BEFORE INDEPENDENT HEARING COMMISSIONERS
APPOINTED BY THE HAMILTON CITY COUNCIL

IN THE MATTER	of the Resource Management Act 1991 (**Act**)
AND	
IN THE MATTER	of an application for subdivision and land use consent for the Amberfield development pursuant to the Act.
APPLICANT	Weston Lea Limited
CONSENT AUTHORITY	Hamilton City Council

LEGAL COUNSELS' OPENING SUBMISSIONS FOR WESTON LEA LIMITED

Dated: 2 May 2019

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MAY IT PLEASE THE HEARING COMMISSIONERS:

INTRODUCTION

1. Weston Lea Limited (**Weston Lea**) is a company owned by the Peacocke family.

2. The Peacocke family have owned the land the subject of this resource consent application for over 140 years. The land has provided a source of production and a home for the Peacocke family for over three generations.

3. As Mark Peacocke will explain, the decision by the Peacocke family to develop the land has not been a quick decision nor one taken lightly. Their decision is a response to Hamilton City Council's (**HCC** or the **Council**) plans to urbanise their land which were initiated in 1989.

4. The Peacocke family's application is the result of many years of work and engagement with the Council to ensure that any development of the land appropriately responds to their sense of custodianship and legacy.

5. The Peacocke family is seeking resource consent to subdivide a total of 833 residential lots, plus two 'super lots' that will form part of the future Peacocke Suburban Centre and two rural balance lots. Land use consent is also sought for a range of activities to facilitate the subdivision.

6. The proposed development is described in the evidence-in-chief of Mr Ben Inger, including the residential activities, the future suburban centre, the open space framework, three waters and roading infrastructure, and the intended staging of the development.[1]

7. The family's proposal has been through an extensive multi-disciplinary master planning exercise. The development layout has been informed by expert investigations and assessments, consultation with tangata whenua, and a range of other stakeholders. The family have made changes and improvements to the development design following lodgement in response to matters raised by submitters.

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[1] Evidence-in-chief of Mr Inger, at [37] – [71].

PROCEDURAL ISSUES

8. There are a few preliminary procedural issues that I would like to briefly address before I move to our substantive submissions including:

   (a) The different roles of HCC in this hearing;

   (b) Role of co-counsel for Weston Lea; and

   (c) Hot tubbing of ecological evidence for Weston Lea.

Council's different roles

9. HCC is the regulatory authority responsible for determining Weston Lea's application for consent.

10. It is important to recognise, however, that the Council has also elected to enter the fray of Weston Lea's application and these proceedings as a submitter.

11. The "Open Spaces and Facilities Unit" and "Strategic Infrastructure Unit" (**Council, as submitter**) have jointly filed a submission in support of the application subject to certain proposed conditions generally designed to secure the vesting of land in the Council and infrastructure funding outcomes (submission 65).

12. I understand that Council, as submitter, seeks these outcomes against a background of negotiations between Council's solicitors (Tompkins Wake) and Weston Lea's solicitors (Wynn Williams) concerning whether a development agreement (**DA**) might be agreed between the parties under the Local Government Act 2002 (**LGA**).

13. As legal counsel, I have not been involved in negotiations between Council, as submitter, and Weston Lea concerning a potential DA or the payment of development contributions under the LGA.

14. My observation that the Council's submission addresses outcomes it wishes to accomplish through a DA (or development contributions) seems clear on the face of the submission. For example, the submission states (para [4]) in relation to the Council's wish for a DA that *"if agreement cannot be reached … Council has preserved its opportunity to address the commissioner (sic) and fully present its position by way of a formal submission."*

15. We address the lawfulness of the relief sought by the Council, as submitter, under the subheadings *"Provision of a sports park"* and *"Infrastructure matters & LGA development agreements"*.

16. I acknowledge that local authorities have many different roles and regulatory functions. However, it is unusual for a local authority to submit on a resource consent application that is before it for consideration in its regulatory capacity as a consent authority under the Resource Management Act 1991 (**RMA** or **Act**).

17. Ordinarily, the local authority's role in determining an application is clear. The s.42A reporting officer assesses the relevant matters and makes a recommendation as to the determination that should be made (and if the recommendation is to grant consent, the conditions that should be imposed).

18. The Council's submission confuses the normal course of s.42A consideration and recommendation stating (para [5]) that *"[t]his submission is in addition to … the s42A report"*. Whatever the intent of that statement, it cannot mean that Council's position and evidence, as submitter, forms part of the Council's recommendations under its s.42A Report.

19. Rather, the Council, as submitter, has entered (what is referred to under administrative law as) "the fray". It has declared an interest in the outcome of any decision made by the Panel. Furthermore, it has directly sought to use the resource consent process under the RMA to influence the course of DA negotiations under the LGA.

20. I am unaware of another situation where a council has lodged a submission on an application before it as a consent authority.

21. A full bench of the Environment Court in *Auckland Council v Auckland Council*[2] considered whether a council (as applicant) can appeal its own decision (as consent authority).

22. The Court started from the simple premise that a single entity has unity of intent or purpose. It found in relation to this point that a council, as a single legal entity, must act with integrity and accountability. It ought not assert that it can "split itself" without addressing and avoiding any apparent conflict of interest.[3]

23. The Court accepted jurisdiction on the facts given the decision raised real issues of controversy, and the s.274 parties would be left to carry the burden of the appeal if jurisdiction was declined. The Court was clear *"that in other circumstances the issue of whether it is lawful or appropriate for a council to appeal against its own decision may need to be decided"*.[4]

24. The Panel will probably be relieved to know that I am not seeking that it make a determination on this point. The question of whether a council can submit on an application for consent where it is the consent authority is more appropriately raised before the judiciary.

25. Rather, I seek that the Panel takes care in its consideration of the Council's s.42A recommendations that conditions of consent should be imposed requiring Weston Lea:

    (a) to provide land for a sports park; and

    (b) complete development agreement negotiations to the Council's satisfaction under the LGA.

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2 *Auckland Council v Auckland Council* [2018] NZEnvC 56 (EC), Judges Smith and Kirkpatrick.

3 *Auckland Council v Auckland Council* [2018] NZEnvC 56 at [51].

4 *Auckland Council v Auckland Council* [2018] NZEnvC 56 at [50].

26. Despite allowing jurisdiction in the *Auckland Council* decision, the Court cautioned that if a council:

> … is to act as both appellant and consent authority, then it must do so in a way that carefully addresses and avoids apparent conflicts and minimises procedural complications.
>
> ….
>
> *The integrity of the consent process, including the appeal process, must be maintained.*
>
> *[emphasis added]*

27. The Council has taken the appropriate step in these proceedings of appointing an independent Panel to determine Weston Lea's application. The Panel needs to take care in the course of considering this application that it remains conscious of areas where the integrity of the process could be brought into question.

28. There is an obvious conflict between the Council's role as a submitter on the application and its duty to provide a s.42A Report on the relief the Council has sought as a submitter. Careful consideration needs to be given to the weight afforded to the s.42A Report's recommendations where that conflict exists.

29. That is not because the s.42A reporting officer has necessarily approached the relief sought by the Council, as submitter, with a closed mind. Rather, it is because the Council is unable to split itself as a single entity and an obvious conflict of interest exists between the relief it has sought and any recommendations made in relation to that relief.

30. I do not wish to labour the point, but it is necessary to stress the importance of the Panel being seen to exercise its independence in its consideration of the application.

31. I am advised in this respect that the Council's normal solicitors, Tompkins Wake, have recused themselves from advising the Panel and an independent barrister has been appointed to provide any legal advice the Panel might seek.

32. That was the correct course of action to adopt given Tompkins Wake's role in advising the Council during DA negotiations and Council's submission on the application seeking relief in relation to those negotiations.

Role of co-counsel for Weston Lea

33. I have been instructed to represent Weston Lea as lead counsel. Ms Woods appears with me as junior counsel.

34. The Court of Appeal resolved in 2018 to *"encourage greater participation of junior counsel in advocacy"*.[5] The resolution encourages gender equality and reflects:

> … an appreciation that junior counsel will have made substantial contribution to the written argument, and will best develop as advocates by advancing part of the oral argument.

35. I consider that the Court of Appeal's resolution is applicable to all hearings and where possible encourage co-counsel to assist in the delivery of submissions.

36. Ms Woods will, therefore, address you on the matters raised under the following sub-headings:

(a) Provision of a sports park; and

(b) Infrastructure matters & LGA development agreements.

Hot tubbing of ecological evidence for Weston Lea

37. It verges on pedestrian to state that ecology is an area of science that requires an integrated consideration of species and habitats to contextualise all areas of specialisation in terms of ecological function.

38. As I will discuss, unless further caucusing can resolve differences, the Panel will need to evaluate and make judgements in respect of the competing ecological evidence.

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[5] Role of Junior Counsel, NZCA, President Justice Kós, 1 March 2018.

39. Despite evidential differences, ecological experts appear to concur that questions of ecological function (especially concerning long-tailed bats) are informed by a range of areas of ecological expertise.

40. Dr Sarah Flynn has prepared a statement of evidence-in-reply (**EIR**), given Dr Stuart Parsons cannot immediately file his EIR, to help address the broader ecological questions that arise out of Weston Lea's evidence-in-chief (**EIC**) concerning terrestrial, bat, and freshwater ecology.

41. Dr Flynn has advised me that the practice of presenting a party's collected ecological evidence at the same time is not uncommon, is efficient, and enables integration of ecological themes. According to this approach, each ecological witness for a party presents a separate oral summary of their evidence. However, they sit together in the witness box and answer questions according to their expertise.

42. Dr Flynn considers this approach has several advantages when considering ecological evidence, including:

    (a) Avoidance of questions being put to the wrong expert witness;

    (b) The benefit of receiving a range of answers to overlapping questions at the same time; and

    (c) Reducing the overall time required to question witnesses by having to repeat questions to different witnesses.

43. Dr Flynn has indicated that, in the present case, she considers there would be considerable benefit if the evidence on terrestrial ecology, bat ecology, and overall ecological function were able to be presented in this manner.

44. It may be that the ecological experts for the Department of Conservation (**DoC**) and Riverlea Environment Society Inc. (**RESI**) see merit in also presenting their evidence in an empanelled format.

45. In any event, I seek a direction that Dr Flynn, Mr Andrew Blayney, and Ms Georgia Cummings may answer questions in relation to their evidence according to the "hot-tub" approach.

DECISION-MAKING FRAMEWORK

Sections 104D, 104(1), and 104B

46. Weston Lea seeks subdivision and land-use consents for the proposed Amberfield development.

47. The proposal entails activities ranging between permitted and non-complying classifications under the Operative Hamilton City District Plan (**District Plan**). Resource consent is required for restricted discretionary, discretionary, and non-complying activities.

48. Weston Lea has bundled all those activities together under one application in support of its master-planned vision for Amberfield. This means that the entire application falls to be considered as an application for a non-complying activity.

49. The key statutory provisions for assessing non-complying applications are:

    (a) The "gateway test" under s.104D;

    (b) The "matters for consideration" under s.104(1); and

    (c) The "determination of a non-complying application" under s.104B.

50. The Environment Court observed in *Blueskin Energy Limited*[6] that the correct approach to assessing an application under these provisions involves the following steps:[7]

    (a) decide whether the proposal passes one or both of the threshold tests in s 104D;

    (b) if it passes, consider the application and submissions, subject to Part 2, having regard to s 104(1):

        - the actual and potential effects of the activity on the environment;
        - any relevant plan; and
        - any other relevant consideration

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6 *Blueskin Energy Limited v Dunedin City Council* [2017] NZ EnvC 150 (EC).

7 (*Blueskin Energy Limited)* [2017] NZ EnvC 150 at [26].

(c) decide the weight that should be given to the matters in subsections 104(1)(a), (b) and (c); and

(d) having regard to effects in the context of properly weighted objectives and policies under s 104(1) and any other relevant consideration, arrive at a judgment whether the proposal promotes the sustainable management of natural and physical resources and decide to grant or decline consent accordingly (s 104B).

51. The decision-maker should decide whether the proposal satisfies one of the limbs of the s.104D test. If it satisfies at least one of those limbs, the decision-maker should consider the proposal under the matters set out under s.104(1). This should be followed by an evaluative decision as to the weight to be given to those matters. Finally, the decision-maker should have regard to the effects of the proposal in the context of the objectives and policies and make a judgement as to whether the proposal should be granted or declined.

52. This is a logically sequential approach to the exercise of a decision-maker's duties under ss.104D, 104(1), and 104B. *Blueskin Energy Limited* was decided prior to the insertion of s104(1)(ab) under the RMA[8] and the Court of Appeal's decision in *Davidson Family Trust.*[9] However, neither have any bearing on the Environment Court's discussion of:

(a) the sequence of statutory considerations for non-complying activities; or

(b) the evaluative judgement that needs to be undertaken in exercising discretion to determine the application.

53. The Court's use of the word "weight" provides further context. The word "weight" signifies the exercise of judgement as to the level of importance that is placed on different facts. The facts, in this context, include the actual and potential effects of the proposal and the relevant planning and policy framework.

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8 Section 143, Resource Legislation Amendment Act 2017.

9 *R J Davidson Family Trust v Marlborough District Council* (2018) 20 ELRNZ 367 (CA).

54. In most resource management hearings, there is often a relatively high level of agreement between experts as to what the relevant facts are. Any disagreement between experts normally centres around different opinions as to how the facts should be interpreted. In cases where there is disagreement between expert opinion, the decision-maker will be required to determine which view should be preferred. This is a separate evaluative exercise that needs to be undertaken prior to the consideration and weighting of facts in the exercise of the overall discretion.

55. Having made an evaluative decision as to the weight that should be accorded to the different factual matters under s 104(1), the decision-maker is required to arrive at a final judgement as to whether the effects in the context of the relevant objectives and policies support a consent being granted or declined under s.104B.

56. *Blueskin Energy Limited* highlights the need to consider *"effects in the context of properly weighted objectives and policies under s.104"* when exercising the discretion to determine an application under s.104B. I consider the Court is simply re-emphasising the need to ensure that the consideration of physical effects against the relevant objectives and policies does not result in overly prescriptive outcomes that fail to recognise the overall thrust of the plan. In other words, judgement is required to ensure that the application of objectives and policies is appropriate to the scale, degree, and duration of effect under consideration.

57. The decision as to whether consent is granted or not ultimately turns on whether a proposal satisfies the sustainable management purpose of the RMA. In *Davidson Family Trust*[10] the Court of Appeal found that whether an application for consent achieves the Act's purpose should normally be evident on the face of the relevant planning documents. This is because a *"plan that has been prepared having regard to Part 2 and with a coherent set of policies designed to achieve clear environmental outcomes*", should not require a decision-maker to revisit whether an application for consent achieves the requirements set out under of Part 2 of the Act.[11]

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10 *R J Davidson Family Trust v Marlborough District Council* (2018) 20 ELRNZ 367 (CA).

11 *(Davidson Family Trust)* (2018) 20 ELRNZ 367 at [74].

Part 2 of the RMA

58. Section 104(1) requires a decision-maker consider the listed matters "subject to Part 2" of the RMA (i.e. ss.5, 6, 7 and 8).

59. The Court of Appeal's *Davidson Family Trust* decision has clarified how the words of "subject to Part 2" are to be approached under s.104(1). In summary, the Court found that:

(a) Decision makers must have regard to Part 2 when making decisions on resource consent applications, "*when it is appropriate to do so"*.[12] The extent to which Part 2 of the RMA should be referred to depends on the nature and content of the planning documents being considered.

(b) Where the relevant planning documents have "*been prepared having regard to Part 2 of the RMA, and with a coherent set of policies designed to achieve clear environmental outcomes*", consideration of Part 2 is not ultimately required.[13] In this situation, the policies of these planning documents should be implemented by the consent authority. The consideration of Part 2 "*would not add anything to the evaluative exercise*" as *"genuine consideration and application of relevant plan considerations may leave little room for Part 2 to influence the outcome."*[14] The consideration of Part 2 is not prevented, but it cannot be used to subvert a clearly relevant restriction or directive policy in a planning document.[15]

(c) Equally if it appears that the relevant planning documents have "*not been prepared in a manner that appropriately reflects the provisions of Part 2, that will be a case where the consent authority is required to give emphasis to Part 2*".[16]

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12 *(Davidson Family Trust)* (2018) 20 ELRNZ 367 at [47].
13 *(Davidson Family Trust)* (2018) 20 ELRNZ 367 at [74].
14 *(Davidson Family Trust)* (2018) 20 ELRNZ 367 at [75].
15 *(Davidson Family Trust)* (2018) 20 ELRNZ 367 at [71].
16 *(Davidson Family Trust)* (2018) 20 ELRNZ 367 at [74].

(d) Further, where it is unclear from the planning documents whether consent should be granted or refused, and the consent authority has to exercise a judgment, Part 2 should be considered for such assistance as it may provide.[17]

60. If the decision-maker is required to apply Part 2, this involves a holistic assessment of whether a proposal achieves the purpose of the Act and promotes the sustainable management of natural and physical resources.[18] In achieving the purpose of the Act, the decision maker will also need to consider the matters provided under ss. 6, 7 and 8 of the Act

Effects on the environment

61. A decision-maker must have regard to any actual and potential effects on the environment of the allowing the activity; this includes positive effects as well as adverse effects.[19]

62. The RMA is not a "no effects" statute that contemplates that all adverse effects must be fully avoided, remedied or mitigated in all circumstances. The Environment Court has found in the context of s.104(1), for example, that activities with very significant effects may nevertheless be granted resource consent.[20]

63. Proposals often involve a range of positive and adverse environmental effects. The effects of proposed activities each need to be considered in terms of such things as scale, degree, and duration. When all the effects of a proposal are considered it may be that the positive effects outweigh the adverse effects. The weight given to different effects may be informed by planning criteria which help identify the kinds of activities and effects that are anticipated in different kinds of environment (e.g. residential, commercial, industrial, rural … etc).

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17 *(Davidson Family Trust)* (2018) 20 ELRNZ 367 at [72].

18 Section 5(1).

19 Section 104(1)(a). "Effect" is defined in section 3 of the RMA to include "any positive or adverse effect". Further, it has been held by the Courts that it is appropriate to evaluate the positive effects of an activity (see *Berry v Gisborne District Council* ENV-2009-WLG-3 and *McKendry v Thames-Coromandel District Council* 09/06/04 Williams J, HC Auckland).

20 *Upland Landscape Protection Society Inc v Clutha District Council* EnvC, Christchurch, C85/08, 25 July 2008 at [94].

64. Weston Lea's assessment of environmental effects (**AEE**) and expert evidence sets out a comprehensive assessment of the actual and potential effects of the activity on the environment. There appears to be a fair degree of consensus between Weston Lea's experts and the s.42A Report that the effects of the proposal mostly range between positive and appropriate.[21]

Conditions of consent

65. If the Panel is of the mind to grant consent, you may impose conditions that you consider are appropriate.[22]

66. It is important to note, however, that the 2017 amendments have inserted some new wording against which the discretion to impose conditions must be exercised. Section 108AA provides that a condition must be either:

(a) "directly connected" to an adverse effect of the activity or an applicable rule or environmental standard; or

(b) relating to "administrative matters" essential to the efficient implementation of the consent; or

(c) agreed to by the applicant.

67. This new provision narrows the previous approach of the Supreme Court in *Waitakere City Council v Estate Homes Ltd* which held that conditions merely needed to be "logically connected" to the development, and that there was no greater requirement for a causal connection between the condition and the development.[23]

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21 Evidence-in-chief of Mr Serjeant at [124] and Section 42A Report at [222].

22 Section 108 and 220, RMA.

23 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [66]. See also David Kirkpatrick and Bronwyn Carruthers "Land use, subdivision, designations, resource consent procedures and appeals" in Derek Nolan (ed) Environmental and Resource Management Law (6th ed, LexisNexis, Wellington, 2018) at 318: *"In recommending the amendment, the Ministry for the Environment stated that the breadth of the previous powers to impose conditions, along with the considerable body of case law that established the fundamental limitations above, had contributed to uncertainty around the scope of those powers. The key impact of the amendment is narrowing that scope, from the prior requirement under Estate Homes for a "logical connection" between the activity for consent and the condition, to a "direct connection".*

68. The purpose of this new test is discussed in a Ministry for the Environment report on the 2017 amendments, which states:[24]

> The amendments proposed by clauses 63 and 64 will introduce a requirement that a condition is 'directly connected' to an effect on the environment or an applicable rule, thereby narrowing the "broadly expressed discretion to impose conditions under s108" as stated by the Supreme Court.

69. While the existing body of case law built up concerning how the discretion to impose conditions remains relevant, s.108AA removes any uncertainty as to the degree of connection that must exist between the proposal and a condition. In simple terms, the conditions must be directly connected to the adverse effect which they are designed to address, an applicable rule, or an environmental standard.

GATEWAY TEST

70. Weston Lea's proposal, as discussed, is considered overall to be a non-complying activity under the District Plan.

71. This means the Panel must consider whether the application passes either of the gateway tests under s.104D(1) of the RMA. The application may only be granted if the Panel is satisfied that:

(a) The adverse effects of the activity on the environment will be minor; or

(b) The application is for an activity that will not be contrary to the objectives and policies of the relevant plan and/or proposed plan.

72. The application only needs only pass through one of the gateways to qualify for consideration under s 104(1) and determination under s104B.

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[24] Ministry for the Environment, Departmental Report no. 2 on the Resource Legislation Amendment Bill 2015 (8 November 2016), at 329. The report further states: *"the requirement for conditions to be 'directly connected' presents a tighter restriction on the scope of condition compared to the 'logical connection' test."*

73. Mr Serjeant acknowledges, in his evidence-in-chief and the AEE, that the proposal's effects on historic heritage and the long-tailed bat will be more than minor.[25] This means the application does not pass through the first gateway under s.104D(1)(a).

74. The application may still pass through the gateway test if the Panel is satisfied that it is not contrary to the District Plan's objectives and policies under s.104(1)(b).

75. The phrase "contrary to" contemplates being opposed to in nature, different, opposite to or repugnant to, not simply that the proposal does not find support from the objectives and policies.[26] The phrase should not be defined restrictively and means something more than simply non-complying.[27]

76. The test is not whether the application is contrary to one or two objectives and policies. Rather, it is whether the application is contrary to the thrust of the plan when viewed holistically.[28] The Court of Appeal has stated that test involves a *"fair appraisal of the objectives and policies read as a whole."*[29]

77. The Panel should accordingly adopt a broad-brush approach when considering whether the activity is contrary to the objectives and policies in the District Plan.

78. Mr Serjeant's evidence-in-chief and AEE provides a detailed assessment of the application against the relevant objectives and policies of the District Plan.[30] Mr Serjeant is of the view that the application achieves a high level of consistency with the majority of the relevant objectives and policies, including the Peacocke Structure Plan Area (**PSPA**) objectives and policies under Chapter 3 of the District Plan.[31]

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25 Evidence-in-chief of Mr Serjeant, at [43]-[46]; AEE, at 7.9; AEE Addendum, at 4.3

26 *NZ Rail Ltd v Marlborough District Court* (1993) 2 NZRMA 449 at 145; *Monowai Properties Ltd v Rodney District Council EnvC Auckland*, A215/03, at [35].

27 *NZ Rail Ltd v Marlborough District Court* [1993] 2 NZLR 641, [1994] NZRMA 70, at 11.

28 *Crater Lakes Park Ltd v Rotorua District Council* 2/12/09 EnvC Auckland, A126/09, at [170]-[171].

29 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].

30 Evidence-in-chief of Mr Serjeant, at [74] – [112]; AEE at 7.9; AEE Addendum at 4.3.

31 Evidence-in-chief of Mr Serjeant, at [112].

79. Mr Serjeant has taken care, in light the of proposal's effects on archaeology and long-tailed bats, to examine the objectives and policies of Chapter 19 (Historic Heritage) and Chapter 20 (Natural Environments). He concludes that the application is not contrary to these provisions.[32]

80. The Council's section 42A officer also concludes that, when considering the relevant District Plan provisions in the round, the application is not contrary to the objectives and policies of the District Plan.[33]

81. It is submitted in the circumstances that the application satisfies the second gateway test under s.104D(1)(b) of the RMA and that the Panel can proceed to consider and determine the application under ss.104(1) and 104B.

KEY MATTERS FOR CONSIDERATION

The objectives & policies of the District Plan

82. There appears to be general consensus between the planners (including the s.42A reporting officer) that the proposal is consistent with the policies and objectives of the District Plan.

83. Mr Serjeant is of the view that the proposal achieves a high level of consistency with the objectives and policies of the District Plan.[34] Mr Riddell concurs with that view, but considers that the proposal is inconsistent with the ecological objectives and policies of the District Plan.

84. Mr Serjeant and the s.42A reporting officer do not agree that the proposal is inconsistent with the ecological objectives and policies of the District Plan. They are of the view that the ecological objectives and policies of the District Plan are restricted in application to Significant Natural Areas (**SNA**) that have been identified and provided for under the District Plan through the first schedule of the RMA.

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32 Evidence-in-chief of Mr Serjeant, at [112].

33 Section 42A report, at [220].

34 Evidence in chief of Mr Serjeant, at [112].

85. Mr Serjeant acknowledges that the ecological experts for all parties have generally concurred that there are significant ecological areas within the Amberfield site, including the North Eastern terrace, East West Shelterbelt, the river margins and the gully.

86. They concur that in the absence of provision under the District Plan for areas for significant ecological value within the Amberfield site that the decision of the Court of Appeal in *Davidson Family Trust* applies and recourse to Part 2 is required in order to assess ecological values of the Amberfield site.

87. Given the planners are in general agreement that the proposal satisfies the urban objectives and policies of the District Plan it is worth noting the following.

88. Amberfield achieves the District Plan's vision for the PSPA:

    (a) it will become *"a high quality urban environment that is based on urban design best practice, social well-being, and environmental responsibility".*

    (b) it will *"respond positively to its natural setting and built form to develop a number of well connected neighbourhoods based on an urban development concept that respects and restores the area's natural environment."*

89. In particular:

    (a) the masterplan delivers a high level of urban amenity.[35]

    (b) the public open space to be provided will lead to an attractive residential community with good, proximate access to different types of open space amenity.[36]

    (c) the design retains important components of the existing landscape, including landform, existing waterways, and vegetation within the Waikato River Esplanade Reserve. [37]

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35 Evidence-in-chief of Mr Mentz, at [53].

36 Evidence-in-chief of Ms de Lambert, at [30].

37 Evidence-in-chief of Ms de Lambert, at [24].

90. No party has offered expert evidence disputing the high level of urban amenity that will be provided by the proposal. This means that any consideration of the proposal's urban design effects and the applicable objectives and policies of the District Plan should be determined in favour of achieving the sustainable management purpose of the Act.

Managing effects on long-tailed bats

91. It is fair to say that the ecological management of the long-tailed bats is the most contentious issue that needs to be considered by the Panel.

92. There exists at the time of preparing these submissions a clear difference of expert opinion between the ecologists for Weston Lea and the ecologists for DoC and RESI as to whether the proposal appropriately manages the actual and potential effects on long-tailed bats.

93. As discussed,[38] unless further expert caucusing can resolve these differences, the Panel will need to evaluate and make judgements in respect of the competing ecological evidence.

94. The task is somewhat simplified in the present case because the facts are generally agreed between the experts. It is the expert opinion, as between the ecologists for the different parties, where the significant evidential differences exist.

95. The Panel will be aware that consideration of competing expert opinion requires an evaluative judgement of those opinions against the relevant facts. The Environment Court has identified, in the course of several different decisions, a range of principles that provide some guidance as to how to weight competing expert evidence, including:[39]

(a) The expert's experience and qualifications;

(b) Simplicity and ease of understanding of the evidence;

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38 Under the sub-heading *Hot tubbing of ecological evidence for Weston Lea*.

39 *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC) at [144]-[145]; *Stokes v Christchurch City Council* [1999] NZRMA 409 (EnvC) at [47],[52], [84]; *Scurr v Queenstown Lakes District Council* EnvC Christchurch C060/05, 29 April 2005 at [52]; and *Briggs v Christchurch City Council* C45/2008, 2 May 2008 at [120], [238]-[249].

(c) The way in which the expert has applied their professional judgment to the facts available, including whether there has been a selective recitation of relevant matters;

(d) The extent of any of their own analysis or fieldwork undertaken; and

(e) Whether the witness has been partisan in their criticism of other witnesses or there has been an underlying degree of advocacy.

96. These principles indicate that the decision-maker is ultimately required to make a value judgment as to whose expert opinion is preferred. One way to look at this issue is, after hearing competing expert evidence, who does the decision-maker feel persuaded is correct?

97. Bat experts from all parties broadly agree that the Waikato River margin, 'minor gully' and E-W shelterbelt are key habitats of high-value for bats within the site. Bat experts from all parties also agree that residential development within the main body of the site will effectively render this environment impermeable to bats, changing their behaviour so that they no longer traverse over these areas.

98. There is less consensus on the value of more marginal habitat (isolated trees and pasture), as DoC and RESI experts do not assess the relative values of features, but rather identify all features that bats use (or potentially use) as significant, and therefore of high value. Dr Borkin, Dr Parsons and Ms Cummings provide a detailed insight into how bats use the landscape, while the latter two experts make clear statements identifying which habitats are important to bats and which are not.

99. Weston Lea's ecologists identify the bat habitats within the site that the bat population frequents and relies on, and the requirements for protection and maintenance of these features and functions on the site. Mr Serjeant concludes that the proposal meets achieves the purpose of the Act, and RPS policy provisions which require protection of significant ecological features. This is because key habitats for bats are permanently protected and enhanced to the extent that the significant values on the site are not compromised.

100. Dr Barea and RESI's ecologists object to the appropriateness of the proposed development on the basis that the site contains significant ecological features (or is significant as a whole).

101. Uncertainty with respect to the importance of potential roost trees, the viability of proposed mitigation (particularly that associated with the vegetated buffer), and the untested nature of the proposed "buffered linear meadow" habitat enhancement are key points of contention between Weston Lea ecologists and those of opposing parties. The extent to which some uncertainty is acceptable is also an area of disagreement, as is the likely impact of failure.

102. Dr Barea and RESI's ecologists contend that any uncertainty is unacceptable, while potential consequences may extend to extinction of the Hamilton bat population. In asserting these opinions, these experts give no weight to the documented examples of bat activity adjacent to residential areas in Hamilton.

103. In contrast, technical reports provided with the application and the evidence of Dr Parsons and Ms Cummings detail potential risks to bats associated with the application, specify methods to mitigate these risks, and outline adaptive management responses to address residual risks that are inherent in predicting future outcomes.

104. DoC and RESI's ecologists generally exclude the proposed mitigation for bats from their consideration of effects, on the basis of their lack of confidence in the viability of these measures. However, we are left with no clear understanding of their opinions on whether, should the mitigation work, the project would adequately address effects on bats.

105. Furthermore, none of the opposing experts weigh the counterfactual scenario of avoidance but no mitigation, and in particular the absence of any protective mechanism for key habitat features if the proposal were not to proceed.

106. I submit that if the Panel accepts the ecological management measures proposed can be successfully implemented, and can be reasonably expected to perform as the Applicant's ecologists envisage, little weight should be given to the opinions of DoC and RESI's ecologists concerning the potential effects of the proposal on bats because their evidence is based on a scenario absent any future management or enhancement of significant bat habitat on the Amberfield site.

Provision of a sports park

107. The Council's s.42A report offers the view that a 7ha sports park area should be shown on the scheme plans as a single lot to vest as recreation reserve to be consistent with an indicative location under the PSPA.[40] Evidence lodged by the Council, as submitter, also requests that the application is amended to provide for a 7ha active recreation reserve around the indicative location under the PSPA.[41]

108. Weston Lea's AEE acknowledges the PSPA's indicative notation of an "Active Recreation" area in the southern part of the Amberfield subdivision and the Council's stated desire for a 7ha sports park to be provided within proximity of that notation.[42] The application was designed on the basis that it could accommodate a future sports park of approximately 7ha, but Weston Lea has made it clear that development of the sports park in the area is contingent on Council's initiatives to purchase and develop the land.[43]

109. This remains Weston Lea's position. There is no legal requirement for Weston Lea to provide a 7ha sports park within the Amberfield subdivision, either to comply with relevant District Plan provisions or to address the effects of the application. It is incumbent on the Council to secure the land it requires for an active recreation area separate from this resource consent process. The application does not prevent the Council from taking this course of action.

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40 Section s42A report at paragraph [211], and recommended condition 101. See also Appendix I to the section 42A report, prepared by Sean Stirling, Planner, HCC's Parks and Open Spaces Unit, pages 14-19.

41 Statement of evidence of Jamie Sirl on behalf of the Council dated 23 April 2019 at [97].

42 AEE, section 2.5

43 AEE, section 2.5, and AEE Addendum, Appendix H – Open Space Framework (Amended 14/02/2019).

110. There is no rule under the District Plan that requires an applicant for consent to provide an active recreation area within proximity to the indicative locations noted on the PSPA. In terms of the PSPA objectives and policies contained with Chapter 3 of the District Plan, Mr Serjeant considers that the application is consistent with these provisions.[44] Mr Serjeant notes that while the scheme plan layout depicts approximately 110 residential lots in that area, the roading pattern has been designed to facilitate the sports park and the scheme plan does not preclude a future 7ha sports park.[45] Mr Serjeant also notes that due to the staging of the subdivision it will be several years before either ss.223 or 224 procedures are completed for the scheme plan in this area. This allows the Council ample opportunity to convert its Long Term Plan funding allocation for recreational purposes into a firm offer for the land in question.[46]

111. In relation to addressing any *"adverse effects of the activity on the environment"*, the evidence demonstrates that, at most, the future Amberfield population will generate demand for sports park land of between 2.48 and 2.76 hectares consistent with the existing level of service within Hamilton City.[47] This is significantly less than the 7ha that the Council has suggested should be provided to it by Weston Lea.

112. However, even this evidence does not mean that Weston Lea should be required to set aside 2.76 hectares of land for sports park:

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44 Evidence-in-chief of Mr Serjeant at [89].

45 Evidence-in-chief of Mr Serjeant at [87].

46 Evidence-in-chief of Mr Serjeant at [89].

47 Evidence-in-chief of Dr Doug Fairgray, at [58]. As noted by Dr Fairgray, the upper end of the range is the land area requirement identified within the Xyst (2018) report, and the lower end is calculated by applying the same level of service to the lower alternative future Amberfield population implied in Dr Small's evidence (at [56]).

(a) Dr Fairgray's evidence is that this remains an upper bound estimate of sports park area required to meet the equivalent rate of demand within the PSPA. This is because fields could potentially be supplied at a higher quality (than the existing identified low quality within Hamilton City) and therefore support the same number of usage hours with fewer fields. An alternative scenario for maintaining existing levels of service may also be to develop additional fields within Hamilton City's existing sports parks.[48]

(b) The evidence-in-chief of Mr Serjeant and Dr Fairgray adds that it would inefficient, and contrary to the Council's 2018 Open Space Provision Policy requirements, for Weston Lea to provide a 2.5ha sports park.[49] Indeed, this is presumably why the Council develops larger fields across the city and recovers funds from developers for these via development contributions under the LGA.

(c) Dr Small's evidence is also that fragmentation of this nature would be inefficient, but he also notes that to avoid this it requires a proactive strategy by HCC to acquire the relevant land, develop it and share the costs in a reasonable and efficient way.[50] Mr Sirl for HCC, as submitter, also accepts that it would not be suitable for Weston Lea to provide the equivalent of a 2.76ha sports park, as it would not result in a functional or efficient sports park.[51]

113. Weston Lea should not be punished or burdened by HCC's failure to proactively acquire the land it requires for sports parks to support the future population within the PSPA:

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48 Evidence-in-chief of Dr Doug Fairgray, at [70].

49 Evidence-in-chief Mr Serjeant at [86], Evidence-in-chief of Dr Fairgray, at [66].

50 Evidence-in-chief of Dr John Small, at [55].

51 Statement of evidence of Mr Sirl, at [73].

(a) The appropriate mechanism for the Council to secure the land it requires for an active recreation area would be through a designation and/or through negotiation to purchase the land, or other means of acquisition. Mr Sirl, on behalf of the Council as submitter, acknowledges that the Council has previously acquired land for sports parks identified on structure plans through negotiations with land owners, with the land then vesting as part of the subdivision process.[52] However, as explained in the evidence of Mr Duncan, no direct offers have been made by the Council to purchase the land or formalise any sort of acquisition process.[53]

(b) The failure of the Council to proceed with a more formal mode of acquisition, such as a notice of requirement for a designation, contrasts to the process the Council is intending to undertake to secure a sports park in the northern area of the PSPA.[54]

(c) Notably the relevant legal tests for a notice of requirement require consideration to be given to whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought.[55] This is the statutory pathway for examining whether the Council is correct in its contention that it needs 7ha of sports park within the Amberfield site.

(d) The fact that Weston Lea opposes the Council's request for land to be set aside as sports park within Amberfield does not mean that it will not be required to contribute to the provision of future sports parks. It is expected that Weston Lea's contribution will be recovered directly by the Council through development contributions, or via a DA agreed between the parties, under the LGA.

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52 Statement of evidence of Mr Sirl, at [64].

53 Evidence-in-chief of Mr Duncan at [26], and evidence-in-reply of Mr Duncan at [5].

54 Evidence-in-chief of Mr Serjeant at [88], Evidence-in-chief of Mr Duncan at [26].

55 Sections 168A(3)(c) and 171(1)(c), RMA.

(e) In terms of the proposed location of a sports park, while the subdivision has been designed to accommodate a sports park (given the notation in the Structure Plan), HCC as submitter has only very recently provided additional analysis to support the work undertaken in 2006 on the potential sport park locations within the PSPA.[56] This analysis identifies a sports park within Amberfield as one of two preferred locations to accommodate the needs of the future population in the PSPA.[57] However, as noted in Dr Fairgray's evidence-in-reply, there appear to be some questions over the Council's latest location assessments.[58] In my submission this further reinforces the need for there to be appropriate statutory steps to taken by the Council if the land is to be set aside.

114. Even if the Commissioners are minded to impose the 7ha sports park condition sought by the Council (as consent authority and submitter), there are serious legal questions as to the lawfulness of any such condition. As discussed above, the recent amendments to the RMA provide that a condition may only be imposed if it is *"directly connected"* to either *"an adverse effect of the activity on the environment"* or *"an applicable district or regional rule, or a national environmental standard."*[59] The 7ha sports park condition does not satisfy these tests.

115. Furthermore, there has been no suggestion by HCC that a financial contribution might be imposed under ss.108(9) and (10) of the RMA as a mechanism to secure the sports park land. It is presumed that this is because HCC, as submitter, accepts that its District Plan provisions regarding financial contributions could not form the basis for requiring a financial contribution (by way of land) to secure the 7ha of land it seeks within Amberfield.

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56 See *"Peacocke Active Sports Parks Location assessment*" dated 12 April 2019 attached to the statement of evidence of Mr Mark Roberts on behalf of HCC as submitter. This supplemented the earlier report *'A Peacocke Structure Plan Landscape and Urban Design Assessment*' (June 2006) prepared by Boffa Miskell for Hamilton City Council, referred to in the statement of evidence of Mr Sirl, at [55].

57 Statement of evidence of Mr Mark Roberts at [21].

58 Evidence-in-reply of Dr Fairgray, at [21] – [23].

59 Section 108AA(1)(a), RMA.

116. It is submitted that the sports park condition recommended under the s.42A Report condition, and sought by the Council, as submitter, is unlawful. It does not relate to an adverse effect of the proposed activity or an applicable rule, and Weston Lea does not agree to it.

Infrastructure matters & LGA development agreements

117. The evidence by Weston Lea's witnesses demonstrates that all infrastructure provided by Weston Lea to service the Amberfield development (including internal roading and three waters) will provide the required level of service.[60] Further, all infrastructure provided will align with the Council's strategic offsite infrastructure, notably:

(a) wastewater will be pumped to the HCC's Far Eastern Interceptor (**FEI**) consistent with HCC's wastewater solution for the PSPA;[61] and

(b) the subdivision design is compatible with HCC's Peacockes Road Southern Links designation and the upgrade of Peacockes Road to minor arterial standard.[62]

118. The s.42A Report officer confirms that she is satisfied that all infrastructural and servicing matters can be appropriately addressed through conditions of consent and any associated effects will be no more than minor.[63] Mr Parsons, on behalf of the Council as submitter, also confirms that all infrastructure provided as part of the application, and as explained in Weston Lea's evidence in support of its application, is in alignment with the Council's expectations and the draft Private Development Agreement (**PDA**).[64]

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60 Evidence-in-chief of Mr O'Callaghan, [25] – [59]. Evidence-in-chief of Mr Penny, at [20]-[38].

61 Evidence-in-chief of Mr O'Callaghan, [71] – [97].

62 See evidence-in-chief of Mr O'Callaghan, [98] – [102]. Evidence-in-chief of Mr Penny at [40] – [52]. I note that the transportation report attached to the s.42A report noted that the Weston Lea's proposed alignment for the interim collector road upgrades is not consistent with the requiring authorities current arterial design, however as Mr Penny notes in his evidence-in-chief this is not consistent with previous discussion with HCC and the Joint Witnessing Statement of transportation witnesses (see [156]-[167]). Further, Mr Parsons, on behalf of HCC as requiring authority, confirms that the works proposed by Weston Lea are compatible with the HCC's Southern Links designation (see [14(c) of his statement of evidence).

63 Section 42A report, at [190].

64 Statement of evidence of Mr Andrew Parsons dated 23 April 2019, at [14].

119. However, Mr Parsons goes further and requests that a condition precedent is included in the subdivision and land use consents requiring the consent holder to enter into a PDA with the Council, on terms satisfactory to Council, dealing with these infrastructure matters, and that land use and subdivision not proceed until such time as that agreement is in place.[65]

120. The condition requested by Mr Parsons is inappropriate and unlawful. Legally there is no requirement to enter into a PDA with the relevant local authority prior to a hearing on a resource consent application under the RMA. Development contributions and PDAs are dealt with separately under the Local Government Act 2002 (**LGA**) and are not relevant resource management matters under the RMA.

121. This separation is confirmed by the s.207D of the LGA that provides that a territorial authority or other consent authority must not refuse to grant or issue a resource consent, certificate, or authorisation (as the case may be) on the basis that a development agreement has not been entered into.

122. Further, in the past the Planning Tribunal has indicated that it will not condone consent authorities engaging in attempts to "sell" resource consents.[66] It is my submission that a condition requiring a development agreement to be entered into would be unlawful, and unable to be enforced.

123. In any event, as noted above on the evidence of the Council itself there is no *prima facie* reason why such a condition is required to ensure that the strategic infrastructure provided aligns with the Council's intentions as it already does. Any other matters in relation to the appropriate cost share arrangement are not relevant to the assessment of the application under the RMA, and will be dealt with under the LGA processes, either by development contributions or under a PDA, if agreed.

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65 Statement of evidence of Mr Andrew Parsons dated 23 April 2019, at [13] and [15].

66 In *Bletchley Developments v Palmerston North City Council* [1995] NZRMA 337 (PT) the Tribunal noted that a consent authority may not put a resource consent application on hold while it negotiates with the applicant the cost of works it would like the applicant to do. To put such pressure on an applicant to reach agreement so that the application process may resume could amount to an abuse of power.

124. One other infrastructure matter raised I would like to touch on is the management of stormwater overland flow paths on individual lots. In the section 42A Report, the Council has recommended a condition that would require easements to be provided over the downslope properties in favour of the upslope properties in order to convey stormwater flows.[67]

125. The evidence-in-chief of Mr O'Callaghan has addressed this issue and notes it is not appropriate to require easements in respect of the overland flow path of stormwater.[68] This is consistent with the legal position of natural servitude, under which lower land is obliged to receive surface water which falls naturally from higher land.[69] Any stormwater to be discharged will not have been the subject of active collection or brought onto the land from another site, and so cannot be subject to an easement.[70]

126. For this reason, Weston Lea has requested the deletion of proposed condition 144, as indicated in the evidence-in-chief of Mr David Serjeant.[71]

Land-use consent conditions & long-term monitoring

127. The Council's s.42A Report has recommended a suite of conditions that relate to the subdivision application only. The Council Officer notes that it is anticipated that most of the conditions relating to all stages of the subdivision consent will also apply to the land use consent.[72]

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67 Section 42A Report, at [181] and Attachment 4 – Condition 144; Statement of Evidence of Caleb Clarke dated 29 March 2019 (Appendix G(a) to the Section 42A Report) at [37].

68 Evidence-in-chief of Mr Ray O'Callaghan dated 12 April 2019, at [140] – [141].

69 This is a well-established doctrine at common law, fully explained in F M Brookfield *Laws of New Zealand* Water (online ed) at [86].

70 Natural servitude does not extend to water which the owner of the higher land has brought onto the land. It is not possible for the doctrine of natural servitude to be registered, as there is no method under the land transfer system that would allow this. (F M Brookfield *Laws of New Zealand* Water (online ed) at [86]). See also *Palmer v Bowman* [2000] 1 WLR 842 for English Court of Appeal authority on this point.

71 Evidence-in-chief of Mr David Serjeant dated 12 April 2019, Annexure C, at [10(f)], and evidence-in-reply of Mr David Serjeant at condition 146.

72 Section 42A report, at [288].

128. Mr Serjeant states in his evidence-in-reply that he is generally comfortable with this approach as there is a considerable degree of overlap between the activities.[73] However, he considers that the conditions relating to Ecological Management and Monitoring should only be included on the land use consent. This is because these conditions relate to environmental effects that are enduring beyond the issue of title (principally the planting and monitoring for the long-tailed bat). It is not appropriate for the Ecological Management and Monitoring conditions to be included on the subdivision consent as upon issuing of title these conditions would need to be included in consent notices pursuant to s.221 of the RMA, and this would effectively transfer Weston Lea's long-term consent obligations to future landowners. This would be unfair and unenforceable when it comes to such things as the ecological conditions which require the implementation of an Ecological Management and Monitoring Plan over a number of years.

129. Weston Lea is conscious that it will need to comply with these conditions over a number of years and beyond the issue of title. While Weston Lea is confident the company will be in a position to perform all ongoing obligations associated with the proposed development in the years to come, it recognises the importance of providing some further assurance that the Ecological Management and Monitoring package will be implemented as is provided for in the conditions. As such, The Adare Company Limited (**Adare**), the Peacocke family's landholding entity, is willing to provide a guarantee to the Council, that these particular conditions will be performed.

130. Mr Jonathan Peacocke, a director of Weston Lea and Adare, has provided a brief of evidence confirming the relationship between Weston Lea and Adare and that Adare is willing to provide a guarantee to the Council.[74] Mr Serjeant's evidence-in-reply also includes a condition that ensures this guarantee will be provided prior to Weston Lea exercising the consent.[75]

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73 Evidence-in-reply, at [31].

74 Supplementary evidence of Mr Peacocke, dated 1 May 2019.

75 Evidence-in-reply of Mr Serjeant, condition 100.

Wastewater pipe & tangata whenua concerns

131. Mr Ray O'Callaghan states in his evidence-in-chief that HCC requires the wastewater from the Amberfield site to be pumped to the Far Eastern Interceptor (**FEI**) on the northern side of the Waikato River.[76]

132. This means Amberfield will need to connect to the FEI prior to HCC's proposed Transfer Pump Station and Transfer Pipeline becoming operational (which requires to the new bridge to be constructed).

133. Weston Lea will drill and lay a temporary pipe beneath the Waikato River to connect into the pipeline to the FEI. The temporary pipe beneath the river would be decommissioned as soon as the permanent transfer pipeline on the new bridge becomes operational. This is expected to be completed by 2023 as part of the Council's Housing Infrastructure Fund works.[77]

134. During Weston Lea's consultation with the Tangata Whenua Working Group (**TWWG**), the TWWG expressed concern about the installation of the proposed wastewater pipe under the river.[78] Their concern related to the potential leaking and discharge of wastewater from the pipe to the river given the metaphysical and spiritual importance of the Waikato River to tangata whenua.[79]

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76 Evidence-in-chief of Mr O'Callaghan, at [79].

77 Evidence-in-chief of Mr O'Callaghan, at [82]. Section 42A report, at [26].

78 Evidence-in-chief of Mr Serjeant, at [120]-[121].

79 Evidence-in-chief of Mr Hill, at [63], evidence-in-chief of Mr Serjeant, at [121].

135. The TWWG met with Mr O'Callaghan on several occasions to discuss the reasons for laying the pipe as a temporary connection to the FEI and related technical issues such as route, design, and construction.[80] Mr O'Callaghan's evidence discusses the pipe's dimensions and construction details, including the pipe's installation via directional drilling and the robust testing to ensure integrity of the pipe.[81] Mr Norm Hill states in his evidence that the TWWG ended up agreeing that the pipe under the river and the connection to the FEI provided adequate mechanisms to ensure that no leakage or discharge would occur. A letter from the TWWG in support of the sub catchment Integrated Catchment Management Plan was signed and provided to this effect on 9 July 2018.[82]

136. The TWWG lodged a submission in support of the application (submission 41). The TWWG's submission notes their concern regarding the wastewater pipe and requests that the pipe be limited in time, at the earliest opportunity, to the installation of the permanent pipe which will attach to the new bridge.

137. The pipe is only intended to be a temporary option, likely three years at most, and will be decommissioned as soon as the permanent transfer pipeline on the new bridge is operational. Mr Serjeant has proposed a condition confirming Weston Lea's commitment that the pipeline will be decommissioned as soon as reasonably possible.[83]

138. Te Haa O Te Whenua O Kirikiriroa (THaWK), an iwi group representing local mana whenua on issues relating to Hamilton's natural resources, has also lodged a submission in support of the application (submission 60). This support is based on their view that Weston Lea's consultation with mana whenua was successful and appropriate mitigation measures are provided.

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80 Evidence-in-chief of Mr Hill, at [66]. Evidence-in-chief of Mr Serjeant, at [121].

81 Evidence-in-chief of Mr O'Callaghan, at [89] – [97].

82 Evidence-in-chief of Mr Hill, at [52], [66].

83 See new condition 130 attached to the evidence-in-chief of Mr Serjeant.

139. Waikato-Tainui (submission 52) has lodged a submission opposing the application due to concern over the installation of the wastewater pipe under the Waikato River. Specifically, the submission states that the Waikato River Clean Up Trust (**Trust**) has not been formally consulted as per s.47 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (**Waikato River Act**).

140. However, s.47 of the Waikato River Act is not triggered by Weston Lea's application. Rather, it requires consultation with the Trust in relation to specified activities requiring resource consent from the Waikato Regional Council (**WRC**) and HCC. Weston Lea's application does not require consent for any of the specified activities. In particular:

(a) The proposed temporary pipe under the river is a permitted activity under the Waikato Regional Plan and does not require consent. Weston Lea has not sought resource consent for this activity.[84] Resource consent may be required from WRC for the earthworks associated with the establishment of the belch pits for the drilling activities. However, these will be at least 50-100 metres back from the river edge[85] and do not trigger the consulting requirements of s.47.

(b) The consultation requirements of s.47 only relate to applications to the HCC for the use of (or activities on) the surface of the water in the Waikato River.[86] The proposed development does not involve any use activities involving the surface water in the Waikato River.

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84 Evidence-in-chief of Mr Serjeant, at [120]. Section 42A report, at [111].

85 Evidence-in-chief of Mr O'Callaghan, at [91].

86 Section 47(1)(b), Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

141. Mr Serjeant notes that if the pipe is not located within HCC's designation corridor then resource consent will be required from HCC, due to the pipes passage underneath an SNA and the Waikato Riverbank and Gully Hazard Overlay. Mr Serjeant does not anticipate that such a consent would be difficult to obtain given the directional drilling methodology that will be employed.[87] Mr O'Callaghan notes the final alignment of the pipe will be refined at a detailed design stage and will involve liaison with HCC and their bridge designer/contractor.[88]

142. Mr Hill considers the Waikato-Tainui submission is probably the result of a misunderstanding as to what was discussed and agreed between Weston Lea and the TWWG.[89] He notes that some members of the TWWG were unable to attend all the hui that took place with Weston Lea, and resulted in those members missing out on discussions that led the TWWG to agree that the construction and use of the pipeline on a temporary basis.

143. Mr Hill states that, in any event, the TWWG has the mandate of the Waikato-Tainui iwi authority, Te Whakakitenga o Waikato Incorporated, to work with Weston Lea and consult with mana whenua.[90]

87 Evidence-in-chief of Mr Serjeant, at [120].

88 Evidence-in-chief of Mr O'Callaghan, [97].

89 Evidence-in-chief of Mr Hill, at [67].

90 Evidence-in-chief of Mr Hill, at [67].

EXERCISE OF DISCRETION

144. As discussed, the Panel when exercising its discretion under s.104B should consider the effects of the proposal against appropriately weighted objectives and policies of the District Plan.

145. The Court of Appeal's decision in *Davidson Family Trust* indicates that where there are effects (positive and adverse) of the proposal that are not provided for through the objectives and policies of the District Plan the same evaluative exercise should be undertaken in the context of Part 2 of the Act.

146. The present application satisfies the urban objectives and policies of the District Plan and in doing so achieves the purpose of the Act.

147. The objectives and policies of the District Plan do not make provision for important ecological areas that sit outside scheduled SNAs. Nevertheless, Weston Lea's ecologists have identified a number of ecological areas within the Amberfield site that are of significant value.

148. They have proposed an ecological management plan for those areas that recognises and provides for their significance under Part 2 of the Act. In particular, the management plan will appropriately mitigate the short-term effects of the proposal on the long-tailed bat located in proximity to the site. In the longer term, the proposal will protect and restore the important areas of habitat on the site in a manner that will ultimately create a far superior habitat for the long-tailed bat than presently exists.

149. It is submitted that, in the circumstances, these matters weigh in favour of a determination that the proposal can be granted consent.

Dated this 2nd day of May 2019

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Robert Makgill / Kate Woods
Counsel for Weston Lea Limited