IN THE MATTER OF	**THE RESOURCE MANAGEMENT ACT 1991**
AND IN THE MATTER OF	**AN APPLICATION FOR SUBDIVISION AND LAND USE CONSENT FOR THE AMBERFIELD DEVELOPMENT**
BETWEEN	**WESTON LEA LIMITED** Applicant
AND	**HAMILTON CITY COUNCIL** Consent Authority

OUTLINE OF LEGAL AND OPENING SUBMISSIONS OF COUNSEL FOR RIVERLEA ENVIRONMENT SOCIETY INCORPORATED

Dated: 8 May 2019

Scope of submissions

These submissions address the following matters:

1. Response to the absence of District Plan scheduled SNAs to protect indigenous fauna and habitat;
2. Application of the District Plan objectives and policies;
3. RMA s104D "gateway" tests;
4. Reliance on management plans;
5. Adaptive Management;
6. Southern Links conditions
7. Options available to the Commissioners

Response to the absence of District Plan scheduled SNAs to protect indigenous fauna and habitat

1. The absence of District Plan scheduled SNAs to protect significant habitats of indigenous fauna is an unfortunate but unavoidable factor in this case. It appears clear from the expert evidence that parts or all of the Amberfield site would be scheduled as SNA if fauna protection had been a focus of the report upon which the SNA scheduling was based. It is noted that the report includes a recommendation that a fauna survey be undertaken to enable the SNA identification in the District Plan to be completed. That recommendation was made in 2012. (extracts are attached as Appendix A)

2. The Court of Appeal decision in *RJ Davidson Family Trust v Marlborough District Council* (2018) 20 ELRNZ 367 clarified the role of part 2 RMA considerations in the resource consent application context. The decisions specify circumstances when resort to part 2 RMA considerations will be appropriate. The *Davidson* decision confirms that it will be appropriate to refer to part 2 RMA considerations where the District Plan provisions do not constitute a

robust implementation of a National Policy Statement, Regional Policy Statement or other superior policy instrument. That is the case here, where there is an absence of SNA scheduling for significant fauna habitat. The District Plan should give effect to the policies of the RPS by scheduling fauna-based SNAs..

3. In the absence of a fauna based SNA schedule, there is a clear need to resort to the Waikato Regional Policy Statement policies and methods for protection of significant habitat of indigenous fauna and resort to the relevant RMA part 2 provisions. Particular reliance needs to be placed on section 6(c), which is the driver for inclusion of the SNA provisions in the Regional Policy Statement and in District Plans. That requires a consent authority determining a resource consent application to recognize and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

4. The resort to part 2 RMA is not simply a resort to a general balancing exercise based on section 5 RMA. The provisions of sections 6, 7 and 8 require close attention. The particular failing in the District Plan relates to implementation of Section 6(c) and the related RPS provisions. In that context, the most critical RMA Part 2 matter for consideration is section 6(c), with guidance on its implementation being taken from the RPS and from the approach that has already been taken on that issue in chapter 20 of the District Plan.

5. The relevant provisions of the RPS are addressed later in these submissions.

6. If the District Plan had given effect to the RPS in relation to significant habitat, there is no reason to expect that the District Plan

would have taken any different approach to fauna based SNAs than has been taken in relation to flora based SNAs. It would be logical to assume that the same or similar policies would be applied, with a strong emphasis on the avoidance of adverse effects on the values that have led to the scheduling of SNAs.

Application of the District Plan objectives and policies

Objectives and Policies in Chapter 20

7. There is a suggestion in the s42A report that the policies in chapter 20 of the District Plan referring to avoidance of adverse effects should be treated as "aspirational" policies, rather than directions to avoid the specified effects. (s42A report paragraph 217).

8. There is no reason to "read down" the policies in chapter 20 of the District Plan to treat the policies as being anything short of directions to avoid adverse effects on the relevant values of scheduled SNAs.

9. The timing of creation of the chapter 20 policies prior to the Supreme Court decision in *Environmental Defence Society v NZ King Salmon Company Ltd* [2014] NZSC 38 provides no justification for "reading down" the policies on avoidance of adverse effects.

10. That decision must necessarily apply to planning instruments that were created prior to the decision, as the decision itself related to implementation of policies in an existing Coastal Policy Statement.

11. The effects avoidance policies in chapter 20 of the District Plan must be implemented as they are written, not read down as being "aspirational" or for guidance only.

12. The Commissioners have heard submissions and evidence to the effect that the chapter 20 objectives and policies are of limited relevance to this application because they relate to SNAs that are scheduled in the District Plan, not to any unscheduled areas that may qualify as SNAs. That issue has been left to the Department of Conservation to argue. The issue is taken up in the Department's planning evidence and will no doubt be taken up in legal submissions as well.

13. The approach taken by RESI under chapter 20 is that the policies in that chapter are directly relevant and important to this case, because the activities proposed by the Applicant are likely to cause adverse effects on the values that give some of the nearby scheduled SNAs their significance.

14. It is clear from the 2012 SNA report that Hammond Bush was recognised as SNA partly because of its value as habitat for indigenous fauna. (Extracts are in Appendix A).

15. The objective 20.2.1, policies 20.2.1(c), 20.2.1(d), 20.2.1(d 20.2.1(f), 20.2.1(i), 20.2.(k), 20.2.1(n)) (at Appendix C) are all directly relevant if the Commissioners accept the proposition that activities in the Applicant's development area may have impacts on the longtailed bat use of Hammond Bush and other SNAs in locality, and may have effects on the valued characteristics of those locations. It is clear from those policies that the protection should not only be against effects of activities taking place within the SNAs themselves, but any activities that affect the SNAs.

16. The RESI evidence refers to 5 extracts from the evidence, including information provided by the Applicant, indicating the potential for loss of values in the SNA at Hammond Park. (Copied

at Appendix B, extract from paragraph section 4.2 protecting SNAs from adverse effects, page 5).

17. The potential effects of the proposal on at least the scheduled Hammond Bush SNA appears to have been given little if any attention in the objectives and policies assessments in the s42A report and the Applicant's evidence. The focus has been on the effects caused to the values of SNA's by activities within those areas.

Objectives and Policies in ODP Chapter 3.4 Peacocke Structure Plan

18. On Day One the Chairman raised the issue of District Plan policies for residential development in this locality in a question to legal counsel for the Applicant. The question posed was whether the clear policy provision in favour of residential development at this location may indicate that the District Plan anticipates a relatively low level of protection for bats in this locality.

19. I expect that proposition was not meant as a genuine interpretation of those competing policies, but as an opportunity to discuss the way in which the pro-development policies for Peacocke fit with the policies for avoidance of adverse effects of significant habitats of indigenous fauna.

20. The two sets of policies can and must co-exist and be considered for all development within the Peacocke area. The intention for residential development in the Peacocke Structure Plan area is absolutely clear, as are the provisions in section 6(c), the RPS and the District Plan for protection of significant habitats of indigenous fauna. Residential development at Peacocke must be enabled, but in a manner that achieves the protections required by section 6, the RPS and the relevant District Plan Policies.

21. There are relevant policies within the Structure Plan section 3.4 in the District Plan, which confirm the need for the specific development proposals at Peacocke to be designed to provide the required environmental protections.

22. As an example, the Structure Plan "key principle" relating to *concentration* is clear about the relationship between density and intensity of use and preservation of the ecological integrity of the area.

Concentration:

Ensure that future development is undertaken at an appropriate density and intensity of use that preserves and restores the ecological integrity of the area while improving the quality of life for residents, facilitating a vital economy, and promoting the efficient use of land and community assets.

That is not a policy direction that promotes concentration of residential development as a priority over ecological integrity of the area.

23. As a further example, the principle for *Contextual Design*:
Ensure that future development considers the natural environment, built environments and how development fits into the surrounding areas as part of the design solution. This will help to establish the quality of development wanted for the area.

24. Many components of the statements of policy about the development of Peacocke refer to the key consideration of the natural environment as part of the design and development process. For example, the opening sentence in 3.4(c) of the Structure Plan text, the repeated references to the natural

environment and ecological integrity of the area, and the reference under the heading “vision” to environmental responsibility.

The vision for the Peacocke area is that it will become a high quality urban environment that is based on urban design best practice, social wellbeing and environmental responsibility. The goal for Peacocke is that development 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.

25. The policies relating to the Peacocke natural system at 3.4.1.1 and 3.4.1.2 are clear about the importance of protecting and enhancing significant natural areas. (Appendix C)

The Structure Plan map Figure 3.4(a) shows a generous future reserve area between the residential development and the north eastern river margin. The extent of that future reserve is the subject of evidence by RESI witnesses who were involved in the development of that map.

Chapter 21 Waikato River and gully systems

26. The objectives and policies again include directly relevant polices concerning the ecological values of the River corridor and gully system. The relevant objectives and policies are in Appendix C.

Subdivision objectives and policies

27. The subdivision policies in Appendix C are also directly relevant to this application.

28. Any assessment of consistency or conflict with the relevant District plan objectives and policies under Section 104D or section 104(1)(b)(vi) must include consideration of the ecological objectives and policies in chapter 3.4, chapter 21 and Chapter 23, alongside those in chapter 20 and the objectives and policies promoting residential development. I note that the s42A report assessment of consistency with objectives and policies in the section 104D context does not pay significant attention to the objectives and policies in chapter 21, Chapter 23 or chapter 3.4.

RMA s104D "gateway" tests

29. I agree with the submissions made by counsel for the Applicant at paragraph 76 of opening submissions:

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

Those submissions are supported by the Environment Court decision in *Crater Lakes Park Limited v Rotorua District Council EnvC Auckland decision 126/09* and *Dye v Auckland Regional Council [2002] 1NZLR337*.

I do not agree with the following submission at paragraph 77 of opening submissions that "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." That is not supported by the authorities. In the present case, the objectives and policies for ecological protection can be

implemented while also considering and implementing the objectives and policies for residential development at Peacocke.

The co-existing sets of policies lead logically to a consideration whether the proposed residential development of the Applicant's site can be undertaken in a way that recognises and applies both sets of objectives and polices. It is the position of RESI that this can be achieved, but not through the Applicant's current proposal. This development can and should contain greater provision for protection of the habitat of longtailed bats, in order to be a proposal that is not contrary to the objectives and policies when considered holistically.

30. The expert planning witnesses have each examined the Applicant's proposal alongside the two "gateway" tests in section 104D RMA. RESI has not filed expert planning evidence, but supports the planning evidence for the Department of Conservation given by Mr Riddell. RESI contends that the proposal, as it currently stands, does not pass either of the tests in Section 104D.

31. The planning witnesses appear to agree unanimously that the proposal does not pass the adverse effects test specified in Section 104D(1)(a).

32. There are differing views amongst the planners about the proposal's status under the objectives and policies test specified in section 104D(1)(b).

A consent authority may grant a resource consent for a non complying activity only if it satisfied that either

(a) (minor effects test); or

(b) The application is for an activity that will not be contrary to the objectives and policies of

(i) The relevant plan, if there is a plan but no proposed plan in respect of the activity.

33. The objectives and policies for the Peacocke Structure Plan, Chapter 20, Chapter 21 and Chapter 23 all contain strong and relevant objectives and policies seeking to avoid or minimize adverse effects on significant natural areas and other values in the River Corridor and gully systems. The current proposal misses the opportunity to design and implement the subdivision so that those objectives and policies are recognized. The proposal in its current form is contrary to the relevant District Plan Objectives and Policies.

34. Even if the Commissioners do decide that the current proposal passes the second s104D test, the consideration of the Application under s104 is not pre-determined in any way by that conclusion. There can be a decision that consent should not be granted although it is not contrary to the Plan objectives and policies, particularly when the objectives and policies do not implement the Regional Policy Statement.

Waikato RPS provisions

35. Section 104(1)(b)(v) of the Act requires that consideration be given to the relevant provisions of a regional policy statement.

36. Chapter 11 of the RPS provides useful direction in terms of indigenous biodiversity.

37. Policy 11.1 of the PRPS seeks to promote positive indigenous biodiversity outcomes to maintain the full range of ecosystem types

and maintain or enhance their spatial extent. It is important to note that this Policy applies to all indigenous biodiversity, including, but not limited to those areas identified as significant natural areas (SNAs) under section 6(c) of the RMA.

38. The approach in Policy 11.1 looks beyond just SNAs to consider all the different elements that combine to provide for ecosystem functioning. In particular, Policy 11.1 signals through clauses c) and d) the importance of recreating and restoring habitats and connectivity between habitats along with supporting (buffering and/or linking) ecosystems, habitats and SNAs. This recognition that SNAs are part of a broader system can be seen in District Plan Policies 20.2.1e, 20.2.1f, 20.2.1i. These policies apply to actions outside of SNAs that may compromise the values and characteristics of the SNA.

39. PRPS Policy 11.2 applies to areas of SNAs as established by section 6(c) of the Act and identified through the criteria for determining the significance of indigenous biodiversity in Section 11A of the PRPS.

40. Implementation Method 11.2.2 provides some useful guidance in terms of remediation, mitigation and offsetting adverse effects on indigenous biodiversity that cannot be avoided. The method is set out as a hierarchy with avoidance as the preference to remediation and mitigation. Where adverse effects are unable to be avoided, remedied or mitigated then any more than minor residual adverse effects shall be offset to achieve no net loss. However, 11.2.2e) recognises that remediation, mitigation and offsetting may not be appropriate in some circumstances where indigenous biodiversity is rare, at risk, threatened or irreplaceable. It has been agreed by all

of the bat ecologists that the Long Tailed Bat has the status of threatened – nationally critical.

41. Where regional and district plans require an assessment of significant indigenous vegetation and the significant habitats of indigenous fauna that have not been identified by Waikato Regional Council as part of Method 11.2.1, the criteria in section 11A (Criteria for determining significance of indigenous biodiversity) shall be used.

Consideration of competing expert evidence

42. The section 104D considerations and the section 104 considerations require either a resolution of the competing expert opinions about the likely effects of the Applicant's proposal on longtailed bats or determinations that can be made from the undisputed parts of that evidence. It may be of value to consider whether there is sufficient guidance on the effects of the proposal from undisputed facts, before deciding whether the competing and disputed aspects of expert evidence need to be resolved.

43. The expert evidence of Mr Kessels, Dr Stirnemann, Dr Barea, Dr Borkin and Dr Clarkson all include conclusions to the effect that the Applicant's proposal does not provide adequate certainty about the likely success of the Applicant's proposed mitigation measures, to provide adequate management of the adverse effects on long tailed bats.

44. The evidence of Dr Parsons, Ms Cummings and Mr Blayney do not draw such negative conclusions about those effects. Dr Parsons in particular expresses the view that the proposed mitigation will adequately address the effects on bats.

45. There are however some conclusions drawn in the Applicant's expert evidence that reduces the significance of the conflicting expert views. In particular:

At paragraphs 74 and 75of Dr Parsons evidence:

> *74. The time lag between construction-related impacts on this site and effectiveness of mitigation works (e.g. maturity of planting) represents a significant risk to the bats that must be managed.*
>
> *75. Management of this time lap is detailed in the evidence of Mr David Sergeant, which refers specifically to a condition (condition 87) addressing the deferral of development until new vegetation is able to provide an effective buffer between bat habitat and new dwellings along the north east terrace and the east west shelterbelt".*

46. At paragraph 99 of Dr Parsons evidence:

> *I do agree with Mr Kessels that there is a lack of "sound scientific data, determining the extent of the residual effect." It is my opinion that without such evidence the conclusion that additional offset is warranted is incorrect. It is my opinion that the presence (or not) of any residual effect and the mitigation of it must be evidence based.*
>
> At paragraph 100:
>
> *It is my opinion that a monitoring scheme able to account for any unforeseen insufficiencies in the mitigation proposed or unanticipated effects is a more effective approach.*
>
> At paragraph 101:

Should any negative impact on the population remain after mitigation, this will be detected by the proposed 10 plus year monitoring programme detailed in conditions 93-96. Targeted, purposeful intervention would then be possible through the proposed adaptive management framework. Such an approach also removes the need for subjective assessment of the potential presence of scale or residual effects.

At paragraph 102:

Through this approach, I thus agree with Mr Kessels that a wide range of offset or management activities be considered, but only once robust evidence of an effect is detected, and that long term monitoring and funding is required (conditions 93-96).

47. These parts of Dr Parsons evidence indicate uncertainties about the effectiveness of the proposed mitigation and that there is a need to gather further information before that effectiveness can be determined. That expert evidence is well aligned with the findings of the other experts on that particular issue.

48. The Applicant's proposed way of progressing the uncertainty is through an Adaptive Management approach that enables development to go ahead with monitoring in place on a 2-yearly periodic basis. This brings high importance to the consideration whether that type of approach is appropriate in this case where a threatened species is affected. The proposed heavy reliance on management plans in an adaptive management regime is addressed in the following submissions.

Reliance on management plans

49. The use of management plans as a post-consent regulatory tool is a recognised way of providing flexibility and adaptation in management of effects. However, that method has serious shortcomings in terms of the certainty about the effectiveness of the consent in managing adverse environmental effects and in excluding meaningful participation by stakeholders other than the Applicant and the Council.

50. One particular limitation in using the management plan tool is that it removes the appeal opportunity that exists for submitters. The highest level of participation that is available to submitters under a management plan regime is a consultation role.

51. The principles in imposing management plan conditions have been developed by the Courts in a series of decisions including the following:

(a) *Royal Forest and Bird Protection Society v Gisborne District Council decision W26/2009*

A condition must also be certain. That can leave the certifying of details to a delegate, using that persons skill and experience, but cannot delegate the making of substantive decisions.

(b) In *Mountfield Limited v Queenstown Lakes District Council* decision [2012] NZEnvC 262 the Court rejected a biodiversity management plan approach that was proposed by the Applicant, making the following comments:

We have no evidence to reassure us that the claimed stewardship benefits of the proposal would eventuate, particularly given the lack

of detail in what the BMP would require and how that would be funded and maintained in perpetuity. We were left with considerable unease about what had been factored into the proposal, including future land management, and implications for the funding model and the ownership and management structure proposed.

At paragraph 77:

*The consent conditions failed to set out clear <u>outcomes</u> for biodiversity within which the biodiversity management plan, as a <u>process</u> condition dealing with how the outcomes would be met, would operate and could be certified by a Council officer. (*Emphasis added*)*

Where management plans are proposed, there is an expectation that the Applicant will provide evidence demonstrating how the effects of the activity are to be managed under the management plans' objectives and in broad terms how those objectives are to be achieved. Such evidence will be necessary in order to demonstrate that the conditions are appropriate. *Re Canterbury Cricket Association Inc* [2013] NZEnvC 184

52. The proposed consent conditions attached to the s42A report and the conditions proposed by the Applicant contain little in the way of detail on how the effects on longtailed bats would be managed under a management plan, other than by retention of the shelterbelts, development of a strip of vegetation along the Waikato Riverbank and gullies and through steps to minimise the removal of known bat roosts.

53. Specific information should be required about the steps that would be taken to avoid adverse effects of construction works, lighting and activity on the known nearby bat population.

54. In a hearing such as this where there is a very clear central issue, relating to the continued existence and protection of a threatened and nationally critical species, this management plan approach is inappropriate, at least in relation to effects on bats. The Applicant can be expected to present a specific plan for avoidance of adverse effects on the bat population. There are clearly steps that could be taken to avoid or minimise such effects, including revising the staging of development and delaying the development of the land nearest to the northern Waikato River margin until a substantial vegetation buffer is in place to avoid the risk of loss or reduction in the existing bat population.

55. A person certifying a management plan would have little guidance on the specific objectives of the plan and the type of measure that can be expected within the plan. Sufficient information must be available in a management plan consent condition to enable a certifier to check that the plan achieves its stated objectives, through a series of implementation measures that will lead to the intended outcomes.

56. The provisions in RMA section 6, the RPS and in numerous District Plan policies make it clear that the avoidance adverse effects on habitat of significant fauna is the first priority method of addressing adverse effects on the local longtailed bat population. It appears to have been acknowledged by most of the experts that there will be a significant adverse effect on the bat population in the short to medium term if the Applicant's proposal proceeds in the intended sequence and timeframe. The Commissioners may be able to

identify possible alternative ways of developing this part of the development site, that would be likely to avoid adverse effects in the short and long term. Exploration of those options would be a preferable alternative to the management plan approach that has little detail for a certifier to consider it against.

57. The Applicant could be given the opportunity to develop the bat monitoring and management plan as part of this hearing process so that all parties can consider and comment on those plans, and the plan can be assessed by the Hearing Commissioners.

58. Although the Commissioners cannot redraft the Applicant's proposal, it is possible to impose conditions about timing and sequence of development within the Applicant's proposal, to better address the predicted effects. The potential for that alternative approach can be signalled to the Applicant during the hearing process and an invitation can be extended for alternative timing and staging to be considered.

59. If the Applicant does not take that opportunity, the Commissioners can set conditions that make better provision for deferral of development activity in the sensitive parts of the Applicant's site while mitigation actions become effective and ongoing monitoring produces greater information about bat activities around those areas. That approach would reflect the priority that the RPS gives to avoidance or minimisation of adverse effects on significant natural areas, with offset or compensation being the last resort where no alternative is available.

60. Further caucusing of the bat experts should be able to make recommendations about that type of approach.

Adaptive management

61. The Applicant's case appears to have developed greater reliance on an adaptive management approach as the hearing has progressed. The position of RESI on this approach is it is inappropriate for this proposal and not actually provided for in any effective way through the consent conditions proposed by the Applicant or recommended in the s42A report.

62. The adaptive management approach to setting of consent conditions was considered in detail in the *King Salmon* series of decisions, starting with the Board of Inquiry decision, and continuing through to the Supreme Court decision. The Board of Inquiry considered a number of cases where the adaptive management technique had been applied in New Zealand and considered that, before endorsing an adaptive management approach in that particular case, it would have to be satisfied that:

    (a) There will be good baseline information about the receiving environment;
    (b) The conditions provide for effective monitoring of adverse effects using appropriate indicators;
    (c) Thresholds are set to trigger remedial action before the effects become overly damaging; and
    (d) Effects that might arise can be remedied before they become irreversible. (Board of Inquiry decision *New Zealand King Salmon request for plan changes and applications for resource consents,* 22 February 2013).

63. While those factors may not necessarily be essential components of every case that warrants an adaptive management approach, they do provide a good indication of the essential features of that approach.

64. The Supreme Court on appeal considered international commentary on the application of the precautionary principle in environmental evaluations, including a guideline on using an adaptive management approach. (*Save Our Sounds Inc. v The New Zealand King Salmon co. Ltd and others* SC 84/2013)

65. The Supreme Court noted that the commentary by the International Union for Conservation of Nature guidelines on using the adaptive management approach recorded that any such approach should include the following core elements:

(a) Monitoring of impacts of management or decisions based on agreed indicators;
(b) Promoting research, to reduce key uncertainties;
(c) Ensuring periodic evaluation of the outcomes of implementation, drawing of lessons and review and adjustment, as necessary, of the measures or decisions adopted; and
(d) Establishing an efficient and effective compliance system.

66. The Supreme Court reviewed a number of New Zealand cases, with particular emphasis on three of them. The decision in *Clifford Bay Marine Farms Limited v Marlborough District Council* EC Decision 131/2003 has relevance to the present case, because it involved a proposed large mussel farm in a “prime Hector’s dolphin habitat” with uncertainty as to the effects of the farm on the dolphins. Instead of granting the consent for the large farm with immediate operational effect, the Environment Court granted a resource consent for a small marine farm, following a specified 2 year intensive survey, research and monitoring programme regarding Hectors dolphins, allowing a cautious adaptive management strategy for longer term development of a larger farm.

67. The Supreme Court also referred to the Environment Court decision in *Crest Energy Kaipara Limited* v *Northland Regional Council* EnvC Auckland A132/2009. The Supreme Court noted the Environment Court's point that it is important in that approach for baseline knowledge to be collected on which management plans can build, in "an ongoing and cycling process". Plans should set reasonably enforceable objectives, plan and design a process for meeting those objectives, establish a monitoring regime and a process for the evaluation of monitoring results leading to the review and refinement of hypothesis. After that point the process will often start again at the design and planning level.

68. The Supreme Court also referred to the decision in *Lower Waitaki Management Society Inc* v *Canterbury Regional Council* EnvC Christchurch C80/2009, at [381]. The Court noted the Environment Court view that it "always has to be careful to ensure that the objectives for the adaptive management are reasonably certain and enforceable". The Environment Court took the view that the management plans that had been presented to it for consideration needed more detail. This indicates that the Environment Court had been presented with a proposed management plan to evaluate, rather than reviewing a proposal for consent conditions requiring preparation of the management plans.

69. The Supreme Court went on to consider a series of principles that could be drawn from the Canadian caselaw and Australian caselaw in relation to adaptive management. Having considered the guidelines and caselaw referred to above, the court was able to make a determination whether an adaptive management regime could even be considered in the King Salmon case. At paragraph [125] of the decision the Supreme Court noted the following:

As to the threshold question of whether an adaptive management regime can even be considered, there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its cause of sufficiently reducing uncertainty and adequately managing any remaining risk. The threshold question is an important step and must always be considered.

70. The Court noted that adaptive management is not a “suck it and see” approach.

71. The Supreme Court returned to the factors identified by the Board of Inquiry, as set out in paragraph 64 above. ie *good baseline information about the receiving environment, certainty of effective monitoring of adverse effects using appropriate indicators, thresholds set to trigger remedial action before the effects become overly damaging, and confirmation that effects that might arise can be remedied before they become irreversible.* The Supreme Court therefore endorsed that set of threshold considerations, rather than simply noting that the Board of Inquiry had applied them.

72. Although there was an acknowledged lack of baseline information in relation to one of the critical issues, the Supreme Court noted that the Board had set conditions that would require greater baseline information to be available before any stocking of salmon farms took place and before any structure could be placed in the farms.

73. In relation to the effectiveness of monitoring, the Court was able to refer to environmental quality standards against which the effects could be measured, with those environmental quality standards having been agreed to by the experts.

74. In relation to the availability of remedial action, there were specific measures available, including removal of fish from the farm, until the effect was diminished.

75. The Board was also able to make a finding that the effects could be remedied before they became irreversible.

76. In the present case the management plan provisions are not available for the Commissioners to consider. They are yet to be developed and are guided only by the briefest of consent conditions.

77. Baseline data is considered to be insufficient by the experts for the Department of Conservation, the Council as Consent Authority and RESI. Page 6 of the Caucusing Agreement records agreement by experts Parsons, Stirnemann, Pryde and Borkin that the existing surveys (at that time) do not form the baseline for an ongoing, statistically sound monitoring plan

78. Efficiency and effectiveness of monitoring is uncertain, as there are no management plan provisions available and there are no proposed thresholds or measures that are agreed as effective for monitoring purposes.

79. There are no thresholds set to trigger remedial action when adverse effects are detected.

80. There is no evidence that effects can be remedied before they become irreversible. 2-yearly or even annual monitoring will produce information periodically, possibly too late to allow an effecttive reaction. No response measures to halt or reduce effects are available for consideration.

81. The consent conditions proposed by the Applicant include no mechanism for adjustment of the management plans in response to the monitoring. Presumably that is left to be addressed in the management plan, through the vague requirement that is required by the proposed condition 98:

Adaptive management of the development shall be integrated into the LBTMMP to ensure regular feedback and allow management to adapt to any change in conditions found during monitoring. Adaptive management may include additional on-site mitigation measures or the cost of off-site habitat restoration of pest control.

82. That proposed condition 98 is the full description of the adaptive management process that is proposed by the Applicant in order to protect a threatened and nationally critical species.

Southern Links conditions

83. In response to questions from Commissioners the Applicant's planner, Mr Serjeant, has explained that the proposed ecological conditions for the Amberfield development are based on the conditions attached to the Southern Links designation. The hearing for the Southern Links Notice of Requirement was during 2014. At that time the longtailed bat had the status of threatened – nationally vulnerable. Its current status is threatened - nationally critical, elevated in 2017. (Appendix D)

Options available to the Commissioners

84. The Commissioners are unable to modify the proposal by reducing its overall scope e.g. changes to the layout, etc. However, opportunity exists to specify mitigation/offset/compensation

measures if further information becomes available or regulate the timing of development at the higher impact parts of the site.

85. Adaptive management, in its true sense, probably very complex and risky for all concerned.

86. Experts may be able to identify an approach to timing of development at critical parts of the site that are based on achievement of measurable mitigation steps. Eg a more conservative version of the Applicant's deferred development condition 87, applicable to all sensitive locations, not just near the NE riverbank.

87. Alternative of inviting the Applicant to redesign the more sensitive parts of the development as a change to the proposal and/or develop a comprehensive mitigation/offsetting/compensation proposal. Would require adjournment of the hearing. That may have to follow caucusing.

88. In the absence of Applicant willingness to modify the proposal or provide fully detailed mitigation/offsetting/compensation proposals, decline the application.

Dated: 8 May 2019

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P. Lang

Counsel for Riverlea Environment Society Incorporated