BEFORE THE CENTRAL OTAGO DISTRICT COUNCIL

Under	the Resource Management Act 1991
And In the matter of	an application by TKO Properties Limited for a residential development and subdivision at Rocky Point, Bendigo (RC230179)

Memorandum of Counsel on behalf of
the Director-General of Conservation *Tumuaki Ahurei*
Dated: 29th November 2024

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MAY IT PLEASE THE PANEL:

1. During the Hearing in this matter, the Panel asked Counsel for the Director-General of Conservation to provide them with further information or case law in relation to two matters: the permitted baseline test and what 'practicable' means. I address those issues in paragraphs 20 to 23 below.

2. Further, at the conclusion of the Hearing I understand that other legal matters arose, including how the Conservation Covenant should be interpreted. Ms Hill has since written to me asking me to clarify the position of the Director-General in this regard. The Director-General's submission is that the Conservation Covenant does not permit the erection of any buildings, removal of cushionfield and Threatened and At-risk plants, or the proposed re-planting on the offsetting sites.

<u>Interpretation of the Conservation Covenant</u>

3. If I understand the Applicant's argument correctly, the suggestion is that because the covenant does not explicitly prohibit building houses on the land, it can be inferred that they are permitted. The argument is: if something is not expressly prohibited in the Covenant, it is permitted.

4. That starting presumption is incorrect. It ignores the content and structure of this specific Conservation Covenant —namely that Recital C sets the general conservation management objectives, and the Covenant specifies 'carve outs' for particular uses that *are* or *may* be permitted — and it does not accord with the legal tests for interpreting statutory covenants. The correct way to interpret the Conservation Covenant is that **if something is not explicitly permitted, it is prohibited.**

5. It must also flow from the Applicant's argument that the Minister would be obliged to approve the building of those 14 houses – because their construction has not been expressly prohibited and so the Minister would be acting *ultra vires* to refuse consent.

Again, that is a misunderstanding of how this particular covenant, and conservation covenants in general, work.

6. Case law states that, if there is any debate about the interpretation of a statutory covenant, there are five issues to consider.[1] I address each in turn below.

First, Is the interpretation supported by a proper understanding of the empowering Act? [2]

7. A proper understanding of the empowering Act clearly supports the Director-General's submission.

8. The Conservation Covenant was created under s 77 of the Reserves Act 1977. The Reserves Act purpose is to provide for 'the **preservation** and management for the benefit and enjoyment of the public' particular areas (s 3) and ensure 'as far as possible, the survival of all indigenous species of flora and fauna, both rare and commonplace, in their natural communities and habitats, and the preservation of representative samples of all classes of natural ecosystems and landscape which in the aggregate originally gave New Zealand its own recognisable character' (s 3(b)).

9. Section 77 provides for conservation covenants to be established, either for a set term or in perpetuity, where the Minister is satisfied that the land should be managed 'so as to **preserve** the natural environment, or landscape amenity, or wildlife or freshwater-life or marine-life habitat, or historical value'.

10. Preserve means "keep safe or free from harm, decay, etc. keep alive; maintain a thing in its existing state; retain a quality or condition."[3]

[1] *Kaimai Properties Ltd v Queen Elizabeth the Second National Trust* [2021] NZCA 10; *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75.
[2] *Green Growth*, ibid, at [136], [154]
[3] *Concise Oxford English Dictionary* (Clarendon, 9th ed, 1995). There is no definition in the Reserves Act and so the word must be given its normal meaning.

11. Where there is a conservation covenant in place, section 77 provides that the offence provisions in sections 93 – 105 of the Reserves Act apply to the land. The covenanted land is treated as a public reserve and the Reserve Act's criminal offence provisions apply.

12. Critically, s 94 makes the following acts **criminal offences** on covenanted land:

    a) **erecting any building** - s 94(1)(k)
    b) **planting** any tree, shrub, or plant of any kind, or sows or scatters the seed of any tree, shrub, or plant of any kind, or introduces any substance injurious to plant life - s 94(1)(d)
    c) **removing or wilfully damaging** any, or any part of, any wood, tree, shrub, fern, plant, stone, mineral, gravel, kauri gum, furniture, utensil, tool, protected New Zealand object, relic, or thing of any kind - s 94(1)(f)
    d) **damaging** in any way the recreational, scenic, historic, scientific, or natural features or the flora and fauna therein – s 94(1)(m).

13. Accordingly, it would be an offence for the Applicant to remove vegetation or erect buildings on the covenanted area or destroy historic heritage or to plant other vegetation on the offsetting sites (which have conservation convents on them). Section 94 reinforces the approach taken to the *structure* of Covenants i.e. a proposed activity would have to be *expressly permitted* by the Covenant (and where required, approval also sought from the Minister), as the default is for an offence to have been committed.

14. The legislative scheme makes it perfectly clear that erecting residential buildings on the land covered by the Conservation Covenant is not permissible.

<u>Second, is the interpretation contended for supported by the objectives of the Covenant?</u>

15. It cannot sensibly be argued that (a 14 house) residential development on the land would meet the conservation objectives of the Covenant. I address this point in my Legal Submissions dated 18th November, at paragraphs [166]-[168].

Third, does the Covenant have "careful carve outs" from the objectives that set the limits for use?[4]

16. Yes. There are "careful carve outs" for use from the management objectives and those carve outs set the limits for use (e.g. grazing), consistent with the intention that the land be used for farming. Erecting buildings is not included as a carve out and so this was not envisaged by or permitted under the Covenant.

Fourth, who does control lie with to approve any uses?

17. Control lies with the Minister of Conservation. Where control lies with an external body (or Minister), the courts have stated the owner's rights under the Covenant are "severely curtailed".[5] As the case law has confirmed, it would defeat the purpose of the Act and the covenant if something could be done on the land without first asking for consent of the body with control. If prior consent were not required, actions may irretrievably damage the values before the Minister becomes aware of them.[6] Accordingly, the Applicant's argument and the natural implications that flow (see para [5] above) cannot stand.

Fifth, what would the Covenant convey to a reasonable person, having the background knowledge reasonably available to the parties in the situation they were in at the time of the contract?

18. That use of land for a residential subdivision (with 14 houses on the covenanted area) was clearly not contemplated by the covenanting parties. The whole point of the

[4] *Kaimai,* ibid at [35].
[5] *Kaimai,* ibid at [34].
[6] *Green Growth*, ibid, at [154].

tenure review process and conservation covenanting was to separate out land to be used and developed, from land that would be protected for conservation *in perpetuity*.

19. The protection of the covenanted land and its values was part of the deal agreed by the Crown and the freeholder, for the loss of public lands. Ms Hill's contention that one 'could not assume the land would remain undeveloped forever' is misplaced. That is precisely what the covenant process intended and provides for (Cl 12 (a)).

20. In relation to the specific controls:

    a. it would appear that specific provisions in respect of heritage were expressly included because of the value in heritage-tourism and the possibility of owners making gold-mining features into tourist sites (which became common in CODC at the time) – so it makes sense to explicitly clarify that the owners could not put up any structures (signs etc) next to the heritage sites, unless done in accordance with Ministerial approval / oversight;
    b. the specific provision in relation to woody vegetation clearance was to protect an ecological sequence (as discussed in the Coterra Report – noting the omissions in the Coterra report, as it fails to mention the Recital C objectives at all).

Other matters

Permitted Baseline

21. There is no debate between the parties or the Council Planner, that the content of the permitted baseline is restricted to permitted activities under the Plan. Relevant case law includes:

    Tairua Marine Ltd v Waikato Regional Council[7]

[7] [2006] BCL 615 (NZHC), at [47].

> "... the subsection does confirm the essential limit which is referred to in the leading cases, which is that it is permitted activities and only permitted activities which form part of the baseline, and not other activities of a different category."

Rodney District Council v Eyres Eco-Park Ltd [8]

> "Section 104(2) modifies the so-called common law test by providing for a discretion where none formerly existed, and by limiting the permitted baseline to the effects of activities permitted under the plan. "

22. Controlled activities are not to be included in the permitted baseline. Permitted activities are expressly defined in RMA s 87A (1) and exclude controlled activities (see s 87A (2)). The rationale for the permitted baseline is that the community has sanctioned certain effects be imposed on the land 'as a right' i.e. without any further authority required. If a resource consent is required, that could have conditions to avoid, remedy or mitigate effects of the activity, clearly the community has not sanctioned those effects.

<u>Meaning of 'practicable' in the Effect Management Hierarchy</u>

23. The case that I referred the Panel to orally is *Royal Forest & Bird Protection Society Of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51. That case interpreted the phrase '*reasonably* practicable' (so arguably sets less of a requirement on an applicant to do something to avoid effects than 'practicable' does). Nevertheless, paragraph [51] is of assistance:

> [51] These legislative examples are, perhaps unsurprisingly, consistent with well-established case law interpreting the meaning of "reasonably practicable." It has been

[8] High Court, Auckland CIV 2005-485-33, 13 March 2006, at [105].

held that the phrase is a narrower term than "physically possible" and implies a computation of the quantum of risk against the measures involved in averting the risk (in money, time or trouble), so that if there is a gross disproportion between them, then extensive measures are not required to meet an insignificant risk.[13] Where lives may be at stake, a practicable precaution should not lightly be considered unreasonable, but if the risk is a very rare one and the trouble and expense involved in precautions against it would be considerable but would not afford anything like complete protection, then adoption of such precautions could have the disadvantage of giving a false sense of security.[14] "Practicable" has been held to mean "possible to be accomplished with known means or resources" and synonymous with "feasible," being more than merely a possibility and including consideration of the context of the proceeding, the costs involved and other matters of practical convenience.[15] Conversely, "not reasonably practicable" should not be equated with "virtually impossible" as the obligation to do something which is "reasonably practicable" is not absolute, but is an objective test which must be considered in relation to the purpose of the requirement and the problems involved in complying with it, such that a weighing exercise is involved with the weight of the considerations varying according to the circumstances; where human safety is involved, factors impinging on that must be given appropriate weight.[16]

24. Essentially the more serious the effects, the higher the standard. In my submission, the fact that Threatened and At Risk species and irreplaceable, vulnerable ecological communities would be destroyed by the present proposal, places a higher onus on the Applicant to show that alternatives to avoid effects are not practicable.[9]

Ceri Warnock

Counsel for the Director-General of Conservation

29th November 2024

[9] I.e. if the Panel places weight on the NPSIB and the pORPS Effects Management Hierarchy, when considering s 104(1)(b).