BEFORE THE HEARINGS PANEL APPOINTED BY THE CENTRAL OTAGO DISTRICT COUNCIL

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

REPLY SUBMISSIONS FOR THE APPLICANT

Dated: 22 April 2025

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LAWYERS | NOTARY PUBLIC

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MAY IT PLEASE THE PANEL:

Introduction

[1] These submissions are in reply to the matters raised at the hearing of TKO Properties Limited's (**TKO**) application for resource consent heard on 18-20 November 2024.

[2] They address the following issues:

(a) The outcome of revised ecological offset/compensation model and expert conferencing;

(b) Whether the permitted baseline should be applied;

(c) How controlled activities within the Rocky Point Development Area should be taken into account when assessing the effects of this proposal (**the Proposal**);

(d) Whether the conservation covenant between TKO and the Director General of Conservation (**covenant**) is a relevant 'other' matter under section 104 of the Resource Management Act 1991 (**RMA**); and

(e) Whether the terms of the covenant are as contended for by the Department of Conservation (**DoC**).

[3] Given the disparities in legal submissions presented to the Commissioners as between counsel for the Applicant and DoC, the Applicant has engaged external senior counsel, since the hearing concluded, to assist. Mr Ian Gordon (barrister) has reviewed the comparative positions and has co-authored these closing legal submissions, with a particular focus on the interpretation and application of the covenant. Should the Commissioners be assisted by further oral address from Mr Gordon, or other counsel for the Applicant, on any matters of closing contained in these submissions, they will happily oblige.

Summary of Applicant's case

[4] As outlined in oral closing submissions, the Applicant's case is that, but for the Proposal, indigenous biodiversity on the site will not otherwise be protected and could be far more significantly degraded.[1] All parties that presented expert evidence (the Applicant, the Council, and DoC) have aligned interests in terms of wanting a positive biodiversity and landscape outcome for the Site which comprises an existing 'development zone'. As Counsel observed orally in closing, the differences of position between the parties are, to a large extent, based upon the different starting positions as to how well the Site currently preserves and protects biodiversity values.

[5] The Applicant's case is that neither the Central Otago Operative District Plan (**plan**)nor the covenant (partially over the Site[2]) protect biodiversity values and much worse degradation could occur under imminently feasible permitted activity or controlled development scenarios.[3]

[6] This different starting proposition underpins philosophical and ideological differences[4] contrasted between DoC's employed witnesses and the Applicant's independent expert witnesses. The Applicant's evidential approach to the comprehensive development of the Site should be preferred in that it:

(a) Correctly applies the established legal authorities to the covenant in a s 104 context;

(b) correctly applies a permitted baseline;

(c) Does not ignore the reality of future development (either permitted or controlled) on the Site given its development zoning;[5]

(d) Provides an offsetting/compensation model more aligned with progress towards an idealised or climax state of biodiversity, rather than ignoring vegetation that would have occurred or is expected

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1 Applicant opening legal submissions, at [112], [134].
2 As demonstrated below by screenshot.
3 Supplementary evidence of Mr Brown, at [10].
4 Applicant opening submissions, at [58]- [59]; JWS, at [13] – [14].
5 Applicant opening legal submissions, at [31] – [33], [134].

to occur on the Site, and which is more aligned with the intent and purpose of the NPSIB;[6] and

(e) Secures a robust, legally enforceable, certain, and achievable long-term outcome for indigenous biodiversity across the wider site that may not otherwise be achieved under permitted and complying development scenarios.[7]

[7] For all of these reasons, and on the basis of the Applicant's independent expert evidence, the Proposal is appropriate for the grant of consent, having met both of the s 104D gateway tests,[8] and having overall net positive effects when assessed under s 104(1).

[8] While the Applicant has provided a development proposal which steps outside of the boundaries of the development zone, it does not provide an overall footprint or yield which is out of context for the controlled activity outcomes. As stated by Mr Baxter, the development zone outline is not 'fine grained' on the ground, and the Proposal has allowed for a more comprehensive and integrated approach to the site as a whole. The result is a Proposal which includes overall net biodiversity gains and robust protection and enhancement of the significant majority of the site.

Changes to the proposal

[9] The Applicant is grateful for the time taken to allow for additional ecological evidence to be tabled and completed at the conclusion of the hearing[9], and to provide an opportunity for ecological experts to confer through joint witnessing conferencing. This has allowed the Applicant to ensure an even more robust biodiversity offset and compensation regime to be reached on the basis of further site-specific investigations.

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6 Applicant opening legal submissions, at [116].
7 Applicant's opening legal submissions, at [131].
8 Applicant's opening legal submissions at [94] – [97] in respect of the first 'effects' gateway, and [124] – [127] in respect of the 'policy' gateway.
9 Wildlands Memo 'supplementary information on threatened / at risk plant survey at Rocky Point, dated 10 February 2025 (**Wildlands Memo**).

[10] As a result of the further ecological information, changes to the Applicant's proposal have been tabled in this reply, and are summarised as:

(a) Revised offset/compensation measures as detailed in the Wildlands Memo, including off-site planting and habitat creation over a larger area than that impacted, on-site woody vegetation plantings, on-site woody vegetation clearance to maintain cushionfield and At Risk/Threatened plant habitat, lizard habitat creation, pest plant and animal control, and robust legal protection for conservation purposes of approximately 90% of the site.[10]

(b) Revised plans to be included in conditions of consent, and revised layout of subdivision removing one lot (lot 7 both of which better prescribe the offset and compensation approach).

(c) Revised conditions of consent to incorporate the above recommendations and respond to other matters arising in the hearing.

(d) Revised planning assessment based upon compensation as well as offsetting, confirming that conclusions reached as to consistency with clause 3.16 of the NPSIB for indigenous biodiversity outside SNAs' is the same as per evidence in chief.[11]

Outcome of revised ecological offset/compensation model and expert conferencing

[11] The ecology JWS now confirms that sufficient information exists in terms of assessment of the ecological effects of the activity on vegetation and flora, therefore removing the issue of DoC's submissions as to the application of s 104(6) RMA.[12]

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10 Calculation based upon revised BDG plans showing total development footprint and balance areas protected by conditions of consent (in addition to offset and compensation planting areas)**.**

11 Supplementary statement of Mr Brown, at [21].

12 While the JWS records MH and RE as considering there is insufficient data to make determinations on invertebrate habitat effects, it is noted that this is a new matter raised that was not discussed in their evidence in chief, and the more qualified expert opinion of Ms Smith should be preferred.

[12] Other than this narrowing of differences, limited agreement was reached in the JWS as to the appropriateness of the revised offset/compensation regime and conditions proposed by the Applicant. Overall, it is submitted that the Applicant's approach, in reliance on the evidence of Dr Wells, should be preferred as an appropriate application of s 6(c) RMA and the NPSIB because:

(a) Dr Wells takes a more holistic approach to biodiversity values across the site, rather than only a 'like for like' species comparison, which is not supported by the NPSIB Appendix 3 and 4 offset/compensation principles. The key is what the effects of the proposal are on **the values** of species and whether these can be adequately dealt with through the hierarchy;[13]

(b) Dr Wells makes his assessments based upon the ecological processes operating at the Site, specifically the current regeneration of kanuka and the dynamic environment, and the requirement of the NPSIB to ensure no overall loss of indigenous biodiversity,[14] rather than ignoring vegetation that would have occurred or is expected to occur on the site. This is closer aligned with the intention of offsetting and compensation in the NPSIB to ensure offsetting or compensation is of the same ecosystem type (rather than only replacement of like for like species);[15]

(c) As assessed by Dr Wells, the revised offsetting / compensation proposals do achieve an overall net gain in indigenous biodiversity values. For individual biodiversity components, there are gains for lizards, avifauna, invertebrates, and woody flora, and losses for herbs, but with an overall positive outcome;[16] and

(d) Dr Wells takes an approach to clause 3.16 and Appendix 4 of the NPSIB consistent with recent case law, discussed further below under '*Friends of Conical Hill*', whereas Messer's Ewan and Harding incorrectly apply the effects management hierarchy in a

13 JWS, at [16].
14 JWS, at [29].
15 JWS, at [116].
16 JWS, at [31].

consenting context and seem to assume that compensation is not a valid response or tool to apply, despite its application through the NPSIB.

[13] It is overall submitted that Mr Beale and Dr Wells' independent expert evidence on ecological and biodiversity effects is more considered, is based on the real world of a permitted baseline, and is closer aligned with the NPSIB, and their evidence should be preferred. Further information gathered post hearing to refine the offset and compensation response has been of value to strengthen the proposal and volunteered conditions.

[14] Key changes to plans and conditions of consent proposed are summarised in the section further below. The key policy change as a result is a modification of the proposed offset/compensation plantings at Bendigo Hills Estate to create more diverse habitats. The outcome, is to treat this response as a combination of both offsetting and compensation, per the NPSIB and the pRPS, rather than offsetting alone.

[15] Dr Wells considers that:

> The NPSIB clearly recognises the role of biodiversity compensation in circumstances where it is not possible to develop a measurable offset. Compensation is therefore an appropriate path, in the above instances, in which to consider how positive gains can be made. Whichever way the proposed off-site plantings are categorised, the combined effects management approach sequentially applies the effects management hierarchy to create a net positive biodiversity outcome.[17]
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> …
>
> understanding future ecological trends is an essential element in informing ecologically meaningful and robust offset/compensation measures that project at least 35 years into the future. This is part of the process of ensuring that offsetting/compensation is informed by science (as required by clauses in Appendices 3 and 4 of the NPSIB). Ecological trends are also relevant to additionality, as natural succession may bring

[17] Wildlands Memo, at page 9.

> back many of the ecologically important woody species to these communities.[18]

[16] The reality cannot be ignored that At Risk and Threatened plants found widespread across the site demonstrates not just its high ecological values, but also how such values are not protected either under the plan and its permitted vegetation clearance rules, or in respect of the application of a controlled development in the development zone. This is a key starting proposition when addressing the effects management hierarchy under the NPSIB.

[17] Moreover, the reality of observed successional trends on the ground, historic loss of the woody component of vegetation, and widespread abundance of spring annuals means that the overall most ecologically appropriate way to achieve a demonstrable gain for indigenous biodiversity is found through accepting a potential loss of spring annual habitat for the gains provided by introducing At Risk/Not Threatened woody vegetation over the long term.

[18] This approach is entirely consistent with the Supreme Court's comments in *East West Link*, that context is particularly important to examining a proposal's effects and consistency with policy direction.[19]

[19] Further, since the conclusion of the hearing, a more recent Environment Court case has been released which examines concepts of offsetting and compensation under the NPSIB and which may assist the Commissioners. The case of *Friends of Conical Hill v Hurunui District Council*[20] considered that:

> [152] … the NPSIB clearly recognises the role of biodiversity compensation in circumstances where it is not possible to develop a measurable offset.
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> [153] We accept Ms Batchelor's evidence and caution against applying the definitions now contained in the NPSIB to planning documents prepared before the promulgation of that document, particularly given the

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18 Ibid, at page 11.
19 Applicant's opening legal submissions, at [46] – 48].
20 *Friends of Conical Hill v Hurunui District Council* [2024] NZEnvC 324.

manner in which the terms off set and compensation have been used in the past.

…

[162] In this instance the NPSIB 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 NPSIB 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". 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 NPSIB provide an appropriate framework for assessing the QEII covenant in this case.

[20] In that case, the Court considered that it was not possible to provide an offset in 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. Compensation in the circumstances was considered to achieve the 'no net loss' policies of the relevant plan in that case, which pre-dated the NPSIB.[21]

[21] Similar to the *Conical Hill* Case, all experts in respect of this Proposal understand the Site does not meet the definition of an SNA in the NPSIB and accordingly clause 3.10 is not applicable. A process of future identification of an SNA through plan review is entirely separate from consideration of this Proposal. Therefore, in this 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 NPSIB. [22]

[21] Ibid, at [154].
[22] Ibid, at [168].

[22] *The Friends of Conical Hill* case also examined the approach to the effects management hierarchy and compensation in circumstances of an area of qualifying SNA values, but which is not defined as such, to conclude:

> [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 NPSIB effects management hierarchy....

[23] There are a number of similarities with this Proposal, including that the employed DoC witnesses misconstrue a requirement for avoidance in the context of a consenting proposal. As outlined in the evidence of Mr Wells in the hearing, and Mr Brown, the Applicant has gone to great lengths to avoid highly valuable areas (such as by removing lots from saline soils) which are within the controlled development zone footprint. The LMP and revised offset/compensation approach then further step through the mitigations and development of new habitat proposed and protected in perpetuity through conditions of consent.

[24] The evidence of Mr Wells, sets out that actions to avoid, remediate, and mitigate effects on indigenous biodiversity across the Site have been sequentially exhausted in accordance with the provisions of clause 3.16, the definition of the effects management hierarchy and Principle 1 of Appendix 4 of the NPSIB. Those provisions set a high evidential bar

which must be met before off-setting or compensation can be considered, and Mr Wells has achieved this.

[25] While no net loss, or preferably net gain, is the goal of the NPSIB, the biodiversity compensation offered in this instance accepts net loss in a way that offsetting does not tolerate.

[26] In interpreting the Appendix 4 principles for compensation as part of an effects management hierarchy under clause 3.16, the Environment Court considered the difficulties in some of the principles in the appendix 4, and the ways in which those were to be applied or complied with. Ultimately the Court concluded:

> [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 clause 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 clause 3.10.
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> [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 clause 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 clause 3.10 and one under clause 3.16. This is particularly so when one considers the operation of clause 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.
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> [215] Principles 2 – 6 go to the heart of designing a biodiversity compensation proposal that meets the objective of the NPSIB 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 clauses 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 NPSIB 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 NPSIB objective.

[27] As set out above, the approach of Dr Wells is considered to be more closely aligned with the *Friends of Conical Hill* considerations in that he prefers context of the Site (in terms of its current lack of protection, the successional observances of woody vegetation, and a long-term gain approach) over a 'tick box' exercise literally applying principles in Appendix 4.

[28] Counsel for DoC also provided extracts of the minority judgement of East West Link (being of persuasive authority only) rather than relying on the majority judgement, and cited incomplete quotes in respect of the majority judgment. For example:

> 79. In *East West Link*, the Supreme Court stated that avoid policies may be met with offsetting. However, the Court also confirmed that offsetting requires like-for-like measures, and avoid policies cannot be met with like-for-unlike measures. The relevant paragraphs are set out below:
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> > [176] The relevant question is not how to define an offset or what kinds of offsets can satisfy avoid policies; **it is whether the relevant adverse effect can be avoided in fact.**

[29] The full citation of paragraph 176 is important and reads:

> [176] In our view, this is a question of fact and degree measured against the terms of the relevant avoid policy. For example, an activity that would otherwise have more than transitory effects on the vulnerable habitat of

a threatened species may nonetheless not breach NZCPS Policy 11(a) if those adverse effects are offset in net terms. Whether the impact of the offset must be in situ or can be deployed elsewhere will be very much context specific. It will, we imagine, depend on the environmental element or value that must be protected and the nature of the adverse effect that is to be offset. Unlike Glazebrook J, who largely treats these as questions of construction, we consider that they are matters of evidence, and probably largely expert evidence, to be carefully assessed by the fact finder. **The relevant question is not how to define an offset or what kinds of offsets can satisfy avoid policies; it is whether the relevant adverse effect can be avoided in fact**. If the contention in the evidence is that adverse effects at the level identified in the relevant policy (locality, population, ecosystem and so forth) can be avoided through offsets applied elsewhere, that will be a matter to be assessed by the fact finder.

(bolded words show parts of quote identified by counsel for DoC)

[30] The question of whether an adverse effect can be avoided in fact is relevant in this full context of the quote which considers the factual and context specific importance as to the appropriate offset or compensation approaches to be deployed, whether offsite or elsewhere. Omitting these components of *East West Link* further exemplifies the deficiencies in the DoC case in approaching compensation as a valid component of the NPSIB.

Whether the permitted baseline should be applied

[31] All parties agree the removal of vegetation on the site is a permitted activity under the Central Otago Operative District Plan (**plan**). They disagree as to whether it would be appropriate for the Commissioners to apply its discretion to apply the permitted baseline under s 104(2) RMA in this instance.

[32] The overall matter to consider in determining whether to apply a permitted baseline is whether applying the baseline and having regard to permitted activities will be helpful comparatively in assessing the significance of the adverse effect of the proposal.[23]

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[23] *Lyttelton Harbour Landscape Protection Association Inc v Christchurch City Council* ENC Christchurch C55/2006, 11 May 2006 at [19].

[33] As the High Court has recently confirmed,[24] 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 activities that are permitted under a district plan or national environmental standard. The Court also confirmed the concept of applying a "partial baseline" (i.e. disregarding those parts of a proposal that were permitted and focusing on those that were not) is a correct one.[25]

[34] TKO in its opening submissions, by reference to the *Lyttelton Harbour* Environment Court case, set out the particular circumstances in which applying a baseline may not be appropriate or helpful. These are:

(a) Where the baseline is fanciful or not credible;

(b) Where its application would be inconsistent with Part 2;

(c) Where the permitted activity is so different in kind and purpose with the plan's framework that the baseline ought not to be invoked; or

(d) Where the application of the baseline would be inconsistent with objectives and policies in the plan.

[35] DoC relies predominantly on (b) and (d) to support its position that the baseline ought not to be applied. It further relied on the proposition that the permitted baseline would be fanciful given its interpretation of the Covenant restricting vegetation clearance outcomes on the site. It submits:[26]

> … it is inappropriate to use the permitted baseline to justify the destruction of Threatened and At Risk species because that would be contrary to the policy [sic] of the Act and the objectives and policies of all relevant planning instruments – *including* the CODP.

[36] TKO does not accept the submission. If it was contrary to the purpose of the RMA and the objectives and policies of the plan for vegetation

[24] *Mahora Residents Society Inc v Hastings District Council* [2024] NZHC 3322 at [38].
[25] Ibid.
[26] Submissions for the Director-General of Conservation, 18 November 2024 (DoC submissions) at [48].

clearance to be permitted on this site, then the plan would not have permitted it. It cannot be said that an activity expressly permitted by the plan could nonetheless be contrary to what the plan intends and by extension, the purpose of the Act. The exemption for freehold land from biodiversity clearance rules was discussed in detail in the evidence of Mr Brown and was not disputed by any planning witness as being a clearly permitted activity. Limited analysis was provided by Ms Wiliams for DoC to assert how vague references in the introductory sections of the plan to covenant arrangements could be read as applying or reading in the provisions of a covenant as if those were rules in the plan.[27]

[37] Ms Williams stated that 'the plan contains these exemptions to the rules (i.e. for indigenous vegetation clearance) to properties freehold under tenure review because it deems the tenure review process as an alternative statutory means to identify and address on a site-specific basis the values which are the subject of these rules. It was anticipated that the tenure review process would greatly increase the amount of land held in the conservation estate and the Plan notes that approach might, to some extent, relieve Council of some of its responsibilities under ss 6 and 7 of the RMA.

[38] This does not support an assertion that the covenant becomes particularly relevant as another matter under s 104(1)(c), nor that it is a reason why the permitted baseline allowed by the plan should not be applied. Rather, the plan supports the position of the Applicant that the Site is not protected under the plan (and therefore a permitted baseline can and should be applied), and the covenant (over part of the site) is a separate process to s 104(1) RMA. Had the plan intended to 'read the covenant' into consent decision making it would have more explicitly done so by reference to the covenant in terms of rules, assessment matters, or matters of restricted discretion (for example) and with explicit reference to the instrument in question itself, as was the case in the

27 For example, in reference to the 'reasons' section of the Rural Resource Area, at [para 53] – [55] of Ms Williams' evidence.

Action for the Environment case, referred to further below and in opening submissions for the Applicant, at [57].[28]

[39] DoC's submission fails because it omits consideration of the exemption provided for in the plan and treats it as some omission or quirk.

[40] On the contrary, the exemption was a deliberate step by the drafters of the plan to provide better certainty for owners of former pastoral lease properties by moving issues of indigenous vegetation out of the plan and addressing them through the Tenure Review process instead. The logic behind it was well explained in the Environment Court's decision in *Royal Forest and Bird v Central Otago District Council*, where the Court upheld Forest and Bird's challenge to the exemption rules (rules which ironically, DoC supported in that case).[29] The Court in particular noted:

> [49] … 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 freehold 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.
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> [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.

[41] Not applying a baseline in this instance would actually introduce considerations that the plan (as explained above) expressly sought to exclude. It would therefore be contrary to what the plan intends, as explained above. Applying the baseline on the other hand is in

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28 *Action for Environment Inc v Wellington City Council* [2012] NZHC 1687.

29 *Royal Forest and Bird Protection Society Inc v Central Otago District Council* ENC Auckland A128/2004, 23 September 2004 at [21]-[25] and [44]-[51].

accordance with the express intentions of the plan and cannot therefore be said to be inconsistent with it.

[42] Nor can it be said that applying the baseline would be fanciful, or that the permitted activity is so different to the activity for which consent is sought so as to make a comparison between the two unhelpful. It is important to remember that this is not a case of the Commissioners having to compare the effects of two different activities: one permitted and one not. Rather, it is the *activity itself* (vegetation removal) which is permitted. The ecological effects of this activity in the context of this Proposal are no different from the effects of carrying out the activity accordance with the permitted activity status. The fact other activities (being subdivision and construction of dwellings) have been sought as part of the proposal so as to require consent overall, does not change that.

[43] What this means, is unlike cases where it might be unhelpful to compare permitted and non-permitted activities because of the difficulty in untangling the different effects resulting from each, that exercise here is relatively simple. All the Commissioners have to be concerned with is those effects resulting from the subdivision and development activity. It does not have to consider the (separate) ecological effects resulting from the vegetation removal activity. This is particularly the case given the sequence and timing, as (permitted) vegetation clearance occurs first, followed by subdivision and land use consent implementation.

[44] This allows the immediate question – being whether considering the adverse effect of an activity or activities permitted as of right where those are exactly the same as, and sequentially before and consented activity, will be helpful comparatively in assessing the significance of the adverse effect of the Proposal[30] – to be answered as, "yes".

[45] Additionally, TKO challenges DoC's dismissal of TKO's submission, that not applying a permitted baseline, would lead to perverse outcomes. DoC questions the extent to which other landowners could be in the same position in terms of the exemption from vegetation clearance

[30] *Lyttelton Harbour Landscape Protection Association,* above n23..

rules.[31] However, respectfully this is beside the point – the fact that one piece of land is subject to the exemption is sufficient to demonstrate the point that if a baseline is not applied, it signals to the landowner that they should simply seek to remove the vegetation first, as it is permitted to do, rather than responsibly proposing a comprehensive ecological package such as that proposed here.

[46] DoC also submitted that the application of a permitted baseline in this instance would be fanciful given the application of the covenant to restrict such outcomes. The key issue with that submission is that s 104(2) RMA refers to the examination of a baseline with respect to what is permitted in a relevant plan or NES:

> (2) When forming an opinion 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)

[47] The express reference to a plan or NES in the section precludes consideration of private covenant or other extraneous controls. The Commissioners' decision on application of the permitted baseline is entirely separate from an interpretation of the covenant. Even if the covenant were to have relevance (over the limited portion of the site in which it sits), the parties have significantly different interpretations as to what it would restrict in terms of permitted activities. This is further discussed below.

[48] Finally, it is far from 'legal conceit'[32] to suggest that not applying a permitted baseline in such circumstances would have perverse outcomes in terms of landowners taking action on the sequencing referred to above, and actually initiating permitted activities to remove biodiversity values (in an entirely lawful way), rather than relying on such being taken into account in a consenting context where significant

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31 DoC submissions at [50].
32 As described by Counsel for DoC at Doc Submissions [50].

positive biodiversity measures are being offered to achieve overall net biodiversity gains.

Plan showing possible permitted scenario

[49] To assist the Commissioners, a plan has been prepared showing a permitted and non-fanciful use of this site (namely for viticulture activities). A copy of this plan is attached with these submissions. Mr Brown's reply planning statement has further analysed the plan with a view to confirming the use of the Site for viticulture or farming purposes is entirely permitted.

[50] The permitted scenario shows a possible viticulture layout based upon layout, topography, soils, and aspect. Nothing in the plan could stop or restrict such activities occurring across the Site imminently, and which would have a much more severe adverse outcome on biodiversity values. Viticulture is demonstrated on adjacent sites in the district with similar aspect and conditions to the site, further demonstrating feasibility.

It is entirely fanciful to suggest that a valuable development zone will sit unused in the instance consent is not granted. The land use and its biodiversity values will change under commercially viable farming or viticulture outcomes.

Correct treatment of controlled activities

[51] As set out by Mr Brown, an entirely controlled (anticipated environment) outcome would also potentially have greater adverse biodiversity outcomes for the Site.[33]

[52] The submissions for DoC criticise the alleged treatment by Mr Brown for TKO and Mr Vincent for the Council of controlled activities under the plan, specifically those within the Rocky Point Development Area. DoC submits the planners incorrectly treat controlled activities as forming part of either the permitted baseline or the existing environment.[34]

[53] In support of this submission, DoC refers to Mr Brown's evidence where he is said to agree with Mr Vincent that controlled activities "form part of

33 Evidence in chief of Mr Brown, at [7] – [8]; supplementary evidence at [10] – [11].
34 At [27] and [57]-[69].

the environment reasonably foreseeable under the District Plan".[35] He then goes on to make a number of comments as to how change to the landscape in accordance with the controlled activity provisions in the plan are "anticipated".[36] He approaches his assessment of effects on that basis.

[54] Legally, it is correct that controlled activities on the site do not form part of the receiving environment. They are anticipated in the environment, but one does not assess effects on the environment on the assumption the activities are already occurring.

[55] Nor in fact could you; the existing environment concept relates to permitted or consented activities beyond (and *additional* to) those proposed on the subject site.[37] Development in accordance with the controlled activity framework is an *alternative* to what is proposed on the subject site.

[56] What is more relevant conceptually is whether controlled activities could form part of the permitted baseline when assessing effects of this development. DoC is correct that legally, they do not. Effects resulting from controlled activities, unlike permitted activities, cannot be disregarded or removed from consideration of adverse effects under s 104(1)(a).

[57] However, on closer analysis, neither Mr Brown nor Mr Vincent treated controlled activities as forming part of the existing environment, nor did they discount such effects on the basis they formed part of the permitted baseline. Mr Brown considers the activities are "reasonably foreseeable" and anticipated. This is not the same as saying the effects of this development should be assessed on the assumption the site has already been developed in accordance with the controlled activity provisions of the plan. It is also not the same as saying the effects of such potential development should be discounted from the effects assessment.

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35 At [26].
36 At [61]-[68].
37 *Queenstown-Lakes District Council v Hawthorn Estate Ltd* [2006] ELHNZ 226 at [66].

[58] Effectively what the planners have done is simply and correctly acknowledge that the plan anticipates a level of development within the Rocky Point Development Area. It is logical and eminently sensible for them to have done so. This enables effects of development to be assessed in their proper context. To not do so would be artificial because it would call for ignoring the reality of a district plan development zone. Effects of a 29-lot subdivision in an area where no further lots are anticipated are very different from effects in an area where some (albeit less than 29 lots) are anticipated. To sensibly recognise this context is not to unlawfully apply permitted baseline reasoning as DoC suggests.[38]

[59] The same point was made by the High Court in *Frost v Queenstown Lakes District Council*,[39] in the context of assessing effects of buildings where the plan provided for buildings of a certain scale as a controlled activity:

> Effects must be assessed in context, and in light of what exists, and is 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.

[60] This was even more recently confirmed by the High Court again in *Mahora Residents Society Inc v Hastings District Council*[40] where it confirms there is nothing irrelevant about also taking into account a controlled alternative development scenario to assist in the assessment of the proposal in combination with a permitted baseline.

[61] To again assist the Panel, a plan showing the nature of development that could be carried out as a controlled activity (and with potentially a worse biodiversity outcome, for example on saline soils) is **attached**.

[62] Mr Brown concludes development consistent with the Concept Plan in 19.16 and Rules 4.7.2.i and 4.7.2.ii would be able to be undertaken as a

[38] DoC submissions at [58].
[39] *Frost v Queenstown Lakes District Council* [2021] NZHC 1474 at [68].
[40] *Mahora Residents Society Inc v Hastings District Council,* [2024] NZHC 3322, at [70].

controlled activity and forms part of the environment reasonably foreseeable under the District Plan. It is reasonable to assume a consent would be granted (given it cannot be refused) with conditions potentially requiring adjustments to the location of roading, building locations and utilities, to mitigate effects on these features. Nevertheless, a controlled activity subdivision would undoubtedly result in the removal of indigenous vegetation, potentially across large areas of the Development Area. In a controlled activity context, this may be less likely to have the same robustness as a proposal like that which is part of this Proposal.[41]

Relevance of the covenant

[63] TKO maintains its position that private covenants, and in particular the covenant between TKO and DoC, is not relevant to an assessment of a resource consent application under s 104. This position is supported by numerous authorities.[42]

[64] DoC takes issue with this position. It argues that the authorities do not in fact support excluding private covenants from the ambit of s 104 considerations. It even asserts TKO's submissions on the point omit "a critical footnote" and "critical words".[43] Its position appears, in summary, to make the following points as to the application of the covenant:

(a) The Site is already well protected by the covenant and this means:

(i) A permitted baseline cannot or should not be applied;[44]

(ii) Volunteering further covenant and consent notice controls over the Site in this proposal cannot be claimed in addition to that protection, or as a 'double whammy';[45]

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41 Supplementary statement of Mr Brown, at [10].
42 Opening submissions for the Applicant at [57].
43 DoC submissions at [154].
44 This is addressed above and disputed on the basis of the express wording of s 104(2) RMA.
45 This is addressed in the following section as to interpretation of the covenant and its 'robustness' of protection at present.

(iii) The covenant is a relevant ‘other matter’ under s 104(1)(d) such that it elevates the protection of the Site under the plan; and

(iv) The covenant would defeat implementation of the consent anyway.

[65] It is germane to examine these assertions.

[66] The alleged “critical footnote” is the *Springs Promotion* case of the High Court. It is not accurate to suggest this was an incomplete quote provided by Counsel, because it was clear that ‘citations were omitted’ which is orthodox. Further, that case had nothing to do with resource consents or what matters should be taken into account when assessing applications under s 104. The factual context was an application for an enforcement order. The passage cited by DoC (and where it itself omitted relevant other passages which provided context for the cited passage) simply pointed out whilst the RMA is a code as it relates to resource management issues; it is not a code as it relates to all matters related to land. An example the Court gave was the existence of District Plan rules governing, for example, noise issues, does not necessarily preclude a person bringing a private civil claim for nuisance.

[67] The above point is irrelevant to the matter in question, and in no way supports the position that private covenants are a matter to consider in determining the appropriateness of a resource consent application.

[68] DoC refers to two other cases in support of its position, *Congreve v Big River Paradise Ltd*[46], and *Deegan v Southland Regional Council*.[47]

[69] In *Congreve*, the Court found private property rights may be taken into account to the extent they are relevant to resolving an issue under the Act. The Court then confirmed (again this was omitted in DoC’s submissions) **“they will not do so if the determination of such rights is not relevant and reasonably necessary to resolve such an issue”.** Again, that case held exactly counter to DoC’s position. It is High Court

[46] *Congreve and Murray v Big River Paradise Ltd* HC Auckland CIV-2005-404-6809, 4 August 2006.

[47] *Deegan Southland Regional Council* ENC Christchurch C110/98, 30 September 1998.

authority for the proposition that the application for resource consent did not and could not require, or involve, an assessment of a private covenant that existed on the land.

[70] In *Deegan*, the issue had nothing to do with the relevance of non-RMA instruments under s 104(1). It related to whether a private instrument (in that case a land transfer instrument) constituted a written approval under s 104(3)(ii). It is of no relevance to the present case. One can understand why a decision maker faced with a task such as that in Deegan found it 'reasonably necessary to resolve an issue' where one party's strike out application was critically dependent on the interpretation of a private agreement. That is clearly not the case in the present situation. Counsel for DoC provided no factual analysis of these authorities that predated the authorities provided in the Applicant's opening submission, and the orthodox position that the Courts have generally not considered private covenant arrangements in the context of s 104 decision making.[48]

[71] At best, the authorities show that private property rights might be relevant to a determination of a resource consent application if, and only if, they are reasonably necessary to determine the effects of an application. This is essentially restating s 104(1)(c).

[72] TKO says the covenant is not reasonably necessary to determine its application, for two main reasons.

[73] First, if the covenant protects vegetation clearance in the manner suggested by DoC (but rejected by TKO), then adequate protection already exists. Any adverse ecological effects associated with implementation of the consent is already protected by the covenant provisions. In the same way the implementation of a consent might be protected or prevented by, for example, the lack of a necessary easement or interest in land.

[74] Secondly, to bring the covenant into the assessment under s 104(1) and treat it as a de facto plan provision would mean the express exemption for freehold land in the District Plan would serve no purpose. Those

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48 *Action for Environment Inc v Wellington City Council* [2012] NZHC 1687 citing *Director-General of Conservation & Others v Marlborough District Council*.

matters would simply fall to be considered anyway as part of the s 104 assessment (just not under the District Plan provision assessment). That is not what the exemption could reasonably have intended. Its whole purpose is to take consideration of ecological matters out of the resource management space in their entirety and instead deal with them in the context of private arrangements (namely tenure review).[49] DoC, seemingly not content with that position and the level of protection afforded through the covenant, is attempting to bring those matters back into the resource management arena.

[75] DoC's submissions are also unclear in terms of what weight should be given to the covenant in this context, or how it should be applied. Moreover, the parties are clearly at odds as to its interpretation and application (which would be a matter for the High Court to ascertain in its declaratory function). Faced with such competing interpretations, one can see why the orthodox position in case law has evolved such as to generally dissuade environmental effects decision making under the RMA away from the realm of private instruments.

[76] DoC further submitted that the reference to the covenant as a private arrangement was 'reductionist' and its status under the Reserves Act 1977 held more importance than it being merely a private arrangement. No authority has been provided as to a position that such a covenant arrangement holds a different weighting *vis a vis* s 104 decision making due to its originating statue. The covenant remains an instrument that is fundamentally private in nature between two parties only. The Reserves Act is simply an enabling statue for the creation of the covenant, and this does not change the established authorities (relating to a range of such instruments and agreements) cited above.

[77] For all the above reasons, TKO's position is that the covenant should be given no weight in the Commissioners' assessment of this application. There is no good reason in the circumstances to depart from the

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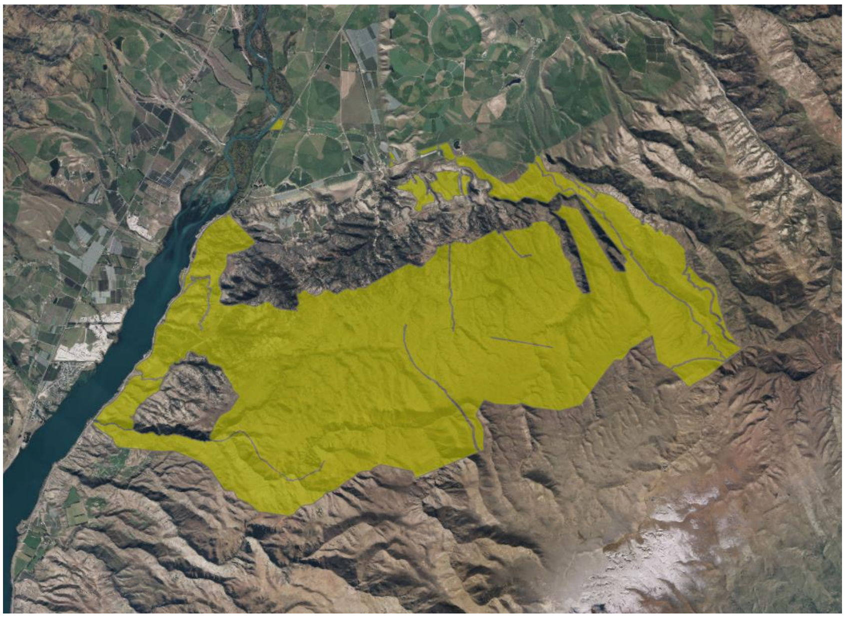
49 *Royal Forest and Bird Protection Society Inc v Central Otago District Council* ENC Auckland A128/2004, 23 September 2004 at [21]-[25] and [44]-[51].

authorities which excluded private covenants from the consideration of effects.

Interpretation of the covenant

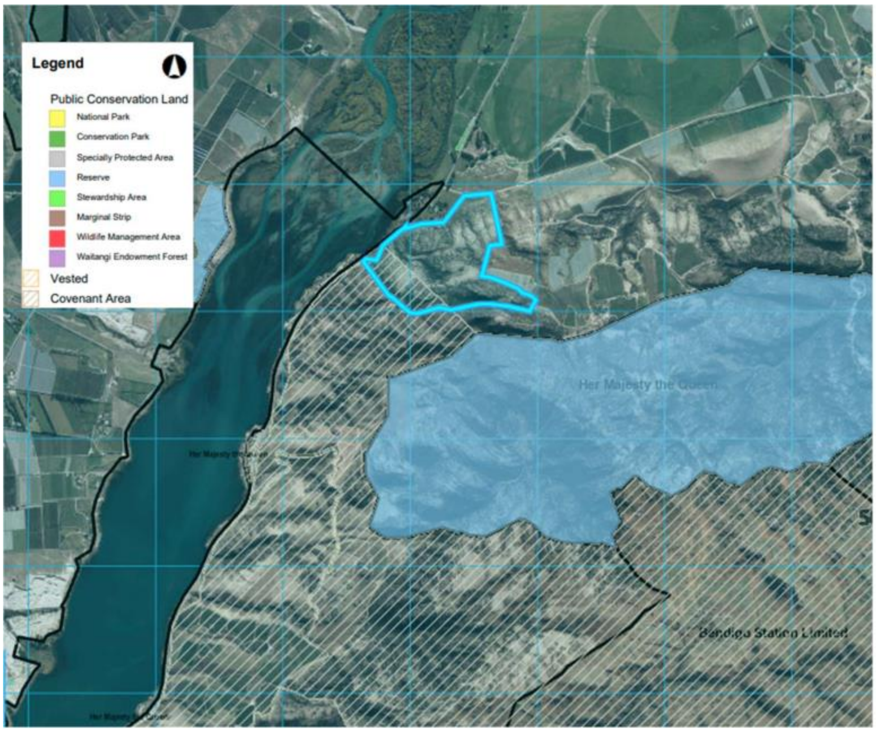
[78] Notwithstanding its lack of relevance to the determination of the proposal, it is nonetheless appropriate to correct the position with regard to the interpretation of the covenant and its application to this site.

[79] First, it is important to point out the covenant does not apply to the entirety of the site. Despite the inference by DoC that any development on the site is subject to the covenant, that is not the case. The extent of the covenant is shown in the below plan:



[80] The large extent of the covenant area over land further demonstrates the point that DoC's interpretation of the covenant is unfounded, given it would purport to control extremely large areas of land in a severely restricted way which does not appear to be borne out on the ground.

[81] In relation to the site itself, this is demonstrated as below (taken from DoC's planning evidence):



[82] Secondly, the only express obligations the covenant imposes on the landowner are as follows:

(a) a requirement for Minister approval, which cannot be unreasonably withheld, to remove woody vegetation (i.e. Kanuka); and

(b) a requirement for Ministerial approval, which again cannot be unreasonably withheld, for structures near historic sites.

[83] DoC, in its memorandum, lodged after the hearing advances the position that the landowner is subject to much wider obligations and restrictions. In particular, it argues the provisions of the Reserves Act 1977 (namely those from ss 93-105) apply. Those provisions include for example a prohibition on construction of buildings on covenanted land.

[84] DoC relies on s 77(3) of the Reserves Act, which provides:

> While any conservation covenant under this section remains in force, s 93 to 105, as far as they are applicable and with the necessary modifications, shall apply to the land affected thereby in all respects as if it were a reserve, notwithstanding that the land or the interest of the lessee may be sold or otherwise disposed of:

provided that in their application to any such land or interest ss 93 to 105 shall be read <u>subject to the terms and conditions set out in the conservation covenant.(emphasis added)</u>

[85] The key element of s 77(3), however, is the last underlined part of that section: "subject to the terms and conditions set out in the conservation covenant". Ss 93 to 105 are not to be read as overriding those terms. It is the terms of the covenant and the particular permissions or restrictions under that are relevant, not the provisions of the Act. If that was not the case, there would in many cases be no need for any covenant provisions at all – the covenant would simply refer to the provisions of the Reserves Act.

[86] DoC's argument in this respect is meretricious.

[87] The interpretation of the covenant itself, and the application of the same through an erroneous application of established case law, has underpinned DoC's approach to this case through both legal and evidential lenses. This appears to be a key philosophical difference between the Applicant and DoC witnesses, particularly in respect of approaching fundamental concepts such as a permitted baseline for the Site or achieving long term positive biodiversity gains.

[88] For these reasons, along with the position set out in opening at s [63] – [65], as to DoC employee-witnesses not being truly independent, the Applicant's expert evidence should be preferred and given greater weighting.

Conclusion

[89] Overall, the context of the Site is particularly important as a starting point for assessing the effects of the proposal and its achievement of relevant objectives and policies of the plan, higher order regional policy, and the NPSIB.

[90] This is consistent with recent Supreme Court and Environment Court decisions in respect of an application of national direction, including the NPSIB.

[91] In this case, the context of the Site includes a development zone, imminently anticipated for reasonably significant controlled activity subdivision and development across land which hosts widespread high value biodiversity. Further, it is a Site which is not well protected by the plan or any NES in terms of ensuring long term robust measures against biodiversity destruction.

[92] In this context, the Proposal sets an achievable, measurable, robust and enforceable long-term regime to ensure overall protection and net gain in biodiversity values which will not otherwise be achieved.

[93] This approach is developed by taking a more holistic and overall integrated approach to the Site, which involves development in areas outside of the development zone, but which also creates a more logical layout and patterning of development and biodiversity and heritage protection.

Dated: 22 April 2025

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……………………………………………
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