BEFORE INDEPENDENT HEARING COMMISSIONERS
APPOINTED BY HAMILTON CITY COUNCIL

IN THE MATTER	of the Resource Management Act 1991 (Act)
AND	
IN THE MATTER	of an application for subdivsion and land use consent for the Amberfield development pursuant to the Act
BETWEEN	
Applicant	**WESTON LEA LIMITED**
AND	
Consent Authority	**HAMILTON CITY COUNCIL**

LEGAL SUBMISSIONS OF COUNSEL FOR HAMILTON CITY COUNCIL (AS REGULATORY AUTHORITY) IN SUPPORT OF SECTION 42A REPORT

Dated: 5 September 2019

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MAY IT PLEASE THE COMMISSIONER HEARING PANEL:

1. These submissions are made on behalf of Hamilton City Council ("Council") as the regulatory authority responsible for preparing the section 42A report which makes a recommendation to the independent commissioner hearing panel ("Hearing Panel") on the applications for subdivision and land use consent for the proposed Amberfield development. The purpose of these submissions is to:

    (a) Address specific legal issues arising during the hearing;

    (b) Where relevant to the above, provide brief comment on the proposed draft conditions, noting where there remain outstanding issues as between Council's section 42A author and Weston Lea Limited ("Applicant"); and

    (c) Respond to the Hearing Panel's Direction No. 10 dated 3 September 2019.

Legal Issues Arising

2. These submissions address three broad topics:

    (a) The application of the test in section 104D of the Resource Management Act 1991 ("RMA") and relevant approach to assessing the adverse effects of the development specifically in relation to the long-tailed bat within the planning framework of the Operative District Plan, the Waikato Regional Policy Statement and Part 2 of the RMA;

    (b) The vires of conditions seeking to vest land in Council for the purposes of the sports park; and

    (c) The provision of other infrastructure related to the development, including "conditions precedent" to ensure infrastructure is in place prior to the development commencing or connecting to Council services.

3. Additional to these matters, these submissions respond to the Hearing Panel's Direction No. 10, dated 3 September 2019, regarding the matters raised by counsel for the Director-General for Conservation ("DOC") relating to the Wildlife Act 1953.

LEGAL FRAMEWORK – SECTIONS 104D 104 RMA

Adverse Effects of the Development on the Long-Tailed Bat

4. As set out in the original section 42A report at paragraph 139 and paragraph 59 of Mr Kessels' evidence in chief, the key issues regarding ecological effects concern the question of adverse effects on long-tailed bats. Mr Kessels has identified the following effects as relevant to the potential impact on long tailed bats. Those are effects associated with the removal, hindrance or prevention of:

> (a) The use of foraging habitats and/or the ability to disburse to foraging habitats;
>
> (b) The ability of long tailed bats to commute across the landscape to forage and/or utilise other known or potential roosting habitats (such as Day Roost 32 or Maternity Roost 8 as mapped in appendix 2) nearby to the site; and
>
> (c) The ability of juvenile long tailed bats to disburse away from maternal roost sites to preferred habitats within the Southern Hamilton locality.

5. Against that background, counsel notes that counsel for the Applicant, counsel for Riverlea Environmental Society Incorporated ("RESI"), and counsel for the Department of Conservation ("DOC") have each made submissions on the legal framework applying in the context of the situation where there is a nationally endangered species at issue and how the District Plan and RMA should be interpreted and implemented, particularly given the evolution of case law around the application of Part 2.

6. There are two parts to consider. First, whether the application passes the non-complying gateway test in section 104D RMA. Second, how the

development should be considered under section 104, particularly in relation to adverse ecological effects on long tailed bats.

Section 104D of the RMA

7. Ms Cockerell's original section 42A report concluded that the effects of the proposed development will be more than minor in respect of the effects on long-tailed bats[1] and effects on archaeological deposits[2]. It follows that the proposal fails the first limb of the "gateway" test in section 104D of the RMA.[3] However, Ms Cockerell concluded that the proposed is not contrary to the objectives and policies of the operative Hamilton City District Plan ("District Plan"), and therefore passes the test in section 104D. The application must then be subject to an assessment under section 104.

8. Counsel for RESI made submissions that the proposal does not satisfy the second "gateway" test of section 104D and asserts that it is contrary to the objectives and policies of the District Plan. That proposition is not accepted for the reasons set out below.

9. Counsel concurs with the case law cited by both counsel for the Applicant and counsel for RESI as to how the evaluation under section 104D(1)(b) should be undertaken. That is, that the test is not whether the application is contrary to one or two objectives or policies, but whether the application is contrary to the objectives and policies of the District Plan when considered on a holistic basis[4]. The phrase "fair appraisal of

[1] Hamilton City Council, section 42A report of Ms Gillian Cockerell, 2 May 2019, paragraph [149]. While this position may have changed because of the additional proposed mitigation measures and proposed offset condition, the issue of the archaeological disturbance remains.
[2] *Ibid,* paragraph [99].
[3] *Ibid, paragraph* [220-221].
[4] *SKP Inc v Auckland Council* [2018] NZEnvC 81; *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81. It is noted that counsel for the Applicant used the phrase "broad brush" in submissions, which is does not align with the concept of considering objectives and policies on a holistic basis. Nevertheless, the intent of those submissions appears consistent with the terminology in the case law.

the objectives and policies read as a whole", accurately states the correct approach.[5]

10. The proposition of counsel for RESI at paragraph 29 (second part) and the subsequent argument does not align with the case law authorities. As explained by Ms Cockerell in her supplementary section 42A report, while there are directive objectives and policies in chapter 20 of the District Plan regarding Significant Natural Areas ("SNA"), to suggest that all the objectives and policies apply to areas that are not mapped and scheduled is not correct. While some policies have application in the sense that the site is a "corridor" or "connection" to the mapped SNA, when considered on a holistic basis, those policies are not determinative of whether the application fails the test in section 104D(1)(b).

11. The test in section 104D(1)(b) does not invoke a requirement that the proposal be consistent with or reconcile all the relevant objectives and policies in the District Plan. The consideration is whether the proposal is contrary to the objectives and policies of the District Plan when they are considered in the round.[6]

12. In that regard, a relevant policy is Policy 20.2.1f which states that:

> the loss or disruption of corridors or connections linking indigenous ecosystems and habitat fragments shall be avoided.

13. In addition, Policy 20.2.1n states as follows:

> The loss of habitat that supports indigenous species classified as at risk or threatened shall be avoided.

14. Both policies are relevant to the site and the development despite the site *per se* not being specifically mapped as a SNA as the site provides linkages and a degree of habitat for the long-tailed bat.

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[5] Paragraph 29 of counsel for RESI opening legal submissions, and paragraph 76 of counsel for the applicant opening submissions, supported by *Crater Lakes Park Limited the Rotorua Districts Council* EnvC Auckland decision 126/09 and *Dye v Auckland Regional Council* [2002] 1 NZLR 337

[6] *Blueskin Bay Forest heights Ltd v Dunedin City Council* [2010] NZEnvC 117 at [22].

15. However, when these two isolated policies are considered "in the round", when the plan is read as a whole with other directive relevant objectives and policies applying to the development, it does not lead to the conclusion that the application is contrary to the objectives and policies of the District Plan.

16. As Ms Cockerell has explained in her revised section 42A report, the proposed development passes the objective and policy gateway test of section 104D based on an assessment of the full suite of objectives and policies which are relevant to the proposal.[7]

17. Accordingly, in my submission the commissioners are then required to turn their minds to the assessment of the application pursuant to section 104 of the RMA.

Section 104 RMA

18. As the Hearing Panel knows, once an application passes the gateway test in section 104D it then falls to be considered under section 104 of the RMA. It follows that the question arises as to whether recourse to Part 2 of the RMA is appropriate or necessary. In the context of the issues arising in this application, the Hearing Panel may have recourse to Part 2.

19. That is because there is doubt whether the District Plan (chapter 20 in particular) can be said to have been "competently prepared"[8]. Furthermore, those provisions are uncertain and incomplete, given that these were prepared with a focus on flora only and that the Waikato Regional Policy Statement contains as less onerous obligation with respect to significant flora and fauna. The proposition that the Hearing Panel may have resource to Part 2 aligns with the position of counsel for the Applicant and counsel for RESI.

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[7] Supplementary section 42A report of Ms Cockerell, 16 August 2019, paragraph [99].

[8] *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 [21 August 2018]. The District Plan pre-dates the determination in both *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] NZLR 1 593 and *RJ Davidson*.

20. In the original section 42A report and the supplementary s42A report Ms Cockerell has considered Part 2 matters in relation to the application overall, as opposed to restricting such an assessment to the issues relating to long-tailed bats. Nevertheless, her assessment of those matters is correct and valid.

21. Insofar as the adverse effects on long-tailed bats are concerned, the question for the Hearing Panel to determine is whether, subject to the proposed conditions, those effects are acceptable having regard to Part 2 of the RMA. In that regard, it is open to the Hearing Panel to accept the recommendation of Ms Cockerell as set out in the s42A report to grant consent, subject to the proposed conditions.

22. For completeness, counsel notes that the proposed Amberfield Bat Fund condition and the appropriate quantum for the fund is explained in the supplementary evidence of Mr Kessels and Ms Cockerell. The proposal for such a condition was outlined in the original section 42A report and Mr Kessels' evidence in chief. As the Hearing Panel is aware, during the adjournment a methodology and appropriate quantum has been developed, which is supported by Mr Kessels. Counsel understands that the Applicant agrees in principle to the condition which is recommended in the supplementary s42A report. It is anticipated that counsel for the Applicant will address this point in their closing submissions.

VIRES OF CONDITIONS SEEKING TO VEST LAND IN HCC FOR THE PURPOSES OF A SPORTS PARK

23. Ms Cockerell in her section 42A report set out the view that a 7ha sports park area ("Sports Park") should be shown on the scheme plans as a single lot to vest as a recreational reserve to be consistent with the Peacocke Structure Plan. This is to be implemented through the imposition of proposed conditions 127 and 128. For reference, these conditions read as follows:

> ACTIVE RECREATION RESERVE
> [127] The residential lots and area of roading shown on the attached plan, comprising an area of approximately 7 hectares, shall be shown on the survey plan as a single lot to vest in Council as recreation reserve. Compensation will be calculated and paid in accordance with the Public Works Act 1981.
>
> [128] If prior to Council and the consent holder agreeing the amount of compensation, or Council referring the matter of the amount of compensation payable to the Land Valuation Tribunal to determine, Council advises the consent holder that it is satisfied that a suitable alternative location for the sports park has been identified, condition 127 above shall not apply and the survey plan for lodgment at section 223 for the stage(s) within which the land is contained shall be in general accordance with Harrison Grierson Drawing 141842 – 1046 Rev 10.

24. There is contention between HCC and the Applicant in relation to the provision of the Sports Park as counsel for the Applicant submits that the condition requiring land to vest in HCC is unlawful.[9] Counsel anticipates that counsel for the Applicant will reiterate that position in closing submissions. Accordingly, the Hearing Panel will need to consider the evidence and legal submissions on the point to then determine the issue.

25. The legal issue arising is, essentially, whether the proposed condition satisfies the requirements of section 108AA of the RMA. That section introduced restrictions on the type of conditions which may be imposed under section 108 of the RMA.

26. However, while section 108AA introduces limitations on the types of conditions that may be imposed on a resource consent, the condition requiring the provision of a 7ha Sports Park is valid, at law, under both section 108AA(1)(b)(i) and (ii). For reference, section 108AA provides:

> Requirements for conditions of resource consent
> (1) A consent authority must not include a condition in a resource consent for an activity unless-
> a. The applicant for the resource consent agrees to the condition; or
> b. The condition is directly connected to 1 or both of the following;
> i. An adverse effect of the activity on the environment;

[9] Opening legal submissions of counsel for Weston Lea dated 2 May 2019 at para 114.

ii. An applicable district or regional rule, or a national environmental standard; or

c. The condition relates to administrative implementation of the relevant resource consent.

(Emphasis added)

27. The condition requiring the Applicant to vest land in HCC arguably satisfies both criteria. The condition is "directly connected" to an adverse effect on the environment that is generated by the development. Furthermore, the requirement for land to be vested in Council is directly connected to a rule in the District Plan that arises from the requirement to give effect to the objectives and policies of the Peacocke Structure Plan ("PSP") in Chapter 3 of the District Plan.

RMA section 108AA(1)(b)(i) – Adverse effect

28. Counsel concurs with counsel for HCC (as a submitter) that the provision of the 7ha Sports Park is directly connected to an adverse effect on the environment arising from the activity. That is the increase in community demand for active infrastructure and facilities in a newly urbanised location.[10]

29. In the absence of case law to the contrary, the requirement for a condition to be "directly connected" to an adverse effect of the development does not, on its face, require the adverse effect to be expressly quantified (i.e., a specific area of land). Furthermore, in the context of this application, it is appropriate to consider the overarching purpose of the RMA, being the sustainable management of natural and physical resources.[11] It follows that any suggestion that a proposed condition must be restricted to the requirement for a 2.48 to 2.76ha area of land for a sports park is inefficient, contrary to the provisions of the

[10] Opening legal submissions of counsel for Hamilton City Council (as submitter number 65) dated 6 May 2019 at para 53.
[11] Section 5, RMA.

PSP and is not a sustainable use of natural and physical resources.[12] This is expanded on further as follows.

30. Counsel for the Applicant has submitted that a 7ha area is greater than what is needed to mitigate the adverse effects on the environment of this specific development. The Applicant's evidence considers that the development would generate demand for between 2.48ha to 2.76 ha. However, the experts for both the Applicant and Council (both as submitter and as regulatory authority) consider or acknowledge that, within the context of the PSP, a sports part of 7ha is necessary.[13]

31. A condition requiring the vesting of only 2.48 to 2.76 ha Sports Park would not only be an inefficient use of land which would be inconsistent with section 7 of the RMA, but more fundamentally would be contrary to the overarching purpose of sustainable management of natural and physical resources.

32. As alluded to above, the Environment Court has yet to determine what constitutes "directly connected". However, having regard to the plain and ordinary meaning of the words, "connected" means "associated or related in some respect"[14]. In that regard, it is submitted that the requirement for land to be vested in HCC is "connected" under the plain meaning of the word, to the increase in community demand for active infrastructure and facilities in a newly urbanised location.

33. As noted above, section 108AA has imposed limitations on the position of the Supreme Court in *Waitakere CC v Estate Homes Ltd* which provided that consent conditions must be "logically connected" to the development, not unrelated to it, and not relating to external or ulterior concerns. Further, that limit does not require a condition to be restricted

[12] This formulaic approach is more closely associated with financial contribution provisions. As explained later in submissions, the condition is not a financial contribution.
[13] Refer to section 2.8 of the supplementary section 42A report.
[14] Oxford English Dictionary.

to the exclusive purpose of the development, but there is no requirement under section 108(2) for a causal connection.[15]

34. Counsel considers that the section 108AA requirement for a condition to be "directly connected" is more restrictive than "logically connected". It follows that consideration of the earlier decision may provide useful guidance.

35. The position at law prior to the Supreme Court decision provided that, notwithstanding the wording of section 108, a "causation" or "nexus" is required between the effects of a proposal and the conditions imposed by Council.[16] As such, it is considered that "directly connected" is similar in application to the requirement for a "nexus".

36. In my submission, there is a nexus between the effects of the proposal and the proposed condition and that such nexus does not import a requirement for the effects of a proposal are quantified and mitigated in exact proportions to the effects generated. It follows that the condition requiring the 7ha Sports Park is valid under section 108AA and meets the overarching purpose of sustainable management.

RMA section 108AA(1)(b)(ii) – Directly connected to a rule in a district plan

37. The condition requiring land to be vested in HCC for the purposes of a Sports Park satisfies section 108AA(1)(b)(ii). That is, the provisions of Chapter 3 in relation to the PSP, the rules in chapter 5 (Master Plan requirement), and the requirements of Volume 2, Appendix 1.2.2.3 of the District Plan are, in effect, rules of the District Plan.[17] As such, the requirements in 3.4.3.1 in conjunction with the other provisions of the

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[15] *Waitakere CC v Estate Homes Ltd* [2007] 2, NZLR 149; (2007) 13 ELRNZ 33; [2007] NZRMA 137 (SC) at [66].

[16] *Estate Homes Ltd v Waitakere CC* [2006] 2 NZLR 619; (2005) 12 ERLNZ 157; [2006] NZRMA 308 (CA).

[17] Refer to the section 42A report, 2 May 2019, paragraph 63; and supplementary section 42A report, 16 August 2019, paragraph 83. Case law provides that rules "prohibit, regulate or allow activities" (see *Murphy Electrical Family Trust v Whangarei DC* [1997] NZRMA 280 (HC)).

District Plan referred to above, regulate and allow and require the provision of Sports Fields and are equated to a rule. It follows that the condition requiring land to be vested in HCC is valid under section 108AA(1)(b)(ii) being directly connected to a district rule.

Compensation for land to vest

38. The condition is not a financial contribution. The proposed condition expressly provides for the Applicant/consent holder to be compensated for the land in question.

Sustainable management purpose

39. Finally, in the context of section 5 of the RMA, given that the District Plan framework clearly and expressly requires the provision of a sports park in the relevant area of the PSP and that Council will compensate the Applicant/consent holder for the land, it would be counterintuitive to impose a condition only requiring the vesting of 2.48 to 2.76 ha. Therefore, the proposed condition requiring the provision of 7ha Sports Park is appropriate in the context of the overarching purpose of the RMA and is valid at law under section 108AA.

WASTEWATER CONNECTION AND OTHER INFRASTRUCTURE MATTERS

40. Ms Cockerell explains the position of Council regarding the wastewater connection and the imposition of the condition precedent which addresses that issue[18]. I do not propose to provide further comment on that matter other than to reiterate the point that a condition precedent is a valid approach to addressing circumstances where an Applicant may be dependent on certain future actions being carried out by a third party.[19]

[18] Supplementary s42A report, 16 August 2019, paragraph 26.
[19] *Westfield (New Zealand) Limited & Ors v Hamilton City Council* HC HAM CIV2003 485 000956 [17 March 2004].

DIRECTION NO. 10 – WILDLIFE ACT 1953 AND PROPOSED CONDITION 90

41. Counsel for DOC filed a memorandum ("DOC Memo") with the Commissioner Hearing Panel ("Hearing Panel") on 2 September 2019 raising a number of issues regarding the relationship between section 53 of the Wildlife Act 1953 ("WLA"), section 63(1) of the WLA and proposed condition 90 in the set of draft conditions attached to the supplementary section 42A report.

42. It is disappointing that counsel for DOC did not raise such matters in its presentation to the Hearing Panel, given its obvious importance to that submitter. Indeed, the question of authority under the WLA was raised in the original section 42A report at paragraph [60] where Ms Cockerell essentially invited DOC to comment on the issue:

> [60] The applicant's AEE (pg 10) states a Wildlife Authority under the Wildlife Act 1953 will be sought to potentially disturb long-tailed bats as part of the construction works and that an Authority is also likely to be required for lizard management. The requirement for an Authority is not raised in the submission by the Department of Conservation (59). The Department may clarify at the hearing if an Authority is required, and if so, this can be addressed by an advice note should consents be granted.

43. Counsel for DOC makes assertions which, with respect, confuses the relationship between the RMA resource consent process and the separate authorisation process under the WLA. That confusion extends to the conflation of DOC's response to the Court of Appeal decision in *PauaMAC5 v Director-General of Conservation & others*[20] to how the Wildlife Act 1953 may or may not apply to the proposed development.

44. For example, the DOC Memo implies pre-determination that the Director-General of Conservation would not grant an authority under section 53 of the WLA, should one be required, and suggests that death of long-tailed bats "is virtually foreseeable", when there is no evidence to

[20] *PauaMAC5 v Director-General of Conservation & others* [2018] NZCA 348 [4 September 2018].

support the latter assertion. Furthermore, the DOC Memo omits to acknowledge the decision is currently on appeal to the Supreme Court.

45. Such matters do not affect the jurisdiction of the Hearing Panel to determine the applications for resource consent under the RMA and, more importantly, do not affect the validity of proposed condition 90.

Condition 90

46. The Hearing Panel subsequently issued Direction No. 10 inviting legal submissions on whether proposed condition 90 can at law be actionable and whether it is within the scope of any consent decision. Counsel understands that the Hearing Panel is concerned that the role of DOC in condition 89 and the updating of the Management Plan(s) in condition 90 could be interpreted as constituting authority from the Director-General of Conservation under the WLA or otherwise purporting to constituting authority.

47. For the reasons explained below, the proposed condition is lawful and within the jurisdiction of the Hearing Panel to impose, should it be minded to grant the consents. Nevertheless, to avoid any doubt as to the scope and intent of condition 90, Ms Cockerell has provided additional wording to be included as part of condition 90.

Relationship between the RMA and the WLA

48. It is accepted that a resource consent under the RMA may not constitute an express authorisation under section 53 of the WLA. Section 23(1) of the RMA contemplates as much where it states that:

> 23 Other legal requirements not affected
> (1) Compliance with this Act does not remove the need to comply with all other applicable Acts, regulations, bylaws, and rules of law.
> (2)…

49. This issue was addressed by the High Court in *Solid Energy v The Minister of Energy & Ors*[21] where the Court determined that the land use consent conditions, agreed to by the Director-General of Conservation, did not confer "lawful authority" for the purposes of s63 of the WLA.[22] This point is made by Counsel for DOC in the DOC Memo.

50. In that case, while the Court stated that a land use consent could potentially constitute "lawful authority" because, under the power conferred by the RMA, it authorises actions, it went on to state that to be "lawful authority" under s63 (of the WLA) the land use consent must confer authority to take the actions that s63 would otherwise prohibit.[23] Therefore, whether a land use consent could constitute "lawful authority" will depend on what actions are authorised by the land use consent.[24]

51. The Court considered whether the agreement from DOC to the conditions of the land use consent in question constituted "lawful authority" for the purposes of section 63 of the WLA. It concluded that it did not.[25]

52. It follows that while a resource consent may be obtained which is subject to a suite of conditions which require actions that ensure the adverse environmental effects on wildlife are avoided, remedied or mitigated, a separate authority under section 53 of the WLA may still be required where that is necessary. However, the fact that a separate authorisation may be required does not render a condition in a resource consent unlawful and this is relevant to the consideration of proposed condition 90.

53. Condition 90 in the updated set of draft conditions attached to Ms Cockerell's supplementary s42A report provides as follows:

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[21] *Solid Energy v The Minister of Energy & Ors* HC WN CIV-2007-485-001381 [10 December 2008].
[22] *Ibid*, paragraph [140] c).
[23] *Ibid*, paragraph [109].
[24] *Ibid,* paragraph [109].
[25] *Ibid*, paragraph [119].

> 90. The Management Plan(s) shall be updated, if necessary, to be consistent with any authorisation from the Director-General of the Department of Conservation under section 53 of the Wildlife Act 1953.

54. As drafted, the condition does not purport or imply that the conditions of the resource consent (if granted), or the Management Plan(s), or DOC's consultative role in the development of management plan(s) could or should be construed as an authorisation under the WLA. Rather, the condition seeks to ensure that if an authorisation is required under section 53 of the WLA, the Management Plan(s) will be updated or amended so that its contents are consistent with such authorisation. In short, the consent conditions contemplate the "dual process" of the RMA and the WLA.

55. To provide additional certainty regarding the separate processes under the RMA and WLA, Ms Cockerell has proposed the following amendment to draft condition 90 (amendments shown in underlined text):

> The Management Plan(s) shall be updated, if necessary, to be consistent with any authorisation from the Director- General of the Department of Conservation under section 53 of the Wildlife Act 1953, <u>if any such authorisation is required.</u>
>
> <u>*Advice Note: Authorisations under the Wildlife Act 1953 may be required, separate to the Resource Management Act 1991 process. The purpose of this condition is to ensure consistency between any authorisation and the content of the Management Plans.*</u>

Additional matters raised in DOC Memo

56. The commentary in the DOC Memo conflates the position of the DOC ecology experts on the resource consent application with a predicted outcome of a process under the WLA. It is not for counsel for DOC to question (or predetermine) whether an authority is required under the WLA and/or whether an authority will be granted by DOC, and/or whether an activity is an offence under section 63 of the WLA.

57. The points raised are irrelevant and it is beyond the jurisdiction of this Hearing Panel to consider whether an authorisation is likely to be granted under WLA. If an authorisation is required under the WLA, that is

separate process and one which is not material to the Hearing Panel's consideration of the proposal under the RMA.

58. On this point, Counsel for DOC cites the Court of Appeal decision in *PauaMAC5 v Director-General of Conservation & others*[26] to support the proposition that authorisations cannot be granted to accidentally or unintentionally disturb long-tailed bats.[27] This is unhelpful for the Hearing Panel and, again, is irrelevant to the determination of the applications for resource consent in the current case.

59. The decision in *PauaMAC5* (Court of Appeal) specifically relates to shark cage diving off Stewart Island and the Court's decision was based in the particular facts of the case. While the pursuit of great white sharks using berley and bait as attractants to bring the sharks to the cage was held to be an offence under section 63A in that case (and that an authority could not be granted under section 53(1)), it is inappropriate to then draw a conclusion (or at least imply), that the disturbance of the long-tailed bats, through the interference with bat roosts (or potentially other activities) is analogous to the "disturbance" of the sharks constitutes an offence under the WLA – and one which cannot be granted an authorisation.

60. In that regard, applying the Court's determination at a broader scale without consideration of the specific factual context may lead to anomalous outcomes. Taken to its extreme, any "unintentional" disturbance of long-tailed bats by anyone would be an offence (for example, driving at night on a road which traverses an area of bat habitat and disturbing bats with headlights). Whether or not an offence is committed under section 63 of the WLA is to be determined on a case by case basis on the specific facts of each case.

61. Relevantly, leave has been granted to appeal to the Supreme Court on the question of whether the Court of Appeal was correct to hold that

[26] *PauaMAC5 v Director-General of Conservation & others* [2018] NZCA 348 [4 September 2018].
[27] DOC Memo, paragraph 20.

shark cage diving is an offence under the WLA. As such, the DOC memo does not reflect settled law, and it is premature to apply the same rationale to the current circumstances.

62. In any event, the question of whether separate authorisation under the WLA is required for actions to carry out activities authorised by the proposed resource consents and/or the status of such actions under the WLA is a separate matter. It is not a matter which the Hearing Panel is required to consider in the context of the RMA process which is the subject of the hearing.

63. Finally, to address the comment in paragraph 23 of the DOC Memo, it is clear that that "all reasonable measures" are being taken, as demonstrated by the proposed conditions, to avoid the death of long-tailed bats which may potentially occur as a consequence of the implementation of the proposed resource consents.

SECTION 42A AND EXPERT EVIDENCE

64. Ms Cockerell has prepared a power-point presentation which provides an overview of the proposed development. Counsel considers that it would be helpful to the Hearing Panel for that to be presented first. Those experts who the Hearing Panel wish to question can then follow, with Ms Cockerell concluding the presentation by responding to any questions that the Hearing Panel may have.

65. Assuming that is an acceptable process, counsel will hand over to Ms Cockerell following any questions the Hearing Panel may have in relation to these legal submissions.

Dated this 5th day of September 2019

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M Mackintosh
Counsel for Hamilton City Council