RC 230179 – TKO Properties Ltd – Supplementary Statement – Adam Vincent – Planning Officer

Introduction

1. First, I would like to thank all the parties who prepared and presented evidence during the hearing. This has been a multi-faceted application that touches on a very wide range of issues, so I appreciate the diligence that has been undertaken from both the applicant and submitters.

2. Before I address the points raised in the hearing, and in light of the evidence presented over the last two days suggesting that the District Plan is out of date, I am of the opinion that the panel should consider the District Plan to remain relevant for the purpose of this application, despite its age. It is my opinion that not the role of a resource consent process to patch holes or otherwise fix what parties to a resource consent application view to be deficiencies in the District Plan. Instead, this would warrant a policy response to resolve the issues identified.

3. In my opinion, the primary outstanding matters are the application of a permitted baseline for ecological effects, the ecological effects of the proposal themselves, the application of the NPS-IB, and landscape effects. I intend to spend most of my time talking to these matters, but will also touch on points raised about archaeological effects, provision of services and precedent. I will then respond to the amended draft conditions tabled by Mr Brown.

Permitted Baseline

4. In my opinion, whether or not to apply a permitted baseline to the ecological effects of the proposal is key to the panel's consideration of this application.

5. I think both Ms Hill and Ms Warnock have provided thorough descriptions of the relevant legal principles at play when considering whether or not to apply a permitted baseline. I would like to make one observation in response to comments raised by Commissioner Rae regarding the timing for when to consider whether a permitted baseline should be applied. Reading the authorities provided, the questions posed by the Court are whether a proposal *might* have the effect of overriding Part 2, or *might* compromise the objectives and policies in the Plan. I take this to mean that the panel does not need to be certain about these matters, only that there needs to be a likelihood that either the objectives and policies or Part 2 might be impinged to decide not to apply a permitted baseline.

Therefore, I consider it reasonable that such a call could be made reasonably early in their consideration. The burden of proof for choosing not to apply a permitted baseline is not high. In this regard, it is similar to the "likely to have more than minor effects on the environment" notification test under Section 95A of the RMA. It does not require certainty that a particular outcome will be the case, only that it may be.

6. I note that Section 104(2), by default, requires consideration of all effects of an activity that needs resource consent, including those that would have the same effects as a permitted activity. The panel must make an active decision to disregard any effects under this section, if it intends to depart from this default expectation that all effects of an activity will be considered.

7. I also agree with legal submissions from both parties that controlled activities should not form part of any permitted baseline. This is correct and I did not seek to apply possible controlled activities as such in either of my reports. Instead, I sought to acknowledge a general idea that some form of development within the development zone would form part of the likely future character of the site for the purposes of Section 104(1)(b), given the Plan provides a specific controlled activity pathway to allow it.

8. I agree that the District Plan does not currently limit indigenous vegetation clearance. Rule 4.7.6KA.I of the Plan sets limits on indigenous vegetation clearance. However, Rule 4.7.6KA.I.ii confirms that this rule does not apply to clearance on land that has been freeholded under Part 2 of the Crown Pastoral Land Act 1998. That this is the case is not disputed by any party.

9. Put simply, I consider that whether to apply a permitted baseline hinges on whether the permitted activity is reasonable to draw a comparison with, the permitted activity itself is not fanciful, and drawing a comparison is of use to decision makers in making a fully considered decision on the application, having regard to the objectives and policies of the plan, and Part 2 of the RMA.

10. I am not convinced that the applicant has provided cogent reasons to apply a permitted baseline. The crux of their argument appears to be that they can clear indigenous vegetation as of right; therefore, a permitted baseline is relevant because their proposal would provide a higher level of protection for what remains. I do not consider the simple presence of an activity that permits an effect to be reason to apply a permitted baseline on its own. Instead, drawing a comparison should be useful to the panel. I concur with

the reasoning of Ms Warnock in paragraphs 53 to 54 of her legal submissions that the effects of activities such a grazing would not necessarily be equivalent to the effects of residential development and occupation of the site. I also note that the effects of subdivision on areas of significant indigenous vegetation is a matter of control for a fully compliant, controlled activity subdivision in this area. While the site is not an identified significant area, I consider that the presence of multiple species listed in Schedule 19.6B on the site (For example NZ Mousetail and raoulia monroi) would warrant consideration of ecological effects under this matter, even for a controlled activity subdivision. I also consider protection of an extant area of indigenous vegetation to be of limited relevance to the areas of vegetation proposed to be removed. This protection would likely be a requirement of any subdivision of the land, including a controlled activity subdivision, in line with the intent of the concept plan for the Rural Resource Area (2).

11. Given the significance of the ecosystems present on the site, I consider that the application of a permitted baseline may compromise the Panel's assessment of Objectives 4.3.2 and 4.3.8, and Policies 4.4.1, 4.4.7 and 4.4.10 and, by extension, its assessment of Part 2, specifically Section 6(c).

12. For the reasons provided above, I do not consider it appropriate to apply a permitted baseline to ecological effects associated with the application.

13. In the event that the panel considers it appropriate to apply a permitted baseline, I consider that the reasoning of Mr Brown, Mr Beale and the applicant's wider team in relation to ecological effects is the correct approach to take.

14. In the event that the panel does not consider it appropriate to apply a permitted baseline, I prefer the evidence of Mr Harding and Mr Ewans on the ecological effects of the proposal and the application of the NPS-IB.

Ecological Matters and National Policy Statement for Indigenous Biodiversity

15. It is agreed between the ecologists that the proposal will have potentially significant adverse effects. I consider that this conclusion would be reached regardless of whether you accept the evidence of Mr Ewans and Mr Harding as to the adequacy of the assessment by Mr Beale and the applicant's team. There also appears to be agreement from the ecological experts that the effects of the proposal will still be more than minor

after proposed measures to avoid, minimise or remedy these effects are taken into account.

16. I also note that the area around the proposed communal wastewater disposal field has not been surveyed or its ecological effects assessed. I share the concerns of DoC that the discharge of wastewater will change the receiving environment through the introduction of additional water and nutrients. These effects have not been fully assessed. I consider that this should be rectified before the panel can be considered satisfied that the ecological effects of the proposal will be adequately managed.

17. One of the matters the panel raised as a point of interest to them is the application of the NPS-IB and mapped or unmapped areas. I do not consider the fact that the area is not mapped as an SNA is particularly material to the panel's consideration of the application. The definition of SNA in the NPS-IB is as follows:

> *(a) any area that, after the commencement date, is notified or included in a district plan as an SNA following an assessment of the area in accordance with Appendix 1; and*
> *(b) any area that, on the commencement date, is already identified in a policy statement or plan as an area of significant indigenous vegetation or significant habitat of indigenous fauna (regardless of how it is described); in which case it remains as an SNA unless or until a suitably qualified ecologist engaged by the relevant local authority determines that it is not an area of significant indigenous vegetation or significant habitat of indigenous fauna.*

18. Based on the above, an area has to be identified in a policy statement or plan as being a significant natural area, or be identified in a policy statement or plan as an area of significant indigenous flora or fauna. Therefore, by definition, the area is not an SNA under the NPS-IB, although the evidence suggests it would likely meet the criteria. Clause 3.16 applies to the proposal. This clause requires subdivision and use of land manage any significant effects on indigenous biodiversity using the effects management hierarchy defined in the NPS. This sets a lower threshold than the more stringent "Avoid effects unless specifically provided for in the NPS-IB" regime for SNA's. Regardless, in both cases, the overarching objective of the NPS-IB to ensure no net loss in indigenous biodiversity across the country applies. Section 6(c) of the RMA also continues to apply.

19. Some consideration needs to be given to the meaning of the term "practicable". The word is not defined in the NPS-IB. Therefore, I would defer to the "normal common meaning" of the word. Various common definitions include "able to be done", "workable" or "able to be carried out". In my opinion, this aligns with the definition put forward by Ms Warnock, and sets a high bar to determine that variously avoiding, minimising or remedying effects are not practicable.

20. I stand by my previous conclusions that it is practicable to fully avoid most adverse effects on indigenous biodiversity outside the development zone. A subdivision that complied with the concept plan in Schedule 19.16 would achieve this, and be more in line with the intent of the District Plan. Under this scenario, the residual effects would be due to the construction of access and services, activities that the District Plan anticipates would happen. As outlined in my supplementary report, in the development zone, I consider that relatively more weight should be given to minimising, offsetting and compensating effects, in light of the District Plan providing a specific consenting pathway for development in this area. The applicant has not provided evidence why this arrangement is not practicable. Therefore, I do not consider that the proposal, taken as a whole, adequately applies the effects management hierarchy.

21. In the event that the panel disagrees, I will also consider the rest of the hierarchy.

22. I agree that the steps proposed by the applicant, such as restricting clearance on sites to specified curtilage areas and design of infrastructure does assist in minimising the effects of the proposal. It is not clear from the application whether more could be done to minimise adverse effects. I also note that there may be edge effects from development of the curtilage areas changing the environmental character outside them. No evidence has been presented to address these effects. However, given the rest of the parties to the application have focused their attention on offsetting or compensation, I will accept that that adequacy of minimisation measures is not particularly pertinent to the panel's consideration of the application.

23. Subdivision and associated development results in, for all intents and purposes, permanent effects on ecological values. Therefore, I do not consider remediation, other than reinstatement of areas disturbed for trenching, to be practicable.

24. I agree with Ms Warnock that "Like-for-like" is defined in the NPS-IB. Given it's not in the interpretation section of the NPS-IB, I didn't fully appreciate the implications of this

definition when writing my s42A and supplementary reports. I find this point particularly persuasive when considering whether the proposed additional plantings adhere to the offsetting principles in the NPS-IB. I do not consider that the additional plantings proposed by the applicant should be defined as offsets because they do not meet the "like-for-like" criteria in Schedule 3. Instead, I agree with the position of DoC that they would better be considered compensation.

25. The NPS-IB allows for compensation only when all other avenues in the effects management hierarchy. Effectively, compensation is a last resort. Specifically, it allows for compensation where offsetting is not possible. My understanding from the oral evidence of Mr Ewans is that like for like replacement of cushionfield is highly unlikely to be possible. In light of this, I consider that the applicant can reasonably pursue compensation in accordance with Appendix 4 of the NPS-IB, provided they have adequately addressed the higher order elements of the hierarchy. For the reasons I have already outlined, I do not consider that this has been achieved. However, for completeness, I will consider the proposed compensation measures. I note that most of the principles in Appendices 3 and 4 are shared, so most of the assessment around offsetting can continue to apply.

26. I agree with Mr Harding and Mr Ewans that there is a level of uncertainty in the effects of the proposal on indigenous biodiversity. The significance of potential effects is not under dispute. I concede that perfect certainty may never be obtainable. However, it does not seem unreasonable that more certainty could be obtained.

27. Biodiversity compensation does not need to be like-for like, allowing consideration of potential "climax" or other communities. However, they must still provide a net positive in terms of ecosystem value. On this point, I am persuaded by the opinion of Mr Ewans that the proposed compensation would seek to trade off threatened species with much more common ones. I agree that the proposed compensation would go some way to address the adverse effects, by attempting to replicate the applicant's best educated guess at the future composition of the environment. I also accept that the NPS-IB must allow for a level of ecosystem change over time. However, it does not appear that the NPS-IB anticipates human intervention in accelerating that change. Overall, I am not convinced that there will be a demonstrably significant benefit that adequately compensates for the significant loss caused by the proposal.

28. For these reasons, I am not satisfied that the proposed compensation would be adequate in terms of Appendix 4 of the NPS-IB.

29. In relation to herpetology, I note that a lizard management plan has been provided, and this has been accepted by DoC. In reliance on DoC considering the effects on lizard populations to now be adequately manged, I accept the evidence of Ms King and consider that the effects of the proposal on lizard populations will be adequately managed.

30. Overall, I remain unconvinced that the proposal would meet the objective of the NPS-IB. I also consider that the proposed compensation would be inconsistent with Policy 5.4.6A.a.ii.2, of the Otago Regional Policy Statement 2019, which requires compensation avoid removal or loss of viability of habitat of a threatened or at risk indigenous species of fauna or flora under the New Zealand Threat Classification System. There are a number of threatened or at risk species present on the site, which would be removed. I consider the removal of some lots outside the development zone, for example Lot 24, which is located on extant, intact dryland ecosystems outside the development zone (See Figure 6 of my original s42A report) may be adequate to reduce the starting level of ecological effects to levels that I could conclude the compensation measures proposed by the applicant to be adequate, having regard to the objective of the NPS-IB, the provisions of both regional policy statements, and the District Plan.

Landscape Matters

31. The panel asked me to identify whether there are any other glazing requirements in the District Plan, or other resource consents. I can confirm that there are currently no similar glazing requirements in the District Plan. The closest the Plan comes is that large windows on buildings in Dark Sky Precincts must have window coverings, and that internal light fittings must be tilted and shielded to minimise direct lightspill through the window. In terms of resource consents, I was not able to undertake a thorough search of our records. However, in my experience, if glazing requirements have been imposed, they have not been common. I can think of one example of a dwelling on a rural lot in St Bathans with large glazed areas overlooking the Blue Lake where a condition was imposed requiring these be shuttered closed when the house is not occupied in order to try reduce the visual effect of the building, having regard to the building's proximity to the St Bathans heritage precinct. I also have no reason to believe glazing requirements would be as specific as those proposed by the applicant.

32. In relation to Mr Baxter's evidence, I consider that the activity standards in the District Plan anticipate that buildings would be totally invisible from view in order to comply with the standard. That is, there is no possible line of sight between an observer and the building. I consider that this forms part of the anticipated rural character of the site, for the purpose of applying Objective 4.3.3 and Policy 4.4.2 of the District Plan. Instead, the solution Mr Baxter proposes is what I would describe as functional invisibility. There is still line of sight, but a person would not observe, and thus experience a visual effect, unless they knew where to look, had binoculars or similar, or just happened to look in the right place at the right time. I agree with Mr Lucas that the site currently exhibits a high degree of natural character and landscape coherency. I consider the landscape of the site to be an important feature at the junction of the Bendigo and wider Clutha areas. However, having regard to the evidence of Mr Baxter, and in light of the controlled activity pathway provided for development in the District Plan, I am broadly satisfied that the proposed layout and design controls as they apply to Lots 1-26, would adequately maintain rural landscape character in terms of Objective 4.3.3 and Policy 4.4.2 of the District Plan.

33. For Lots 27-30, I retain my reservations about the increased density of development in this area, in close proximity to Bendigo Loop Road. I consider paragraph 79 of Ms Lucas' evidence to be a fair criticism of points raised in my reports about how strong the connections to the Stables and Bendigo Station buildings. Particularly, I concede that there is no direct visual link between the lots and the Station buildings. However, I still argue that they are proximate, and could form a conceptual relationship over time. Over time, I consider that maturing vegetation between buildings on these lots and the road will serve to soften the effects of those buildings on the landscape. However, I accept that there will be greater levels of temporary effects while the plantings are maturing. I also accept the argument that these plantings will be different in character to the existing large mature exotic trees around the stables and Station building. However, I do not consider this to be material, provided effective screening is provided. I consider that one fewer lot in this location would result in substantially less cumulative effects, both in the short and long term, and I would be more able to support the proposal if one lot was removed from this area. However, I do consider that, long term, development on these lots would not significantly detract from the rural character of the area, in reliance on the design controls and landscaping proposed by Mr Baxter.

34. I maintain my reservations about the visibility of dwelling lighting at night. In my experience, and supported by Ms Lucas, interior lighting in elevated positions can be visible over several kilometres. For example, lighting from dwellings in Queensberry is visible from State Highway 8A, up to 3.5-4km away. Traveling along this road at night presents a constellation of lights up the hillside. In some cases, this can make the domestication of the area immediately obvious and detract from the open, undeveloped character of rural areas anticipated by the plan. While I note that Queensberry does not have the same lighting controls as proposed by the applicant, I consider that the density of development could result in a similar effect, with a concentrated set of lights, even if each individual light is small, drawing attention to the presence of domestication in this area.

35. In order to reduce the effects of lighting at night even further, I recommend that the Panel consider adding a further requirement that fixed internal lighting in buildings facing north or west be shielded or oriented away from windows so as to minimise light spilling outside the dwelling, in a similar manner to LIGHT-R3 in the District Plan. Mr Baxter and the applicant may wish to put forward a recommendation for how close lighting can be to windows before shielding or tilting is required. Otherwise, I would default to applying the requirement to all interior lighting. However, in principle, I consider that this, in addition to the other measures proposed, would adequately address my residual concerns about the nighttime visual and landscape effects of the proposal, as well as those of Mr Lucas.

36. In relation to building heights, I'm happy with a reference to heights based on RL. I think it would be worth the applicant confirming where RL is to be measured from (For example, mean sea level) and for this to be referenced on Appendix A, Guideline 1, in order to avoid future landowners attempting to get a different outcome by using a different reference point.

37. In relation to my suggested condition that the land be entered into a QEII covenant, or similar, to ensure the long term protection of the common land, and the applicant's response that this could be managed through the joint ownership structure and services entity, I share the concerns raised by submitters that, while unlikely, this system of relying solely on private covenants is fallible as it relies on the willingness of the parties to uphold the covenant. Landscape and ecological protections have public benefits. I think it would be appropriate to have a public body or public representative be an ongoing party to the covenants to ensure that public purpose and benefit is maintained.

Parties not in the covenant cannot enforce it, so having such an organisation in the mix (Be it CODC, DOC or the QEII Trust) would allow enforcement on behalf of the public in the event that the owners all cabal together to not comply with terms of covenant, or enforcement between the owners is relaxed.

Archaeological Matters

38. The RMA and HNZPTA create dual roles for the management of historic heritage, including archaeological sites. s6 of the RMA requires protection of historic heritage (Including archaeological sites) from inappropriate subdivision, use and development. The HNZPTA works on the principle that the identification, protection, preservation, and conservation of New Zealand's historical and cultural heritage should—

    (i) take account of all relevant cultural values, knowledge, and disciplines; and
    (ii) take account of material of cultural heritage value and involve the least possible alteration or loss of it; and
    (iii) safeguard the options of present and future generations; and
    (iv) be fully researched, documented, and recorded, where culturally appropriate

39. The HNZPTA prohibits modification or destruction of archaeological sites without authority from HNZPT

40. Given this, I consider that the panel should consider archaeological effects of the proposal, and should be wary of approving an application that does not adequately protect historic heritage, regardless of the provisions of the HNZPTA.

41. In reliance on the initial assessment of Mr Jennings, I was of the opinion that the effects of the proposal on archaeological material can be adequately managed. The new evidence provided by Mr Jennings and Mr Schmidt warrants re-consideration of this, however.

42. The applicant has proposed to realign the road to avoid site G41/773. The compete destruction of G41/771 has also been proposed through realignment of access to Lots 1 and 2. I consider these measures to be appropriate to manage the effects of the proposal in terms of the RMA.

43. The other archaeological material identified by Mr Schmidt is all located outside the proposed developable lots. I note that there is potential that the proposed walking tracks will disturb these sites, or others that have not been identified. I consider it reasonable that a walking track could be designed sympathetically to avoid any archaeological sites through the specific design of the track. I do not consider there to be any reason why a condition of consent could not be imposed requiring avoidance of these sites as a method of appropriately managing effects on archaeological features in the vicinity of the tracks.

Service Provision

44. Given NZTA have indicated their support of a Diagram E standard for the State Highway 8 / Bendigo Loop Road intersection, I am satisfied that the effects of the proposal on the roading network can be managed. I am also satisfied with Mr Carr's assertions that safety features and signage for the subdivisional road can be provided in principle, and that determining what exactly is required can be deferred to the detailed design phase. I have also confirmed verbally with Council's infrastructure manager that they are happy with this approach.

45. Mr Carr identifies that Council is currently in the process of reviewing its adopted subdivision standard (NZS 4404:2004 and its 2008 addendum). This is correct. However, it is uncertain how this will look, what departures Council may decide to make from NZS 4404:2010 to suit local conditions, and when the change might be made. The panel must consider an application based on the standards that apply today. Section 16 of the Plan allows Council to permit departures from its adopted standard, based on the particular circumstances affecting a subdivision. Therefore, Council staff take a pragmatic approach and consider the merits of any application wanting to use 4404:2010 on a case by case basis. Any approved use of 4404:2010, then forms part of a condition of consent. If Councils standards were to change in the future in a way that meant it was no longer appropriate to apply an old standard, then I would suggest this would make good grounds for considering an application under s127 of the RMA. I also note that the conditions have been drafted with an eye to effects beyond just adequacy of infrastructure. For example, changes to infrastructure may have landscape, ecological or archaeological implications. These are not matters Council's engineers have oversight of. Therefore, I am not willing to support the inclusion of the phrase "Unless otherwise approved by Council Engineers" to the proposed servicing and roading conditions.

Precedent

46. I remain of the opinion that the proposal would set a limited precedent. The reasons are provided in Paragraphs 7.50 and 7.51 of my original s42A report and expanded on in Page 27 of the supplementary report. The evidence provided at the hearing has not changed these conclusions.

Overall Recommendation

47. Based on the application before the panel, I continue to hold the opinion that the application in its current form should be refused, for the reasons given today, and in my recommending reports. I have suggested changes to the application that, in my opinion, would make the proposal supportable. However, I consider that the panel's consideration of the application should be finely weighted, and decisions, such as whether or not to apply a permitted baseline, will have significant implications on whether consent should be granted.

Conditions

48. I intend to comment on the draft conditions of consent verbally in turn. However, I note that the tracked changes version of my original draft conditions provided by Mr Brown does not include all the changes he has proposed. For example, deletions to land use Conditions 4 and 6 are not recorded. This limits my ability to fully comment on Mr Brown's proposed changes.

Prepared by:

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