

**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

**CLOSING SUBMISSIONS OF LEGAL COUNSEL
FOR WESTON LEA LIMITED**

Dated: 4th September 2019

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MAY IT PLEASE THE HEARING COMMISSIONERS:

INTRODUCTION

1. Counsel appears for Weston Lea Limited (**Weston Lea**) to provide closing submissions.
2. The hearing was adjourned in May this year to enable expert conferencing to take place and the parties to provide Hamilton City Council (**HCC** or **Council**) s.42A Reporting Officers with any information that might assist them in making a final recommendation on Weston Lea's application for consent.
3. Discussions have continued to take place between Weston Lea's experts and the Council s.42A Officers since the adjournment and today. These experts have now reached is agreement on the bulk of the evidential matters that remained unresolved between them at the time of the adjournment and following ecological expert caucusing on 10 and 11 June 2019.
4. There remain some areas of disagreement between the Weston Lea's experts and the Council's s.42A Officers. These differences concern small number of conditions and do not impact on the experts' agreement that Weston Lea has adequately addressed the potential adverse effects of the proposed activity.
5. The supplementary s.42A recommendation provides a revised set of recommended conditions (**s.42A conditions**). These were updated by the s.42A reporting officer on 3 September 2019.¹
6. Weston Lea is largely comfortable with the s.42A conditions subject a few amendments sought under these submissions. The s.42A conditions in respect of which amendment is sought are identified and marked up (with track-changes) under **Annexure "A"**.²
7. Significant differences in opinion remain between the ecologists for Weston Lea and the Council on the one hand and the ecologists for the Director-General and RESI on the other. The Panel will be required to decide whether

¹ These submissions refer to the revised conditions unless otherwise stated.

² For the sake of clarity, Annexure "A" simply identifies and marks up the s.42A conditions in respect of which amendments are sought. The balance of the s.42A conditions may be treated as agreed between Weston Lea and the Council s.42A Officers.

it prefers the expert evidence of Weston Lea and the s.42A Officers or the evidence of the submitters.

8. I address the evidential differences in my submissions and submit that the evidence of Weston Lea and the s.42A Officers should be preferred given it is premised on empirical study whereas the submitters' evidence is based on speculation.

GLOSSARY OF ABBREVIATIONS/ACRONYMS

9. The following list provides a quick reference to the acronyms used in these submissions:
 - (a) Assessment of Environmental Effects (**AEE**)
 - (b) Biodiversity Accounting Model (**Model**)
 - (c) Commissioner Hearing Panel (**Commissioners** or **Panel**)
 - (d) Director-General of Conservation (**Director-General**)
 - (e) Hamilton City Council (**HCC** or **Council**)
 - (f) Local Government Act 2002 (**LGA**)
 - (g) Resource Management Act 1991 (**RMA** or **Act**)
 - (h) Waikato Regional Policy Statement (**RPS**)
 - (i) Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (**Settlement Act**)
 - (j) Weston Lea Limited (**Weston Lea**)
 - (k) Wildlife Act 1953 (**WA**)
 - (l) Riverlea Environment Society Incorporated (**RESI**)
 - (m) Supplementary s.42A recommendation conditions (**s.42A conditions**)
 - (n) Tangata Whenua Working Group (**TWWG**)

- (o) Te Ture Whaimana o Te Awa o Waikato (Vision and Strategy for the Waikato River) (**Vision and Strategy**)

TANGATA WHENUA

Agreement with TWWG regarding temporary wastewater pipe and consultation requirements

10. Sonny Karena confirmed, on behalf of the Tangata Whenua Working Group (**TWWG**), during the hearing, the TWWG's support for the proposal.³
11. Mr Karena noted that the TWWG appreciated the regular and open way in which Weston Lea, and its owners the Peacocke family, have engaged with the TWWG and sought to understand their concerns and address them.⁴
12. Mr Karena gave evidence that the TWWG's concerns regarding the proposed wastewater pipe under the Waikato River, and the risk of the pipe failing and impacting the mauri of the Waikato River, have been satisfactorily addressed. The TWWG is prepared to accept the laying and operation of a wastewater pipe under the Waikato River, as a temporary measure, because they accept the view of Weston Lea's experts that risk management measures implemented under the conditions of consent remove any real risk of an impact on the River's mauri.⁵
13. Mr O'Callaghan gave evidence on the type of pipe that will be used. Due to its high-pressure rating, and his previous experience using the pipe for gas projects, Mr O'Callaghan is confident the risk of a failure occurring is extremely low.⁶ Mr O'Callaghan stated that, even in the unlikely event the pipe failed, it remained unlikely that wastewater would be released into the water of the Waikato River as the pipe will be directionally drilled at least 10m below the bed of the river.⁷

³ Statement of evidence of Sonny Karena on behalf of the TWWG, dated 13 May 2019, at [4].

⁴ Statement of evidence of Sonny Karena on behalf of the TWWG, dated 13 May 2019, at [4].

⁵ Statement of evidence of Sonny Karena on behalf of the TWWG, dated 13 May 2019, at [12].

⁶ Evidence-in-chief of Mr O'Callaghan, at [108].

⁷ Evidence-in-chief of Mr O'Callaghan, at [91].

14. Any failure of the pipe would be able to be quickly contained. Mr O'Callaghan gave evidence that as the interim wastewater pipe is only to be used for the first 300 houses in the development (at a maximum), wastewater could be transported on trucks for the two to three days that would be required to fix the pipe.⁸ This would cause minimal disruption. Mr O'Callaghan estimated this would only require five to seven truckloads per day.⁹
15. Condition 161 confirms Weston Lea's commitment that the pipeline will be only be a temporary measure and will be decommissioned as soon as reasonably possible.
16. The legal submissions for the TWWG, and Mr Karena's written evidence, noted that the TWWG wanted to see greater recognition of the commitment by Weston Lea to consult with the TWWG and sought refinements to the conditions.¹⁰
17. Prior to the TWWG's appearance at the hearing, Weston Lea had drafted some amendments to the conditions to address further recognition of the consultation commitment. Mr Gardner-Hopkins, counsel for the TWWG, confirmed during the hearing that the TWWG agreed with the proposed changes. Mr Gardner-Hopkins further confirmed that the proposed amendments addressed all the remaining concerns of the TWWG.¹¹
18. The s.42A conditions include the further consultation requirements agreed with the TWWG:
 - (a) Condition 28(K)(iv) includes a requirement to provide updates to the TWWG during construction so that the TWWG can understand any issues that might arise at the early stage.
 - (b) Condition 62 includes a requirement to consult with the TWWG specifically in relation to the Archaeological Heritage Reserve Management Plan.

⁸ In response to questions from the Panel.

⁹ In response to questions from the Panel.

¹⁰ Synopsis of legal submission on behalf of the TWWG dated 13 May 2019, at [11], Statement of evidence of Sonny Karena dated 13 May 2019, at [13]-[17].

¹¹ Synopsis of legal submission on behalf of the TWWG dated 13 May 2019, at [12], and in response to questions from the Panel.

- (c) Condition 191 makes it clear that the consent holder shall consult with the TWWG in relation to the naming of roads and reserves in accordance with the HCC Naming of Roads, Open Spaces and Council Facilities Policy.

Vision and Strategy and s.104D

19. On the first day of the hearing, Commissioner Lovell asked for assistance regarding whether the Panel needs to consider Te Ture Whaimana o Te Awa o Waikato (Vision and Strategy for the Waikato River) (**Vision and Strategy**) as part of its s.104D assessment.
20. Section 104D requires that a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either the adverse effects of the activity on the environment will be minor, or the application will not be contrary to the “relevant” plan. The reference to the “relevant” plan in s.104D is a reference to the plan under which consent is being sought.¹² In this case, the hearing relates only to applications under the operative Hamilton District Plan (**District Plan**), so that is the “relevant” plan for the purposes of s.104D.
21. Under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (**Settlement Act**), the District Plan is required to give effect to the Vision and Strategy.¹³ In contrast, the Vision and Strategy is deemed to be part of the Waikato Regional Policy Statement (**RPS**).¹⁴
22. The District Plan gives effect to the Vision and Strategy through section 21 which sets out the objectives and policies that relate to the Waikato River Corridor and River Systems. The introductory text states the purpose of the chapter and notes that the Vision and Strategy is included under Appendix 10 to the District Plan:

¹² As undertaking the activity will breach the rules in a plan without a consent, the “relevant” plan in respect of the activity is the plan that controls the particular activity. This approach was adopted by the Courts in a number of instances; see for example the approach taken in *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at [16]. Counsel is not aware of a different approach ever being taken to the ‘relevant plan’ for the purpose of s.104D. The scope of consideration is confined under s.104D and can be contrasted to the consideration under section 104, which requires the consideration for “any relevant provisions” of a number of different planning documents.

¹³ Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, section 13(4).

¹⁴ Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, section 11(1).

21.1 Purpose

(a) The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 establishes Te Ture Whaimana o Te Awa o Waikato – the Vision and Strategy for the Waikato River – as the primary direction-setting document for the management of the river (refer to Volume 2, Appendix 10). The Vision and Strategy forms part of the Regional Policy Statement. This chapter provides a mechanism for giving effect to the Vision and Strategy.

23. When the District Plan is read as a whole, it is clear the Vision and Strategy is not intended to form part of the District Plan itself. Rather, the Council has gone through the exercise of developing its own objectives and policies which give effect to the Vision and Strategy.¹⁵ To interpret the provisions of the Vision and Strategy as being part of the District Plan's objectives and policies, would be inconsistent with the Settlement Act.
24. Another way of determining whether a document forms part of a District Plan is whether the document can be changed independently of District Plan. In this case, the Vision and Strategy has been created by the Settlement Act, being legislation of Parliament. This legislation can be amended independently of the District Plan. The Vision and Strategy could not be amended through the Schedule 1 process.¹⁶
25. The Vision and Strategy cannot, therefore, be said to form part of the District Plan and cannot be considered under s.104D of the Act
26. While the Vision and Strategy is appended the District Plan, this does not mean the objectives of the Vision and Strategy forms part of the District Plan.
27. This does not mean the Vision and Strategy does not need to be considered. The Panel should have regard to it when considering the application under section 104 and 104B.

¹⁵ See Chapter 1 – Plan Overview, in particular, 1.1.2.2.(b) that explains the relationship between the Vision and Strategy, and Chapter 21, in particular, the explanation provided under objective 21.2.4 that notes that the objectives and policies relate to the objectives of the Vision and Strategy.

¹⁶ The Environment Court has previously warned against incorporating material that could at any time be changed without reference to Schedule 1 – see for example *Remarkables Park Ltd v Queenstown Lakes District Council* [2004] NZRMA 433 at [22]; *Auckland City Council v Auckland Regional Council* EnvC Auckland, 22 April 2004 at [32].

28. Mr Serjeant addressed the application’s consistency with the Vision and Strategy as part of his evidence-in-chief.¹⁷ The approach taken to the restoration and protection of water quality is consistent with the relevant objectives and policies of the RPS and the Vision and Strategy.¹⁸

SPORTS PARK

29. Counsels’ opening legal submissions clearly set out why there is no legal requirement for Weston Lea to provide a 7ha sports park within the Amberfield subdivision.¹⁹
30. The sports park conditions sought by Council (as submitter and s.42A Reporting Officer) are *ultra vires*. The conditions do not satisfy the tests under s.108AA of the RMA.
31. Accordingly, Weston Lea seeks the deletion of s.42A conditions 127 and 128.²⁰

Addressing arguments by HCC as submitter

32. HCC as submitter provided several arguments as to why the relief it seeks should be granted and why it sought to appear as a submitter at all. I address each argument in turn.

Relief sought by HCC as submitter

33. Mr Muldowney, for HCC as submitter, presented submissions that provided a different interpretation of s.108AA(1)(b) of the RMA. Mr Muldowney appeared to argue that so long as a proposed development “contributes” to an effect that, alone, establishes a sufficiently direct connection to impose a taking condition requiring a consent holder to make a contribution (financial or reserve) to mitigate need created for contribution generated by other parties (existing or future).

¹⁷ Evidence-in-chief of Mr Serjeant, at [57]-[73].

¹⁸ Evidence-in-chief of Mr Serjeant, at [66].

¹⁹ Legal Counsels’ opening submissions for Weston Lea Limited dated 2 May 2019, at [107]-[116].

²⁰ See Annexure “A”

34. Mr Muldowney contends the relief sought complies with s.108AA, in this case, as the provision of the 7ha sports park is directly connected to a type of adverse effect contributed to by the proposal (i.e. the increased community demand for active sports park infrastructure and facilities in a newly urbanised location).²¹
35. Mr Muldowney's interpretation finds no support under s.108AA(1)(b).²²
36. Section 108AA(1)(b)(i) of the RMA states that a condition may only be imposed if it is "*directly connected*" to "*an adverse effect of the activity on the environment*" (*emphasis added*). On the plain reading of the words, the adverse effect must relate to the effects of the Amberfield development itself. They cannot go beyond the effects of the activity for which consent is sought.
37. Mr Muldowney's approach is completely contrary to Parliament's intention under s.108AA, which was to narrow the scope of conditions from the broadly expressed discretion employed by the Supreme Court in *Waitakere City Council v Estate Homes Ltd*.²³
38. It is incumbent on the Council to secure the land it requires for an active recreation reserve by lawful means.
39. The appropriate mechanism for the Council to secure the land is through the designation process under the RMA via a notice of requirement (as the Council is doing for the sports park in the northern area of the Peacocke Structure Plan Area)²⁴ with compensation determined under the Public Works Act 1981. Alternatively, the Council could secure the purchase of the land by

²¹ Opening Legal submission for HCC as submitter dated 6 May 2019, at [53].

²² See legal counsels' opening submissions for the Weston Lea dated 2 May 2019, at [65]-[69].

²³ See legal counsels' opening submissions for the Weston Lea dated 2 May 2019, at [69]. For further context, in the *Waitakere City Council v Estate Homes Limited* the Supreme Court held that it would be lawful to impose a condition requiring an arterial road to be constructed when the effects of the development only warranted a local road. The Supreme Court that held that a direct causal link between the effects of the activity and conditions imposed is not required, rather the conditions only need only be "logically connected" to the development and not unrelated to it. This broad "logically connected" test is what Parliament intended to narrow by inserting the "directly connected" test.

²⁴ Evidence-in-chief of Mr Duncan at [26], and evidence-in-reply of Mr Duncan at [5].

negotiation. There is nothing stopping the Council from acquiring the land for a sports park should consent be granted.²⁵

40. The Panel should not pre-empt any of those processes when determining this application by way of conditions that are not directly connected to the qualified and quantified effects of the development.
41. The fact that Weston Lea seeks the deletion of the sports park conditions does not mean that it will not be required to contribute to the provision of a sports park. It is expected Weston Lea's contribution would be recovered directly through development contributions or via a development agreement reached between the parties under the Local Government Act 2002 (LGA).

Why HCC as submitter lodged a submission

42. Care needs to be taken by the Panel in its consideration of the weight to be afforded to the relief sought by evidence of HCC as submitter due to the conflict between the Council's role as submitter on this application and its duty to provide a s.42A recommendation.²⁶
43. Mr Muldowney has stated that the reason HCC lodged a submission on the application was because the provision of a s.42A report is entirely at the discretion of the Panel and HCC wished to ensure the critical strategic infrastructure matters were addressed.²⁷
44. The reason provided by Mr Muldowney is curious, given that the submission lodged by HCC itself acknowledges that a s.42A report would be produced. The submission noted that it *"is in addition to....the s.42A report."*²⁸ The reason given by Mr Muldowney also does not account for why HCC continued

²⁵ As Mr Serjeant noted in his evidence-in-chief at [89] due to the staging of the subdivision it will several years before either the s.223 or 223 procedures are completed for the scheme plan in this area. This allows Council ample opportunity to convert its Long-Term Plan funding allocation for recreation purposes into a firm offer for the land in question.

²⁶ See paragraphs [9]-[32] of counsels' opening submissions that addressed HCC's decision to enter the fray of Weston Lea's application and these proceedings as submitter (in addition to its role as consent authority).

²⁷ Hearing Transcript dated 6 May 2019, page 79 and 80. Counsel provided a copy of the transcripts to the Panel, Council and submitters on 8 July 2019. However, counsel will also include a copy of those parts of the transcripts referred to in the bundle of authorities provided at the hearing.

²⁸ Submission on behalf of the Open Spaces and Facilities Unit and Strategic Infrastructure Unit within HCC, dated 28 September 2018, page 1, section 1.5.

to participate in proceedings and appear at the hearing (as a submitter) once a s.42A report had been commissioned and prepared.

45. The orthodox way for various business units within Council to provide comments on an application for resource consent would be via technical reports for the consideration of the s.42A Reporting Officer.
46. HCC's submission, itself, suggests that the real reason the submission was lodged is to preserve its position if a development agreement was not entered into before the hearing.²⁹ HCC's submissions appears to have been an attempt by the Infrastructure Unit to use the resource consent application as a mechanism for progressing a development agreement under the LGA.
47. I address the lawfulness of the relief sought by Council (as submitter) below.

Supplementary s.42A report

48. The Council's supplementary s.42A report acknowledges that the provision of a 7ha sport park is greater than the demand generation by Weston Lea's application and therefore compensation is required.³⁰ The s.42A report goes onto state that because the compensation process is separate to the RMA process it is not relevant to the Panel's determination.³¹
49. Weston Lea accepts that any compensation paid is separate to the RMA decision making process. However, this does not mean a condition can be imposed that renders land incapable of any other use. The fact that it addresses adverse effects beyond those generated by the proposal cannot be ignored by the Panel (as outlined above). Otherwise, the consent holder will be required to vest 7ha of land without any certainty of the compensation to be provided. This is, in effect, a financial or reserve contribution by any other name.
50. The supplementary s.42A Report explains, at length, the background to why the indicative active recreation areas have been identified on the Amberfield

²⁹ Submission on behalf of the Open Spaces and Facilities Unit and Strategic Infrastructure Unit within HCC, dated 28 September 2018, page 1, section 1.4.

³⁰ Supplementary s.42A report dated 16 August 2019, at [78].

³¹ Supplementary s.42A report dated 16 August 2019, at [78].

site, including referring to the previous versions of the Peacocke Structure Plan that were resolved through appeals.³² This is not relevant to the Panel's determination. The Panel is entitled to rely on the Peacocke Structure Plan included in the District Plan, not the prior iterations of the Peacocke Structure Plan relied on in the supplementary s.42A report.

DEVELOPMENT AGREEMENT

51. HCC (as submitter) has emphasised the need to include conditions on the subdivision and land use consent which specifically address the connection and integration of the infrastructure within the Amberfield development to HCC's broader strategic network. HCC (as submitters) seeks a condition precedent requiring a development agreement between Weston Lea and HCC prior to infrastructure works commencing.³³
52. Mr Muldowney stressed that a condition of this nature is necessary for the proposed development to be *consentable*.³⁴ In other words, so that the Panel can have confidence that the consent holder will be able to connect to the HCC infrastructure network. To illustrate this point, Mr Parsons presented a table that listed all the HCC approvals required to connect to the various HCC services.
53. Weston Lea does not dispute that it will need to obtain these approvals from HCC in due course. Weston Lea would not be able to *implement* the consent without approved connections to the HCC infrastructure. However, Mr Muldowney's arguments appear to mischaracterise the need for these conditions to be imposed for the development to be *consentable*.
54. These approvals are not relevant to the Panel's consideration of the application. As the Panel noted during the Hearing, these approvals are obtained all the time without being required as a condition of consent.³⁵ What is relevant to the Panel's consideration is that the infrastructure provided by

³² Supplementary s.42A report dated 16 August 2019, at [65]-[67].

³³ Opening legal submission for HCC as submitter dated 6 May 2019, at [26].

³⁴ Opening legal submission for HCC as submitter dated 6 May 2019, at [30].

³⁵ Hearing Transcript, dated 6 May 2019, page 81, second paragraph Commissioner Wasley speaking.

Weston Lea will adequately service the Amberfield development and will align with Council's strategic offsite infrastructure. The parties have already confirmed that all infrastructure, to be provided as part of the application and set out in Weston Lea's evidence, is aligned with HCC's expectations and the draft development agreement.³⁶

55. Further, the s.42A conditions ensure that infrastructure will be aligned with the Council's strategic offsite infrastructure:
 - (a) Condition 158 provides that wastewater will be pumped to the HCC's Far Eastern Interceptor. Condition 159 ensures the wastewater rising main required to pump the water to the Far Eastern Interceptor is operational prior to s.224(c) approval for the first stage of the subdivision;
 - (b) Condition 9 ensures any upgrade of Peacockes Road will be compatible with HCC's Peacockes Road Southern Links designation and the upgrade of Peacockes Road to minor arterial standard.
 - (c) HCC's Strategic Development Unit will also need to certify all plans for engineering works, and no works will be able to commence until the plans are accepted and certified (condition 183).
56. It is simply incorrect to say the development agreement condition precedent sought by HCC (as submitter) is primarily required to ensure the consent holder will obtain all necessary HCC approvals. Any development agreement agreed between the parties will deal with a range of matters related to infrastructure provision, including appropriate cost share arrangements between the parties. As set out in my opening, cost share arrangements on infrastructure matters are not relevant to the assessment of this application under the RMA.³⁷ These matters are dealt with under the LGA processes; either by way of development contributions or under a development agreement.

³⁶ Refer to Legal counsels' opening submission for Weston Lea dated 2 May 2019, at [117]. Hearing Transcript dated 6 May 2019, Mr Parsons speaking, page 72.

³⁷ Legal counsels' opening submission for Weston Lea dated 2 May 2019, at [120]-[123].

57. The development agreement condition precedent sought as relief by HCC (as submitter) is unnecessary and inappropriate.
58. Notably, Ms Cockerell agrees that she does not have scope under the RMA to impose such conditions and none are included in the s.42A conditions.³⁸

MASTER PLAN SUBMISSIONS

59. The evidence of Mr Skilton, on behalf of the Johnson Family Trust, and Mr Brown, on behalf of Woolworths NZ Limited raise issues with the Master Plan that has been submitted for approval as part of the application. Both parties are concerned that it does not adequately or comprehensively cover the whole of Neighbourhood 6 under the Peacocke Structure Plan and may pre-empt future decisions on the suburban town centre.³⁹
60. These concerns appear to be overstated. While the Master Plan indicates a general location for the suburban centre, no resource consents have been sought in relation to the future suburban centre. It is unclear how the current application could pre-empt future decisions on the suburban town centre.
61. Any development of the two “super lots” that form part of the future suburban centre will require resource consent. Any future resource consent application will be required to provide sufficient detail on integration with the balance of Neighbourhood 6.⁴⁰
62. Weston Lea acknowledges that a co-ordinated and integrated approach for the future development of the future suburban centre is preferred. Both Mr Serjeant and Mr Inger support a co-ordinated approach to planning the centre between the landowners on the opposite sides of Peacockes Road when resource consents are sought in the future.⁴¹

³⁸ Supplementary s.42A report dated 16 August 2019, at [27].

³⁹ Statement of evidence of Mr Brown dated 23 April 2019 at [2.2], statement of evidence of Mr Skilton dated 8 May 2019, at [3.0.2].

⁴⁰ Necessary to address the relevant District Plan provisions relating to the Peacocke Structure Plan.

⁴¹ Evidence in chief of Mr Serjeant dated, at [91], and evidence-in-chief of Mr Ben Inger dated, at [45].

63. One of Mr Skilton’s key concerns, at the hearing, was the extent to which the Master Plan could be relied on for future development proposals with the suburban centre and how this would affect the activity status of future resource consent applications for commercial activities.⁴²
64. Mr Skilton’s concern is founded on unlawful application of the provisions under the District Plan. If the District Plan provisions were applied in the manner he suggests, any resulting consent would *ultra vires* as a result of the Environment Court’s Framework Plan decisions.⁴³ Those decisions confirm that:
 - (a) Plans (including Framework Plans, Comprehensive Development Plans and Master Plans) are not activities for which consent can be obtained; and
 - (b) An activity’s status is derived from the RMA and its subsidiary planning instruments. Activity status cannot be determined by whether (or not) another resource consent has been granted.
65. Any application for a resource consent premised on the District Plan’s *ultra vires* framework provisions (i.e. an activity class premised on a masterplan consent) would by extension would be unlawful.
66. In any event, Ms Cockerell has addressed this issue in the Supplementary s.42A report. Ms Cockerell has recommended that wording is added to the resource consent that makes it clear that the two “super lots” are precluded from the consented land use activities pursuant to the Master Plan provided in support of the application for consent.⁴⁴
67. Weston Lea is comfortable with the recommended wording and considers it provides a belts and braces approach to address Mr Skilton’s concerns.
68. To avoid loose ends, the Panel would have difficulty granting the relief sought by Mr Skilton. This is because Mr Skilton requests that the resource consents

⁴² Statement of evidence of Mr Skilton dated 8 May 2019, at [4.0.5].

⁴³ *Re Auckland Council* [2016] NZEnvC 56, (2016) 19 ELRNZ 425; and *Queenstown Airport Corporation v Queenstown Lakes District Council* [2014] NZEnvC 93.

⁴⁴ See page 1 of the Recommended Condition dated 16 August 2019, also see [61] of the Supplementary s.42A report dated 16 August 2019.

are declined in so far as they relate to Neighbourhood 6, or that the Master Plan is amended to physically include of the Johnson Family Trust's land.⁴⁵

69. Declining the resource consent, in so far as it relates to Neighbourhood 6, would require a significant amendment to the application that has not been assessed. The Panel would be unable to determine effects of the amended application, or its consistency with the relevant planning provisions. Alternatively, any amendment to physically include of the Johnson Family Trust's land within the Master Plan would be outside the scope of the application as submitted, and therefore outside of the Panel's jurisdiction.

STORMWATER EASEMENTS

70. The supplementary s.42A report continues to support the inclusion of condition 172 requiring private easement boundaries for all down slope properties to convey secondary stormwater flows.
71. This matter is addressed in the evidence-in-chief of Mr O'Callaghan⁴⁶ and in counsels' opening submissions.⁴⁷
72. Mr O'Callaghan does not consider such an easement is appropriate.⁴⁸ Creating specific flow paths has the potential to create channelised flows. These would pose a greater risk to downslope properties than the natural passage of water, particularly if the flow path is not maintained.⁴⁹ The secondary flows, in the present case, will be minor and there is a very low risk of them creating a nuisance.⁵⁰
73. Further, it is not legally necessary to require private easements for all down slope properties to convey secondary stormwater flows. This is not consistent

⁴⁵ Statement of evidence of Mr Skilton dated 8 May 2019, at [6.0.2].

⁴⁶ Evidence-in-chief of Mr Ray O'Callaghan dated 12 April 2019, at [140] – [141].

⁴⁷ Opening legal submissions for Weston Lea Ltd, dated 2 May 2019, at [125].

⁴⁸ Evidence-in-chief of Mr Ray O'Callaghan dated 12 April 2019, at [140].

⁴⁹ Evidence-in-chief of Mr Ray O'Callaghan dated 12 April 2019, at [140].

⁵⁰ Evidence-in-chief of Mr Ray O'Callaghan dated 12 April 2019, at [141].

with the legal position of natural servitude under which lower land is obliged to receive the surface water which falls naturally from higher land.⁵¹

74. Accordingly, condition 172 should be deleted.⁵²

MANAGING EFFECTS ON LONG-TAILED BATS

Introduction

75. As foreseen in my opening, the ecological management of the long-tailed bats is the most contentious issue that needs to be considered by the Panel.
76. The Panel has received a large amount of contested evidence concerning the management of potential effects on long-tailed bats.
77. Significant differences in opinion remain between the ecologists for Weston Lea and the Council and those for the submitters (i.e. the Director-General and RESI) as to whether the proposal appropriately manages the potential adverse effects on long-tailed bats.
78. The further caucusing of ecological witnesses on 10 and 11 June 2019 did little to narrow the issues between the experts.
79. Agreement has been reached, since that time, between Weston Lea's ecologists and the Council's ecologist, Mr Kessels, on the adequacy of Weston Lea's proposed mitigation measures to manage effects on long-tailed bats (as explained in the supplementary s.42A report).⁵³
80. During the adjournment of the hearing, Weston Lea's ecologists (Dr Stuart Parsons, Dr Sarah Flynn, Ms Georgia Cummings and Mr Andrew Blayney) engaged with Mr Kessels to see whether the Council's remaining concerns

⁵¹ This is well established doctrine at common law, fully explained in F M Brookfield *Laws of New Zealand, Water* (online ed) at [86].

⁵² See Annexure "A".

⁵³ See Supplementary s.42A report dated 16 August 2019 at [46], [53]. Supplementary Statement of evidence of Gerardus Kessels dated 16 August 2019, at [40], [55] and Attachment 1 to Mr Kessels evidence.

might be resolved. It is appropriate for experts to engage directly with one another in order to try and reconcile differences in opinion.⁵⁴

81. Counsel, obviously, made Weston Lea's ecologists aware of the Panel's direction for parties to consider alternative or additional measures available and required to adequately avoid, remedy or mitigate effects of the development as part of consequential information to be provided to the Council.⁵⁵
82. It was, nevertheless, the ecologists' decision as to whom to engage with in further expert discussions. I understand Weston Lea's ecologists engaged with Mr Kessels on the basis that they considered a common evidential position could be reached. They elected not to hold further discussions with the experts for the Director-General or RESI because they considered their respective opinions were simply too far apart to find any common ground.
83. Discussions between Weston Lea's ecologists and Mr Kessels concentrated on Mr Kessels' concerns related to the potential short-term effects of the proposal on the bats while immediate to longer-term mitigation measures become established. The experts went on to agree that the potential short-term effects of the proposal would be best managed through an offset pest management fund.⁵⁶
84. I understand that the only remaining difference is the opinion of Weston Lea's ecologists that the pest management offset addresses the *risk* of short-term effects, whereas Mr Kessels holds the view that that offset will address a temporal effect.⁵⁷
85. Weston Lea confirms that it is comfortable with the recommended conditions of consent in the supplementary s.42A report (including the further amendments circulated by Ms Cockerell on 3 September 2019), subject to an

⁵⁴ The Environment Court Practice Note 2014 at 4.14 notes that the co-operation in the preparation of evidence before a hearing is appropriate. It states that "*In preparing for the hearing, parties are expected to co-operate in ensuring that the proceedings are dealt with in a focussed way.*"

⁵⁵ Direction No. 8 dated 28 June 2019.

⁵⁶ Supplementary Statement of Gerardus Kessels dated 16 August 2019, at [33]-[36].

⁵⁷ Supplementary Statement of Gerardus Kessels dated 16 August 2019, at [4]. Risk mitigation offset memorandum prepared by Georgia Cummings dated 22 July 2019, page 1.

amendment to the conditions relating to the artificial roost boxes which I discuss below.

86. These submissions:
- (a) summarise the updated mitigation package, including the revisions since evidence was filed;
 - (b) address the revised approach to address the risk of short-term effects on long-tailed bats, including noting concerns with the Biodiversity Offset Model relied on by Mr Kessels to validate the adequacy of the offset funding;
 - (c) address the revised number and layout of the artificial bat roost boxes deployed across the Amberfield site;
 - (d) respond to the concerns raised by the Director-General and RESI and why the evidence of Weston Lea's ecologists and Mr Kessels should be preferred; and
 - (e) answers Direction No.10 and address the Director-General's comments on the Wildlife Act 1953 and condition 90.

Updated mitigation package

87. Weston Lea has made significant efforts to manage the potential effects of the proposal on long-tailed bats within the Amberfield site.
88. The proposal will retain and enhance the key areas of bat habitat,⁵⁸ namely the Waikato River margin, the Southern Gully, and the East-West Shelterbelt. The onsite mitigation package includes 18.65ha of habitat restoration.⁵⁹ This is 7 times the area of vegetation that will be removed.⁶⁰ The risk of a time lag effect, between planting and buffering from planting becoming fully

⁵⁸ Evidence-in-chief of Georgia Cummings, dated 12 April 2019, at [43].

⁵⁹ Evidence-in-chief of Georgia Cummings, dated 12 April 2019, at [54]. The figure of 18.5 ha referred to in Ms Cummings evidence has since been updated to 18.65ha to include the East-West Shelterbelt enhancement (as referred in condition 69).

⁶⁰ Evidence-in-chief of Georgia Cummings, dated 12 April 2019, at [54].

established, will be minimised as much as possible through early planting and lot deferrals.⁶¹

89. The potential impacts of light spill on bat habitat will be effectively mitigated through a bat-sensitive lighting regime for streetlights and all lots adjacent to sensitive locations. The lighting evidence of Mr Kessner, particularly the indicative light spill diagrams,⁶² demonstrates that the potential lighting effects on key bat habitats will be negligible. Any light spill will be further managed by the buffer planting and lot deferrals.
90. Weston Lea has not shied away from taking measures designed to improve the environment for long-tailed bats. The overall gross Amberfield landholding of 105 ha will only have a developable area of 75ha, largely due to the enhancement of ecological features.⁶³ This demonstrates Weston Lea's commitment to creating an ecologically sound urban development.
91. Weston Lea modified the proposal throughout the pre-hearing process in response to submissions made and discussions held with Council's s.42A Officers and the submitters.⁶⁴
92. Weston Lea has continued to make amendments in response issues raised by the Council and submitters since the hearing commenced in May (and Weston Lea's evidence was filed). Key amendments during this time include:
 - (a) A revised staging plan that has been prepared and incorporated into the recommended conditions. The revised staging plan modifies the development staging to increase, as much as practicable, the time lag between buffer planting and house construction close to the river edge;

⁶¹ Evidence-in-chief of Georgia Cummings, dated 12 April 2019, at [60].

⁶² See Annexure B to the Statement in Answer to the questions of the hearing panel raised in Direction 9, dated 24 July 2019.

⁶³ Evidence-in-chief of Andrew Duncan, dated 12 April 2019, at [13].

⁶⁴ Weston Lea submitted additional information in February and March 2019 which introduced a significant broadening of the North-East Terrace and a commitment to early planting of buffer vegetation and bat habitat together with light spill screening, and the retention of the East-West Shelterbelt which maintained the eastern section of a vegetation corridor used by bats between the Waikato River and the Mangakotukutuku Gully. This resulted in the consequential reduction of 27 residential lots. Prior to the hearing, the proposal was also modified to enable the retention and enhancement of an existing shelterbelt of trees to provide a vegetated corridor between the Waikato River and Peacockes Road (the East-West Shelterbelt). This resulted in a further reduction of 2 residential lots.

- (b) A Local Purpose (Ecological Reserve) is now proposed for the western end of the East-West Shelterbelt to vest in HCC (replacing the previous proposal to transfer to Council fee simple with an option to buy back the land if the East-West Shelterbelt was not used by the bats because future plans or consents are not integrated with shelterbelt mitigation) (see condition 197);⁶⁵
 - (c) The residential lot immediately north of the new reserve at the western end of the East-West Shelterbelt will be subject to a condition and consent notice requiring that building on the lot must not commence until required planting standards for the enhancement of the East-West Shelterbelt are satisfied (see conditions 84 and 85);
 - (d) Shifting the boundaries of Lot 182 to protect the root system of the trees on the southern boundary of the HCC-owned lot on Peacockes Road, as these trees form a continuation of the East–West Shelterbelt. This means that the reserve will have frontage of approximately 8m to Peacockes Road;
 - (e) Further restrictions on residential outdoor lighting to include all lots north of the East–West Shelterbelt and all lots immediately to the south (see condition 82); and
 - (f) Installation of artificial bat boxes along the riparian margin to address any removal of potential roost trees. Weston Lea will maintain the bat boxes for a minimum of 10 years. I discuss this further below at [109]-[116]).
93. To assist the Panel with their assessment of effects under section 104 of the RMA a summary of potential effects and Weston Lea’s avoidance, remediation, and mitigation strategies is tabulated under **Annexure “B”**. The summary table is referenced to the evidence (incl. Supplementary s.42A Report) that has been put before the Panel over the course of this hearing.

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Weston Lea agreed to vest this area of land in the Council, even if the Council does not ensure future linkages, because Weston Lea’s ecologists advised that the long-tailed bats could still make use of the area as potential habitat.

94. A conceptual diagram, in turn, illustrates the revised approach to addressing the risk of short-term effects while planting becomes established as a functioning habitat under **Annexure “C”** (as discussed directly below).

Revised approach to address the risk of short-term effects

95. Weston Lea (as noted above) has agreed to Mr Kessels’ approach to address the risk of potential short-term effects of the proposal while planting mitigation becomes fully established.
96. Weston Lea’s ecologists remain of the opinion that the proposed mitigation package will address all adverse effects of the proposal on the long-tailed bat population.⁶⁶ They view the predator control offset as a form of risk insurance that safeguards against the risk of unanticipated or unexpected temporal effects on the long-tailed bat while the habitat restoration and buffer planting is becomes established as a functioning habitat.
97. Weston Lea has agreed to pay \$200,000 towards a Council programme designed to control predators across the bat population’s home range. The purpose of the predator control programme is to offset the risk of a temporal effect during the early stages of the development by managing/increasing the resilience of the bats in high value habitats across the population’s home range.⁶⁷
98. The use of predator control measures to target bat habitat offsite recognises the need for a coordinated landscape wide approach across the Peacocke Structure Plan Area and the population’s home range in Hamilton.⁶⁸ Weston Lea’s ecologists concur with Mr Kessel’s that predator control measures targeting core habitats, such as confirmed maternity roost sites, will be considerably more beneficial for the bat population compared to small scale

⁶⁶ Risk mitigation offset memorandum prepared by Georgia Cummings dated 22 July 2019, page 1.

⁶⁷ Risk mitigation offset memorandum prepared by Georgia Cummings dated 22 July 2019, page 1. See also supplementary statement of evidence of Gerry Kessels dated 16 August 2019, at [35].

⁶⁸ Risk mitigation offset memorandum prepared by Georgia Cummings dated 22 July 2019, page 1.

pest control in retained habitat on the Amberfield site.⁶⁹ This is why a predator control fund is proposed instead of onsite pest control.

99. This approach replaces the adaptive management approach previously proposed by Weston Lea to address the risk of unanticipated or unexpected effects. It is important to note that the adaptive management approach was never relied on by Weston Lea's ecologists to address adverse effects on long-tailed bats. It was proposed as a mechanism to mitigate unanticipated or unexpected effects while planting and new habitat became fully established.⁷⁰
100. Mr Kessels' approach (agreed to by Weston Lea's ecologists) proactively implements previously proposed adaptive management responses. For example, targeted pest control and artificial bat roosts. In simple terms, Weston Lea's ecologists have agreed to implement further mitigation measures rather than rely on adaptive management to trigger the implementation of those measures.
101. The offset predator control funding is based on a calculation that estimates the dollar amount required per hectare to undertake predator control in comparable habitat over a 10-year period. This is effectively a proxy method for quantifying the effort required to satisfactorily address the risk of short-term effects. The calculation methodology is set out in a memorandum prepared by Weston Lea's ecologists for Mr Kessels in response to his preferred approach to potential short-terms effects.⁷¹
102. Mr Kessels is comfortable to the calculation methodology contained within the memorandum, subject to accurate pest management contractor costs being applied.⁷² I am informed that Weston Lea's ecologists agree that the pest management contractor costs relied on by Mr Kessels are appropriate.

⁶⁹ Evidence-in-reply of Dr Sarah Flynn dated 1 May 2019, at [33]. See also Mr Kessels communication with Dr Parsons on this matter referenced at [61] of the Mr Kessels' supplementary statement of evidence dated 16 August 2019.

⁷⁰ Evidence-in-chief of Dr Parsons dated 12 April 2019, at [105]; Evidence-in-chief of Georgia Cummings, dated 12 April 2019, at [1(r)].

⁷¹ Risk mitigation offset memorandum prepared by Georgia Cummings dated 22 July 2019

⁷² Supplementary Statement of Evidence of Gerardus Kessels dated 16 August 2019, at [48]

103. Mr Kessels ran a Biodiversity Accounting Model (**Model**) for the Amberfield proposal as a whole in order to test whether the offset predator control quantum is appropriate.⁷³ The results Mr Kessels obtained from running the Model satisfied him that the proposed quantum of predator control funding was appropriate when considered against all of the other mitigation measures put forward by Weston Lea.⁷⁴
104. The Panel should exercise caution as to the reliance it places on the Model itself. Any model is only as good as the data it relies on to produce a result. The Model in question does not process hard data (i.e. empirically gathered scientific information). Rather, it processes valued based assessments (or opinions) made by the expert running the Model.
105. That means that, in the present case, the results the submitters' experts arrive at using the Model would likely differ quite significantly to those of Mr Kessels or Weston Lea's experts (given the differences of opinion between the experts). Mr Kessels has run the Model as a way of validating for himself that his expert opinion yields a similar result to the calculation relied on by Weston Lea's experts.⁷⁵
106. In simple terms, the input values used in the Model (habitat value, benefit of mitigation/offset, etc.) appear to be derived from subjective estimates rather than measured data. It is unclear how these estimates were reached and so it is difficult to test their reliability.
107. In contrast, the methodology and input values relied on by Weston Lea's experts to arrive at the offset quantum are transparent. It clearly explains how any assumptions are reached. While some of the inputs in the methodology are based on expert opinion, they are substantiated by the empirical evidence of Weston Lea's ecologists, concerning habitat values across the Amberfield site (i.e. generally ranging from high in riparian and gully areas to low in pastoral areas).⁷⁶

⁷³ Supplementary Statement of Evidence of Gerardus Kessels dated 16 August 2019, at [43].

⁷⁴ Supplementary Statement of Evidence of Gerardus Kessels dated 16 August 2019, at [48].

⁷⁵ Supplementary Statement of Evidence of Gerardus Kessels dated 16 August 2019, at [43].

⁷⁶ Evidence-in-chief of Georgia Cummings, dated 12 April 2019, at [33]-[37].

108. The Panel should avoid relying on the Model as the determinant of offset costs. Instead, it should rely on Mr Kessels' expert opinion and the more transparent calculation methodology prepared by Weston Lea's ecologists.

Artificial roost boxes

109. During the expert caucusing Weston Lea's ecologists proposed that 240 artificial roost boxes be installed on site as an additional way to address "other effects".⁷⁷ This is been captured under s.42A conditions 112 and 117(d).
110. Although the nature and quantum of artificial roost boxes was raised at expert caucusing, it was not agreed by Council or the submitters' ecologists. Weston Lea proposes a revised number and configuration of artificial roost boxes to be deployed across the Amberfield site. Accordingly, amendments are sought to s.42A conditions 112 and 117(d).⁷⁸
111. Weston Lea's ecologists outlined the revised artificial roost box proposal and provided this to Council last week to see if agreement could be reached prior to the Hearing. The correspondence provided to the Council is attached as **Annexure "D"**.
112. I understand that agreement was not reached between Weston Lea's ecologists and Mr Kessels on the number of bat boxes now required. There is no record of Mr Kessels reasons as to why he disagrees with Weston Lea's ecologists and it is suggested that Panel provide him with an opportunity to provide his view so that it is not being asked to make a change without the competing evidential view.
113. To briefly explain, Weston Lea's ecologists now propose that artificial bat boxes are placed along the riparian margin and 300 metres into the southern gully. Groups of four artificial roost boxes would be placed on a pole with predator exclusion devices. Poles would be placed approximately every 150 metres, meaning a total of 80 artificial roost boxes would be deployed at 20 locations.

⁷⁷ Joint Statement of the Ecology Witnesses, June 10-11 2019, page 8, column 6, under the heading "additional actions".

⁷⁸ See Annexure "A".

114. Further, the artificial roost boxes are only proposed to be installed on the Amberfield site. This reflects the intention to address the loss of potential roost trees onsite. No artificial roost boxes are proposed to be located off-site. Weston Lea's ecologists consider the most effective offsite measure to address short-term effects is pest control. The Council is best placed to implement off-site forms of pest-control as it has a wider responsibility for the management of the bat population across the Hamilton home range.
115. The final location, design, and timing of the installation of the artificial roost boxes would be confirmed when the Bat Management Plan is prepared and certified by HCC (see condition 117(d)). The Bat Management Plan would be submitted following consultation with the Director-General and RESI (see condition 89).
116. Weston Lea's ecologists note that the addition of 80 roost boxes represents a ratio of 30.5 bat boxes per ha of potential lost roost habitat. This compares well with the Hamilton Section of the Waikato Expressway which has a ratio of between 3.6 to 5 bat boxes per ha of cleared land, and to the Southern Links project, which has a total of 150 roost boxes as partial mitigation for the loss of approximately 12 ha of woody vegetation.

Evidence of the Director-General and RESI

117. There remains a difference in expert opinion (as discussed) between the ecologists for Weston Lea and the ecologists for the Director-General and RESI as to whether the proposal appropriately manages the effects on long-tailed bats.
118. It became apparent throughout the hearing that the ecologists for the Director-General and RESI rely on two assumptions that contribute to this difference of opinion. These are:
 - (a) the assumed importance of existing pastoral habitat as productive habitat; and
 - (b) the assumed existential threat the proposal poses to the long-tailed bat (presumably as opposed to the Waikato Expressway or Southern Links).

119. The evidence presented by Weston Lea's ecologists is that these assumptions are ill-founded and without an empirical basis.
120. The evidence of Dr Parsons demonstrates that pasture is of low habitat value. Bats have in fact been shown to specifically avoid pasture and other open areas.⁷⁹ Following the consideration of Dr Parsons evidence, Mr Kessels now agrees with Dr Parsons that pasture is of low habitat value.⁸⁰ The ecologists for the Director-General and RESI do not appear to place any weight of studies identified by Dr Parsons that demonstrate bats avoid pastoral areas.⁸¹
121. In relation to the purported existential threat that urbanisation poses to the long-tailed bat, the ecologists for the Director-General and RESI give little to no weight to the value of the existing urban environment in supporting bat populations.
122. Dr Parsons' evidence demonstrates that bats have been shown to utilise urban areas, particularly urban parks, in choosing their roosts.⁸² Published evidence and reports, including the results from the AECOM radio tracking study, show that bats are able to tolerate and adapt to urban environments.⁸³
123. Mr Kessels agrees that long-tailed bats in the peri-urban Hamilton landscape demonstrate resilience and a relative amount of "behavioural plasticity" to landscape.⁸⁴ Provided long-tailed bats are not isolated from key foraging habitats, they are likely to adapt over time.⁸⁵ The proposal will not isolate long-tailed bats from key foraging habitats (for example, the Waikato River, Hammond Bush).
124. I submit that the Panel should prefer to the evidence of Weston Lea's ecologists because it is grounded in empirical research and is not premised on assumed values.

⁷⁹ Evidence-in-reply of Dr Stuart Parsons, dated 12 May 2019 at [36].

⁸⁰ Supplementary evidence of Gerardus Kessels, dated 16 August 2019 at [21].

⁸¹ Evidence of Dr Kerry Borkin, dated 23 April 2019, at [62]; Evidence of Moira Pryde, dated 23 April 2019, at [7.14]; Evidence of Dr Rebecca Stirnemann, dated 23 April 2019, at [12]

⁸² Evidence-in-reply of Dr Stuart Parsons, dated 12 May 2019 at [42].

⁸³ Evidence-in-reply of Dr Stuart Parsons, dated 12 May 2019 at [42] - [44].

⁸⁴ Supplementary evidence of Gerardus Kessels, dated 16 August 2019 at [28].

⁸⁵ Supplementary evidence of Gerardus Kessels, dated 16 August 2019 at [28].

125. The Director-General and RESI's both contend the proposal needs to be significantly redesigned to address their perceived effects of the proposal on long-tailed bats. Most notably, they seek an increased (up to) 100m wide vegetated buffer along the riparian margin, on either side of the East-West Shelterbelt, and along the southern gully.⁸⁶
126. At the hearing, Dr Borkin for the Director-General confirmed that the rationale for a 100m buffer is largely based on Crewther and Parsons (2017) model, which suggested that the probability of the presence of long-tailed bats increased the further the distance to streetlights (out to 100 metres).⁸⁷
127. However, Dr Parsons, one of the designers of the model, clearly stated during the hearing that Dr Borkin has misunderstood his model. Dr Parsons cautioned against using his model to measure the appropriate width of vegetation or distance from streetlights. He considered this would be highly unreliable and did not think the model should be used for this purpose.⁸⁸
128. Further, the assertion that a 100 metre setback is required ignores the patterns of habitat use currently exhibited by the long-tailed bat population in South Hamilton. Numerous areas that have known habitats for long-tailed bats are directly adjacent to urban areas, with significantly less than 100 metre buffers, including Hammond Bush and Sandford Park. Dr Parsons was clear that, if the development is to go ahead, it will represent an urban area on the edge of bat foraging habitat (being the river and riparian margin and East-West Shelterbelt). This clearly mirrors existing bat activity in South Hamilton.⁸⁹
129. Mr Kessels' confirms in his supplementary report that the current design and mitigation measures offered by Weston Lea are now sufficiently developed that he is no longer concerned about the lack of 100 metre buffer along the entire river margin.⁹⁰

⁸⁶ Opening submission for the Director-General dated 13 May 2019, at [51]. Also see Joint Statement of Witnesses, Topic 5, page 8, for position of ecologists on behalf of Director-General and RESI.

⁸⁷ Hearing Transcript dated 13 May, page 51, second paragraph.

⁸⁸ Hearing Transcript dated 14 May, page 17 and 18.

⁸⁹ Hearing transcript dated 14 May 2019, page 12, last paragraph.

⁹⁰ Supplementary Statement of evidence of Geradus Kessels dated 16 August 2019, at [55].

Addressing concerns of Director-General and RESI

130. Over the course of the hearing, two key concerns of the Director-General and RESI appeared to be the applicant's use of management plans and its adaptive management approach.⁹¹
131. While Weston Lea's ecologists considers a management plan approach is a sound - and tested - method of managing effects, Weston Lea's planners have worked with the s.42A Reporting Officer, Ms Cockerell, to address the concerns of the Director-General and RESI. The proposed conditions have been amended to include as many specific performance standards within the conditions themselves as possible. In particular, the following specific standards have been clarified through the proposed conditions:
- (c) Early planting commitments to ensure a maximum possible time for plants to grow and screen lighting (see conditions 71-76);
 - (d) Lot staging deferral for all lots within stages fronting the Waikato riparian margin (condition 86) and building development deferral on lot 166 to the north of the and East-West Shelter Belt (condition 84); and
 - (e) A bat-sensitive lighting regime for street lighting (condition 79-81) and for all lots within stages fronting the Waikato riparian margin and East-West Shelter Belt (condition 82).
132. A Bat Management Plan is still proposed to be used to demonstrate how certain mitigation measures will be implemented. However, the matters to be addressed under the Bat Management Plan have been significantly reduced (see condition 117).
133. The parameters for each of the matters to be certified have been specified in the consent conditions to allow the Panel certainty that the mitigation measures will be appropriately implemented. In addition, the proposed conditions ensure that the Bat Management Plan will be prepared in collaboration with HCC, the Director-General, RESI and TWWG. Any

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Outline of legal and opening submissions of counsel for RESI dated 8 May 2019, at [49]-[82]; Opening legal submissions on behalf of the Director General dated 13 May 2019, at [43].

changes to the Management Plan will be prepared after consultation with those parties (see condition 89).

134. With regard to the Director-General and RESI's concerns with an adaptive management approach, Weston Lea is no longer relying on adaptive management to address short-term effects. Additional mitigation measures are implemented as a belts and braces approach to any potential short-term effects while onsite habitat becomes fully established. This approach removes any uncertainty as to mitigation measures the applicant is proposing to undertake.
135. Weston Lea has attempted, in good faith, to address each new issue raised by the submitters prior to, and during, the course of the hearing.
136. RESI and the Director-General have stated on numerous occasions that it wanted to be included in a collaborative process.⁹² It is evident from paragraphs [91] (and footnoted references) and [92] that Weston Lea has continued to endeavour to address issues even when they might not have been evidentially necessary.
137. I have yet to see any evidence of reciprocal collaboration. Instead of assisting with solutions, the submitters have greeted just about every solution with experiment and risk-based rebuttal. It seems not to matter to the submitters that the solutions are based on empirical evidence of bat behaviour in other urban areas (incl. those in Hamilton).
138. I have represented to numerous environmental groups on a *pro bono* basis. I have not seen a comparable lack of acknowledgement where large changes have been made to address the concerns of those groups. The only explanation, I can come up with, is that the submitters and their experts are quite simply opposed to any version of the proposal that is not their own. I struggle to see how this amounts to collaboration.
139. Lastly, in critiquing the adaptive management approach both the Director-General and RESI have referred to the Supreme Court's decision in *Sustain*

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For example, see Hearing Transcript, dated 6 May 2019, page 24, second paragraph, Professor Clarkson speaking.

*Our Sounds Inc v New Zealand King Salmon Ltd*⁹³ to illustrate the factors that a decision-maker must be satisfied of before endorsing an adaptive management approach.⁹⁴

140. As an adaptive management approach is no longer proposed, the Supreme Court case is not relevant to the Panel's decision. Accordingly, it is not necessary to analyse this case in any detail.
141. However, there is one point that needs clarifying. Both the Director-General and RESI have repeatedly asserted that there is insufficient baseline information about the receiving environment.⁹⁵ One of the four factors that need to be demonstrated when applying an adaptive management approach is that there is good baseline information about the receiving environment.⁹⁶ It is noted that this is a perquisite factor of the assessment and imposition of conditions on any proposal (i.e. it is not exclusive to adaptive management).
142. The evidence shows that there is adequate information on the receiving environment. Dr Parsons' evidence shows that the existing baseline data is of high quality and sufficient to understand how bats are using the site, and to measure potential effects.⁹⁷ Dr Parsons confirmed at the hearing that in his experience the data gathered to determine this application is the most he has ever seen in a first instance hearing.⁹⁸
143. I submit that the Panel can be confident that it has sufficient information to assess the actual and potential effects of the proposed activity on the environment.

Condition 90 and authorisations under the Wildlife Act 1953

144. In Direction 10 the Panel requested submissions on recommended condition 90 and the matters raised in the Memorandum of the Director-General with

⁹³ *Sustain Our Sounds Inc v New Zealand King Salmon Ltd* [2014] NZSC 40

⁹⁴ Opening legal submissions of counsel for RESI dated 8 May 2019, at [61]-[82]; Memorandum of counsel for the Director-General dated 7 June 2019 at [3]-[5].

⁹⁵ Opening legal submissions of counsel for RESI dated 8 May 2019, at [77];

⁹⁶ *Sustain Our Sounds Inc v New Zealand King Salmon Ltd* [2014] NZSC 40, [133]. [135].

⁹⁷ Evidence-in-chief of Dr Parsons dated 12 April 2019, at [95], Evidence-in-reply of Dr Parsons dated 12 May 2019 at [47].

⁹⁸ Hearing Transcript dated 14 May 2019, page 19, last line.

respect to that condition, including the extent and impact of the Director-General's authority under the Wildlife Act 1953 (**WA**).

145. Condition 90 is lawful. It does not purport to provide authorisations under the WA. As was identified in the AEE, separate authorisations under the WA are likely to be sought for potentially disturbing long-tailed bats and for lizard management.⁹⁹
146. It is important to note that condition 90 is not a “new” condition. The conditions recommended in the s.42A Report, dated 2 May 2019, included a similar requirement for management plans to be updated to achieve consistency with any authorisation given by the Director-General under s.53 of the WA (if any such authorisation is required).¹⁰⁰
147. As drafted, condition 90 does not purport to provide any authority to undertake actions that would be inconsistent with the WA, or to provide authorisations under the WA. This is consistent with s.23 of the RMA, which expressly provides that compliance with the RMA does not remove the need to comply with all other applicable Acts.¹⁰¹
148. The purpose of condition 90 is solely to ensure that the management plans are not inconsistent with any separate approvals that may be granted in the future under the WA.
149. Whether any authorisation is subsequently sought or required does not affect the lawful operation of the consent or render the condition “unusable” or unlawful. If an authorisation cannot be sought, or is sought but not obtained, then the management plans under the consent will not need to be updated.
150. Weston Lea’s planners and the s.42A Officer have discussed how this could be clarified. The parties have agreed to the addition of an advice note to clarify the purpose of the condition and demonstrate that authorisations under the WA are separate to the resource consent process.

⁹⁹ Weston Lea’s assessment of environmental effects, page 10.

¹⁰⁰ For example, see conditions 73(d), 70(c).

¹⁰¹ RMA, s 23. See also *Solid Energy New Zealand Ltd v Minister of Energy* [2009] NZRMA 145 (HC), at [109].

151. The s.42A Officer has amended the wording of condition 90 to now read as follows (additions underlined):¹⁰²

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, if any such authorisation is required.

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.

152. In the memorandum dated 30 August 2019, Counsel for the Director-General referred to recent case law under the WA, including what constitutes an offence under the Act and when the Director-General can grant authorisations under the Act.¹⁰³ While the Panel did not specifically request counsel to address the issues raised by the Director-General it is necessary to clarify several matters.
153. In short, whether something is an offence under the WA is not relevant to the Panel's assessment of an application for resource consent under the RMA. Whether an authorisation will or can be granted for any activity is not a matter for the Panel's consideration. As established above, it does not affect the lawful operation of condition 90.
154. The Director-General's arguments relating to the WA are based on the Court of Appeal decision of *PauaMAC5 Inc v Director-General of Conservation*.¹⁰⁴ This decision relates to shark cage diving off Stewart Island and whether the use of berley and bait to attract sharks constitutes an offence under the WA.
155. The context of the Court of Appeal's decision is also quite different to the matter at hand here. The Court of Appeal was satisfied that the use of attractants meant that shark cage diving is pursuing or disturbing the sharks, which falls within the wider definition of "hunt or kill" used in the WA. The Court considered that the use of attractants was equivalent to the use of bait

¹⁰² See Memo to the Hearing Commissioners from the section 42A officer, Gillian Cockerell, dated 3 September 2019.

¹⁰³ Memorandum of counsel for the Director-General dated 30 August 2019, at [17]-[23].

¹⁰⁴ *PauaMAC5 Inc v Director-General of Conservation* [2018] NZCA 348.

to draw a fish to an angler's hook, and as such the disturbance was so great that it would constitute an offence.¹⁰⁵

156. The difference between the facts of that case and the present situation demonstrate how caution must be used in applying the reasoning broadly. The Court of Appeal's reasoning was based on the specific factual situation before it. The situation in this case involves the potential disturbance of bats by everyday activity. This is quite remote from the facts of *PauaMAC5*.
157. Importantly, leave has been granted to appeal to the Supreme Court on the question of whether the Court of Appeal was correct to hold that shark cage diving is an offence under the WA.¹⁰⁶ The Supreme Court hearing on this matter was held in March 2019, with a decision imminent. It cannot be said that the Director-General's comments in this regard reflect settled law.
158. Given the above, counsel for the Director General is taking a far-reaching interpretation of the WA. In particular, counsel for the Director-General has suggested that interfering with bat roosts and creating a distraction or attractions to bats through bright lights would constitute a "disturbance" for the purposes of the WA and thus be an offence under the Act.
159. If the Director-General's contention is correct, it would logically flow that any person that shines a light within Hamilton (including from houses or cars) that may disturb long tailed bats would be committing an offence under the WA.
160. The memorandum on behalf of the Director-General is concerning as it appears that the Director-General has predetermined any future application that may be made under the WA (being a separate statutory authority) without facts or evidence to support that decision. Counsel for the Director-General states that an authority could only be granted if it is consistent with the purpose of the WA, and that there is no such intent by the Applicant in respect of the proposal.¹⁰⁷

¹⁰⁵ *PauaMAC5 Inc v Director-General of Conservation* [2018] NZCA 348, at [45].

¹⁰⁶ *Shark Experience Ltd v PauaMAC5 Inc* [2018] NZSC 121.

¹⁰⁷ Memorandum of Counsel for the Director-General dated 30 August 2019, at [20].

161. The Court of Appeal's decision in *PauaMAC5* has not removed the ability to apply for all authorisations under the WA. The Court of Appeal considered that authorisations can be granted for catching alive or killing, for a purpose consistent with wildlife protection.¹⁰⁸ The Court expressly anticipated that such a situation could include the capture for purposes of removal to a safer environment.¹⁰⁹
162. In this case, it is anticipated that authorisations for the translocation of lizards will be sought from the Department of Conservation so that that lizards are not killed during earthworks.¹¹⁰
163. There is no evidence before the Director-General for it to support the proposition that no situation in the course of this proposal could arise in which a Wildlife Act authorisation could be obtained.
164. This amounts to unlawful predetermination on the part of the Director-General. Any future decision made on a WA authorisation applied for will be tarred with this predetermination, rendering it susceptible to judicial review.

¹⁰⁸ *PauaMAC5 Inc v Director-General of Conservation* [2018] NZCA 348, at [52].

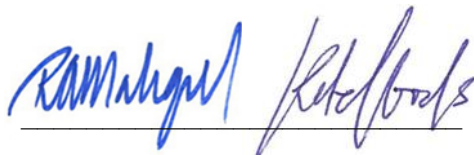
¹⁰⁹ *PauaMAC5 Inc v Director-General of Conservation* [2018] NZCA 348, at [53] .

¹¹⁰ See condition 96, that describes how lizard translocation measures will be implemented so that lizards are not killed during earthworks.

DECISION SOUGHT

165. It is submitted that, for the above reasons, the Panel should have confidence that the application can be granted in accordance with the s.42A conditions, subject to the small number of amendments sought by Weston Lea (as shown under Annexure "A").

Dated this 4th day of September 2019

The image shows two handwritten signatures in blue ink. The first signature, on the left, is 'Robert Makgill' and the second, on the right, is 'Kate Woods'. Both signatures are written in a cursive style and are positioned above a horizontal line.

Robert Makgill / Kate Woods

Counsel for Weston Lea Limited

ANNEXURE "A"

MARKED-UP CHANGES TO THE S.42A CONDITIONS

SOUGHT BY WESTON LEA

All amendments requested in this annexure are in addition to the further amendments set out in the Memo to the Hearing Commissioners from the section 42A officer, Gillian Cockerell, dated 3 September 2019.

Weston Lea also notes that there may need to be consequential changes to the numbering of the conditions as a result of these requested changes.

112. ~~80 240~~ artificial roost boxes shall be installed within the site ~~and/or (where prior approval granted from Council), within Hamilton City Council reserves where known high activity of bats occurs~~ and must be maintained by the consent holder for a period of 10 years from the date of their installation.

117. The consent holder shall prepare a Bat Management Plan which demonstrates how conditions 110 to ~~and~~ 115 above will be satisfied and shall include the following Long-tailed bat management procedures and actions:

~~Long-tailed bat management procedures and actions for:~~

- (a) the identification of any actual or potential roost trees and their monitoring before their removal and the preparation of a pre-tree felling protocol following consultation with the Department of Conservation;
- (b) minimising disturbance associated with land development activities around any active roosts within the site that are discovered that do not require removal;
- (c) minimising disturbance associated with land development activities around any active roosts within the site that are discovered that require removal until such roosts are confirmed to be vacant of bats, as determined by a suitably qualified and experienced bat ecologist using current best practice.;
- (d) the location, design and timing of installation of ~~240~~80 artificial roost boxes and their maintenance for a period of 10 years.;
- (e) ongoing monitoring and reporting of bat activity annually over the long-tailed bat breeding season and peak activity period (1 November to 30 April) for a minimum period of 10 years.

~~ACTIVE RECREATION RESERVE~~

~~127. The residential lots and areas 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 lodgement 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.~~

~~172. The consent holder shall provide private easement boundaries for all down slope properties in order to convey secondary stormwater flows from upstream properties to the relevant road reserve or Jointly Owned Access Lots (JOALs). Any necessary easements shall be shown on the survey plan for the relevant subdivision stage.~~

SECTION 224(C) COMPLIANCE CONDITIONS

197. Before the Council will issue a certificate pursuant to s224(c) of the RMA for the respective stage below, the consent holder shall demonstrate compliance with the general conditions above as they are applicable to the stage being developed.

...

STAGE 7

Survey Plan Approval (s223) Conditions ~~except as modified by condition 127:~~

...

STAGE 8

Survey Plan Approval (s223) Conditions ~~except as modified by condition 127:~~

...

STAGE 9

Survey Plan Approval (s223) Conditions ~~except as modified by condition 127:~~

...

STAGE 10

Survey Plan Approval (s223) Conditions ~~except as modified by condition 127:~~

...

STAGE 11

Survey Plan Approval (s223) Conditions ~~except as modified by condition 127:~~

...

STAGE 12

Survey Plan Approval (s223) Conditions ~~except as modified by condition 127:~~

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ANNEXURE “B”

SUMMARY OF EFFECTS

AND AVOIDANCE, REMEDY, AND MITIGATION STRATEGIES

Summary of effects and avoidance, remedy, and mitigation strategies for Amberfield development

Potential Effect	Avoidance/remedy/mitigation [shaded to reflect colours in Figure 1]	Effects Addressed[shaded to reflect colours in Figure 1]
- Physical removal of bat habitat (2.6 ha of vegetation (patches of mainly exotic trees and shrubs). One tree confirmed as a bat roost; other trees are <u>potential</u> bat roosts. - Potential aversion by bats associated with landscape change from pasture to urban environment. - Loss of connectivity through the site requiring bats to take alternative routes to reach distant habitat across their home range. - Indirect increase in mortality (increased predator densities resulting from the development). - Direct mortality (tree felling and vehicle collisions). <i>The above potential effects were agreed in the JWS dated 14 May 2019.</i>	Avoidance: - Key habitat features retained as far as practicable¹. - Setbacks and lot deferrals of development from key habitats. - Lighting design and specific restrictions to limit light spill. - Tree felling protocols to ensure no roosts are felled while occupied by bats. <i>The above measures are outlined in paragraphs 50 – 70 Ms. Cummings’ EIC.</i>	- Avoidance of the E-W shelterbelt maintains key connective link for commuting bats. <i>(paragraph 62 of Ms. Cummings EIC).</i> - The setback of the development from the river margin between (37.8 – 100+ m) avoids the potential for light spill from the development to impact bats using the river corridor. <i>(Figures 3 and 4 in Annexure “A” of Ms. Cummings’ EIC, and paragraph 9 and Annexures “A” and “B” in the Statement in Answer to Questions of the Hearing Panel Raised in Direction No. 9 dated 24 July 2019).</i> - Bat sensitive lighting will limit light spill into adjacent habitats. <i>(paragraphs 65 – 65 of Ms. Cummings’ EIC, paragraph 13 in Mr Kessner’s EIC, and Annexures “A” and “B” in the Statement in Answer to Questions of the Hearing Panel Raised in Direction No. 9 dated 24 July 2019).</i> - Lot deferrals further limit the potential for light spill into adjacent habitats while buffer planting establishes. <i>(paragraph 68 of Ms. Cummings’ EIC and Condition 84 - Appendix G of HCC’s Council’s Supplementary Section 42A Report).</i>
	“Lag Phase” Offset: Short term (<10 years): Contribution towards off-site pest control targeting core habitats within the population’s home range (not limited to the Amberfield site)² <i>Offset contribution proposed by My Kessels in his was agreed based after conversations with the HCC expert during the adjournment and post-caucusing. Refer to the memo from Boffa Miskell dated 22 July 2019, and paragraphs 32 – 52 of Mr. Kessels’ EIR.</i>	Pest control will offset potential avoidance of the site while planted habitat matures and becomes functional. <i>(Boffa Miskell memo dated 22 July 2019 and Condition 120 – Appendix G of HCC’s Council’s Supplementary Section 42A Report).</i>
	Medium term mitigation (>5 years): Artificial bat roosts with predator exclusion mechanisms. <i>Installation of artificial roosts was proposed in paragraph 56 of Ms. Cummings’ EIR and in the joint witness statement (JWS) dated 14 June 2019.</i>	Artificial roosts will provide alternative roost habitat while the restoration plantings mature. Predator exclusion mechanisms on the artificial roosts will provide immediate protection for vulnerable roosting bats. <i>(paragraphs 52 and 56 of Ms. Cummings’ EIR, and the JWS dated 14 May 2019).</i>
	Medium - long term mitigation (10 – 25+ years): 18.5 ha of native restoration in sites with highest habitat potential, including: - Restoration of the southern gully which will provide an alternative commuting corridor in the medium to long-term³. - Creation of high quality foraging habitat in the NE terrace and the southern gully to mitigate for potential reduction in energy efficiency associated with individual bats using alternative commuting routes. - Early planting in strategic areas will reduce time lag between the development commencing and the restoration plantings maturing. - Vegetation will be designed at road crossings to facilitate bat movement over the road crossings or under the bridge (Condition 107(c)). <i>The above mitigation measures are outlined in paragraphs 50 – 70 Ms. Cummings’ EIC.</i>	- Within 10 years, buffer plantings will reach a height and density where it will create an effective physical barrier that will block light from the development impacting on adjacent habitats. <i>(paragraphs 60 and 73 of Ms. Cumming’s IEC and the Boffa Miskell memo dated 22 July 2019).</i> - Buffer planting will provide a physical barrier between the adjacent habitat and the roads, minimising potential vehicle collisions. <i>(page 10 of the JWS dated 14 June 2019).</i> - After 10 years, the restoration planting be of a stature where bats will utilise it for foraging and commuting. The site will contain more extensive, well-connected bat habitat than that present pre-development. The value of the replacement habitat will continue to increase over time. <i>(paragraph 51 in Ms. Cummings’ EIR).</i> - The native restoration will mature and provide natural roost habitat in 25+ years. At this stage, the structure and diversity of the restoration planting will be of considerably higher quality than exotic trees and pastureland removed. This habitat value will continue to increase over time. <i>(Section 3.2.3 in the Boffa Miskell Ecological Assessment Addendum dated 20 February 2019); paragraphs 92 and 95(e) in Ms. Cummings’ EIC).</i>

¹ With the exception of road crossings and 0.019 ha of vegetation temporarily removed (and replanted to service a stormwater outlet).

² We consider that coordinated, large-scale predator control targeting core habitats such as confirmed maternity roost sites will be considerably more beneficial for the bat population compared to small scale pest control in retained habitat on the site (refer to Paragraph 33 in Dr Sarah Flynn’s evidence). This consideration is why the offset is proposed instead of on site pest control.

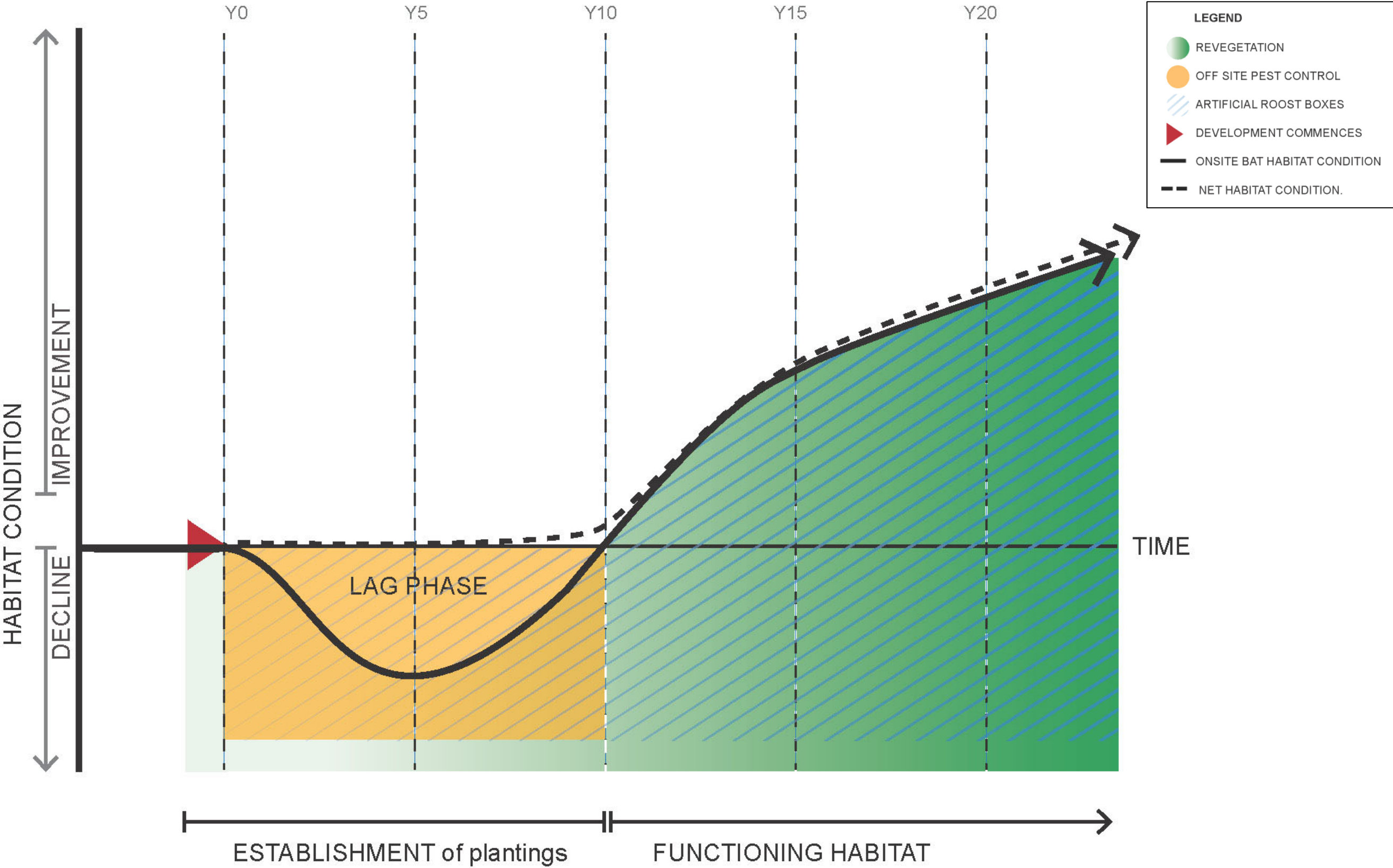
³ We note that the value of the southern gully as commuting habitat is dependent on the area outside of the Amberfield site being planted (as indicated in the PSP – Figure 2-1: Peacocke Structure Plan – Land Use).

ANNEXURE “C”

**FIGURE 1: CONCEPTUAL GRAPHICAL DEPICTION
OF HABITAT CONDITION RESPONSE TO MITIGATION STRATEGIES**

Figure 1: Conceptual graphical depiction of habitat condition response to mitigation strategies.

X axis = time. Y axis = habitat condition.



ANNEXURE “D”

WESTON LEA ECOLOGIST’S

ARTIFICIAL ROOST BOXES REVISED PROPOSAL

26 August 2019

Attention: Marianne Mackintosh

Tompkins Wake
PO Box 258
Hamilton 3240

By email to: Marianne.Mackintosh@tompkinswake.co.nz

Dear Marianne

AMBERFIELD – ARTIFICIAL ROOST BOXES

1. Following a review of the Council's supplementary s.42A report and the supplementary statement from Mr Kessels, Weston Lea Limited's (**Weston Lea**) ecologists have further considered the proposed installation of 240 artificial roost boxes across the site.
2. I **enclose** a note prepared by Weston Lea's ecologists that proposes a revised number and configuration of artificial roost boxes to be deployed across the Amberfield site, including the reasons why a revised approach is proposed.
3. Weston Lea's experts would like to discuss this revised approach with Mr Kessels. Can you please advise if Mr Kessels would be available for further discussion with Weston Lea's experts as soon as possible?
4. Weston Lea would like to see whether agreement can be reached prior to the hearing next week. Accordingly, we would appreciate if a teleconference or meeting can be arranged between the ecologists this week (if possible).
5. Please don't hesitate to contact me if you have any questions.

Yours faithfully
Wynn Williams



Kate Woods
Senior Associate

P +64 3 379 7622

E kate.woods@wynnwilliams.co.nz

In accordance with Council's S42a report, the Applicant has revised proposed measures to address short term effects on bats through a fund for off-site predator control. Medium- and long-term effects on bats (10 – 25+ years) are addressed through a series of activities including buffer and mitigation planting, and installation of artificial roost boxes. Although the nature and quantum of artificial roost boxes has been raised at expert caucusing, detailed plans have not been suggested by the Applicant, nor agreed by Council or other submitters. In addition, Council's expert, Gerry Kessels, has previously expressed doubts that the 240 roost boxes initially suggested could be appropriately sited on the Amberfield property, which we surmise is the reason for including provision in the consent condition for relocating them offsite.

Given the Applicant's diminished reliance on artificial roost boxes as a means of addressing short term effects (through contributions to offsite predator control), and scepticism from other experts as to the viability of deploying the number originally proposed within the site, we have revised the proposed number and configuration of roost boxes to be deployed across the Amberfield site and invite discussion on this proposal with Council's expert.

Artificial bat boxes will be placed along the riparian margin from the NW to the SE margins of the site, and 300 m into the southern gully. Groups of 4 boxes will be placed on a pole with predator exclusion devices (e.g. a metal pole or metal exclusion bands within the riparian strip). Poles will be placed every 150 m, meaning a total of 80 artificial roost boxes will be deployed at 20 locations. We have chosen to target the riparian strip because:

1. it represents the best quality habitat on the site (after works have commenced);
2. has good levels of bat activity;
3. vegetation is relatively uniform and so placing poles every 150 m is unlikely to lessen the likelihood of bats finding and using the roost boxes; and
4. two roost trees have been found in the area in the past.

We exclude the E-W shelterbelt on the grounds that it is not good roosting habitat (due to tree type) and its primary role is as a connector.

The Amberfield development will result in the temporary loss of 2.62 ha of potential bat roost habitat¹ which will be replaced with 18.5 ha of native restoration planting including tall stature, native trees which will provide potential bat roost habitat in the long-term. The addition of 80 roost boxes represents a ratio of 30.5 bat boxes per ha of lost potential roost habitat. This compares well with the Hamilton Section of the Waikato Expressway which had a ratio of between 3.6 to 5 bat boxes per ha of cleared land, and to the Southern Links project, which offered a total of 150 roost boxes as partial mitigation for the loss of ~12 ha of woody vegetation.

Dr Stuart Parsons, Dr Sarah Flynn, Georgia Cummings, Andrew Blayney

¹ Areas containing tall stature trees that could provide potential bat roost features such as cavities or loose bark.