the effects on the environment. Mr Lawson refers to *Queenstown-Lakes District Council v Hawthorn Estate Ltd*[27] and states in that decision the Court of Appeal expressly rejected the suggestion that the effects of resource consent applications that might be

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26 *Arrigato,* above n 14, at [29].
27 *Queenstown – Lakes District Council v Hawthorn Estate Ltd*, 12 ELRNZ 299.

made in the future should be brought to account in considering the likely future state of the environment.

[41] Mr Slyfield submits it is not clear what evidence the applicant relies on to support this submission, other than a statement on page 33 of the assessment report which reads "[i]n considering both the existing environment and the District Plan enabled environment …". Mr Slyfield submits that when this is read in context, this is referring to the character and amenity as it presently exists and as it might change over time with permitted development. They are not being conflated, but rather are each being recognised as important parts of the assessment. Mr Slyfield says there is nothing contrary to *Hawthorn* in this, as the Officer is not discussing the environment in terms of its potential receipt of effects, but in terms of the attributes it possesses (now and as it evolves over time) that collectively make up residential character and amenity, along with the attributes of the site.

<u>Analysis</u>

[42] In *Hawthorn,* the Court of Appeal clarified the scope of what was meant by "the environment" in the context of the assessing the effects of activities under s 104(1)(a) the RMA. The Court confirmed the receiving environment should be assessed in respect of the potential to accommodate permitted activities in the future, but not on potential consent applications as that was too speculative.[28] The relevant paragraph of the judgment reads:[29]

> … In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment.

[43] Additionally, earlier in the *Hawthorn* decision, the Court of Appeal noted that the High Court Judge in that case appeared to have incorrectly used the term

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28 Kenneth Palmer *Local Government Law in Aotearoa New Zealand* (online ed, Thomson Reuters) at [18.2.5].

29 *Hawthorn,* above n 27 at [84].

"permitted baseline" to refer to the likely developments that would take place beyond the boundary of the subject site, utilising existing resource consents. The Court of Appeal considered that nothing turned on the label the Judge used to refer to lawfully authorised environmental change beyond the subject site. But they made it clear that assessing the permitted baseline is a different exercise to ascertaining the effects on the environment as the permitted baseline focusses solely on the site of the resource consent application.[30]

[44] Mr Lawson, for the applicant contends that the Council erred in applying the permitted baseline by confusing it with the environment as the High Court Judge in *Hawthorn* did.

[45] Mr Lawson has not identified where in the assessment report or the notification and resource consent decisions this conflation and what was said to be the extension of the environment to include future consent applications has occurred. The assessment report discussed the potential future state of the environment at pages 33 and 35:

> Notwithstanding the current residential environment, the current District Plan provisions do not preclude two storied dwellings up to 8 metres high on these sites at a density of 1 dwelling on 350 m plus provision for a supplementary dwelling. The site is not located in the Hastings Residential Character Zone where higher minimum densities have been established to protect an identified character. The site is also not located in an area specifically identified for CRD. The District Plan provides for CRD outside of identified areas is a Discretionary Activity, allowing assessment of a proposal on its merits, although noting this proposal does not meet the definition of a CRD.
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> …
>
> Whilst the immediate area presently does not have multi-unit developments or two storied dwellings, the current District Plan does not preclude more (even when considering what could be done under an alternative development scenario). While the proposal does not meet the permitted density of 1 residential building per 350m^2 or the CRD density of 1 residential dwelling per 250m^2 the density proposed is not dissimilar to what could be developed as an alternative feasible development within this land area. Furthermore, the proposed building coverage is less than what could be provided by a permitted activity. This is an appropriate comparison to determine the suitability of these sites for the proposed density.

30 *Hawthorn*, above n 25 at [90].

[46] It is clear from these passages that the reporting officer did not consider future applications for resource consent when considering the future state of the receiving environment. Rather, she acknowledged that under the current District Plan, higher densities of development were permitted. This is consistent with the approach set out by the Court of Appeal in *Hawthorn.*

[47] Throughout the assessment report, the reporting officer correctly uses the term permitted baseline, namely, to refer to a permitted activity that could occur on the site without consent that has similar effects to the proposed activity. This was considered separately from the environment.

[48] The applicant has not established that the Council erred in its application of the permitted baseline.

Issue 2: the alternative development scenario

[49] In relation to the Council's consideration of the alternative development scenario, the applicant submits that the scenario was an irrelevant consideration as:

(a) the alternative development scenario was not a controlled activity due to its inconsistency with r 26.1.6A of the District Plan relating to minimum access way width;

(b) the alternative development scenario was not a controlled activity due to the fact the net site area of each lot was under the minimum of 350 m^2; and

(c) The alternative development scenario was not part of the environment as, per *Hawthorn,* the future environment does not include consents that may be applied for and granted in the future.

The minimum accessway width

Submissions

[50] Mr Lawson submits that what he describes as the erroneous consideration of the alternative development scenario was further exacerbated by the fact it was considered a controlled activity when it in fact was not. This was because it did not meet the requirements under r 26.1.6A of the Hastings District Plan for a minimum access way of 4.5 metres to service four to six household units.

[51] Mr Lawson also notes that Mr Wiffen, who provided an affidavit in support of the respondents' opposition to the judicial review, disagreed with the requirement of a 4.5 metre minimum width on the basis that a supplementary residential building is not a separate household unit. Mr Lawson submits that NZ Housing Group cannot have it both ways, in that it cannot on the one hand put forward that the primary and supplementary residential dwelling on each of the five lots as being akin to 10 residential homes on a 10 lot subdivision and on the other contend that for the purposes of calculating the required width of an accessway, a supplementary residential building is not a separate household unit.

[52] Mr Slyfield submits that the alternative development scenario was correctly described in the application and in the Council's decisions as a controlled activity. He notes the width of the JOAL which services the rear three lots is 3.6 metres at its narrowest and states the District Plan standards requires a private access way servicing three properties to have a minimum width of 3.6 metres and a private access serving four to six household units to have a minimum width of 4.5 metres.

[53] Mr Slyfield submits the District Plan does not define "household unit" and submits that Mr Wiffin, in his affidavit, correctly interpreted a household unit by reference to relevant Plan provisions including the definition of supplementary residential buildings, and the fact these buildings do not require a separate parking space and are exempted from density and outdoor living space standards. These considerations are submitted to strongly support the interpretation that supplementary residential buildings are not to be treated as separate household units for the purposes of vehicle access.

Analysis

[54] Rule 26.1.6A of the Operative Hastings District Plan provides:

> **1. Access to Property**
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> …
>
> (c) The minimum legal widths for private access are contained in Table 26.1.6.1-1 below. Private access to properties shall allow the safe passage from the edge of the road to the legal boundary of the lot for a single site or household unit. For two or more sites or household units or for any Right of Way, formation of the access to the activity undertaken on the site is required in compliance with Table 26.1.6.1-1.

[55] Table 26.1.6.1-1 specifies that for private access ways that service three household units in urban zones, the minimum legal access width is 3.6 metres, whereas for private accesses servicing 4–6 household units, the minimum legal access width is 4.5 metres.

[56] Household unit is not defined under the District Plan. However, s 7 of the Building Act 2004 provides:

> **household unit—**
>
> (a) means a building or group of buildings, or part of a building or group of buildings, that is—
>
> (i) used, or intended to be used, only or mainly for residential purposes; and
>
> (ii) occupied, or intended to be occupied, exclusively as the home or residence of not more than 1 household; but
>
> (b) does not include a hostel, boarding house, or other specialised accommodation.

[57] A supplementary residential building is defined under the District Plan as "a residential building which supports the principal dwelling on the site and is therefore located within the curtilage of the principal dwelling and shares its vehicle access and services". A principal residential dwelling is defined as "the main dwelling on the site and is the primary living space for the site". Lastly, a residential building is defined as "a building, a room, or a group of rooms, used or intended to be used exclusively by one or more persons as a single, independent and separate household unit".

[58] These definitions are consistent with the submission that supplementary residential buildings are household units. However, the requirement under the Building Act that a household unit is occupied as the residence of not more than one household suggests that, given supplementary residential buildings are generally intended to host other family members,[31] that they are not a household unit and that rather supplementary residential buildings together with the principal residential dwelling make up the household unit. This interpretation is also supported by the fact that supplementary residential buildings are not required to meet the density or outdoor living space standards, as provided in standard 7.2.6C of the District Plan.

[59] When read together, the relevant provisions of the District Plan indicate that supplementary residential buildings do not fall within the definition of a household unit. Consequently, a width of 3.6 metres for the accessway to the rear three lots was compliant with standard 26.1.6A of the District Plan. The width of the accessway did not render the alternative development scenario a non-compliant activity.

The net site area

<u>Submissions</u>

[60] Mr Lawson submits that the alternative development scenario is not a controlled activity due to the fact the net site area per dwelling is less than 350 m^2, since common use areas, access lots, access strips and entrance strips are excluded from the calculation of this area. He states this means where a supplementary residential building is located on the site, the net site area must be 350 m^2 plus 36 m^2 of shared outdoor living space and plus the areas used as common driveways, access lots, access strips and entrance strips.

[61] Mr Casey submits that Mr Stickney's interpretation of "common use area" that the applicant relies on is not sustainable. He contends that the definition of net site area distinguishes between areas set aside for the exclusive use of its owners, lessees or tenants, which are included in the definition, and "common use areas" which are

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[31] I note that the outcome statement that accompanies Standard 7.2.6C of the Operative Hastings District Plan states that "this provision provides flexibility in providing for extended family (and the like) or supplementary accommodation on SITE and contributes to utilising land is an efficient manner while maintaining residential AMENITY for occupants and neighbours".

excluded. He submits the clear intention is for a supplementary residential building to be used as an extension of the principal dwelling, meaning any occupiers would be anticipated to be part of the owners' family or their tenants. Mr Casey argues the outdoor living space between occupiers of the principal and supplementary is land set aside for those occupants and therefore forms part of the net site area.

[62] Mr Slyfield supports the Council's submissions and submits further that Mr Stickney's approach referred to by the applicant relies improperly on Figure 9 of Appendix 68 to the Plan. He submits that, as Mr Wiffin identified in his affidavit, all examples of common use areas depicted in Figure 9 involve areas that rely upon easements or legal instruments to protect or enable the use. In contrast, a supplementary building shares the outdoor living space of the principal dwelling, without the need for legal instruments to enable that shared arrangement, which is consistent with the stated purpose of the Plan's provision for supplementary residential buildings.

Analysis

[63] Under the Operative Hastings District Plan, net site area is defined as:

> **Net Site Area:** means a single contiguous site area set aside for the exclusive use of its owners, leases or tenants and shall exclude all common use areas, (excluding easements for water, power, phone, sewer and stormwater), access lots or access strips and entrance strips but in the Rural Areas/Zones shall also include the total of two or more such areas separated by any common use areas, access lots or access strips. *See Appendix 68 – Figure 9*

[64] Although common use area is not defined in the District Plan, Figure 9 in Appendix 68 to the District Plan sets out a number of examples of what constitutes net site area and what does not. Examples include rights of way, shared access, and shared parking and manoeuvring areas. In the cross-lease example, the shared parking and manoeuvring area is excluded from the net site area as it is not an "exclusive use area".

[65] The cross-lease example indicates that what is determinative of whether an area is a common use area or part of the net site area is whether it is an "exclusive use area". I consider that the fact that supplementary residential dwellings are exempt from the outdoor living space requirements under the District Plan to be compelling

here. Supplementary residential buildings are intended to provide additional accommodation for members of a household and to support the principal dwelling. This contrasts with the cross-lease example where two different households are sharing parking and manoeuvering area. The outdoor living space between the supplementary residential buildings and the principal dwellings are for the exclusive use of that household.

[66] I therefore consider that the net site area requirements under the District Plan were complied with by the alternative development scenario, and thus the reporting officer correctly identified the alternative development scenario as a controlled activity.

Contradictions with Hawthorn

Submissions

[67] Mr Lawson submits that the alternative development scenario was an irrelevant consideration as it was not part of the permitted baseline, nor part of the environment. He states that, applying *Hawthorn,* the future environment does not include consents that may be applied for, and granted in the future.

[68] Mr Slyfield submits that the Council did not consider the alternative development scenario contrary to *Hawthorn.* He argues that *Hawthorn* confirmed a distinction between the site on which an activity is proposed and the environment surrounding that site, which receives the effects of such a proposal. While Mr Slyfield accepts that it would be contrary to *Hawthorn* for the Council to consider the alternative development scenario in the receiving environment, he states this is not what the Council did. Rather, it assessed the alternative scenario as a development that could occur on the site itself. He submits that it was a relevant consideration that the Council was well aware it could not treat as a permitted baseline, as was stated a number of times by the reporting officer. The alternative scenario was used in a very limited way to consider effects that might occur in relation to residential amenity without any ability to impose conditions addressing matters such as urban design.

Analysis

[69] As noted above at [42], the discussion in *Hawthorn* concerned the meaning of "environment" in terms of the receiving environment, rather than the subject site itself. The inclusion of potential future consents that had not yet been granted in the consideration of the "environment" was found to be too uncertain.

[70] The alternative development scenario concerns a potential development on the site itself which would be a controlled activity, in that it required a subdivision consent. A consent authority must grant a consent for a controlled activity[32] except in certain circumstances, such as where the consent is for a subdivision and there is a significant risk from natural hazards or sufficient provision has not been made for legal and physical access to each allotment created by the subdivision.[33] Given sufficient legal and physical access is provided by the alternative development scenario (see paragraphs [54]–[59] above), the concerns around uncertainty identified in *Hawthorn* do not apply, as the Council would be required to grant the consent. In any event the principles discussed in *Hawthorn* do not relate to potential development on the subject site but potential developments of other unrelated sites, and thus are largely irrelevant here.

[71] As is clear from the practice of permitted baselines, the comparison of a proposed development with a non-permitted activity is not contrary to the purposes and principles of the RMA. I accept the submission of Mr Slyfield that the Council used the alternative development scenario in a limited way to assist in the assessment of the effects of the proposal on residential character and amenity in combination with the permitted baseline. The repeated statements that the alternative development scenario was not a permitted baseline demonstrated that the reporting officer was live to risks of the scenario being improperly relied on. There is nothing identified by the appellant nor apparent from the assessment report or decisions that suggests that by having regard to the alternative development scenario the reporting officer and/or the Council had regard to an irrelevant consideration.

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[32] Resource Management Act, s 87A.
[33] Section 106(1)(a) and (c).

Traffic generation

Submissions

[72] Mr Lawson submits that the reporting officer's application of Standard 7.2.5M of the District Plan, that 30 vehicle movements per day on access roads applied to 30 vehicle movements per day per site, was inconsistent with the clear wording of the rule. He submits the rule imposes a threshold of 30 vmpd for vehicle movements on access roads, not 30 vehicle movements per day per site.

[73] Mr Casey contends that the applicant's interpretation of Standard 7.2.5M of the District Plan is not supported by the text, nor would it serve a valid management purpose. He refers to Mr Wiffin's second affidavit, which noted that Rimu Street already has approximately 10 times the volume of traffic that an access road is restricted to according to the applicant. Mr Casey also points to the note to the standard which states that under the standard "movement" means "the arrival and departure of a vehicle as a result of an activity on a site", and states this pins the standard directly to vehicles generated by "a site" and not the number of vehicles using the road.

[74] Mr Casey also submits that applying the threshold to the road instead of the application site means the standard would fail to respond to an effect of the activity proposed for that site. He argues there could be no permitted or controlled activities at all, because the standard could never be complied with. Such an approach would be directed at avoiding virtually any traffic at all, rather than the "high traffic volumes" as stated in the standards outcomes.

[75] Mr Casey also submits the District Plan adopted the NZTA's "One Network Road Classification" system to differentiate the types of roads and anticipates that the average daily traffic on an access road, such as Rimu Street, would be less than 1,000 for urban roads. He submits there is no indication of any road being expected to have as few as only 30 vehicle movements per day.

Analysis

[76] Standard 7.2.5M of the Operative Hastings District Plan provides:

> **7.2.5M TRAFFIC GENERATION**
>
> **All Hastings Residential Zones**
>
> Motor vehicle movements on access roads as shown in Appendix 69, shall not exceed the following threshold limits:
>
> **Vehicle Class/Type –** Maximum Number of Movements Per Day or Averaged Per Day Over Any 7 Day Period:
> HCV-II - Nil
> HCV-I -1
> All Others - 30
>
> Note: *Movement: means the arrival and departure of a vehicle as a result of an activity on a site.*

[77] The outcome sought to be achieved by this standard is the "avoidance of nuisance and safety impacts of heavy Vehicles and high traffic volumes in residential areas".

[78] As submitted by Mr Casey, the note to the standard makes clear that movement concerns the arrival and departure of a vehicle from a site. It is therefore a logical corollary that the maximum of 30 movements per day would apply to each site, and not to the entire access road itself. An overview of recent case law[34] concerning vehicle movements per day makes clear this is generally concerned with vehicle movements per day per site, rather than per road.

[79] I also accept the affidavit evidence of Mr Wiffin, in which he argues 30 vehicle movements per day for the whole of Rimu Street would be nonsensical, given it already sustains far more than 30 vehicle movements per day. As noted by Mr Wiffin, the traffic impact assessment appended to the resource consent application estimated average daily traffic on Rimu Street was 164 vehicles per day. Given there appears to be around 20 properties on Rimu Street, a 30 vehicle movements per day limit for the street would be unworkable and would mean any change to any land use on a site on

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34 *Currie v Palmerston North City Council* [2023] NZEnvC 27; *Daisley v Whangarei District Council* [2022] NZHC 1372; *Car Distribution Group Ltd v Christchurch City Council* [2018] NZEnvC 235;

Rimu Street would require a resource consent. Such a limit would far exceed the outcome sought by the standard to avoid the nuisance and safety impacts of high traffic volumes in residential areas.

[80] I therefore consider that the Council did not make a mistake of law and/or a mistake of fact in applying the maximum number of vehicles movements for the access road to reach individual site under standard 7.2.5M of the District Plan.

Conclusion

[81] The Council acted neither illegally nor for an improper purpose in applying a permitted baseline in its notification decision and resource consent decision. The correct legal test was applied, with the applicant failing to demonstrate that the Council either "unbundled" the consents/activities, applied a "partial" permitted baseline, or conflated the permitted baseline with the environment in a manner contrary to the findings in *Hawthorn.* The permitted baseline was also not an irrelevant consideration, but rather provided an appropriate potential permitted development to compare against the proposed development in order to ascertain the effects in excess of what was permitted under the District Plan.

[82] The Council also did not act under a mistake of law or fact in using an alternative development scenario in its assessment of the resource consent application. The alternative development was in fact a controlled activity and did not seek to expand the concept of the environment to include future consents, as was deemed impermissible in *Hawthorn.*

[83] The applicant has failed to advance a convincing argument that the Council acted unreasonably in coming to its notification and resource consent decisions.

[84] Lastly, the Council clearly did not make a mistake of law in interpreting and applying standard 7.2.5M of the Hastings District Plan, but rather correctly determined that the 30 vehicle movements per day limit applied per site rather than per access road.

[85] I consequently find that none of the grounds of review advanced by the applicant are made out.

[86] The application is dismissed.

[87] I invite the parties to agree costs, however, if that is not possible the respondents are to file and serve their applications within 14 days of the date of this judgment with the applicant to have 14 days after service to file and serve a reply. I will then deal with the matter on the papers.

Churchman J

Solicitors:
Lawson Robinson Limited, Napier for Applicant
Hastings District Council Solicitor, Hastings for First Respondent
Sainsbury Logan and Williams, Napier for Second Respondent

Decision No. A 128 /2004

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of three references under clause 14 of the First Schedule to the Act

BETWEEN **THE ROYAL FOREST AND BIRD PROTECTION SOCIETY INC**

(Part RMA 500/00)

DIRECTOR-GENERAL OF CONSERVATION

(Part RMA 518/00)

OTAGO CONSERVATION BOARD

(Part RMA 531/00)

Appellants/Referrers

AND **THE CENTRAL OTAGO DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge R J Bollard (presiding)
Environment Commissioner C E Manning
Environment Commissioner I G McIntyre
Deputy Environment Commissioner R Grigg

HEARING at Alexandra on 10, 11, 12, 15, 16, 17, 18, 19 December 2003; at Queenstown & Alexandra on 14,15,16, 17 June 2004 (memoranda lodged subsequently on 19, 24, 27 August; 2, 8 September 2004 by leave)

APPEARANCES

M J Cameron for the Royal Forest and Bird Protection Society Inc
R H Ibbotson for the Director-General of Conservation and Otago Conservation Board
J A Williamson and G A Clark for Federated Farmers of New Zealand Inc and High Country Trustees (Southern) as submitters
R W Kilgour, a submitter on own behalf
J E Macdonald for the respondent

INTERIM DECISION

Introduction

[1] Each of these appeals relates (as to part) to the proposed Central Otago district plan (the other part in each instance involving outstanding natural landscape issues and natural features). The relevant parts of the appeals raise as their central focus or concern the question of aptly providing, in the context of the Resource Management Act 1991 (RMA), for the indigenous biodiversity and significant indigenous vegetation of the Central Otago district.

[2] The plan looks to a dual form of approach in addressing the issue. First, there is a schedule of protected areas (Schedule 19.6). Those areas are subject to rule 4.7.6K of the plan, the effect of which is to assign non-complying status to various activities within the protected areas – that is to say, activities which involve:

(a) removing or adversely affecting indigenous vegetation, or

(b) adversely affecting significant habitats of indigenous fauna or valued non-indigenous fauna, or

(c) draining or adversely affecting any wetland or its associated values, or

(d) erecting any structure (excluding fences and signs that conform with rule 12.7.5(i)(e)), or

(e) carrying out any earthworks or cultivation of land, or

(f) establishing woodlots, production forestry or shelterbelts, or

(g) subdivision of land (except for the creation of reserves or conservation areas).

[3] The second basis of approach is directed to areas outside those specifically identified in Schedule 19.6. For the non-scheduled areas, the plan relies on voluntary mechanisms and processes independent of the plan's regulatory function, (such as tenure review of Crown pastoral lease lands later discussed), to achieve recognition and protection. The plan indicates, nevertheless, that a review of the extent of protection achieved within five years of the plan becoming operative will be undertaken. The position of the Central Otago District Council is supported by Federated Farmers of New Zealand Inc. and the High Country Trustees (Southern). For convenience, we will refer to the latter two parties simply as Federated Farmers.

[4] The Director-General of Conservation and the Otago Conservation Board (referred to as the Director-General except where the context otherwise requires), both contend as appellants, with the support of the Royal Forest and Bird Protection Society Inc., that Schedule 19.6 is woefully inadequate. The Director-General suggests that until such time as adequate research has been carried out to facilitate the compilation of a much more comprehensive schedule, the plan must realistically contain a "general protection" rule. For areas beyond those specifically scheduled, it is said that the effects of vegetation clearance involving endangered species, or areas exceeding a specified minimum, or higher than a particular altitude, require assessment through resource consent processes. The specific triggers are an altitude of above 1080m (although 1070m was spoken of during the hearing); secondly, an area of more than 0.5ha; and thirdly, inclusion of a threatened plant species amongst the vegetation to be cleared, where the species is on a site identified in the planning maps. The Society supports the above, but suggests that the rule not be viewed as an interim measure.

[5] Another variation in position between the appellants centres upon two exemptions sought by the Director-General from the general rule. The first proposed exemption (which the Society opposes) comprises areas covered with matagouri less than 1.5m tall. The second (also opposed) involves land freeholded through the Crown pastoral lease tenure review process (refer paragraphs [21] to [25]), being a process deriving from the Crown Pastoral Land Act 1998 (CPLA).

[6] According to the Council, supported by Federated Farmers and by Mr R W Kilgour, a submitter in person, the plan's framework as it stands reflects due fulfilment of the Council's function and duties under ss.31 and 32 of the RMA. In short, it is claimed that the approach adopted represents the most sensible basis for promoting sustainable management of the district's resources at issue in both the present and reasonably foreseeable circumstances. The plan, so it is said, pays proper heed to the need for clarity, workability, and community acceptance allied with a reasonable expectation of compliance.

General Background and Discussion

[7] The Central Otago district comprises some 1.1million hectares, of which some 66,500ha is managed by the Department of Conservation (the Department) as public conservation land, or is otherwise protected under the Reserves Act 1977 or the Conservation Act 1987. A further 2752ha is protected by QE II covenants.

[8] In terms of biodiversity, Central Otago has suffered a disproportionate degree of loss consequent upon human occupation. The original forest cover still in being is of token extent, yet the district contains a much higher proportion of endangered species than most other parts of the country. The territorial district represents 3.7% of New Zealand's land area, but contains about 12% of the country's listed threatened vascular plant species. Part of the loss has been quite recent, due to changes in land use. For example, as regards 40,000ha of saline soils supporting native plant communities mapped in the 1960s and 1970s, only 100ha or so now remain.

[9] Some thirteen lizard species have been identified within the district. Those species include the grand skink and the Otago skink, both of which are nationally critical in status. It is possible that further undiscovered species exist in the high country. The endangered skinks of the district have very specific habitat requirements appertaining to non-forested grassland and shrubland areas. It is therefore necessary for conservation initiatives to take place in situ. Degradation of habitat renders such species conspicuous to mammalian predators.

[10] The district also supports a wide range of invertebrates, including moths, ground beetles, cicadas and native spiders. Four invertebrate species are nationally critical in conservation terms, and six are nationally endangered. Many have long generation times and are flightless, which restricts their ability to cope with habitat loss. Various species have evolved with the ability to survive extremely dry

conditions or extreme temperature fluctuations. There is sometimes a specific connection between a number of invertebrates and particular species of shrubs, thus rendering the former extremely sensitive to vegetation removal.

[11] While differences emerged in evidence from a peripheral perspective, that is to say, whether one species or another should be included in a schedule, there did not appear to be any disagreement over the general proposition that Central Otago has suffered considerable loss of native vegetation, and again, considerable loss of habitat of indigenous fauna. As a result, it was common ground that various species of both flora and fauna (both named and in some cases as yet unnamed) are under threat, along with an indeterminate number of unknown species.

[12] As observed, nearly 70,000ha comprising about 6.5% of the land within the district, is currently afforded some form of protection through the Department, or as a consequence of procedures under legislation other than the RMA. The distribution, however, is uneven. In the alpine zone, 26.5% of the land is either within the Crown conservation estate or protected by covenant. The comparative figure for the montane zone (mean elevation 828m asl) is 4.1%, and in the lowland areas (mean elevation asl 439m), 2.2%.

[13] Approximately 350,331ha of the district is currently Crown pastoral lease land. That land is subject to a process of voluntary review of tenure as between the Crown and any leaseholder. Hence, the possibility exists for more land to come within the conservation estate during the plan's lifetime, as tenure reviews are successfully negotiated and settled with individual leaseholders. If reviews completed hitherto afford any degree of prognosis, it is likely that between 40% and 60% of the land subject to a review may be expected to be retained by the Crown, free of the leasehold interest, and devoted to public interest purposes centered on conservation. Most of the land, however, would probably lie at an altitude higher than 900m asl.

[14] During the mid to late 1980s, a series of surveys was undertaken, with the aim of implementing a "protected natural areas programme" (PNAP). The surveys were designed to establish recommended areas for protection (RAPs), by selecting the best examples of significant areas of vegetation. The Council's evidence was that significant doubts exist over the validity of these surveys, due to such factors as restricted access to farm properties, and the rush to complete surveys over university vacations (often with inexperienced personnel involved).

[15] Dr B P J Molloy, called on behalf of Federated Farmers, believed that, using the surveys as a base, most significant areas could be identified within twelve months, provided all parties co-operated. Other witnesses were sceptical of the comprehensiveness and value of the PNAP, and hence considered that more research was needed on an up-to-date footing over a notably greater time period comprising several years.

[16] In the 1990s, the Department, through the Minister of Conservation, issued a notice of requirement for parts of a landholding called Little Valley Station. The notice was directed to conserving the relevant parts in their natural state owing to their perceived significance. This caused considerable tension between farming interests and conservation groups, in that landowners had been assured that attempts to protect areas identified through the PNAP would be by voluntary agreement, not statutory means. Some explanation is thus lent to the limited proportion of RAPs included in Schedule 19.6. Mr Ibbotson submitted for the Director-General that 71.5% of the district's RAPs had not been included. The Council proposes to conduct a review process with a view to adding to the schedule five years after the plan becomes operative. This implicitly indicates that the schedule is not comprehensive as it stands, and therefore cannot be relied on alone.

[17] Another source of contention was whether an approach based on protecting only the most notable sites or areas is appropriate. Dr W G Lee, an ecologist called for the Society, suggested in evidence that the degree of indigenous vegetation loss is such that even sites of modified native vegetation may be critically important in maintaining indigenous biodiversity. In other words, there is a risk that vitally important areas may nonetheless be viewed as "insufficiently pristine" to qualify for inclusion in a schedule.

[18] According to Dr Molloy, the survival of various endangered species depends on active management input, which in many cases needs to come from the landowner. Moreover, proper management of threatened taxa often involves an on-going labour intensive process. The mere setting aside of land for conservation purposes does not guarantee protection. Mention was also made of the widespread infiltration of naturalised species and the need for the farming community to be reasonably informed about rare, let alone threatened, indigenous species. Better community understanding and support were seen as key factors. Dr Lee for his part acknowledged, in response to a question from the Court, that present conservation strategies require the co-operation of landowners. It falls to us to weigh, therefore,

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whether a particular regime or mode of approach in the light of past experience, will assist in promoting that co-operation.

[19] The removal of matagouri and the burning of tussock are considered essential farming practices by various high country farmers. Matagouri and tussock, when dense, prevent access by sheep to grazing areas. The methods used by farmers (fire and aerial spraying) may not distinguish between species sought to be controlled and other species within the same area. To ensure that valuable species are not damaged, the Otago Regional Council has introduced a voluntary code of practice for burning. The code provides for the monitoring of both vegetation and soils, and the maintenance of adequate intervals between burn-offs. Expert evidence called on behalf of the appellant challenged whether, from a long-term perspective, soil conditions can remain such as to sustain tussock grasslands where burning occurs at regular 10 to 20-year intervals.

[20] Lastly, evidence adduced on behalf of Federated Farmers suggested that the cost and delay associated with resource management processes was a continuing concern for rural landowners. The Little Valley designation hearings apparently stimulated many of those concerns – the view being that once a consent application is notified, opposing submitters (including public interest groups such as the Society) may take matters on appeal to this Court at commensurate expense to all concerned. Hence, in the event of a "general protection" rule being introduced, the question of public notification was seen as significant.

Pastoral leasehold tenure review

[21] As noted at paragraph [13], a notable portion of the district (approximately 32%) comprises Crown pastoral leasehold land. The lessees have perpetual rights of renewal, and enjoy exclusive possession. Although they require the approval of the Commissioner of Crown Lands for any type of soil disturbance or activity other than pastoral farming, the Commissioner's ambit of consideration is restricted to water and soil conservation matters, without including considerations for protecting bio-diversity.

[22] In the early 1990s, a combination of circumstances arose in which the Department was seeking improved means to protect bio-diversity on the pastoral leasehold lands, while a number of lessees were seeking to use land for purposes other than pastoral farming. Against that background, benefits were perceived for

both the Department and farmers via a process designed to afford the Department full control of important ecological areas, but allow more extensive opportunities to lessees to freehold and develop other lands for rural purposes, including viticulture. The tenure review process thus emerged, under which farmers were able to freehold parts of their land in return for surrendering other parts as additions to the conservation estate, or by agreeing to land protection by covenant. Essentially, the process embraced an exchange of property rights between the Crown and pastoral lease farmers, thus freeing the latter from the management constraints existing under pastoral leases and achieving for the Crown public access and protection of significant inherent values. The process occurred initially under the Land Act 1948, but gained more satisfactory legislative recognition and sanction under the CPLA.

[23] In the course of the CPLA review process, an opportunity may be afforded for public submission. Again, there may be the opportunity for a non-governmental organisation such as the Society to inspect a particular area of conservation interest. Lessees, however, are not obliged to have their leases reviewed, and agreement is essential for any tenure review to be progressed.

[24] The Director-General considers that the review process can achieve many gains for bio-diversity on Crown pastoral lease lands; further, that its success depends on a constant belief on the part of lessees that bargaining will be undertaken in mutual good faith. The Department's Otago conservator, Mr J E Connell, testified to his belief that farmers would lose confidence in the good faith element of the process if settlements were concluded and implemented on the basis of freehold titles being issued to lessees for areas defined and agreed under the process, but with the district plan under the RMA imposing land use controls over such areas, directed to matters of conservation and bio-diversity. This was emphasised in the light of the Department's revised approach to tenure review following release in February 2000 of the New Zealand Bio-Diversity Strategy (NZBDS), prepared by the Department and the Ministry for the Environment, assisted by other governmental organisations. Under the approach as revised, the Department is concerned to ensure that the bio-diversity strategy is heeded and applied under tenure review negotiations and outcomes.

[25] In dissenting from the notion of a protection rule exemption for freehold land derived under tenure review, the Society contends that, because an agreement can only be reached with a lessee's consent, there is no guarantee that conservation and bio-diversity values of land under review will be adequately protected. Any

settlement reached between the Crown and a lessee is claimed to depend, by its very nature, upon mutual compromise and trade-offs.

Statutory considerations

[26] Those exercising functions under the RMA are required to recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna as a matter of national importance; s.6(c). That duty, however, is in the context of "achieving the purpose of this Act". Hence, while one must seek responsibly to recognise and provide for the nationally important matter in question, one must also look to achieving the Act's single purpose of sustainable management of natural and physical resources. And in so doing one must look to methods that are necessary and most appropriate under s.32 as it stood before the 2003 amending Act came into force. That is so because these proceedings were lodged in 2000, and under the transitional section of the amending Act (s.112), for the purposes of proceedings such as these, the principal Act applies as though the amendment had not been passed.

[27] In practical terms, the quest for achieving the Act's purpose involves the production of a workable planning framework, duly conceived and analysed in accordance with the RMA's dictates. Central to the process is the need for diligent attention to Part II of the legislation, both in reference to the Act's purpose, and to the principles that inform and assist in relation to that purpose. At the end of the day, the key desire is for good environmental outcomes efficiently attained, not overlooking, of course, the enablement of people and communities to provide for their social, economic and cultural wellbeing and their health and safety in the manner contemplated by the assigned definition of "sustainable management".

[28] In various cases cited to us, different panels of this Court have endorsed a variety of methods (depending on the circumstances perceived in particular districts) for recognising and providing for significant items falling under s.6(c). Those methods have ranged from reliance upon voluntary mechanisms and incentives on the one hand, to controls in the form of district plan rules of general application on the other. In general, where voluntary methods are endorsed, we accept Mr Ibbotson's submission that one needs to be satisfied that they will be efficacious in providing the degree of protection needed to reflect the level of importance that the legislation attaches to significant indigenous vegetation and significant habitats of indigenous fauna.

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[29] The question inevitably follows, however, as to what is "significant". That issue was discussed in ***Minister of Conservation v Western Bay of Plenty District Council*** (A71/2001) at paragraphs [18] and [19] of the decision in these terms:

> Importantly, in determining whether an area of indigenous vegetation or a habitat of indigenous fauna is significant for the purpose of paragraph (c) the area or habitat is not required of itself, or in combination with other areas or habitats, to be nationally important. Neither does its importance have to be regional in character or otherwise exceed the bounds of the planning district. Rather, it is a question of identifying and assessing (with the aid of qualified advice and assistance) those areas or habitats that are significant within the district as to require protection.
>
> "Significant" in its context necessarily imports the notion of informed judgment as to those natural resources of the district that need to be protected. In the case of Western Bays, a factor in coming to that judgment is the extent to which the bio-diversity resource of the district has already been diminished.

[30] Later in the decision (paragraph [30]), reference was made to the interrelationship of nationally important matters under s.6 with the RMA's purpose under s.5. We adopt the following passage for present purposes:

> In weighing the evidence of the witnesses on all sides, we have borne constantly in mind the Act's single purpose of promoting the sustainable management of natural and physical resources. Section 6 matters, nationally important by prescription as they are, plainly need to be recognised and provided for in conjunction with the many other considerations contemplated by the legislation in the district planning process. It thus becomes a question of weighing all relevant matters and incorporating them within the plan's framework in order to produce a carefully analysed and well-balanced document for achieving the Act's purpose. This is not to say that individual aspects of sections in Part II of the Act that follow upon s.5 are bound to become submerged and lost sight of in the mix of the plan's ingredients. The sections subsequent to s.5 are designed more fully to inform and assist a body such as the Council in following through and applying Parliament's intent in achieving the Act's purpose for its district. Expressed in the reverse context, those sections are not intended to be applied as a series of competing considerations liable to undermine achievement of the purpose laid down in s.5.

[31] In the above case a list of evaluation criteria bearing on the issue of significance under s.6(c) was recorded – such list being generally endorsed by various ecologist witnesses in the present proceedings. Quoting again from the ***Western Bay of Plenty*** decision (paragraph [20]):

> (The criteria) comprise: representativeness (concerning the extent or range of genetic and ecological diversity); diversity and pattern (in relation to ecosystems, species and landforms); rarity factors and/or special features; naturalness/intactness; size and shape (affecting the long-term viability of species, communities and ecosystems, and amount of diversity); inherent ecological viability/long-term sustainability; relationship between natural

areas and other areas of more modified character (inasmuch as well-buffered areas linked to other natural or semi-natural areas tend to have higher value than unbuffered isolated ones); vulnerability to "threat processes" liable to disturb existing equilibrium; and finally, management input required to maintain or enhance an area's significance (including nature and scale of imput or degree of intervention, and degree of restoration potential).

[32] The Court refrained in the above case from characterising the cited criteria as definitive or exhaustive for general purposes. But they were said to represent "a helpful means of guidance in assessing an item's significance". We adopt the same qualification and comment. While the Western Bay of Plenty district is very different from that of Central Otago, the earlier case is not wholly dissimilar as to the background circumstances, with a notable decline in bio-diversity resources having occurred in the lower lying parts of each district. Unlike the Western Bay of Plenty District Council's situation, however, the District Council in the present proceedings is not in a position of being able to notify a variation to the schedule in the plan accurately identifying and defining additional areas for protection under s.6(c). Rather, the Council seeks, in effect, a five-year period of latitude to review the "protection issue" and obtain data and information necessary to amplify the schedule. In the meantime, reliance is to be placed upon voluntary mechanisms and incentives, in the hope that adequate protection will occur through the goodwill of landowners. That is so, notwithstanding the concerns raised in evidence for the appellants as to the bio-diversity decline in the montane and lowland parts of the district in particular.

Views and findings on various aspects

[33] On assessing the extensive evidence on all sides we observe that:

- In the absence of any regulatory provision of general application, voluntary practices of landowners, encouraged by the Department of Conservation, the District and Regional Councils and other agencies such as the High Country Steering Committee and Land Care Groups, have resulted in a better level of protection in terms of s.6(c) values in the high country reaches of the district, compared with other parts at lower altitudes. However, 26% of alpine areas are under formal protection via other legislation.

- Unfortunately, in the montane and lowland areas, a non-regulatory approach has not proved effective in recent times. Land use changes in those areas have been significant and seemingly relentless – driven by trends towards greater intensification, particularly in the field of viticulture. There has been no pronounced pattern or trend (either established or emergent) in voluntarily adopting salutary initiatives to stem what can only be described as a clear and continuing saga of decline in areas relevant to s.6(c) – such being the case within a district that ranks very high nationally as regards precious flora and fauna, and in its range of bio-diversity. Consequently, various areas containing indigenous vegetation and habitats of indigenous fauna, albeit of limited size compared with yesteryear but still existent within the montane and lowland reaches, are significant in current and future terms under s.6(c), against the background of the diminution that has occurred. Significant areas that remain within the lower reaches are in many cases fragile in nature, with a need of active management to secure their continued existence.

- The history of relationships in recent times between conservation groups and farming interests has been remarkably strained. Concerns were thus expressed, both in evidence and submissions, that the adoption of a "general rule" approach in these proceedings would produce a resistance from landowners, with an ongoing lack of goodwill necessary to promote a good conservation ethic in protecting s.6(c) values.

- Schedule 19.6 as it stands is deficient on account of the Council's inability at this stage to bring the schedule into a suitably comprehensive state. In fact, most of the areas presently listed in the schedule derive protection from other means outside the RMA.

- The Code of Practice developed by the Otago Regional Council in association with the High Country Steering Committee for the management of vegetation burning in the Otago High Country is merely a set of "good practice" guidelines. No one is bound to follow the Code, although it was suggested in evidence that the Code was generally accepted by the farming community. Be that as it may, the Code is not apt for ensuring protection in terms of s.6(c) for reasons outlined below.

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Discussion concerning the Code

[34] Tussock burns in recent times have been infrequent (one or two a year), thus adding to the argument that no controlling provision is needed under the RMA. However, apart from the infrequency factor, evidence adduced in support of voluntary protection through the Code was not persuasive. According to Mr J A Pannett, a member of the High Country Steering Committee, a burn conducted in 2002 had not been subsequently audited. And he also acknowledged under cross-examination that, except for tussock, no other native plants are required to be recorded before burning occurs.

[35] Mr Pannett's evidence left a clear impression that the Code, as a voluntary mechanism for protecting areas qualifying under s.6(c), lacks sufficient depth and substance. Neither were we reassured by evidence from the Regional Council's Chief Executive, Mr G N Martin, who sought to suggest that the Code is "a very robust and effective tool". He went on to note that the Regional Council is "very well satisfied that environmental performance is best advanced by optimising use of non-regulatory instruments wherever practicable". That, in principle, we accept, provided the legislative purpose is suitably served. The issue in these proceedings is what is necessary and most appropriate in recognising and providing for the RMA's concern under s.6(c) in the Central Otago district?

[36] We do not overlook the following statement of intent in the Code headed "To encourage retention of valued ecological and natural areas":

> Across the Otago high country there are many areas of value for native flora and fauna which have not been set aside under formal protection. These include remnant forest shrublands and other plant communities that have survived periodic burning and grazing. Without care, burning and grazing could unwittingly damage these areas and lead to greater public opposition to future use of burning. Land occupiers may know of important ecological and natural areas on their properties, within or near areas they want to burn. It is their responsibility to make sure these areas are not damaged. Post-burn audits will check performance (Section 7.5).
>
> There are also ecological and natural areas, that are formally identified and protected by District and Regional Plans, which are not to be burnt.
>
> The Code encourages the retention of valued ecological and natural areas by raising awareness of their potential presence and ensuring steps are taken to protect these from burning.

[37] Despite that statement, Mr Pannett indicated that someone applying to conduct a tussock burn in compliance with the Code, under the guiding review of a

local voluntary Landcare Group (which the Code contemplates), need only state "yes" or "no" in answer to the question:

> Does the area include any sensitive ecological and natural areas?

On further enquiry, nevertheless, Mr Pannett acknowledged as a "fair comment" the proposition that "there should be some evidence from the landowner as to whether or not there will be a valued area affected by the burning, more than just a yes or no".

[38] And again, Mr Pannett thought that the following question asked by the Court:

> Would it be helpful if the question "does the area include any sensitive ecological and natural areas" were expanded with some subsequent questions such as if yes please elaborate. If no, please indicate what steps you have taken to ascertain that conclusion.

- was likewise a fair comment.

[39] In concluding that the Code lacks a sufficiently robust framework to qualify as a suitably reliable mechanism for addressing the protection of significant areas under s.6(c), we are concerned that the Regional Council proposes to rely on the Code alone, without additionally relying in future on the controlling bylaw adverted to by Mr Martin in evidence. We do not criticise the Code as a mechanism simply because it is voluntary in nature. Were the Code to contain adequate investigation, review and audit procedures, with a record of successful operation and widespread acceptance by the farming community with those checks and requirements incorporated, we do not exclude the possibility that the Code might suffice on its own, without a need to control tussock burn-off under the district plan. Whether such a situation develops will depend on initiatives taken to strengthen the Code and demonstrate an enhanced operational standard.

Should there be a general rule?

[40] As noted (paragraphs [2] & [3]), the Council's policy approach is two-fold – to include Schedule 19.6 in the plan, and otherwise to rely on voluntary means and incentives. A review of the success of this approach is intended five years after the plan becomes operative. The "voluntary element" is substantial, inasmuch as the schedule consists largely of land in the conservation estate or wetland protected at regional planning level. In practical terms, therefore, the approach involves reliance upon the tenure review process to produce appropriate results in affording section

6(c) protection, while seeking to foster a liaison with the wider farming community to see what information and assistance can be derived towards introducing a suitably defined and comparatively comprehensive schedule in due course.

[41] At the Court's prompting during the hearing, information was sought concerning the incentives that the Council had in mind to encourage voluntary conservation. Mr W D Whitney, an independent planning consultant engaged by the Council, presented a supplementary brief of evidence at the resumed hearing phase in June this year which was helpful in providing:

- An outline of what was termed a package of available incentives under headings: financial, education, resource management, recognition and monitoring.

- A possible form of rule, in the event of our concluding that a rule is a necessary basis for fulfilling the Act's purpose with particular regard to s.6(c), notwithstanding the Council's basic "no rule" position.

[42] The Council's decisions were notified in 2000, resulting in production of the decisions version of the plan in July that year. Nevertheless, the Council is suggesting a delay period for review five years after the plan becomes operative. It appears to us that, even then, the existence of adequate base data may be limited in the absence of a suitably funded survey programme at least to update and build upon source material available from past PNAP surveys (refer paragraph [14]). No suggestion was advanced that the Council considers itself in a position to undertake such a programme, neither was there a positive indication that the Department would commit itself to the task. Without wishing to cast criticism in any particular direction, such a situation, viewed objectively against s.6(c) as a matter of national importance, hardly seems an adequate foundation on which to proceed, without including some form of general rule in the plan at this point as a matter of necessity. While seeking to achieve a workable planning framework, directed to promoting the Act's single but multi-faceted purpose under s.5 with the elucidation and support of subsequent sections, one cannot but be concerned in weighing the issues in these proceedings at the extent of continuing loss within the district of s.6(c) relevance, particularly in the lowland and montane areas.

[43] We have reflected upon the "package" of incentives outlined by Mr Whitney. In our view, they should be actively pursued in conjunction with a carefully

conceived rule, with people having practical options available to them to invoke or take up as they see fit. The incentives alone cannot be expected to achieve the level of protection that the matter of national importance in question demands, given the current day circumstances. The issue, therefore, is not so much whether a rule is necessary and most appropriate as a method to adopt, but one of determining the rule's ambit, having regard to the competing views advanced in that regard.

Should land freeholded under tenure review be excluded?

[44] The current tenure review process has a number of beneficial attributes. In the early stage, each property for which review is sought is inspected and reported on by a range of specialists in matters such as landscape values, species and habitats, ecological communities, geopreservation sites, historic sites and public access potential. Collectively, the gathered material represents a major new source of knowledge about the conservation values of an area surveyed.

[45] The process is site-specific, and involves as a centrally important element the compilation of a comprehensive conservation resources report from the information gathered as above by the Department. At that point there may be opportunity for non-governmental organisations such as the Society to inspect a particular area of conservation interest.

[46] Following further consultation with interested parties, the Commissioner of Crown Lands publicly notifies the preliminary proposal. After consideration of all the issues and in consultation with the Department and the landholder, the Commissioner develops a detailed substantive proposal, which once accepted by the farmer constitutes a binding contract. Mr Connell indicated that the tenure review process is under continual examination with an eye to improvement. Currently, 16 to 20 properties in the Central Otago district are involved in the process.

[47] Examples were proffered of six completed tenure reviews, together with a summary of the conservation outcomes. Five other cases were cited as having been completed under the Land Act 1948. Witnesses for the Society were critical of some of the outcomes, but Mr Connell was emphatic that the process is constantly being refined. He also observed that the more pastoral leases that go through tenure review, the more comprehensive the approach becomes in protecting a representative range of natural environments. More pertinently still, it was pointed out that from

the Crown's perspective, tenure review is now conducted so as to give effect to the aims and intent of the NZBDS.

[48] Mr John Davis, a witness for Federated Farmers, discussed from personal experience how the tenure review process can be used on a larger scale to encompass a number of properties simultaneously. This affords an enhanced range of opportunity to protect landscape values and provide for more extensive walkways and mountain bike tracks. We were reminded, however, that lessees are not obliged to have their leases reviewed, and of the need for mutual goodwill and co-operation for the process to be progressed in any given instance.

[49] On the last score, a question of concern is the distinct possibility, indeed likelihood, raised in evidence that pastoral leaseholders will be less willing to enter the tenure review process should freeholded land then be subject to s.6(c) related protection controls in the plan. Given that scenario, it becomes a matter of weighing the potential gains from the tenure review process against the usefulness of a generally applicable district plan rule.

[50] Having considered all the arguments advanced for the Society in opposition to the Director-General's stance on this issue, we are satisfied that the review process, as now applied, is a method under which due attention is directed to those matters with which s.6(c) is concerned. The Department is well aware of the "loss factor" within the district, and the critical need to protect significant areas, particularly in the montane and lowland regions. We accept that, through the process, the chance is presented of obtaining gains in the protection stakes, including arrangements of a pro-active and continuing kind, that would not, in all probability, occur otherwise.

[51] Plainly enough, the process involves a concerted endeavour to achieve an outcome that pays due heed to each side's main aspiration – conservation and protection of important natural values on the one hand, and economic rural land use opportunity on the other. While, viewed practically, the process may be said to involve compromises, we are satisfied that a firm aim of the process is to ensure that significant natural areas, obviously warranting attention against the background of the NZBDS and RMA, are conserved and protected. Looking at all aspects for and against, we conclude that the process should be accepted as the most appropriate method for achieving protection of s.6(c) areas within pastoral leasehold lands that are voluntarily submitted to the process, and thoroughly evaluated accordingly. We

therefore accept the Director-General's plea on this branch of the case. We add a reminder, however, that land freeholded under the process is not exempt from the general duty imposed by s.17 of the RMA to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of the relevant landowner. Indeed, rural landowners throughout the district must seek to carry on and advance their farming and other rural activities in collaboration with maintaining and enhancing the environment, and promoting the sustainability of those natural resources that are vitally representative of the district's inherent values and character. No one is heard to undervalue those resources when spoken of in general terms. But however cherished they are in that sense, they are constantly vulnerable in the same sense to stealthy erosion and diminution through the unremitting application of a "thousand cuts", paradoxically well-intentioned in a case by case context.

Little Valley Station

[52] The Director-General proposes that land not covenanted for protection under the settlement reached between the Minister of Conservation and the Sanders Family as owners of Little Valley Station consequent upon the RMA procedure earlier set in train (refer paragraph [16]), be excluded from the proposed rule. The settlement agreement included an undertaking by the Minister that the Crown's interest in terms of formal protection lay in the area to which the settlement related, with no further designation process being intended for the remaining area the subject of the Minister's original notice of requirement.

[53] Mr L A Sanders gave evidence in support of Federated Farmers. He described in graphic detail the effect that the designation process had had on his late father in particular, and on the continuing viability of the Little Valley Station farming operation while the process was in train. He was indignant at the Society's suggestion that the proposed rule should apply to the residue land above-mentioned, against the background of events culminating in the settlement. In all the circumstances, we are prepared to regard the area concerned as a special case. We accept that the rule ought not to include land within the area known as the Greenland Recommended Area for Protection in excess of that covenanted for protection under the settlement. We do not overlook the concern raised for the Society that other sector interests, including the Society itself, were not party to the settlement. Nevertheless, the settlement resulted in the notably important part of the property being formally covenanted. And having seen and heard Mr Sanders, we consider

that he, and the family he represents, will act responsibly in operating the Little Valley Station, and, in so doing, maintain farming practices that avoid destruction of, or substantially mitigate any damage to, any significant area under s.6(c) known to exist.

Conclusion and determination

[54] In the event of our concluding, as we have, that a form of general rule should be incorporated in the plan, at least for the time being, (as a method to assist in meeting the intent of s.6(c) in combination with voluntary mechanisms, the tenure review process, and Schedule 19.6), various draft rules were tendered for the principal parties – including both the Council and Federated Farmers (though without prejudice to their prime positions in denying the need for any rule).

[55] Before passing to consider those drafts, a jurisdictional question requires consideration. The question stems from the form of rule that the Society requested in its original submission to the Council. The clearance of indigenous vegetation upon areas larger than 1ha was there suggested. On appeal, the rule requested by the Society sought to regulate clearance of areas above 0.5ha – that being at variance with the Society's original submission, but similar to the minimum area proposed for the Director-General and the Conservation Board. The consistent position of the Director-General (as distinct from the Board) has been to seek the introduction of an interim rule pending the availability of adequate data to enable the schedule to be amended to a suitable state of comprehensiveness.

[56] The Society seeks to rely on the Board's original submission to the Council, which was couched in general terms without mention of a minimum area. Neither did that submission suggest that the rule should be interim in nature. The Board's reference to this Court was likewise general in nature. However, the Board subsequently chose to amend its reference by limiting the relief sought to a request for an interim rule only in company with the Director-General.

[57] Ms Macdonald contends for the Council that, as the Society did not give notice seeking to be a party to the Board's reference, it is not open to it to seek to avail itself of the Board's original submission and reference, as though the Society were a party to the reference. In other words, the Society must either adhere to the relief sought in its own reference, or simply support the relief sought by the Director-General and the Board on an interim rule footing. She concedes that had the Society

been a party to the Board's reference, it would have been open to it to rely on the relief originally sought by the Board. In our view, Ms Macdonald's analysis is correct.

[58] Having said that, the timing of the expiration of a rule intended to be of interim effect will depend upon the extent to which Schedule 19.6 is proposed to be enhanced in due course, which, in turn, will depend upon the breadth and quality of the input data. Were the Council in a position to expand the Schedule appropriately, (as was possible in the Western Bay of Plenty case), we would readily have endorsed that in preference to a general rule. In fact, it is only after considerable deliberation upon the manifold arguments and counter-arguments of counsel, and the differing points of view presented by the range of experts called to give evidence (all well-qualified and respected in their fields), that we have been driven to the conclusion that a general rule must be looked to as a method for recognising and providing for the legislative objective of national importance (in combination with other methods as mentioned). That is necessary until the Council can expand Schedule 19.6 to a state of comprehensiveness that reasonably identifies and reflects the district's resources that carry significance in terms of s.6(c).

[59] The rule proposed for the Director-General in the form finally revised and refined, is claimed aptly to balance the aim of protection under s.6(c), coupled with reasonable flexibility and opportunity to pursue farming practices without unnecessary regulatory interference. The Society lends its general support (save for the exception of land freeholded under the tenure review process and other particular items of dissent such as that involving Little Valley Station).

[60] The rule suggested for Federated Farmers is supported by the Council (but reserving each party's principal stance in opposition). For convenience we will call it the counter rule. An exception is proposed for the burning of tussock grassland below 1500m asl. On the basis of the evidence and submissions advanced for the appellants, including the inadequacies of the Burning Code earlier discussed (refer paragraphs [34] to [39]), and the evidence of bio-diversity loss within the lowland and montane parts of the district in particular, we uphold the appellants' position on this issue – subject to finally determining whether clearance of up to 10ha of snow tussock grassland should be exempted from the rule (refer paragraph [69] below]).

[61] On the issue of tenure review, the counter rule adds an exemption for land freeholded under the Land Act 1948 - being the statute that preceded the CPLA. We

agree with Mr Ibbotson that tenure review under the previous Act was founded differently, without the same focus as the current process - the latter being comparatively well geared for lending respect to the NZBDS and issues related to s.6(c) of the RMA. We uphold the Director-General's position on this issue.

[62] Another alteration suggested under the counter rule is the addition of a further criterion to determine ecological significance. The extra criterion is as follows:

> (vi) Sustainability – the ability of the ecosystems, habitats or species in an area to remain or their potential to become viable in the longer term.

The addition is opposed by all the appellants for various reasons, including:

- Sustainability is not purely related to determining ecological significance but is liable to involve management considerations.

- The term "sustainability" lacks a definition, or an objective standard to which the criterion could be applied.

- The criterion "sits outside" other criteria directed to determining ecological significance in terms of actual existence.

[63] Having reflected on this issue, we agree that the additional criterion does not marry with the others in assessing significance where it exists. In determining an application under the rule, however, there may be situations where some form of management is needed to protect the area's existing state (including continuity of its natural attributes) and, associated with that, the area's significance. Depending on the circumstances, consent might conceivably be given for part of a natural area of lesser significance, with the truly significant part being protected via some form of ongoing input which the consent holder might be willing to undertake, or otherwise in accordance with some mechanism or approach lawfully available to fit the circumstances. We therefore propose that item 4 of the items for consideration in the exercise of discretion under the rule be amended to read as follows:

> 4. The means of protecting the ecological values of the site, including consideration of positive ecological benefits that can be achieved through fencing off and protecting ecological values in conjunction with the clearance activity.

[64] On the issue of clearance of matagouri, three basic positions were adopted – that of the Society that the rule should encompass clearance of matagouri exceeding 0.5ha in area irrespective of plant height; that of the Director-General that the rule should apply to such an area of matagouri where the vegetation exceeds 1.5m in height; and that of Federated Farmers, supported by the Council, that all clearance of matagouri should be exempt from the rule. Much evidence was led for and against these various propositions. In the end, we are inclined to accept the evidence for Federated Farmers that distinguishing precise heights and exempting individual trees is impractical in the course of spraying over, or otherwise seeking to control, extensive areas of matagouri, often involving steep terrain. Again, it appeared in at least some evidence we heard for the appellants that the emphasis lay in encouraging regeneration of other species within areas of matagouri rather than looking to protection of matagouri for its own sake. Even so, we must confess that the issue has been far from easy to determine. In the upshot, we are prepared to uphold the position of Federated Farmers, supported by the Council, but, in so doing, must not be taken as endorsing the clearance of any significant natural area or threatened plant species that may otherwise come under the rule, simply on some form of pretext that the natural area or species exists within a wider surrounding area in which matagouri is predominant.

[65] We do not overlook the risk of destruction within the context above-described, but find ultimately in favour of the position espoused for Federated Farmers and the Council, having regard to what is practical, and in reliance upon those parties' assurances regarding the responsible approach generally taken by landowners in relation to the environment in clearing matagouri and containing its spread.

[66] Other additional exemptions sought under the counter rule by Federated Farmers involve clearance associated with the construction of new fence lines and direct drilling. The question of exemption or otherwise for these matters was debated during the hearing. Weighing the arguments for and against, we consider the position of the appellants to be more persuasive as regards new fence lines, remembering that the rule is to apply to the clearance of 0.5ha or more of indigenous vegetation. On the issue of direct drilling, however, we prefer the position of Federated Farmers and the Council by favouring an exemption from the rule so long as the activity is associated with existing pasture. We do not consider an exemption on that basis to be likely to defeat the rule's central purpose of aiding to protect significant areas under s.6(c).

[67] Lastly, Federated Farmers suggest two amendments to those matters to which the Council's exercise of discretion is proposed to be limited under the rule. Firstly, instead of paying regard to "The 'inherent values' of the indigenous vegetation that will be affected", it is suggested that the sentence be amended to refer to "The 'significance of the ecological values' etc". That alteration appears to us to be appropriate, as it is the very question of significance that subsequent assessment criteria in the rule are designed to assist in determining.

[68] A further alteration is suggested to another item for the exercise of the Council's discretion, namely, "The necessity or desirability of clearance on production land". An amendment is suggested by deleting "production" and inserting "the" instead. We regard the effect of that as too general in assisting the rule's purpose related to s.6(c). As to the provision as drafted, if "non-production" vegetation is sought to be cleared, it seems incongruous to describe the relevant land as "production land". On the other hand, if land has previously been in production, we accept that the necessity or desirability of clearance ought reasonably to be an item for consideration on the Council's part in conjunction with the other matters of relevance. We would amend the sentence accordingly.

[69] For all the reasons we have endeavoured to express, we uphold the case for the Director-General in seeking that a general rule be included in the district plan on an interim footing, pending the Council being in a position to expand Schedule 19.6 in the manner discussed at paragraph [55]. The rule proposed for the Director-General is upheld, subject to the modifications raised for Federated Farmers that we have endorsed above, and subject to further consideration of the 10ha allowance for the burning of snow tussock grassland (and the description of "snow tussock"), in the light of any response by other parties to the Society's submission on those aspects received on 8 September. The rule as tentatively contemplated for insertion in the plan at this point is set forth in the Appendix attached. It includes some refinements that we have introduced for ourselves after considering the various drafts submitted. We invite counsel to offer any comment on the relevant matters concerning the Society's submission above, or as to any of our own amendments, when submitting the memorandum referred to below in paragraph [71]. Our ability to settle the final form of the rule in the light of such comment is reserved.

[70] In arriving at the conclusion that a rule along the lines shown in the Appendix, subject to ultimate refinement as mentioned, should be included in the plan at this stage, we are satisfied that it is necessary in achieving the Act's purpose;

further, that it will assist the Council in carrying out its function of control of actual or potential effects related to the need to recognise and provide for the protection of significant areas under s.6(c); that it is the most appropriate means of exercising that function on the basis of various allowances and exemptions to be incorporated – the rule being anticipated to apply in combination with other methods alluded to in the course of this decision; and finally, subject to what we say in the succeeding paragraph, that the rule will have the purpose of achieving the plan's objectives and policies relating to the recognition and provision for protection of significant areas falling under the above-mentioned matter of national importance.

[71] This decision is delivered on an interim footing so that counsel may seek instructions and confer over appropriate amendments to other provisions of the plan to blend with the rule's introduction. If agreement can be reached via a consent memorandum to be filed by 1 November 2004, a final order will be made as appropriate. A consent order proposed by the parties under the same references concerning issues related to s.6(b) of the RMA (as to outstanding natural features and landscapes), arrived at without contest before us, will be issued contemporaneously if found in order. If agreement is not reached by 1 November as above, a judicial telephone conference will be convened to discuss the means of achieving final resolution.

Costs

[72] Being reference matters, we consider that costs should lie where they fall in accordance with the Court's normal practice, unless there is some special reason warranting an award. If no application is filed and served within 10 working days of receipt of this decision, any issues as to costs will be viewed as resolved as above.

<u>DATED</u> at Auckland this 23rd day of September, 2004.

For the Court:

R J Bollard
Environment Judge

APPENDIX

4.7.6KA Clearance of Indigenous Vegetation

I Clearance of indigenous vegetation on land not listed for protection under Schedule 19.6 and subject to rule 4.7.6K, where the vegetation -

(a) comprises more than 10 hectares of snow tussock grassland (Chionochloa rigida), or half a hectare or more of other indigenous vegetation on one site; or

(b) involves any species listed as threatened in Schedule 19.6A, and the clearance affects a site containing any such species as identified on the planning maps; or

(c) is more than 1080m above sea level;

is a discretionary (restricted) activity.

Provided that this rule shall not apply to:

(i) Clearance of indigenous trees that have been windthrown or are dead standing as a result of natural causes and have become dangerous to life or property.

(ii) Clearance of indigenous vegetation on land that has been freeholded under Part 2 of the Crown Pastoral Land Act 1998.

(iii) The Greenland Recommended Area for Protection on Little Valley Station apart from the land subject to Conservation Covenant No. 5013375.2 (Otago Land Registry).

And provided that I(a) and (c) of this rule as above shall not apply to:

(iv) Grazing.

(v) Oversowing and topdressing.

(vi) Direct drilling associated with existing pasture.

(vii) Clearance of matagouri.

II For the purpose of this rule "clearance" is defined as the felling, clearing, or modification of any indigenous vegetation by cutting, mechanical crushing, spraying, burning and any activity causing disturbance to the soil.

III The Council shall restrict the exercise of its discretion to the following matters, where applicable:

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1. The significance of the ecological values of the site that will be affected.

2. The effect of the clearance on those values.

3. The necessity or desirability of clearance on land previously used for production.

4. The means of protecting the ecological values of the site, including consideration of positive ecological benefits that can be achieved through fencing off and protecting ecological values in conjunction with the clearance activity.

In determining the significance of ecological values, regard will be had to the following:

(i) Representativeness – Whether the area contains a full range of genetic and ecological diversity as expressed along environmental gradients. Representativeness extends beyond ecological units that are rare or unusual in a local or regional context. High representative values are given to particular communities or ecosystems which:

- Have large overall areas in the district;
- Have been reduced from their former extent;
- Are poorly represented in reserves.

High representative values are given to particular sites according to how well they represent particular communities or ecosystems of high representative value.

(ii) Rarity – Whether the area supports or is important for the recovery of an indigenous species, habitat or community of species which is rare or threatened locally, regionally, or nationally.

(iii) Diversity and pattern – The diversity of biological (species, community) biophysical (ecosystem) or physical (landform) features and of biological gradients. More diverse natural areas containing a greater range of species/communities, ecosystems, landforms and/or compositional and structural gradients tend to have greater ecological and conservation values than less diverse ones.

(iv) Size and shape – the degree to which the size and shape of an existing area is conducive to it being, or becoming ecologically self-sustaining. Larger areas with more compact shape tend to have higher values than smaller, irregularly shaped ones.

(v) Location and connectivity – the extent to which the area has ecological value due to its location and functioning in relation to its surroundings. An area may be ecologically significant because of its connections to a neighbouring area, or as part of a network of areas of fauna habitat. For example an area may act as a corridor or stepping stone for movement or migration of species between or to areas of important habitat.

IV Unless an applicant otherwise requests, or the Council considers that special circumstances exist, an application under this rule will not require public notification, nor will any person require to be served, if information from a qualified and experienced ecologist is provided, demonstrating to the Council's satisfaction that any adverse effect upon significant ecological values will be no more than minor.