BEFORE THE COMMISSIONERS APPOINTED BY THE CENTRAL OTAGO DISTRICT COUNCIL

UNDER	the Resource Management Act 1991
IN THE MATTER	of RC230179 an application for a 30-lot subdivision at Rocky Point on Tarras-Cromwell Road (SH8)
BY	**TKO PROPERTIES LIMITED** Applicant

OPENING LEGAL SUBMISSIONS FOR THE APPLICANT

Dated: 18 November 2024

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LAWYERS | NOTARY PUBLIC

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MAY IT PLEASE THE COMMISSIONERS:

INTRODUCTION

[1] These legal submissions are presented on behalf of TKO Properties Limited (**Applicant**) in respect of consent application RC230179 (**Application or Proposal**).

[2] The Applicant seeks resource consent for the subdivision of 30 lots with associated building platforms and one balance allotment at Rocky Point. The proposal overall is a comprehensively designed development which incorporates stringent conditions of consent to ensure certainty in terms of long term ecological and landscape management.

[3] Evidence in support of the Application has been lodged in advance of the hearing and will be called from:

(a) Mr Garden (Applicant / corporate);

(b) Mr Cowan (fire risk);

(c) Dr Jennings (heritage and archaeology);

(d) Mr Carr (traffic and transport);

(e) Mr Baxter (landscape);

(f) Mr Sternberg (wastewater and water supply);

(g) Ms Rhynd (Stormwater);

(h) Mr Beale (ecology);

(i) Dr Wells (offsetting model);

(j) Ms King (invertebrates); and

(k) Mr Brown (planning).

[4] These submissions will outline the framework for your decision making and address the key evidential issues to be determined.

Executive summary

[5] It is the Applicant's case that the Proposal will ensure:

(a) No more than minor effects will occur in terms of landscape and visual amenity, servicing, traffic / transport, fire and hazard risk, and archaeology / heritage.

(b) Applying a carefully prescribed ecological management regime, including biodiversity offsetting in accordance with National Policy Statement Indigenous Biodiversity (**NPS-IB**) criteria, the Application will ensure an overall net gain in indigenous biodiversity values.

(c) In consideration of the Central Otago Operative District Plan (**ODP**) as a whole, and undertaking a structured analysis of the objectives and policies of the ODP in the proper context, the Proposal will not be contrary to those plan provisions.

(d) In light of this, the Application passes both gateway tests for a non-complying activity under s 104D of the Resource Management Act 1991 (**RMA**). Moreover, the overall effects of the proposal when assessed under s 104(1) are considered to be appropriate and net positive.

[6] An important starting proposition for determination of the Proposal is that the Site as it stands today does not protect important indigenous biodiversity. This is because:

(a) the ODP precludes the land from rules as to indigenous vegetation clearance;

(b) the ODP permits farming and viticultural uses which could have significant adverse effects on indigenous biodiversity; and

(c) the private covenant between the landowner and the Minister for Conservation does not provide any meaningful protection through prohibitions on indigenous biodiversity destruction.

[7] The Department of Conservation (**DoC**) evidence lodged, and the s 42A report writer, have failed to look at the Proposal in this light. We submit that when looking at the current under-protection of the Site compared to the benefits of the Proposal (which will actively protect the significant majority of the Site in perpetuity), the effects overall are overwhelmingly positive.

[8] The submitter and Council positions are undermined by their failure to factor in the permitted baseline for the Site which could, quite likely, result in far more significant adverse effects on indigenous biodiversity than the Application. A failure to take account this baseline when making determinations on the Proposal could result in perverse outcomes, contrary to Part 2 of the RMA and the NPS-IB.

[9] The Application overall is highly unique in that it is fundamentally designed around an underlying development right in the 'development zone' within the Site. A detailed and technical review of the Site as a whole has resulted in a more suitably integrated development proposal, having regard to all environmental effects, than that which could otherwise be envisaged by stringently staying only within the development zone footprint.

[10] Since lodgement of the Application, the Applicant has significantly refined the proposal to respond to submitter concerns and those of the s 42A report writer. Moreover, the Proposal's approach to addressing indigenous biodiversity effects within the Site has been fine-tuned since lodgement, in light of relatively recent case law and guidance evolving under the NPS-IB.

[11] Accordingly, we submit that it is appropriate to grant consent to the Application on the conditions sought.

Site and environment context

[12] The context for the Site and an overview of the Proposal are set out in Mr Brown's evidence.[1] This has not changed since the lodgement of the

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1 Statement of evidence of Jeff Brown,4 November 2024 at [2.1] – [3.6].

Applicant's evidence, save for preparing an updated set of conditions (to be tabled with Mr Brown's summary statement).

[13] Mr Brown outlines the design process for the Proposal which has involved micro-siting building platforms within the Site, based upon the starting point of the development zone, but also balancing the competing intricacies of landscape and visual effects, heritage and archaeology, indigenous biodiversity, and servicing and access constraints.[2]

[14] As his evidence demonstrates, the Proposal has involved a significant level of precision in its design across multiple and overlapping environmental domains. We would urge the Commissioners to keep this in mind when considering those competing tensions, and the constraints in terms of alternative or redesigned layouts. The Proposal is overall highly sophisticated and has been designed by a collective of exceptionally experienced consultants.

LEGAL PRINCIPLES

Statutory framework

Section 104D RMA

[15] The Proposal is a non-complying activity under the ODP. Accordingly, it is required to pass through one of the s 104D gateway tests. Consent may only be granted if the decision-maker is satisfied that one of the following gateway tests are met:

(a) the adverse effects on the environment will be no more than minor (**Minor Effects Test**); or

(b) the Proposal will not be contrary to the objectives and policies of the District Plan (**Policy Test**).

[16] If the Proposal can satisfy one of the gateway tests, the decision maker must then consider the matters in s 104(1) of the RMA when determining whether to grant or refuse consent under s 104B.

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2 At [2.8] – [2.9].

[17] The Minor Effects Test is confined to adverse effects only. Whether effects are minor is to be determined after having regard to any mitigation of effects that might be achieved by imposing conditions.[3]

[18] The Policy Test requires an application not to be contrary to the objectives and policies of the ODP. The High Court has found 'contrary' to objectives and policies to mean *"...opposed in nature, different to or opposite... repugnant or antagonistic"*.[4] Whether an activity is contrary with the objectives and policies of a plan is to be considered on a fair appraisal of the objectives and policies as a whole.[5] As a consent authority you must consider all of the relevant plan provisions comprehensively, and so far as possible reconcile them where they appear to be pulling in different directions.[6]

[19] As our submissions and the evidence of the Applicant will demonstrate, the adverse effects of the Proposal will be no more than minor, and the Proposal is not contrary to the objectives and policies of the ODP. Accordingly, the Proposal passes through both gateway tests and consent can be granted subject to conditions.

[20] The Supreme Court recently described the s 104D policy test as[7]

> **The assessment of whether the threshold is passed does not take place in the abstract but in the context of the particular project at issue.** What is required is a holistic assessment of whether, on the basis of the proper interpretation of the plan as a whole, the particular project could (not would) be granted the relevant resource consents. This is a preliminary assessment only. Whether or not the consents would be granted if the threshold is passed would depend on the outcome of the full analysis under s 104.
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> [Emphasis added]

[21] We note that, as is a consistent theme of these submissions, that contextual approach is particularly important in this Proposal, where the

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3 *Stokes v Christchurch City Council* [1999] NZRMA 409.
4 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
5 *Royal Forest and Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 at [79] (**East West Link**).
6 At [101].
7 At [237].

starting proposition is the Site is currently highly vulnerable to degradation due to a lack of protection under the ODP or any other regulation.

Section 104 RMA

[22] Section 104 of the RMA outlines the matters that a decision-maker must, subject to Part 2, have regard to when considering the Proposal. These matters include:

(a) the environmental effects of the proposed activities;

(b) the relevant provisions of the regional and district plans and higher order planning documents;

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application; and

(d) any measure proposed or agreed to by the consent applicant for the purpose of ensuring positive effects to offset or compensate for any adverse effect arising from the application.

[23] In our submission, on a consideration of the above matters, the Proposal is suitable for granting of consent.

Section 104(6) RMA

[24] Planning evidence lodged for DoC asserts that there are gaps in the baseline data for the site on Threatened and At Risk Plants (particularly spring annuals). On this basis, it is suggested that consent be declined under s 104(6) of the RMA for want of adequate information submitted to make a determination on the application.

[25] The Applicant (through Neill Simpson, Andrew Wells, Mandy Tocher, Samantha King, Roger Gibson, and Simon Beale,) has spent considerable time undertaking base data surveys and documenting these in the EcIA and in evidence. This work has also been supported by peer review input from further experienced consultants. Granted, DoC has also invested considerable resources into their evidence, using four

senior botanists and unsurprisingly identified other sites in the development area where spring annuals occur.

[26] It simply cannot therefore be true that between these extensively experienced experts, and the significant data and time taken to prepare the same, that the Commission is faced with inadequate information to determine the Application. Rather, the Commission will need to weigh and balance competing expert opinions in order to ultimately determine the predicated effects of the proposal.

[27] The inference from the DoC evidence is a philosophical one, that no amount of data investigation would be enough. This is a demonstrably untrue claim. The Applicant has spent several years, engaged 8 separate ecological specialists plus other peer reviewers, and invested heavily on compiling information to present a thorough proposal. Matters as to competing evidence are addressed further below in our submissions.

Permitted baseline

[28] An application of the permitted baseline in this case is necessary and important in order to understand and assess the effects of the proposal on the environment. Mr Brown, as compared to Mr Vincent and Ms Williams, take different approaches to the permitted baseline. This difference appears to be a key factor underpinning differences of opinion.

[29] Fundamentally, the Applicant's proposition is that a landowner on this Site could undertake any level of vegetation clearance under the ODP as of right. The only reason that consideration is being given to indigenous biodiversity effects in this case is by virtue of the overall non-complying activity status, the triggered objective and policy assessment, and the NPS-IB as a result of the same. No rule as to vegetation clearance *per se* is otherwise triggered.

[30] This point is critical to properly have regard to when assessing the effects of the proposal on the environment, and what the ODP deems to be permissible activities within that environment. The Council officers and submitters have failed to understand that in this context, the

Proposal is affording long term and secure protections to these values which will not otherwise be achieved.

[31] The purpose of the permitted baseline test is to isolate and make effects of activities on the environment that are permitted by the plan or NES irrelevant. When applying the baseline, such effects cannot then be taken into account when assessing the effects of a particular resource consent application. The baseline has been defined by case law as comprising non-fanciful (credible) activities that would be permitted as of right by the plan in question. That is a less exacting test than which applies to the receiving environment concept of whether a consented proposal is 'likely' to be implemented.

[32] The logic of the permitted baseline is that if a relevant plan made an activity permitted, that represented a community view that the effects of that permitted activity were acceptable. Accordingly, a resource consent application for an activity on the same site should similarly be able to take those effects as 'acceptable'.

[33] Mr Vincent contends that there is no relevant permitted baseline as no subdivision or residential activity can occur on the land as permitted activities.[8]

(a) This approach conflates activities with effects. It seeks to disregard the application of the baseline by comparing the likeness of a permitted *activity* with a consenting *activity*. That is inconsistent with the philosophy of the baseline, which is an effects-based approach (not activity-based).

(b) Further, whilst the overall activity for which is sought (subdivision and building platforms) is not permitted, insofar as indigenous vegetation is concerned, the specific activity (the removal of such vegetation) is in fact permitted. This is regardless of whether the clearance is associated with a particular use.[9]

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8 Section 42A report at [6.4].
9 Evidence of Jeff Brown at [4.2].

[34] In our submission, there are few exceptions to where the baseline has been chosen not to be applied by a decision maker. Case law guiding when a baseline may not be appropriate to apply, include:

(a) where the baseline claimed by the applicant is fanciful or not credible;

(b) where the application of the baseline would be inconsistent with Part 2 of the RMA;

(c) where the permitted activity with which the proposal might be compared as to adverse effect nevertheless so different in kind and purpose within the plan's framework that the permitted baseline ought not be invoked; or

(d) where the application of the baseline would be inconsistent with objectives and policies in the plan.[10]

[35] Mr Brown has addressed the relevance of the permitted baseline in his evidence.[11] Of note, a thorough analysis of the ODP reveals that farming and viticulture activities on the Site are entirely permitted and could have no corresponding limits on indigenous vegetation clearance and earthworks. Mr Brown has addressed the credibility of such activities occurring on the Site with the owner, particularly in light of needing to generate a return on the investment in some form.

[36] As above, clearance of vegetation is permitted regardless of whether it is associated with a particular land use. This is different from for example a situation where the clearance was only permitted as part of a specific use. Issues of whether any such use is fanciful or non-credible do not come into play.

[37] However, in any event, it is imminently possible (not just non fanciful) that farming activities through spraying and direct drilling, or ploughing/tiling of exotic pasture, or introduction of viticulture on the Site

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10 *Lyttleton Harbour Landscape Protection Association Incorporated v Christchurch City Council* Environment Court, Decision No. C055/2006.

11 Evidence of Jeff Brown at [4.1] – [4.5].

could be undertaken in a way that would have severe consequences on ecological values.

[38] Applying a baseline in this case is entirely consistent with Part 2 of the RMA (particularly ss 6(c) and (f)) and the relevant provisions of the ODP because it will ensure an overall net positive biodiversity outcome as compared to any permitted farming or horticultural rights. It is not realistic to assume that the Site will continue to sit undeveloped or unused in perpetuity.

[39] While the activity of subdivision and development are of a different nature to farming and viticulture, in our submission this is quite different from previous case law in that the Site does contain the development zone which anticipates a level of dense residential development within the Site, coupled with the exclusion of the Site from SNA and vegetation clearance rules altogether (rather than just through specified permitted rural uses).

[40] There would potentially be perverse outcomes of not applying the baseline in this case, which would be directly contrary to the ODP and Part 2, in that:

(a) It would effectively signal to landowners that they should or could eradicate biodiversity values as of right under permitted rules, but if they do not do so, and instead seek to protect those in a consent application process, they will not necessarily obtain the benefit of that comparison of alternative effect scenarios.

(b) Not applying a baseline approach in this case would disregard the clear intentions and possibly outcomes of the ODP, that indigenous biodiversity is not particularly well protected on this Site.

(c) Applying Mr Vincent's approach, that it is not useful to compare a farming activity to an activity that requires consent, would be completely illogical and contrary to the fundamental approach of the permitted baseline (which is a comparison of effects rather than activities).

[41] The importance of the baseline in considering competing expert evidence is further set out below in relation to the NPS-IB and offsetting sections. However, the key point is that a disregard of the baseline in the Council (and DoC's) evidence is a fundamental flaw as a starting point. The Applicant's case is that, but for the Proposal, indigenous biodiversity on the site will not otherwise be protected and could be far more significantly degraded.[12]

Adverse effects versus positive offset effects

[42] It is clear that under s 104D of the RMA, it is not permissible when considering whether the adverse effects of an activity will be more than minor to take into account separate positive effects of the activity or the extent to which those positive effects might overall serve to counterbalance the more than minor effects.[13] That exercise is reserved for the subsequent determination under s 104.

[43] In order to pass the effects gateway, an applicant must show the adverse effects (as mitigated, but before any separate positive or offsetting measures are considered), are no more than minor.

[44] A key distinction then when assessing effects under s 104D(1)(a) is whether a particular aspect of a proposal described as an "offset" (being a consideration that diminishes or balances the effect of an opposite one)[14] serves to mitigate or diminish an adverse effect, or whether it more properly is said to introduce a positive effect that counterbalances but does not reduce the adverse effect.

[45] Based on previous High Court authority, the position was offsets were in the latter category. In *Royal Forest and Bird v Buller District Council*[15] the Court said (obiter) that offsets are a separate positive effect and not a mitigation of an adverse effect. It noted:[16]

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12 Evidence of Simon Beale at [56].
13 *Stokes v Christchurch City Council* above n 3 at [76].
14 Oxford English Dictionary, definition of "Offset".
15 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1346.
16 At [72].

> The usual meaning of "mitigate" is to alleviate, or to abate, or to moderate the severity of something. Offsets do not do that. Rather, they offer a positive new effect, one which did not exist before.

[46] However, recent authority of the Supreme Court suggests the above statement is not necessarily correct. In the '*East West Link*' case,[17] the Court confirmed, in the context of determining whether an activity was contrary to a policy that sought to avoid certain adverse effects, that offsets can in fact serve to avoid or mitigate such effects. The extent to which they do so (in other words, whether they serve to avoid/mitigate an adverse effect, or are really introducing a separate positive effect) is a question of fact and degree.[18]

[47] The majority of the Court found an activity that would "otherwise have more than transitory effects … may nonetheless" not result in adverse effects "if those adverse effects are offset **in net terms**" [emphasis added].[19] It then went on to say:

> Whether the impact of the offset must be in situ or can be deployed elsewhere will be very much context specific. It will, we imagine, depend on the environmental element or value that must be protected and the nature of the adverse effect that is to be offset... [these] are matters of evidence and probably largely expert evidence, to be carefully assessed by the fact finder.

[48] Based on this finding, the extent to which offsets could serve to avoid adverse effects will be fact-dependent. In many cases the offsets would more appropriately be deemed a positive effect rather than avoiding an adverse effect. What is clear, however, is the Court's rejection of a suggestion that as a matter of law offsets cannot function to avoid adverse effects.[20]

[49] The Court in *East West Link* was specifically dealing with issues of offsets in the context of complying with objectives and policies that seek to avoid adverse effects. It was not asked whether offsets could serve to avoid adverse effects in the context of an assessment under the effects

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17 *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26.
18 At [176].
19 At [176].
20 At [229].

gateway of s 104D. However, we submit in principle there is no reason why the logic applied by the Court could not extend to an assessment under that gateway. Both are dealing with the issue of adverse effects. The policy overlay which the Court addressed does not change the fundamental principle.

[50] Further, we are not aware of any cases subsequent to *East West Link* that have addressed that issue or found the Supreme Court's approach to be confined to a policy assessment.

[51] In *Royal Forest and Bird v West Coast Regional Council*[21] (prior to the *East West Link* judgment), the Environment Court approached the issue of offsets on the basis they were a positive effect under s 104(1)(ab), as opposed to a mitigation or avoidance of an adverse effect.[22] However, that decision is currently under appeal to the High Court.

[52] In the context of this case, the issue is whether the relevant environmental offsets (being the substantial ecological program on and around the site) serve to sufficiently reduce the level of adverse effects on ecological values, or whether they introduce separate positive ecological effects. We note there is commonly a matter of distinction between parties as to the scale of when measures turn from mitigation, to offsetting, to compensation – depending on circumstances. In our submission where there is an overall discretionary or non-complying activity consent under consideration, less turns on how those measures are marshalled under the s 104(1)(a) assessment. This is particularly the case given the clearer approach to the NPS-IB for assessing offsetting policies under the effects management hierarchy for non-SNA areas.

Relevance of private covenants

[53] The evidence of Ms Williams for DoC claims that the private covenant between the Minister and the landowner is a relevant consideration to this application. This is on the basis that the ODP identifies the tenure

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21 *Royal Forest and Bird v West Coast Regional Council* [2023] NZEnvC 68.
22 At [150].

review process as an alternative statutory means of protecting significant indigenous vegetation.[23]

[54] Ms Williams' assessment of the references in the ODP to the tenure review process as a mechanism for protection are, with respect, misplaced. Those references do not flow through to any rule triggers for freehold land, nor the private covenant, and do not provide any meaningful protection of ecological or biodiversity values. The Commission is bound to follow the ODP and higher order policy and legislative direction, not place weight or reliance on the covenant.

[55] The covenant bears no relevance to the decision-making role under ss 104D and 104 of the RMA. The position expressed by DoC's planner is in contradiction to established case law and is not supported by the very general references made in the ODP to tenure review.

[56] The Applicant's position is that private instruments agreed between landowners are irrelevant to determining resource consent matters. It has long been settled law that consent authorities and the Environment Court are concerned with a proposed activity's effects, not the nature of an applicant's legal rights in respect to the particular land nor private interests in respect of the same.

[57] This was set out by the Environment Court in *Action for Environment Inc v Wellington City* Council:[24]

> [24] ... the RMA, and in particular s 104, provide a code for the consideration of applications for resource consents. Section 104, as enumerated in subsections (a), (b) and (c), sets out the matters which, here, the Environment Court was to have regard to. The general lawfulness of a proposed activity is not a matter referred to in s 104. Moreover ... there is also clear authority that questions relating to the right to use land in a particular way, as a matter of private property rights, are not issues which are properly the concern of the Environment Court. As noted by the *Environment Court in Director-General of Conservation & Others v Marlborough District Council:*

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23 Evidence of Elizabeth Williams, 11 November 2024 at [23].

24 *Action for Environment Inc v Wellington City Council* [2012] NZHC 1687.

> Disputes about private property rights are outside the Environment Court's jurisdiction and are not generally considered in determining a resource application.

> [25] The Court of Appeal in *MacLaurin v Hexton Holdings Limited* has held that consent authorities are concerned with the effects of proposed activities, and not the nature of the applicant's legal rights or interests in the particular land.

(citations omitted)

[58] For obvious reasons, the provisions of law concerning private property rights (as for instance here, regarding the application and interpretation of a private covenant) are not generally within the province of the consent authority (or Environment Court). On the basis of this authority, we submit that you should have no regard to that instrument in decision making.

[59] Moreover, the position of DoC is misplaced in that:

(a) It appears to rely on a proposition that the Proposal is to remove the conservation covenant and replace it with a private covenant.[25] That is not correct. Rather, the Applicant has volunteered the imposition of a private covenant to address effects of the proposal on a long term basis, and volunteered an advice note (consistent with other CODC approved consents) to the effect that:

> Note: The consent holder is bound by the Conservation Covenant attached at Appendix 2 of this consent and this consent does not infer any rights or authorisation which are contrary to the Conservation Covenant. Authorisation from the Minister of Conservation will be required to undertake any works on the site in accordance with Conservation Covenant.

(b) The question of whether the objectives and conditions of the covenant are met, or not (and in fact what those mean), is a matter of interpretation between the parties to the covenant. It appears that DoC has based its approach to the Proposal on the intentions

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25 Evidence of Elizabeth Williams at [23].

of the covenant, rather than a focus on effects as guided by the ODP and relevant higher order policy instruments under the RMA.

[60] Additionally, even if the covenant were a relevant matter (the Applicant says it is not), there are a number of issues with its drafting, including:

(a) The covenant wording is reasonably vague and does not specify particular areas as being historically significant, leaving those matters open to interpretation.

(b) The covenant does require an approval process via the Minister for work near historic sites which would include those that Dr Jennings has identified. This would effectively be additional to the approval/certification processes he has recommended be included in the consent conditions. The Minister cannot unreasonably withhold approval. A reasonable starting point would be that DoC in making such approvals reasonably, would be guided by the authority of the Heritage New Zealand Pouhere Taonga Act 2014.[26]

(c) The covenant does not in and of itself ensure positive protection or enhancement of heritage and biodiversity values, nor their enhancement. Rather it allows for degradation overtime, particularly under permitted land management uses (such as farming or horticulture). This is particularly important as a counter to the issue raised by Ms Williams for DoC, that there is uncertainty for the proposed offsetting and mitigation to be undertaken in the covenant area.[27] Her reading of the covenant is that offset planting itself would be restricted under the covenant. In our submission, that is not the case, and is not a relevant matter to consider.

[61] Overall, it is submitted that declining biodiversity values under the covenant area have not been successfully arrested by that instrument. The Applicant's proposal will however, ensure meaningful, realistic, and enforceable outcomes on the Site that would not otherwise eventuate.

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26 Summary statement of Chris Jennings at [10].
27 Evidence of Elizabeth Williams, at [72].

[62] This matter is further addressed below in relation to the DoC evidence lodged under ecological and heritage effects.

DoC evidence

[63] As an initial point, the evidence for DoC, whilst purporting to have been prepared in accordance with the Environment Court Expert Witness Code of Conduct, does not reflect truly independent evidence given the experts are all DoC employees.

[64] Moreover, the approach taken by the witnesses and the language used by Mr Ewans in particular demonstrate they are approaching the issue on the basis of representing the position of their organisation rather than on an independent assessment of the proposal. For example, the use of terms such as "fatally undermined", "inexplicably missing obvious [matters]", "fundamental issues", and "The EcIA has massively underestimated …"[28]

[65] The evidence is also flawed in failing to recognise the Site's currently unprotected and vulnerable state, and also by an over-reliance and incorrect interpretation of the private covenant and its legal relevance to the Application, as set out above.

EFFECTS OF THE ACTIVITY ON THE ENVIRONMENT

Landscape character and visual amenity effects

[66] The Application is supported by a landscape assessment carried out by Mr Baxter. Mr Baxter has also prepared a brief of evidence in support of the Proposal.

[67] Mr Baxter concludes:[29]

(a) the majority of the development is within the development area identified in the ODP;

(b) controls will be implemented to minimise adverse visual effects of the development;

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28 Evidence of Richard Ewans, 11 November 2024 at [54].
29 Statement of evidence of Paddy Baxter, 31 October 2024 at [140]-[141].

(c) the proposal will constitute a low level of change in landscape character, most of which will be anticipated within the Rocky Point Recreation Zone;

(d) the values of the ONL will be protected; and

(e) there will be a low level of adverse effect on landscape character and visual amenity values.

[68] Mr Vincent for the Council agrees that adverse visual amenity and rural character effects will be no more than minor.[30]

[69] Ms Lucas, landscape architect engaged by Ms Kenderdine, does not agree with Mr Baxter's opinion. She considers the proposal will result in at least moderate adverse effects, and will involve inappropriate subdivision, use and development in both the ONL and the Rocky Point Development Area.[31]

[70] It is noted Ms Lucas whilst also purporting to give evidence in accordance with the Code of Conduct makes no reference to or disclosure of the fact that she is the sister of Lillian Lucas and Helen Pledger (submitters in opposition to the proposal), and is the owner of land at Tarras-Cromwell Road, opposite the Site. This is despite the requirement in clause 9.2(c) of the Code of Conduct for experts to declare any interest they may have in the outcome of the proceeding. Furthermore, her evidence appears to stray into matters beyond her expertise, including geological matters.[32]

[71] In any event, we submit Mr Baxter more properly and comprehensively addresses the effects of the Proposal on the character of the landscape in the context of not only the physical environment but also what is anticipated under the development zone. Ms Lucas whist acknowledging the development zone, appears to treat any visibility of buildings as an adverse landscape effect, seemingly on the basis that visibility of such buildings triggers a discretionary activity resource consent. This misconstrues the nature of discretionary activity status, which is not (in

30 Section 42A report at pp 6-8.
31 Statement of evidence of Di Lucas, 11 November 2024.
32 At [33].

the absence of supporting objectives and policies) to necessarily avoid activities, but rather to allow them to be assessed on their merits.

[72] Her evidence also overstates the level of visual effect from distant locations, and proceeds on the assumption that the proposed mitigation planting, which will serve to reduce any adverse visual amenity effects to a low level, is "impractical and unsustainable",[33] with no reasonable basis to support such an assumption.

[73] In response to s42A remaining matters as to landscape and visual effects:

(a) Mr Vincent concludes there are no more than minor visual effects from the Proposal including in relation to those lots outside the development zone in the ODP.[34] Minor queries raised in relation to conditions as to height level measurements, lighting, and future variations from design controls, are addressed in the evidence of Mr Baxter and Mr Brown.[35]

(b) Mr Vincent raises the issue of effects on open rural character of the area as a result of the clustering of lots 27-30 buildings.[36] In response, the Applicant filed further supplementary evidence from Mr Baxter providing a revised landscaping approach for these lots, to ensure that effects on open rural character are appropriately mitigated.[37]

Heritage and archaeology effects

[74] Mr Brown assesses effects on heritage and archaeology as minor, on the basis of Dr Jennings' assessment and recommended conditions to protect two affected features found within the Site.[38]

[75] Key issues raised in DoC's evidence to counter this position in effect relate to:

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33 At [69].
34 Section 42A Addendum at pp 5-6.
35 Evidence of Jeff Brown at 4.28-4.29.
36 Section 42A Addendum at p 7.
37 At [4.49].
38 Summary Statement of Chris Jennings at [13].

(a) appropriateness and rigour of assessment in the identification of heritage and archaeological sites within the property; and

(b) lack of consideration of avoidance as a management measure as an RMA best practice option, rather than what is required under the HNZPTA 2014.

[76] Dr Jennings remains of the position that features within the Site are not found to be regionally significant and rare. They have low information potential, are in poor condition, and have low amenity value (even when considered as part of a wider complex of sites).[39] He considers the Site has been thoroughly investigated and appropriately identified, and the management responses are appropriate in the context.[40]

[77] Avoidance of a feature must consider more than just the fabric of a site. If the values of a site are dependent on its setting in a landscape or within the context of associated sites, then the effects this a redesign will have on these values must still be considered. The Applicant has explored redesign as a way to avoid the feature G41/771, however considered this would be difficult to achieve for landscaping and construction purposes.[41] Dr Jennings concludes these sites would be appropriate for detailed recording instead, to mitigate any loss of their (relatively low) heritage site value.

[78] Dr Schmidt for DoC disagrees, and thinks that as these sites are part of a network or site complex, they should be retained. He clearly has a lower bar for condition than Dr Jennings, and considers the reservoirs are in good condition. The archaeological value is a site's potential to provide evidence relating to the history of New Zealand. It is submitted that the Commission will likely observe this in their own site visit and agree that G41/771 is of low value in this regard.

[79] It is also submitted that the approach from Mr Schmidt for DoC is overly orthodox in that:

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39 At [8].
40 At [7]-[8].
41 Summary Statement of Chris Jennings at [11].

(a) As referred to above, it is not purely independent expert evidence given his DoC employment. As with the other DoC experts, our observations as to the approach from these employed experts is that their evidence is not entirely impartial and is based upon underlying flawed assumptions.

(b) It lacks any real-world analysis of the Site containing a significant development area and the expectation of the same through certainty in administration of the district plan.

(c) The sites identified are arguably not as rare as is asserted. There are two pond / dam features on the Site alone; there are others in the wider covenant area that the Applicant is aware of, and Dr Schmidt himself highlights the representation of these remnant features across the Otago goldfields associated with many race systems.

[80] In his s 42A addendum, Mr Vincent concludes on the one hand that on their own, heritage and archaeology effects should not be fatal to the application if other matters can be resolved, but on the other hand, he remains concerned as to the DoC position on such effects in light of the conservation covenant 'having effect in its current form'.[42] These two positions are contradictory and confusing. For the reasons set out above, the private covenant between DoC and the landowner is not relevant to interpret or apply to the Commission's decision under ss 104D and 104 of the RMA. The Commission must make its determinations on heritage and archaeology effects as guided by expert evidence and applying the same to the ODP (and any relevant other policy or legislative guidance on the matter).

[81] On this basis, it is suggested that Mr Vincent's conclusions as to heritage and archaeology effects can be narrowed with removal of the reliance on the covenant as a relevant matter and are overall not more than minor.

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42 Section 42A Addendum at pp 16-17.

Ecology and biodiversity effects

Introduction to the NPS-IB and its policy intent

[82] Given its relatively new introduction, there is limited higher court authority on the application of the NPS-IB offsetting approach.[43]

[83] Overall, the NPS-IB has the goal of maintaining indigenous biodiversity nationally, so there is no overall loss. This is achieved through a number of matters identified under objective 2(b)(i) – (iv) including protection and restoration of biodiversity, and while providing for the social economic and cultural wellbeing of people and communities.

[84] Ms Williams in her evidence omits objective 2(b)(iv) in particular,[44] and the overall balanced approach this brings to the key objective of the NPS-IB. That is particularly relevant to the Site in this instance which contains an expected development zone, and a relevant permitted baseline which would allow economic activities to proceed with significant adverse effects on indigenous vegetation otherwise unhindered. Ms Williams' one-sided approach to the NPS-IB has influenced the remainder of her evidence and conclusions.

SNAs under the NPS-IB vs under the ODP

[85] The experts are in agreement that the Site would meet the significance criteria of the relevant statutory documents (NPS-IB and the operative and proposed Otago regional policy statement) in terms of future 'SNA" identification, and is considered to contain very high ecological values.

[86] As it stands today however, the Site is not mapped or scheduled as an SNA for the purposes of the ODP. It therefore triggers no rules in respect of the same. The Commission will be aware of the recent deferrals to the NPS-IB direction and timeframes as to future SNA mapping for local authorities.[45]

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43 The main case being that of *Te Rūnanga o Ngāti Whātua v Auckland Council* [2023] NZEnvC 277 referred to at [98] below.

44 Evidence of Elizabeth Williams at [42].

45 The Resource Management (Freshwater and Other Matters) Amendment Act 2024 has been enacted and section 78 suspends the provisions of the NPS-IB 2023 mapping requirements for a 3-year period

[87] Therefore, the requirements of clause 3.10 – 3.11 NPS-IB do not apply. Rather the effects management hierarchy applies to adverse effects of the Proposal on other indigenous biodiversity values (outside an SNA), per clause 3.16.

[88] Ms Williams suggests that the Council 'could' undertake a plan change to bring forward the mapping of the Site as an SNA into the ODP, despite this recent legislative change to delay such.[46] In our submission that hypothetical possibility is entirely irrelevant to this decision.

[89] To the contrary, without this Proposal obtaining consent, the Site will remain less protected overall in terms of biodiversity (given the permitted baseline as set out above).

Proposed offsetting and overall adverse effects on ecology and biodiversity values

[90] As set out above, a key issue in terms of the Commission's assessment of the first gateway under s 104D is whether the proposed ecological offsetting serves to avoid adverse environmental effects, or whether it constitutes a separate positive effect. If the latter, the Applicant accepts the proposal cannot pass the first gateway (although the offsetting will be a relevant consideration under s 104(1)).

[91] A determination of this issue involves an assessment of the particular effect in question and what is sought to be protected.

[92] Mr Harding for the Council and Mr Ewans for DoC take a narrow view as to the nature of the effect. They say because the proposed revegetation is not sufficiently "like for like" with the vegetation being removed, it cannot serve to reduce adverse effects associated with removal.[47]

[93] We say that is not the correct approach, for several reasons.

[94] First, it is artificial to apply such a granular level of assessment of any particular effect. To do so would invariably mean the level of effect would be more than minor. Any change to an environment, if the change was

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46 Evidence of Elizabeth Williams at [40].

47 Summary evidence of Andrew Wells, at [11]; Simon Beale, at [7] – [9].

assessed at such a fine grain level, would be seen as adversely affecting the environment because it is removing or changing what existed before. It is well understood that assessing effects on an environment must therefore be at the appropriate scale.

[95] When the appropriate scale is applied, the question to ask is not whether particular species of vegetation or areas of vegetation might be lost, but whether the overall effect of the proposed activity on ecological and biodiversity values will be positive or negative. The clear ecological evidence is such effects will be positive.

[96] This requirement to apply the proper scale is supported by the NPS-IB. Its objective is to ensure there is no *overall reduction* in indigenous biodiversity.[48] As well as the principles for offsetting in Appendix 3 of the NPS-IB, which are more extensively addressed in the evidence of Mr Beale and Dr Wells.

[97] Additionally, at the risk of repeating the point, the ODP itself (in respect of the Site) does not protect vegetation or restrict its removal (at a particular species level or otherwise). If the removal of specific species in specific locations constituted an adverse effect that could not be offset by planting and maintenance elsewhere, then the Plan would not permit the removal of such species on this site. As Mr Brown correctly puts, the position of the Council and DoC incorrectly assumes the status quo protects the indigenous vegetation that exists on the site.[49] It does not.

Likely success and effectiveness of offsetting

[98] The Environment Court acknowledged the inherent uncertainties in offsetting in *Te Runanga o Ngati Whatua v Auckland Council*, which analysed the offsetting principles set out in the NPS-IB: [50]

> [731] … The Court must be satisfied that a net gain outcome will be achieved and is measurable over a reasonable timeframe. This inevitably requires that risks as to the outcome are addressed by contingency planning to assure the outcome.

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48 Summary statement of Andrew Wells at [21], [25].
49 Evidence of Jeff Brown at [4.18b]
50 *Te Runanga o Ngati Whatua v Auckland Council* [2023] NZEnvC 277.

> [732] we understand that any mitigation project, including riparian or terrestrial planting, fauna translocation and habitat restoration, will take time for the benefits to be realised and that is taken into account in the modelling. We also understand that the modelling itself is used to estimate the time that will be needed for a positive outcome to be observed. Where there are doubts they must be addressed by providing alternative methods to assure the outcome.

[99] A key issue from the differences in expert option is the extent of certainty around the delivery and effectiveness of the Applicant's offsetting package, including the risk of non- or partial compliance.

[100] For offsetting to be acceptable in light of the scale of adverse effects predicted and the NPS-IB expectations of both adherence to an effects-hierarchy and then a net-gain to be achieved via offsetting, there must be a high-level of confidence in the quantified values needing to be offset. Without this, the NPS-IB cannot be said to be being appropriately implemented.

[101] It is submitted there can be a high degree of confidence in implementation of the offsetting, given the clarity and stringency posed in Mr Brown's conditions of consent. Condition 10 effectively acts as a gatekeeper to implementation of the subdivision through titling, subject to certification and signoff as to completion of the prescribed offset. A high degree of oversight and enforcement is available through the requirements of the EEMP's monitoring and annual reporting, and long-term maintenance.

[102] As to the certainty of quantified values to be offset, this is addressed in the evidence of Mr Beale and Dr Wells in terms of the extensive investigations of the Site, and and the evaluation that maintaining status quo of current vegetation types only should not be preserved as a museum piece where it is successional and would become more complex overtime if current pressures ceased and more complex and diverse seed sources were available.[51]

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51 Evidence of Andrew Wells at p 27.

[103] As is acknowledged in leading authorities, any offset model is just that– a predictive model as to effects which inherently will have some residual degree of uncertainty. This is an accepted element of offsetting under the RMA / NPS-IB, and in this case, the evidence and the conditions of consent reduce that uncertainty to an acceptable level particularly in the context of:

(a) the otherwise available permitted baseline of the Site;

(b) the comparative value and rarity of cushionfield which is successional anyway; and

(c) the lack of protection to Threatened and At Risk species (such as Spring Annuals) on the Site as it currently stands under the legislative framework (and the Conservation Covenant).

Assessment of differences in evidence as to offsetting

[104] Mr Harding and Mr Mr Ewans consider that offsetting is not appropriate in this case due to lack of baseline data / information, inconsistency with principles of offsetting. Those issues are addressed below.

[105] As will be set out in the summary statements of Dr Wells and Mr Beale:

(a) The differing survey results as between Mr Ewans and the Applicants' experts are not irreconcilable. Spring Annuals are variable year to year and are also short-lived. The DoC site visits strengthen the underlying assumption in Dr Wells' evidence that these species are likely to be abundant across the wider landscape wherever there is suitable habitat.

(b) The fact they are a wider seed source across the Site is particularly relevant when considering the extensive area to be protected by the LVMP covenant approach (and which is not currently protected by private covenant or ODP controls).

(c) The removal of Spring Annual habitat from the development area will not adversely affect the wellbeing/populations of these species

at a local or national level – for similar reasoning that has been applied to loss of other species, as set out in Dr Wells' evidence.[52]

(d) Threatened spring annuals and other herbs/grasses are only one small component of the ecosystem. It is concerning that DoC's submission seems to be based on these species alone, and there is no acknowledgement of any of the other flora, fauna and ecology of the area or of the proposed effects management package set out by the Applicant. This shows a lack of the holistic ecological thinking that is integral to achieving a net positive overall outcome for indigenous biodiversity.

[106] DoC is correct that the Applicant's experts did not assess the offset sites for Spring Annuals – however as will be set out in Dr Wells' summary, these have since been visited and the experts remain of the opinion that any concern as to 'leakage' effects would be negligible.

[107] The results of the DoC site visit and the Applicant surveys indicate that the Spring Annuals are abundant at a local level, both within the development footprint of the Proposal and within the balance of the Site to be protected as well as at an ecological district level where kanuka shrubland and cushionfield occur together as a mosaic[53].

[108] The DoC site visit results further confirm the very high score the Applicant's experts have given to the ecological values inherent to the development area, noting that the EcIA guidelines assign a very high value to the presence of nationally threatened species, either permanently or seasonally[54].

Application of regional policy statement principles for offsetting

[109] Little reliance should be placed on the offsetting criteria as set out in the Operative or Proposed RPS. The Proposed RPS (**pRPS**) in particular is in a state of flux, and sets out different and additional criteria to that

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52 Summary evidence of Andrew Wells at [22].
53 At [21].
54 Summary evidence of Simon Beale at [4].

which is in NPS-IB appendix 3. The higher order national direction must take precedence.

[110] Counsel was involved in the pRPS hearings, and observed that there was extensive criticism by experienced counsel for other submitters as to the pRPS taking an inconsistent (and higher-bar) approach to the NPS-IB.

[111] We note the criteria are also subject to extensive appeals, and limited weight should be placed on them. For example, a screenshot of the Oceana Gold Appeal on the criteria is set out below. A number of parties have joined in support of the appeal point as to the criteria in the pRPS setting additional principles which are unwarranted, unnecessary, and inconsistent with, the national direction.

APP3 - Criteria for Biodiversity Offsetting	00115.024 Oppose. These limits as to when biodiversity offsetting is not available for use as part of an overall effects management	Accept. Have also inserted additional criteria. (2) When biodiversity offsetting is not appropriate:	OceanaGold supports the changes made to align APP3 with the NPSIB, however the additional criteria for when biodiversity offsetting is not appropriate are not warranted and are unnecessary.	Amend APP3: (2) When biodiversity offsetting is not appropriate: ... ~~(d) the loss from an ecological district of any individuals of Threatened taxa, other than kanuka (Kunzea robusta and Kunzea serotina), under the New Zealand Threat~~

	strategy are not appropriate. The proposed approach sets the threshold as to when offsetting can be considered too high and as a result this is not likely to lead to beneficial ecological or biodiversity outcomes.	... (d) the loss from an ecological district of any individuals of Threatened taxa, other than kanuka (Kunzea robusta and Kunzea serotina), under the New Zealand Threat Classification System (Townsend et al, 2008); or (e) the likely worsening of the conservation status of any indigenous biodiversity as listed under the New Zealand Threat Classification System (Townsend et al, 2008); or (f) the removal or loss of health and resilience of a naturally uncommon ecosystem type that is associated with indigenous vegetation or habitat of indigenous fauna.	The Government has signalled its intention to amend the NPSIB and therefore any changes to the NPSIB must be incorporated into this RPS to give effect to the NPSIB. Some minor consequential amendments are required to improve remove typographical errors.	~~Classification System (Townsend et al, 2008); or~~ ~~(e) the likely worsening of the conservation status of any indigenous biodiversity as listed under the New Zealand Threat Classification System (Townsend et al, 2008); or~~ ~~(f) the removal or loss of health and resilience of a naturally uncommon ecosystem type that is associated with indigenous vegetation or habitat of indigenous fauna.~~ 5. Leakage: Aquatic offset design and implementation avoids displacing harm ~~hard~~ to other locations (including harm to existing biodiversity at the offset site). Plus any further amendments in order to give effect to any changes to the NPSIB. Or grant such other relief or consequential amendments which addresses OceanaGold's concerns.

[112] Mr Vincent prefers the position of Mr Harding's peer review on ecological effects and offsetting than the Applicants' two experts, and therefore remains concerned the Proposal would have more than minor effects on the overall existing ecological values of the area. It is submitted in response that:

(a) This position is fundamentally flawed in that it again fails to take into account a highly relevant permitted baseline scenario for the Site which credibly would result in a significantly worse net ecological outcome. This philosophical starting point also is flawed in Mr Harding's peer review, which does not account for this permitted comparison, and wrongly assumes that the NPS-IB and s 6(c) of the RMA together provide a starting point of protection of existing indigenous values on the Site. For the reasons set out above under the permitted baseline, that approach is not correct.

(b) The position is also predominantly based upon the assumption from Mr Harding that use of the EIANZ method to assess ecological effects is not appropriate. For the reasons explained in Mr Beale and Dr Wells' evidence,[55] those criteria are acceptable best practice, and the Applicant has expended significant resources into comprehensive ecological baseline assessments which far exceed those of Mr Harding (or DoC employees).

(c) Mr Harding has declined to take up offers from the Applicant's experts to engage and seek to narrow areas of disagreement on these matters.

[113] Mr Vincent concludes on these effects that:

> ... the measures proposed by the applicant primarily seek to ensure that no greater effect occur than the applicant considered reasonably necessary to give effect to the development, with remediation measures... only going some way to reducing these effects.

[114] There is no basis for that proposition, and it is contrary to the expert ecological evidence from the Applicant, which demonstrates that the approach to the EEMP has been to achieve the overall objective of no

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55 Summary evidence of Simon Beale at [5].

net loss of biodiversity values, and preferably a net gain – consistent with the NPS-IB.[56]

[115] Overall, it is submitted that the evidence and assessments provided by Mr Beale and Dr Wells are more comprehensive, better informed by multiple site visits and analysis on the ground, and provide a more prescriptive assessment of proposed offsetting against the NPS-IB principles.

[116] Dr Wells attaches to his evidence a comprehensive table assessing responses to Mr Harding's' views as to why offsetting is not considered appropriate. Key conclusions are:

(a) The irreplaceability and vulnerability of development-affected biodiversity areas are not sufficiently high to exclude offsetting as a way of dealing with residual adverse effects.

(b) The concept of offsetting is more aligned with progress towards an idealised or climax state of biodiversity, rather than ignoring vegetation that would have occurred or is expected to occur on the Site. This is closer aligned with the intention of offsetting in the NPS-IB to ensure offsetting is of the same ecosystem type (rather than only replacement of like for like species).

(c) Areas for offsetting are carefully selected to ensure that principles of additionality, no leakage, and landscape context, are applied.[57]

[117] It is therefore submitted that Mr Beale and Dr Wells' evidence on ecological and biodiversity effects is more considered, is based on the real world of a permitted baseline, and is closer aligned with the NPS-IB, and their evidence should be preferred.

[118] Ms Wardle has tabled a letter in advance of the hearing, however it appears to be framed as if it were expert evidence. Some caution should be applied to this evidence given:

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56 Evidence of Andrew Wells at [30]-[33], [98]-[99].

57 As summarised in Dr Wells summary evidence, at [13] – [15].

(a) It is not prepared in accordance with the Code of Conduct given Ms Wardle is a submitter.

(b) She appears to conflate values and assessments on neighbouring sites and translate those to the Site.

(c) She makes similar observations as to DoC experts in respect of data and reporting sufficiency. Those matters are also addressed in Dr Wells' summary statement.

(d) In respect of the prevalence of Threatened and At Risk Species, the position is that these are prevalent across the wider Site, however that does not factor in the Proposal develops only 13 per cent of the 65ha site and more than 87 per cent of the Site (containing said species) is given a significantly stronger level of protection than the status quo, and a net positive effect.

(e) Overall, she has given little time and attention to understanding the rigour of conditions of consent imposed to secure the covenant protection areas and offsetting regime – and in this way the tabled statement appears one-sided.

Other effects

[119] The Applicant has called expert evidence in relation to servicing, traffic and transport, and fire risk. The experts have addressed all outstanding matters in the s42A addendum report and will address the Commission on those matters in summary statements.

[120] The Applicant's case is that there are no more than minor effects from these matters. All issues raised in the S42A and Addendum reports have been addressed in Applicant evidence.

Conclusion on environmental effects

[121] Overall, we submit that the adverse effects of the Proposal on the wider environment and on neighbouring properties will be no more than minor. Accordingly, the Proposal can pass through the Minor Effects Test under s 104D(1)(a) of the RMA.

Section 104(1) positive effects

[122] Under s 104(1)(ab) of the RMA, any additional positive or beneficial effects may be taken into account in the overall evaluation of the effects of an activity.[58] We submit the Proposal will result in a number of positive effects, including the following:

(a) the proposed formal protection of the significant majority Site through ecological and vegetation management, plans , consent notice conditions, and covenant mechanisms will provide clear and enforceable protections that endure for landscape and ecological outcomes;

(b) landscape mitigation planting around the building platforms / curtilage areas, along with rabbit and goat control and stock exclusion;

(c) implementation of the Rocky Point Servicing entity which will ensure a high degree of regulation and oversight of the Proposal and therefore decrease any regulatory burden on the Council (to ensure delivery of positive effects overtime);

(d) recreational opportunities are improved through commitments to new public trails and car parking; and

(e) positive social and economic benefits through the creation of additional allotments (mostly within an identified development zone) for residential and related purposes including traveller accommodation.

[123] Overall, it is considered the s 42A Report has not adequately considered the positive effects arising from the Proposal. These do not appear to be specifically addressed in the report under 'other matters' despite the direction of s104(1)(ab).

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58 *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009 at [140].

DISTRICT PLAN ASSESSMENT

[124] In order to pass through the Policy Test in s 104D(1)(b) of the RMA, the Proposal must not be contrary to the objectives and policies of the ODP. For reasons set out above and on the basis of Mr Brown's assessment, our submission is the Proposal is not contrary with the relevant objectives and policies. Accordingly, the Proposal meets the Policy Test under s 104D(1)(b) of the RMA.

[125] In relation to key ecological policies and objectives in the ODP, these include:

(a) *Objective 4.3.8 is To recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna*

(b) *Policy 4.4.7 is To protect areas of... (a) significant indigenous vegetation.*

(c) *Policy 4.4.10 is To ensure that the subdivision and use of land in the Rural Resource Area avoids, remedies or mitigates adverse effects on:(f) the ecological values of significant indigenous vegetation.*

[126] Consistent with the themes above in these submissions, this exemplifies an approach in the ODP signalled towards protection of SNAs that are mapped and scheduled, but is not well placed to protect other areas of (privately owned) significant vegetation. The Site as such is highly vulnerable under the status quo. That can be remedied through this Proposal, but will not necessarily be the case under other credible permitted activities that could occur.

[127] In our submission there are no avoidance type bottom line policies in terms of ecology, heritage, and landscape, in the ODP. Mr Brown's evidence addresses relevant objectives and policies of the ODP, and concludes, overall, the proposal is consistent with and achieves those provisions.[59]

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59 Summary evidence of Jeff Brown at [10].

Precedent effects

[128] Mr Vincent concludes that there is a potential precedent in relation to development within the Rural Resource Area 2 (outside the development zone), however overall considers that any precedent set will reinforce a high bar in terms of minimising environmental effects.[60]

[129] Mr Brown's position however is of the opinion that no precedent exists in particular on the balance land (lot 200) given tight ongoing registered controls in terms of landscape protection and restriction on further development.[61]

[130] In our submission, there are no precedent effects of the proposal given:

(a) the Courts have made clear that each case must be considered on its merits;[62]

(b) generally the outcome of future applications will depend on the evidence before the Court at the time measured against the relevant assessment criteria;[63] and

(c) in *Dye v Auckland Regional Council*,[64] the Court held that while precedent effects may be relevant in terms of s 104(1)(c) as another matter that a consent authority must have regard to, they are not considered an effect on the environment. Precedent effects are therefore irrelevant to the gateway tests under s 104D of the RMA.

[131] In any event, the Proposal has exceptionally unique circumstances that mean it is unlikely to be replicated elsewhere in a precedent sense. Namely, it is an integrated proposal that comprehensively addresses landscape, ecological, and other environmental effects through a stringent condition set. It is a unique property that is centred around a development zone, and within a highly complex environment. The

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60 Section 42A report at p 27.
61 Evidence of Jeff Brown at [7.2].
62 *Monowai Properties Limited v Rodney District Council* A215/03 at [24].
63 *Progressive Enterprises v North Shore City Council* (HC) Auckland CIV-2008-48502584 at [63]-[71].
64 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at [32].

establishment of management entities, balance land controls, and offsetting sites, are all unique to the Site and the Proposal.

[132] However, if the Commission disagrees and considers that the Proposal (or part of it) will set a precedent effect, we submit that will be an appropriate precedent to set in the Rural Resource 2 Zone due to the extensive mitigation and positive effects proposed.

Part 2 of the RMA

[133] The Applicant agrees with Mr Brown that on balance the Proposal achieves the purpose and principles contained in Part 2 of the Act.[65]

Conclusion

[134] The Proposal is overall exceptionally unique. Taking into account:

(a) the available permitted baseline and significantly worse indigenous biodiversity outcomes that could arise under the same;

(b) the underlying development rights that emanate from the development zone which underpin spatial planning and design and provide relevance to the receiving environment; and

(c) the highly sophisticated design approach to the Proposal as a whole, including through comprehensive conditions of consent to secure significantly positive enduring benefits.

[135] The Applicant has provided a design-led master planned response to ensure appropriate mitigation of all environmental effects, including importantly, the protection of indigenous biodiversity values. This is an outcome that is much more desirable than what could otherwise realistically occur on this Site under either credible permitted or likely consented, uses.

[136] Given that, we submit that the Proposal:

(a) meets at least one, if not both, s 104D gateway tests; and

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65 Evidence of Jeff Brown at 8.1-8.3.

(b) is supported by robust expert assessment that demonstrates the adverse effects of the Proposal will be minor; and

(c) upon consideration of the relevant matters under s 104, is appropriate and overall significantly net positive compared to the status quo or future credible permitted land uses.

[137] The Commission can therefore be satisfied that it is appropriate to grant consent for the Proposal, subject to the conditions set out in Mr Brown's summary evidence.

Dated: 18 November 2024

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R E M Hill / B B Gresson
Counsel for the Applicant