

BEFORE THE ENVIRONMENT COURT
AUCKLAND REGISTRY

ENV-2019-AKL

IN THE MATTER

of an appeal under Section
120 of the Resource
Management Act 1991

BETWEEN

**DIRECTOR-GENERAL OF
CONSERVATION**

Appellant

AND

HAMILTON CITY COUNCIL

Respondent

AND

WESTON LEA LIMITED

Applicant

NOTICE OF APPEAL BY THE DIRECTOR-GENERAL OF CONSERVATION

Dated: 22 November 2019

Department of Conservation
Private Bag 3072
Hamilton
Counsel acting: Victoria Tumai / Michelle Hooper
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To: The Registrar
Environment Court
AUCKLAND

INTRODUCTION

1. I, Lou Sanson, Director-General of Conservation appeal parts of a decision on the following matter:
 - a. A decision made by Commissioners on behalf of Hamilton City Council to grant consent to the subdivision and land use consent applications (11.2018.6695.01 & 10.2018.9853.01) of Weston Lea Limited to:
 - i. Undertake a fee-simple subdivision; and
 - ii. Undertake the following land use activities associated with a Master Plan development for urban purposes:
 - (1) Walkways and cycleways;
 - (2) Earthworks and utility infrastructure within the Waikato Riverbank and Gully Hazard Area;
 - (3) Bulk earthworks;
 - (4) Fences and wall exceeding permitted height (proposed retaining walls);
 - (5) Construction of subsoil drain outlet within a Significant Natural Area (SN 54);
 - (6) Pump Stations;
 - (7) Stormwater detention, treatment and/or soakage facilities;
 - (8) New transport corridors;
 - (9) New works not in accordance with the function of Peacocke Road as defined in the District Plan Transport Corridor Hierarchy Plan.
2. I made a submission on those applications.
3. I received notice of the decision on 1 November 2019.
4. The decision was made on behalf of Hamilton City Council (**Council**) by independent hearing commissioners William Wasley, Richard Knott, and Loretta Lovell (**Commissioners**) acting under delegated authority.

5. I have a right to appeal this decision under section 120 of the Resource Management Act 1991. The decision to which this appeal relates is not one of those activities excluded by section 120(1A) or (1B) of that Act.
6. I am not a trade competitor for the purposes of section 308D of the Resource Management Act 1991.
7. The parts of the decision that I am appealing are the consent conditions.
8. The land affected is legally described as Lots 1 and 2 DPS 81210 (SA66A/99), Lots 3 and 4 DPS 81210 (SA66A/100), Lot 1 DP 36935 (SA5D/1211), Part Lot 6 and Lot 8 DP 34164 (SA4B/788), Lot 5 DP 17475 (SA718/181), Allotment 87, Part Allotments 93 and 94 Te Rapa Parish (SA528/20), Lot 1 DPS 78023 (SA60A/826), and Pt Lot 10 DPS 7724 (SA7D/254) located at 337 – 461 Peacockes Road, Hamilton.

REASONS FOR THE APPEAL

General reasons

9. The decision fails to address Part 2 of the Resource Management Act 1991 as the consent conditions inadequately address the adverse effects of the development on the environment, in particular on long-tailed bats. Notably the decision:
 - a. Does not promote sustainable management of natural and physical resources under section 5 of the Act;
 - b. Does not adequately recognise and provide for matters of national importance under section 6 of the Act, in particular section 6(c); and
 - c. Leaves critical adverse effects to be addressed via yet to be developed future management plans.
10. The decision represents a failure of the Respondent to fulfil its functions under section 31(1)(b)(iii) of the Act to control any actual or potential effects of the use or development of land for the purpose of the maintenance of indigenous biological diversity.
11. The decision is contrary to the objectives and policies of the Waikato Regional Policy Statement and it is inconsistent with the Hamilton District Plan.
12. The consent conditions do not represent best resource management practice.

Particular reasons

13. The particular reasons for the appeal are as follows:
 - a. The land affected by the decision is significant habitat of the long-tailed bat. The potential effects of the consented development include the removal of roost trees, earthworks and effects arising out of and in connection to the occupation of up to 835 residential lots and 5 commercial lots. The

consequential effects will be considerably greater than the environmental effects of the past land uses of the site.

- b. The decision to grant consent relies heavily on the adoption of an adaptive management approach that is intended to reduce the uncertainty and manage any remaining risk for the long-tailed bat.
- c. The adaptive management consent conditions have significant inadequacies and the consent conditions leave critical adverse effects to be addressed via yet to be developed future management plans. The consent conditions are therefore unlikely to achieve their purpose of reducing uncertainty and managing the risk for the long-tailed bat and other indigenous biodiversity issues.
- d. The long-tailed bat is of national importance and the adverse effects of the consented development on this nationally important threatened species have the potential to result in significant and irreversible loss (and possibly local extinction).
- e. At paragraph 12(b) of the decision the Commissioners stated:

The single point of contention is the long-tailed bat and the effect of this development on this threatened species and native fauna and as a matter therefore of national importance under section 6. It is with this in mind that further consideration and conditions were required.
- f. The long-tailed bat is now assigned to the category most at risk of extinction “Nationally Critical” (O’Donnell et al. 2018). This is assessed by a team who predicted a 70% decline over the next three generations of bats based on studies where the rate of decline was much greater in unmanaged populations. The Hamilton population is one of those unmanaged populations where it is likely that the population is declining and, in addition to this, is under pressure from increasing urbanisation via roads and subdivisions.
- g. It is accepted in the decision that the adverse effects are more than minor.
- h. At paragraph 9.3 of the decision the Commissioners considered the Waikato Regional Policy statement and stated at subparagraphs (q)(iv) and (v) that they are satisfied that:

(iv) The cumulative effects of subdivision are largely known. Where the effects are not clear (long tailed bats) an adaptive management approach was initially proposed and has been reinstated in the conditions.

(v) As with cumulative effects, the sufficiency of information relating to the long-tailed bats has been questioned. However, conditions were proposed and are now in place to ensure that baseline information is in place prior to construction.

- i. To be effective, adaptive management conditions should, among other things, require:
 - i. A statement of objectives and expected outcomes of the use of adaptive management;
 - ii. Good baseline information to be obtained prior to the commencement of the activities authorised by the consent that is statistically robust and capable of answering the questions;
 - iii. The identification, in advance, of the stages of the development at which the effects of the activity will be reviewed and clear processes for timely decisions to be made to either: (a) proceed with the development; (b) cease further development; or (c) reduce the scale of the development;
 - iv. Monitoring and reporting that is appropriate for the significance and risk;
 - v. Clear mechanisms and processes for appropriate remedial action to be taken in a timely manner before effects become irreversible;
 - vi. Certain criteria to be met before the consent holder can progress to the next stage (note: enough time should be allowed at the completion of each stage of development for monitoring to establish the effects of the relevant stage of the development); and
 - vii. Ongoing monitoring and review.
- j. The consent conditions do not adequately cover the key aspects for adaptive management as outlined above. The consent conditions do require a range of management plans relating to the effects on long-tailed bats and other biodiversity issues. However, the consent conditions do not provide a clear integrating framework for following adaptive management with respect to the development and implementation of those management plans. The management plan approach also gives Hamilton City Council a subjective discretion on critical adverse effects. Critical adverse effects need to be appropriately addressed with adequate consent conditions before a decision to grant is made and should not be left to be addressed via future management plans.
- k. Examples of specific conditions and how they do not address the concerns in my submission include:
 - i. *Conditions 25-32: Management Plan Liaison Group*
 - (1) The consent conditions require the establishment of a Management Plan Liaison Group (MPLG) for the Amberfield Development.

- (2) Condition 26 stipulates that membership of the MPLG is to include two (2) representatives of:
- (a) The consent holder;
 - (b) Hamilton City Council;
 - (c) The Department of Conservation;
 - (d) Riverlea Environmental Society Incorporated;
 - (e) Tangata Whenua Working Group; and
 - (f) Upon establishment, two representatives of the Amberfield resident's association or such other group established for the purposes of representing the interests of Amberfield residents and community.
- (3) Condition 27 provides that the purpose of the MPLG will include, among other things, participation in the development, monitoring, and review of the Ecological Management and Monitoring Plan and sub plans. The stated role of the MPLG is confusing and inconsistent, when read in conjunction with the consent conditions on the separate biodiversity-related sub plans.
- (4) In addition to the MPLG's role with respect to the future management plans being unclear and uncertain, there is a high probability that the MPLG will become dysfunctional and unable to perform its role effectively. Reasons for this include:
- (a) There are differing interests and expertise among the members of the MPLG;
 - (b) There is no detailed dispute resolution process; and
 - (c) There are no clear rules for decision-making and there is no clear process for communicating with, and making recommendations to, Hamilton City Council.
- (5) Examples of the differing interests among the MPLG include: (a) the representatives of Weston Lea Limited will be under financial pressure to keep the stages of the development moving; (b) the representatives of the Amberfield resident's association will be under pressure to advocate for the interests of the residents; and (c) the bat experts representing the Department of Conservation will be focused on getting the required expert recommendations to Council. Tensions are likely to arise when the experts wish to make recommendations

with respect to long-tailed bats that are not supported by other members of the MPLG.

- (6) Further, condition 28 of the consent conditions states that:

Should a majority of MPLG members decline or not respond to an invitation to meet, the consent holder is not required to hold that meeting.

- (7) The timeframes for the MPLG to make decisions and act will be tight. For example: there are conditions relating to the Vegetation Management Plan that allow for the removal of trees that may be bat roosts and condition 118 only gives the MPLG twenty [20] working days to make recommendations to Council.
- (8) In summary, the differing interests of the members of the MPLG; the absence of decision-making and other processes for the MPLG; the absence of a clear dispute resolution process; and the ability of the consent holder to not hold meetings, all point to a high probability of the MPLG becoming dysfunctional and unable to effectively perform its role within the timeframes required.
- (9) As noted in paragraph 12 j above, critical adverse effects need to be appropriately addressed with adequate consent conditions before a decision to grant is made and should not be left to be addressed via future management plans. It is not appropriate to give Hamilton City Council a subjective discretion on critical adverse effects. Particularly in circumstances where the MPLG is likely to be dysfunctional and unable to provide clear recommendations on the development of the future management plans.
- (10) The critical adverse effects need to be addressed by the consent conditions. Future management plans should be limited to non-critical operational processes that lie behind a performance or operational standard.
- (11) The consent conditions should therefore:
- (a) Include conditions to address the critical adverse effects. This could be achieved by way of clear conditions that specifically set out the essential requirements for the management plans or preferably by way of including final versions of the management plans in the consent conditions. The management plans will need to clearly set out how adaptive management will work for the Amberfield Development (e.g. identification of stages; baseline monitoring requirements with no work allowed

until that is completed, and monitoring requirements as each stage is completed before there is sufficient robust monitoring information to decide whether to proceed to the next stage or not). Each individual management plan will need to be checked against the other management plans for conflicts/issues to make sure that the management plans do not have any conflicts or other issues that have the potential to override the objectives and expected outcomes of the adaptive management approach;

- (b) Require as a condition precedent to the commencement of the activities authorised by the consent the establishment of a Management Plan Expert Panel comprising a panel of experts who:
 - (i) Have the requisite qualifications and experience (i.e. are bat ecologists);
 - (ii) Have been approved by the Department of Conservation;
 - (iii) Are able to provide the expert advice that is required for an integrated adaptive management approach;
- (c) Include a mechanism for the interested parties identified in condition 26 to receive regular updates from the Council and the consent holder;
- (d) Clearly set out the purpose, specific roles, powers, and procedures of the Management Plan Expert Panel (including decision-making rules and a process for dispute resolution);
- (e) Place an obligation on the consent holder to maintain, and provide the interested parties identified in condition 26, a record of: (a) any approvals obtained from the Management Plan Expert Panel; and (b) any issues raised by the Management Plan Expert Panel and the consent holder's response to those issues (including reasons in circumstances where no action is taken);
- (f) Set out a dispute resolution process; and
- (g) Require the consent holder to pay the costs associated with the Management Plan Expert Panel and, if a liaison

group is still required, the costs associated with the liaison group.

ii. *Conditions 75 – 147: Ecological Management and Monitoring*

- (1) Condition 121 requires The Long-Tailed Bat Management and Monitoring Plan to include details of ongoing monitoring and reporting of bat activity, including the establishment of adequate baseline survey. Condition 123 requires that best practice monitoring including but not limited to bio acoustic monitoring be carried out. Intensive bat surveys using radio tracking equipment may be more appropriate than acoustic monitoring given the fact that the long-tailed bat is a nationally critical threatened species and the effects of the Amberfield Development on the long-tailed bat have the potential to result in significant and irreversible loss (and possibly local extinction). Radio-tracking is resource intensive, but it provides the most comprehensive information on how bats are using the landscape. As noted above, good baseline information is critical to the effectiveness of an adaptive management approach and this information should be obtained and agreed prior to commencement.
- (2) The conditions lack specificity. The adaptive management strategies are not set out. The mechanisms and triggers for the adaptive management approach are uncertain and detail that should be included in the consent conditions, to ensure compliance with certain standards, has been left for the management plans. This reduces the likelihood of the consent conditions achieving the priority objectives which in turn increases the risk to indigenous fauna. For example: condition 86(b) states that animal pest control will be undertaken at significant roost sites but there is no mention of the levels of pest control (or when they are required to be demonstrated), the species targeted and there is no definition of "significant roosts"; conditions 89-93 provide little detail on how bat sensitive lighting will be achieved and how this will be measured; condition 96 lacks any description of the actual management that is to occur; condition 123 will lead to data that is not comparable; condition 124 which has little detail in how monitoring will be designed to detect any changes; condition 124(h) states that trigger values will be determined but there is no detail on how this will be achieved; condition 126 states that adaptive management will be integrated into the Long-Tailed Bat Management and Monitoring Plan but there is no detail on how this will be effective when the monitoring

measures will take years to show a change; conditions 132 and 133 lack detail and process and do not support an adaptive management approach.

- (3) The conditions rely in part on the implementation of another project (Southern Links) and condition 124(e) contemplates the cross-referencing of data – this will cause some third party and other practical issues for the implementation of the conditions.
- (4) Condition 123(c) requires monitoring to be completed on a two yearly basis. Monitoring every two years will double the time to detect a change. Monitoring every year is essential to determine the interannual variation and trend over time. Monitoring should also continue beyond 15 years. Pest control should be in perpetuity and consent conditions should require annual reports on pest control and identify how it will be funded.
- (5) Condition 124(d) states that the survey design will be developed as part of the Long-Tailed Bat Management and Monitoring Plan with input from a biostatistician. The management plan should be developed and included as part of the consent conditions with the assistance of a Department of Conservation approved biostatistician as it is essential that surveys are robust and comprehensive.
- (6) There are conflicts between the consent conditions. For example:
 - (a) There are conflicts within the conditions relating to the Vegetation Management Plan and removal of trees; and
 - (b) Condition 95 states:

Activities on site shall be carried out to ensure that potential bat roost removal is avoided [or if required removed due to sickness or danger to the public]. Potential bat roost removal shall comply with the specific standards for roost tree identification and monitoring of roost trees before their removal.

Whilst the danger to the public must be considered and the Health and Safety at Work Act 2015 complied with, there needs to be better alignment of the consent conditions and the objectives of the adaptive management approach. The consent conditions should include mechanisms to deal with any conflicting provisions to avoid the risk of the conflicting provisions being used to get around the requirement to avoid the removal of roost trees. The consent conditions should require all options to be identified (including fencing and other

measures) and the consent conditions should require the options to be documented by way of a report in writing that is to be submitted to the Management Plan Expert Panel. A robust decision-making process for removal should be set out in the consent conditions and the decision-making process must recognise the importance of retaining roost trees.

- (7) The inclusion of the term “where feasible” in consent conditions is likely to result in the Consent Holder identifying feasibility issues to support a decision not to provide the mitigation associated with the condition. Conditions need to require a higher level of certainty.
- (8) Conditions 143 to 147 (now 141 to 145) create a high degree of uncertainty.
- (9) The Commissioners have exercised the power under section 133A of the Resource Management Act 1991 to issue an amended consent to correct minor mistakes or defects in the consent. I am still reviewing the amended consent, my initial observations are as follows:
 - (a) Some changes to the consent conditions are more than minor. For example: the consent notice mechanism has been removed from condition 132(g). Removing the consent notice covenant from the titles will have a significant impact on the ability to implement the adaptive management approach to reduce upward light if this action is required following the sale of the individual lots to third party home buyers. Alternatives to a consent notice include a covenant in gross or an encumbrance instrument. It needs to be recognised that the adaptive management approach will need to be able to rely on the ability to enforce the required obligations on any incoming purchasers of the relevant lots to reduce upward light.
 - (b) Conditions 140 and 141 have been deleted. The lots that are to vest in Hamilton City Council to provide a vegetated corridor should be vested subject to a requirement for those lots to be retained by Hamilton City Council in perpetuity for that purpose.
 - (c) There are further errors in the consent conditions that have not been corrected. For example: in conditions 113 and 116(b) the term should be “diameter at breast height” not “diameter and breast height”.

14. The above are examples of specific issues with the consent conditions that do not address the concerns in my submission. There are further issues with the consent conditions that will need to be worked through.

RELIEF SOUGHT

15. I seek the following relief:
 - a. That the conditions of consent are amended to ensure that the actual and potential adverse effects on the long-tailed bat and other biodiversity issues will be adequately addressed (including inserting new conditions as required to ensure that an effective adaptive management regime is in place to ensure a positive ecological outcome for long-tailed bats);
 - b. Such further, consequential or alternative relief to like effect, that the Court considers fit to address my concerns;
 - c. Any consequential changes to the conditions required as a result of the changes sought; and
 - d. Costs.
16. I agree to participate in mediation or other alternative dispute resolution proceedings.

ATTACHMENTS

17. I attach the following documents to this notice:
 - a. A copy of my submission;
 - b. A copy of the original decision;
 - c. A copy of the addendum to the decision;
 - d. A copy of the amended version of the decision; and
 - e. A list of names and addresses of persons to be served with a copy of this notice.

Brigitte Meier
Director, Operations
Hauraki, Waikato, Taranaki
Department of Conservation
Acting pursuant to delegated authority on behalf of the Director-General of Conservation¹

Date: 22 November 2019

Address for service of appellant:

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¹ A copy of the Instrument of Delegation may be inspected at the Director-General's office at Conservation House (*Whare Kaupapa Atawhai*, 18/32 Manners Street, Wellington 6011).

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Advice to recipients of copy of notice of appeal

How to become party to proceedings

You may be a party to the appeal if,—

- (a) within 15 working days after the period for lodging a notice of appeal ends, you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
- (b) within 20 working days after the period for lodging a notice of appeal ends, you serve copies of your notice on all other parties.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (*see* form 38).

How to obtain copies of documents relating to appeal

The copy of this notice served on you does not attach a copy of the relevant application or the decision appealed. These documents may be obtained, on request, from the appellant.

Advice

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch.