

**BEFORE A HEARING PANEL
OF WAIPĀ DISTRICT COUNCIL**

IN THE MATTER of the Resource Management Act 1991 (**RMA**)

AND

IN THE MATTER of Proposed Plan Change 20 – Airport Northern Precinct
Extension to the Operative Waipā District Plan

**FURTHER LEGAL SUBMISSIONS ON BEHALF OF THE DIRECTOR-
GENERAL OF CONSERVATION**

Dated 20 March 2023

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INTRODUCTION

1. These legal submissions briefly address the following matters:
 - a) Significance criteria in the Waikato Regional Policy Statement (**WRPS**);
 - b) Biodiversity Compensation Model (**BCM**);
 - c) Effects Management Hierarchy;
 - d) The meaning of the term “functional” in the context of a Bat Habitat Area;
 - e) Scope of PC20 and the relief sought by the Director-General; and
 - f) Next steps.

SIGNIFICANCE CRITERIA IN THE RPS

2. Mr Welsh has said at paragraph 8.27 of his opening legal submission that it is the provisions in the WRPS “*relating to “non-significant” habitat that apply*”.¹ The Director-General does not agree. The PC20 site includes habitat of the threatened nationally critical pekapeka. Therefore, the significance criteria in the WRPS has been triggered. The Director-General’s position is supported by: (a) the evidence of Ms Thurley;² and (b) the analysis by Mr Kessels of the Applicants evidence and the WRPS significance criteria provisions as set out in his further submission.³
3. A copy of Mr Kessels further submission dated 25 November 2022 is **attached** for your reference. Mr Kessels is an experienced bat ecologist.⁴ He has submitted on PC20 in his personal capacity, and in his further submission, Mr Kessels has said:⁵

¹ Opening legal submissions on behalf of Titanium Park Ltd and Rukuhia Properties Ltd dated 15 March 2023 at paragraph 8.27.

² Evidence in Chief of Ms Tertia Thurley dated 7 March 2023.

³ Further Submission of GHA Kessels dated 25 November 2022.

⁴ You will note from the PC5 decision that he was Hamilton City Council’s bat ecologist for the PC5 hearing process.

⁵ Further Submission of GHA Kessels dated 25 November 2022 at the reasons set out in 2.

Criterion 3 and Criterion 11 of the Waikato Regional Policy Statement (WRPS) criteria for determining significance of indigenous biodiversity (Part B, Chapter 11A, Table 11-1) are triggered by evidence presented by the applicant showing regular utilisation of pasture, treeland habitats by long-tailed bats within the Plan Change area.

4. The Director-General therefore submits that the evidence of Ms Thurley should be preferred over the evidence of Ms Cummings on the question of the significance criteria. Ms Thurley's evidence is clear and it is supported by another independent bat ecologist.
5. This also raises a procedural issue. Mr Williams, the section 42A report author, has indicated to the hearing panel that he did not engage a bat ecologist to provide technical advice for the section 42A report because he decided to rely on the bat ecologists reaching a consensus. There has been no consensus reached between the bat ecologists on the question as to whether the PC20 site triggers the significance criteria. Therefore, the section 42A officer is not in a position to make a recommendation on the question as to whether the habitat within the PC20 site is "significant" or "non-significant" habitat.
6. Mr Kessels attended the bat ecology expert conferencing on 8 February 2023 for PC20. The JWS produced from that expert conferencing indicates that the facilitator did not ask the expert bat ecologists to confirm their expert views or to reach a consensus on the question as to whether the significance criteria in the WRPS has been triggered for the PC20 site. This is the fundamental question for PC20. Without wishing to overplay this issue, it is unfortunate that Ms Oliver failed to have the bat ecologists address this question during the bat ecology expert conferencing. The agenda for the expert conferencing was pre-circulated and a request was made for the ecological assessment to be the first item for discussion at the expert conferencing. However, that change was rejected by Mr Welsh.
7. At paragraph 3.1.1 of the Ecology and Bat Habitat JWS, Mr Kessels and Ms Thurley agreed that "... *updated ecological evidence or impact assessment is required to determine the adequacy of the BHA and the measures to address adverse residual effects, in managing effects on long-tailed bats and their habitat within the PPC20 area.*"⁶

⁶ Joint Witness Statement Ecology and Bat Habitat dated 8 February 2023 at 3.1.1.

8. The Ecology and Bat Habitat JWS further states at paragraph 3.1.2 that Ms Thurley and Mr Kessels “*consider that industrial and urban habitats are those least used by bats and that the industrialisation resulting from the plan change will result in habitat which is less suitable for bats and may effectively remove 130ha of foraging, commuting and possibly roosting habitat. This will result in smaller home ranges of bats that use the site who must then find resources that they need to survive and reproduce from a reduced home range which may affect their survival.*”⁷
9. Further down the page it is noted that “*Georgia Cummings supports the 11 hectare property being proposed as offsite compensation Gerry Kessels also supports the 11 hectare proposed as compensation subject to more information being supplied on the certainty that it will be suitably restored and protected, and also subject to review of the additional residual effects assessment.*”⁸ I have not copied the full wording from this section of the JWS as it is accepted by all bat ecologists that the location of the compensation site is good from an ecological perspective (noting that there are scope issues as the compensation site is outside the PC20 area). I encourage the hearing panel to read the full Ecology and Bat habitat JWS together with the original submission and further submission from Mr Kessels.

BCM

10. The Director-General’s concerns with the BCM relate to the lack of transparency on the inputs and on the calculations. If a model is to be accepted, the inputs and calculations need to be tested through the hearing process and understood by the fact finder. The Applicants experts can use the BCM to assist with their calculations to reach their own expert views on predicted future outcomes. However, the hearing panel as the fact finder must evaluate all of the evidence.
11. A key issue with the BCM is that the submitters; the section 42A reporting officer; the Council; and the hearing panel are not given the opportunity to check and understand the inputs and the calculations. This means that a decision to rely on the BCM in its current form is a decision to only evaluate the evidence of the Applicants.

⁷ Joint Witness Statement Ecology and Bat Habitat dated 8 February 2023 at 3.1.2.

⁸ Joint Witness Statement Ecology and Bat Habitat dated 8 February 2023 at 3.1.2.

12. To be clear, the Director-General sees expert conferencing as the alternative to the BCM. The expert conferencing should take a wider approach and it should not be focused on models in the absence of data. The focus should be on the ecological requirements of pekapeka and the available management options. This will enable the hearing panel to be satisfied that the hearing panel has evaluated all of the evidence. Please note that the Director-General sees expert conferencing as being a very different process to mediation or a negotiation.

EFFECTS MANAGEMENT HIERARCHY

13. The Director-General submits that it is the effects management hierarchy in ECO-M13 of the WRPS that applies. The Director-General's position is supported by: (a) the evidence of Ms Thurley;⁹ and (b) the analysis by Mr Kessels of the Applicants evidence and the WRPS significance criteria provisions as set out in his further submission.¹⁰
14. The Director-General further submits that the WRPS intended that good practice effects management be followed and that the published good practice guidance¹¹ should be utilised to assist with the interpretation and implementation of the effects management hierarchy. The Director-General agrees with the hearing panel "words do matter". The good practice guidance is simply to assist with the proper implementation of the effects management hierarchy (noting that the concepts of offsetting and compensation are explained in the good practice guidance and the guidance includes some key principles that have been developed to aide proper implementation).

WHAT DOES THE TERM "FUNCTIONAL" MEAN?

15. The Director-General submits that in the context of a Bat Habitat Area the term "functional" should be defined as follows:

⁹ Evidence in Chief of Ms Tertia Thurley dated 7 March 2023.

¹⁰ Further Submission of GHA Kessels dated 25 November 2022.

¹¹ The good practice guidance contained in the August 2014 publication entitled "*Guidance on Good Practice Biodiversity Offsetting in New Zealand*" and the September 2018 publication entitled "*Biodiversity Offsetting under the Resource Management Act*".

“Functional means performing or able to perform in the way that the Bat Habitat Area is required to perform to provide the resources and conditions needed for bats to be present”.

16. From a section 32 perspective, applying this definition would be both efficient and effective. It is the most cost effective way to implement the provisions. The questions relating to “functional” then turn to the physical design of the Bat Habitat Areas and any associated requirements. The Director-General acknowledges and agrees that the Bat Habitat Area needs to be designed carefully so that it does not have the unintended consequence of causing operational issues at Hamilton Airport through an increased risk of bird strike. It appears from the JWS that further expert conferencing is required on the design of the Bat Habitat Areas.
17. It is worth noting that 3.3.1 of the Ecology and Bat Habitat JWS records that Mr Kessels also seeks the addition of the word “functional” to Policy 10.3.2.2A(a).¹²

SCOPE OF PC20 AND THE RELIEF SOUGHT BY THE DIRECTOR-GENERAL

18. Mr Gooding has indicated in his evidence that he is mostly comfortable with the updated wording in PC20 apart from a couple of requested changes that have not been accepted by the Applicants. These changes are explained in Mr Gooding’s evidence. In particular, see clause 10.19 of Mr Gooding’s statement of evidence. As a point of clarification, the Director-General seeks that the “land” requirement in 21.1.10.18A(c) should be a “must” not a “may”. The monetary requirement could be a “may”, but the land requirement should be a “must”.
19. As noted on day 3 of the hearing, the pekapeka is a taonga species that has a threat classification of threatened nationally critical. This is one step away from extinction. The pekapeka is predicted to decline by greater than 70% over the next three generations (36 years). The Director-General considers that the District Plan is the only way to slow or prevent habitat loss for the pekapeka. This is because it is the District Plan that controls the use of private land. As stated by the Environment Court, a unified catchment

¹² Ecology and Bat JWS at 3.3.1.

approach to habitat protection and enhancement needs to be adopted.¹³ The Waikato Bat Alliance currently has no status or ability to slow or prevent habitat loss (other than as a submitter in the RMA processes which as you can see is a function that is already being performed by Te Papa Atawhai).

20. PC20 is a private plan change which is limited in scope and land area. This makes it difficult for the Director-General to specify relief for PC20. PC20 is occurring much sooner than anticipated due to a high demand for industrial land near the airport.¹⁴ It is occurring out of sequence with the changes that are required to the Waipa District Plan to identify and protect the areas within the Waipa District (particularly in the area to the north of the Airport and to the south of the Peacocke Structure Plan Area) that will need to be protected and enhanced for the pekapeka. One option would be to decline PC20 or to put PC20 on hold so that it can be decided in conjunction with a wider plan change process to enable a more strategic spatial planning approach to be taken for the protection of the habitat for the pekapeka.
21. A practical issue that arises for PC20 is that while the Applicants can offer a compensation site outside of the PC20 land, it is not possible for the Director-General to request, or for the hearing commissioners to require, a bigger compensation site on land that is outside the PC20 land.
22. This situation creates a conundrum for both Waipa District Council and Hamilton City Council as both Councils are looking to allow development to proceed in the area but there may not be enough land (space) available for the compensation sites (not to mention the scope issues that will arise due to the location of the compensation sites). Hamilton City Council did signal to the hearing panel in PC5 that Hamilton City Council would need to look to utilise land outside the Hamilton City boundaries for the compensation sites.

NEXT STEPS

23. As noted above, there is no consensus between the bat ecologists on the question as to whether the habitat at the PC20 site is “significant” or “non-significant”. In the circumstances, the Director-General respectfully requests that the hearing panel prefer the evidence of Ms Thurley on the significance question and/or direct further expert bat ecology conferencing.

¹³ *Weston Lea Ltd v Hamilton City Council* [2020] NZEnvC 189 at paragraph 11.

¹⁴ Request for Plan Change at paragraph 4.2.2.

24. Any further expert bat ecology conferencing should:
- a) answer the question as to whether the significance criteria in the WRPS has been triggered;
 - b) focus on the ecological requirements of pekapeka and the available management options;
 - c) involve a further bat ecologist who has been engaged by Waipa District Council to provide technical bat ecology advice to the section 42A author; and
 - d) be facilitated by a different independent facilitator.



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