BEFORE THE CENTRAL OTAGO DISTRICT COUNCIL

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

Legal Submissions on behalf of

the Director-General of Conservation *Tumuaki Ahurei*

Dated: 18th November 2024

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MAY IT PLEASE THE PANEL:

INTRODUCTION

1. These submissions are made on behalf of the Director-General of Conservation *Tumuaki Ahurei* ('the Director-General') in respect of the application for resource consents by TKO Properties Limited ('the applicant') for a residential development and subdivision at Rocky Point, Bendigo (RC230179).

2. The Director-General opposes the application.

3. The Director-General's primary submission is that the application should be refused pursuant to s 104(6) of the Resource Management Act 1991 (RMA). There is inadequate information on the values on the site to fully assess effects and the mitigation of those effects.

4. The Director-General's alternative submission is that the application does not meet either test in s 104D. The proposal is a non-complying activity that would impose significant residual effects on matters of national importance, on a site that is a significant natural area, partly in an outstanding natural landscape, contains regionally significant heritage, and is subject (in part) to a Conservation Covenant. Further, the application is contrary to the objectives and policies of all relevant planning instruments.

5. In the event that the Panel determines that the application passes the s 104D gateway, the application should be refused under s104.

6. To assist the Panel, these submissions proceed in a sequential fashion. However, they focus on contentious legal issues, particularly those raised by the Panel yesterday, including:

a. the relevance of mapped versus unmapped SNAs,

b. the permitted baseline test,

c. the legal force of private covenants,

d. the legal relevance of the Conservation Covenant to this application and its role in the Plan as a method to protect s 6(c) values,

e. the legal meaning of like-for like offsetting.

Evidence

7. The Director-General will call the following witnesses to give evidence:
   - Richard Ewans (terrestrial ecology)
   - Dr Matthew Schmidt (archaeology)
   - Elizabeth Williams (planning).

The first consideration for the Hearing Panel is whether there is adequate information to assess effects. If not, the application should be declined pursuant to s 104(6) or adjourned pursuant to s 41C(3)(4).[1]

Section 104(6)

A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

8. The Panel has inadequate information before it to determine the application because:

   a. The ecological values are 'critically underestimated' in the application. Due to inappropriate methodology, critical plant species data,

[1] The Panel may consider adjourning the hearing pursuant to s 41C (3), (4) - in order to give the applicant an opportunity to provide the necessary additional information. However, it may be challenging to provide the necessary information within a short period as some of it does not yet exist and must be generated, and seasonality is important. The relevant sections to consider in relation to timing include s 115, but s 37A(5) permits a waiver to time limits for a decision on a resource consent if the applicant agrees.

including percentage cover is lacking.[2] The information from the applicant 'massively underestimates' the amount of spring annuals on the site, and likely misses multiple Threatened and At Risk species (including Threatened – Nationally Critical plants and halophytic plants) and their occurrences / quantities in the development footprint.[3]

b. The Director-General's evidence cannot remedy this omission because Mr Ewans has been unable to survey the development footprint or proposed offsetting sites to an adequate degree.[4] Ms Hill's legal submissions that 'the inference from DOC is a philosophical one, [and] that no amount of data investigation would be enough' are incorrect. The Director-General's contention is a methodological one. It doesn't matter how many hours are spent investigating a site if the wrong methodology is used. Here, the development footprint and lots should have been surveyed not sampled.[5]

c. The biodiversity offsetting model is unreliable because the 'ecological values inputted into it are critically underestimated'.[6]

d. No on-site survey of invertebrates has been undertaken.[7] One is required, in Mr Harding's opinion, because there is a 'high likelihood' of At Risk invertebrates being on site that rely on cushionfield habitat.[8]

e. The applicant's archaeological assessment failed to identify significant heritage features on the site. Dr Schmidt states that it is uncertain how the development will affect those features and 'more detail is required to ascertain where infrastructure, services, tracks etc. will

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[2] Report prepared by Mike Harding, September 2024, at [3]-[4.1]; Statement of Evidence of Richard Ewans, 11th November 2024, at [34].

[3] Statement of Evidence of Richard Ewans, 11th November 2024, at [41]-[54].

[4] Statement of Evidence of Richard Ewans, 11th November 2024, at [55].

[5] Report prepared by Mike Harding, September 2024, at [4.1]; Statement of Evidence of Richard Ewans, 11th November 2024, at [27].

[6] Statement of Evidence of Richard Ewans, 11th November 2024, at [30].

[7] Report prepared by Mike Harding, September 2024, at [4.2].

[8] Report prepared by Mike Harding, September 2024, at [4.2] citing Wildlands' assessment in the AEE.

go'.[9] The heritage features that *were* identified by the applicant's archaeologist, were incorrectly identified and their significance undervalued. This error means that the development has not been appropriately designed to avoid effects on those features.

f. Case law states that when RMA s 6 matters are impacted, the application should address alternatives (see below). No alternatives are before the Panel.

9. In making the assessment of adequacy, the Director-General submits that the Panel should consider the following matters:

a. The scheme of the Act directs that a fulsome and integrated approach be taken to addressing effects in order to determine the application (see Appendix A for details).
b. Information should include adequate baseline information about the receiving environment, including Threatened or At Risk species present and impacted by the proposal,[10] in order to assess the effects on the environment and the adequacy of any mitigation, (including offsetting and / or compensation) before the application is determined.
c. Given the high degree of risk that additional Threatened and At Risk species, and that Threatened Land Environments, and regionally significant heritage would be lost, a precautionary approach should be taken, in order to reduce uncertainty as much as possible.
d. Further, it is important to properly scrutinise this proposal, as there is a risk it will set a precedent (see below).

10. In making an assessment of adequacy, the Panel must also take into account s 107(7), (i.e. whether any request made of the applicant for further information

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[9] Statement of Evidence of Dr Matthew Schmidt, 11th November 2024, [23].

[10] *Crest Energy Kaipara Ltd v Northland RC* A132/09 22 December 2009, (EnvC), and [117]-[118] in particular.

resulted in further information being available). In response to Mr Harding's view that 'all parts of the project area directly affected by the proposed development should be thoroughly surveyed —not just sampled— over more than one spring-summer season', Mr Beale stated, 'I do not consider a further spring-summer season of sampling is warranted'.[11]

11. For all these reasons, the Director-General submits the application should be refused pursuant to s 104(6).

<u>If the Panel decides that it has adequate information upon which to determine the consent, the Director-General submits that the following matters are relevant in respect of the s 104D gateway test</u>:

Section 104(D)

12. The application is for a non-complying activity. The Panel must determine whether the application passes either of the s 104D gateway tests before considering the application under s 104.[12]

13. For the reasons set out below, the Director-General's submission is that the application fails to pass either test in s 104D.

The first test: s 104D(1)(a)

*the **adverse effects** of the activity on the environment ... will be **minor***

14. The High Court has explained that the gateway test in s 104D(1)(a) is akin to passing through the 'very small eye of the needle' i.e., the appropriate standard

[11] Statement of Simon Beale 4th November 2024, at [page 25 [4.1].
[12] *Queenstown Central Ltd v Queenstown Lakes DC* [2013] NZHC 817, at [21].

is that adverse effects of the proposal are so minor they are not likely to matter in any decision to grant consent.[13]

15. In the Director-General's submission, if the Panel accepts the preponderance of expert ecological evidence (i.e., from Richard Ewans, Mike Harding, and the submission of Kate Wardle), the evidence from Dr Matthew Schmidt (on archaeological heritage) and Di Lucas (on landscape), it is not possible to suggest that the residual adverse effects of activity are minor so that the proposal passes through the s104D(1)(a) gateway (see further discussion on effects below).

16. In response to Ms Hill's submission that offsetting can be used in the s 104D(1)(a) test, I agree that is legally correct. But **only** if the proposal provides 'like for like' offsetting that, as the Supreme Court has said, can avoid the adverse effects "in fact" (see discussion below on *East West Link*). The proposal does not provide 'like for like' offsetting and so the proposal cannot help the application through the s 104D gateway.

The alternative test: s 104 D (1)(b)

the application is for an ***activity*** *that will not be contrary to the* ***objectives and policies*** *of the relevant plan ... and any proposed plan*

17. Whether a proposal will 'not be contrary' to the objectives and policies of the relevant plan must be assessed on a 'fair appraisal of the objectives and policies as a whole'.[14] 'Not contrary to' sets a high test.[15] The relevant plan is the CODP.

18. Mr Brown considers that both tests in s 104D are passed. As I explain below, however, Mr Brown's analysis of effects proceeds on an incorrect legal basis

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[13] *Queenstown Central Ltd v Queenstown Lakes DC* [2013] NZHC 817, at [82]. Note: the positive or net effects of the proposal are not to be considered in the s 104 D(1)(a) threshold test that is only concerned with adverse effects (see *Stokes v Christchurch CC* [1999] NZRMA 409 (EnvC), [76]).
[14] *Dye v ARC* [2002] 1 NZLR 337 (NZCA), at [25].
[15] *Akaroa Civic Trust v Christchurch CC* [2010] NZEnvC 110, at [73].

and as a result his recommendations should carry little weight. In relation to his analysis of s 104D(1)(b), he appears not to confine his analysis to the relevant plan but rather 'the various planning instruments'.[16]

19. Mr Vincent however concludes that the proposal is contrary to the objectives and policies of the COPD.[17] Ms Lucas[18] and Ms Williams[19] also both conclude that the proposal is contrary to the objectives and policies of the COPD, noting their particular focus on the interaction of the objectives and policies for development with those that address section 6(b), (c) and (f) values.

20. The Director-General's submission is that the application fails to pass either test in s 104D.

If the Panel determines that the activity passes through the s 104D gateway, the Director-General submits that the following matters are of particular relevance to the s 104 test:

s 104(1)(a) *any actual and potential effects on the environment of allowing the activity*

The relevant environment

21. There is no dispute that the site:
    a. is of very high ecologically significance and meets the significance criteria in the National Policy Statement on Indigenous Biodiversity

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[16] Statement of Evidence of Jeffrey Brown, 4th November 2024, p 32 [6.1(b)].
[17] S 42A Report, 27 September 2024, p 24.
[18] Statement of Evidence of Di Lucas, 11th November 2024, at [105].
[19] Statement of Evidence of Elizabeth Williams, 11th November 2024, at [22], [95].

(NPSIB) and operative Otago Regional Policy Statement (ORPS) / proposed Otago Regional Policy Statement (pORPS);[20]

b. supports populations of threatened indigenous flora communities;
c. is habitat for McCann's skink and Kawarau gecko (At Risk -regionally endemic[21]);
d. is likely to be habitat for many invertebrate species, including At Risk species;
e. is an outstanding natural landscape (outside the development area); and
f. contains heritage features.[22]

22. However, some issues are contentious and /or the data is incomplete:

a. The classification of the site in accordance with Threatened Environments Classification (TEC) is contentious. Mr Harding suggests the 2012 TEC classification is out of date and that part of the land environment is now likely to be in the 'acutely threatened category' and the rest 'acutely threatened'.[23] Ms Wardle's submission speaks to the widespread loss of indigenous vegetation within these land environments in Central Otago over the last 30 years. Mr Ewans agrees, noting that cushionfield has been severely impacted by land use and his evidence charts the destruction of dryland vegetation in Central Otago.[24] Mike Harding suggests that the 'ecologically robust area of kanuka-cushionfield' on the site are some of the most extensive, remaining communities in Central Otago.[25]

[20] See in particular, Statement of Evidence of Simon Beale, 4th November 2024, at [9]-[11], [39]-[40], [44]-[45].
[21] Kawarau gecko - https://www.orc.govt.nz/media/p20daumd/orc_kawarau_gecko_a4_2024.pdf
[22] Statement of Evidence of Dr Matthew Schmidt, 11th November 2024, at [29].
[23] Report prepared by Mike Harding, September 2024, at [4.3] and [6.1].
[24] Statement of Evidence of Richard Ewans, 11th November 2024, at [25], [64].
[25] Report prepared by Mike Harding, September 2024, at [7].

This evidence of widespread loss is an important factor within which to contextualise effects. It impacts an evaluation of the gravity of effects, and feeds into whether the indigenous vegetation and ecological communities are vulnerable and irreplaceable —and so, is relevant in determining whether offsetting / compensation is even appropriate at all (see discussion below).

b. As explained above, the data as to Threatened and At Risk plant species on site is incomplete and likely, woefully inadequate. A ***survey*** of their presence and quantities in the ecological communities impacted by the proposed development is not available.[26] The applicant's ecological ***sampling*** reported three At Risk plant species in the development footprint, whereas Mr Ewans undertook two walk-through surveys and found,

> an additional 1 Threatened and 5 At Risk plant species ... in the development area ... [and] 1 Threatened, 13 At Risk, 2 locally uncommon (within the ED) plant species, some of which include multiple occurrences and regionally important populations on the site.[27]

Mr Ewans states that there are likely to be more Threatened flora species (including a species that is Nationally Critical and possibly halophytic plants) on the site.[28] Again, this omission in the application is problematic because it impacts the assessment of effects and appropriateness and adequacy of any offsetting / compensation.

c. The importance of the site as a habitat for the spring annuals species is also contentious, and in particular their location /presence in the development footprint, and their quantities. Mr Ewans states that the site 'could be the most important remaining area ***nationally*** for the conservation of the spring annuals species' and that likely hundreds

[26] Report prepared by Mike Harding, September 2024, at [4.1].
[27] Statement of Evidence of Richard Ewans, 11th November 2024, at [37b], [42].
[28] Statement of Evidence of Richard Ewans, 11th November 2024, at [46].

of *Myositis brevis* and thousands of New Zealand mousetail are located within development plots.[29] In contrast, Mr Beale suggests most spring annuals are located outside the development area. [30]

d. As I understand Mr Jenning's evidence, the significance (and rarity) of the heritage sites is also in contention.

The future receiving environment

23. In evaluating the relevant environment, the Panel must also consider the future, receiving environment that the activity will impose effects upon.

24. In *Queenstown Lakes District Council v Hawthorn Estate Ltd*, the Court of Appeal set out the legal test for the future environment as including activities **permitted by the plan and unimplemented resources consents likely to be implemented**. **Controlled** activities are **<u>not</u>** to be considered in conceiving of the future environment.

25. I emphasise this legal test, because Mr Brown (and also, at times, the s 42A Report writer), appears to confuse the future environment test (and also the permitted baseline test) and this serves to undermine his reasoning.

26. For example at [4.11] in his evidence, Mr Brown states:

> Mr Vincent also considers a development consistent with the Concept Plan in 19.16 and Rules 4.7.2.i and 4.7.2.ii, able to be undertaken as controlled activities, **forms part of the environment reasonably foreseeable under the District Plan**. I agree with that assessment. (emphasis added)

27. Activities that are controlled ("anticipated") have no place in the s 104(1)(a) receiving environment test.

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[29] Statement of Evidence of Richard Ewans, 11th November 2024, at [46].
[30] Statement of Evidence of Simon Beale, 4th November 2024, at [47].

Actual and potential effects on that environment <u>with</u> proposed 'avoidance and mitigation' but <u>before</u> offsetting / compensation

Indigenous biodiversity

28. The proposal will result in the destruction of c 4ha of kanuka-cushionfield and multiple Threatened and At Risk flora. Mr Ewans states that,

> The proposal will destroy multiple populations of several nationally Threatened and At Risk plant species unaccounted for in the EclA, with no matching mitigations. Some of these populations are **regionally** significant and collectively with adjoining habitat are **nationally** significant. This **destruction represents an irreversible loss of significant indigenous biodiversity.**[31]

29. Further, Mr Ewans notes the application has not taken account of the effects on the drylands biodiversity from waste water disposal[32] and run-off, edge effects, fragmentation, and wild fire controls (up to 30 meters from houses). These additional effects are 'potentially seriously underestimated'.[33] In response to questions from Commissioner Cooney , Derrick Sterberg stated 'treated effluent will discharge to land via a perforated pipe across an area of c. 1,100 ms2'. Mr Ewans will explain that this constitues further clearance of indigenous biodiversity because this is changing the abiotic conditions in a drylands environment (akin to irrigating the land).

30. It is not clear if translocation of plants is still proposed (i.e., digging up Threatened species and replanting elsewhere).[34] Accordingly, I do not address this point

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[31] Statement of Richard Ewans, 11th November 2024, at [24].
[32] Derrick Sterberg – answer to questions from Commissioner Cooney – treated effluent will discharge to land via a perforated pipe across an area of c. 1,100 ms2.
[33] Statement of Richard Ewans, 11th November 2024, at [70]-[71].
[34] Statement of Richard Ewans, 11th November 2024, at [83]-[85].

further, but refer the Panel to Mr Ewan's evidence on the challenges of translocation.

31. Mr Ewans, Mr Harding, and Ms Wardle all agree that there would be significant adverse effects on significant indigenous biodiversity from the proposal.

32. Where the ecologists differ in assessing the degree of effects on indigenous biodiversity, the evidence of Mr Ewans, Mr Harding, and Ms Wardle should be preferred to that of Mr Beale because:

    a. Harding, Ewans and Wardle are noted drylands experts;
    b. Mr Beale has used the EIANZ Guidelines to assess the significance or degree of effects. The use of the EIANZ guidelines have been criticised and rejected in previous RMA decisions.[35] In the *Balmoral* case, expert witnesses from Wildlands —the firm that Mr Wells works for— explicitly rejected their use stating the "limitations of the EIANZ approach means it provides biased guidance on effects" (see Appendix C). Their use is not supported by DOC, the Ministry for the Environment, or any statutory process. As both Mr Harding and Mr Ewans explain, their use acts to suppress values by balancing them out against other issues.[36] They are not a replacement for the evaluation of significance through careful ecological survey, expert knowledge and contextualisation of those values in the wider environment (using universally acceptable metrics such as the NZ Threat Classification System and Threatened Environments Classification). They act to usurp the role of the decision-maker in evaluating the significance of effects, after careful consideration of the evidence, set against the

[35] See e.g. Bathurst Coal (Resource consent applications CRC184166, CRC200500, CRC201366, CRC201367, CRC201368, CRC203016, CRC214320, CRC214321, SDCRC185662 and RC185640 – Bathurst Coal Ltd – Report and Decision of the Hearing Commissioners, 17 June 2022); Balmoral Solar Farm (Resource consent applications CRC224567, CRC230898 and RM220048 - A W and K F Simpson – Report and Decision of Hearing Commissioners, 8th November 2023).
[36] Report prepared by Mike Harding, September 2024, at [5]; Statement of Evidence of Richard Ewans, 11th November 2025 at [72].

planning and legislative framework (including s 3, part 2 and s 104(1)(a)).

c. For clarity, I do not propose to address in my submission the issue of bias in the DOC evidence that Ms Hills has raised, but I am happy to do so if the Panel indicate they would find that helpful.

33. In the EEA, Wildlands states effects on invertebrates from the development will be 'high' because of the importance of cushionfield plant communities as habitat. Contrary to Mr Beale's assertion,[37] the proposed offsetting / compensation cannot improve habitat for relevant invertebrate because the offsetting is not replicating lost cushionfield.

Heritage effects

34. The proposal would destroy two regionally significant heritage sites and damage a third.[38] It may also impact other significant heritage features discovered by Dr Schmidt (however the relevant information is not clear and / or available).

35. In Dr Schmidt's opinion, the effects of the proposal on heritage constitute 'significant adverse effects'.[39]

Landscape effects

36. The Director-General has not submitted landscape evidence. However, Shonagh Kenderdine, in opposition to the application, has filed evidence from Di Lucas.

37. Ms Lucas observes that the land outside the 'development area' is classified Outstanding Natural Landscape (ONL) and concludes that the 'activity would have

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[37] Statement of Evidence of Simon Beale, 4th November, at p 25 [4.2].
[38] Statement of Evidence of Dr Matthew Schmidt, 11th November 2024, at [52]-[53].
[39] Statement of Evidence of Dr Matthew Schmidt, 11th November 2024, at [66(e)].

significant adverse effects on the ONL.'[40] In respect of activity within the 'development area' she concludes that,

> a number of the lots as currently proposed would have significant adverse landscape effects due to their visibility from either the state highway or Wairere/ Lake Dunstan.[41]

38. Ms Lucas notes that Mr Baxter's evidence focuses on 'a visual perception analysis and has not addressed the physical landscape itself'.[42]

39. The Environment Court[43] has confirmed that the evidence framework for assessing landscape contains more than visual splendour and aesthetics and also includes:

    a. the natural science factors - the geological, topographical, ecological and dynamic components of the landscape;
    b. its aesthetic values including memorability and naturalness;
    c. its expressiveness (legibility): how obviously the landscape demonstrates the formative processes leading to it;
    d. transient values: occasional presence of wildlife; or its values at certain times of the day or year;
    e. whether the values are shared and recognised;
    f. its value to tangata whenua;
    g. its historical associations.

Effects on tangata whenua

[40] Statement of Evidence of Di Lucas, 11th November 2024, at [77].
[41] Statement of Evidence of Di Lucas, 11th November 2024, at [97].
[42] Statement of Evidence of Di Lucas, 11th November 2024, at, [32].
[43] *Wakatipu Environment Society Inc v QLDC* [2000] NZRMA 59 (EnvC).

40. It is uncertain whether there has been any or any adequate cultural effects assessment. However, I note the letter that has been filed from Kā Rūnaka.

41. The Rūnaka are opposed to the application and state that the landscape is 'culturally significant' as recorded in the Ngāi Tahu Claims Settlement Act 1998, sch 40. The Panel can have regard to this statute under s 104(1)(c).

42. In particular, Kā Rūnaka state:

> the proposal affects a wāhi tūpuna area known as Upper Mata-au Trail, with values that include but are not limited to: mahika kai, nohoaka, and ara tawhito.[44]

43. In the Director-General's submission, the proposal would result in significant adverse effects on significant indigenous biodiversity, regionally significant heritage, and outstanding natural landscape.

s 104 (2) ***When forming an opinion for the purposes of subsection (1)(a), a consent authority <u>may</u> disregard an adverse effect of the activity on the environment if a national environmental standard or the <u>plan permits an activity</u> with that effect (the 'permitted baseline').***

44. The applicant's legal submission place considerable weight on the use of the permitted baseline.

45. The application of the permitted baseline (PB) is discretionary (see use of the word 'may' in s 104(2)). The higher courts have not set down any prescriptive rules as to when the PB may or may not be used, emphasising it is a matter of discretion for the decision-maker but have given guidelines as to when it is NOT appropriate.

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[44] Te Rūnanga o Ōtākou, Kāti Huirapa Rūnaka ki Puketeraki, and Te Rūnanga o Moeraki ('Kā Rūnaka'), Letter dated 12th November 2024, at [3.3],[3.7].

46. The legal submissions of the applicant set out four considerations when it is NOT appropriate at [34]:

(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]

47. In my submission, (b), (c) of those criteria are clearly met in this case (and *possibly* (a) and (c)).

48. In respect of (b) and (d), it is inappropriate to use the permitted baseline to justify the destruction of Threatened and At Risk species because that would be contrary to the policy of the Act <u>and</u> the objectives and policies of all relevant planning instruments — *including* the CODP.

49. In respect of (d), I note Mr Vincent's various comments about the 'tricky' nature of the CODP, and the difficulty of 'reconciling' it in some places. The 'elephant in the room' is that the CODP is extremely old. It states that a review will be conducted within five years of tenure review to ensure s 6(c) matters are adequately addressed on freeholded land. That has not been done. It is likely that the exemption rules do not 'give effect' to higher order planning instruments or Part 2 of the RMA (and in particular, s 6 (c)). In the circumstances, the

applicant should not be able to use the PB to justify destruction of Threatened and At Risk species.

50. In their legal submissions, the applicant's argue that not to apply the baseline may result in 'perverse outcomes' (at [40]). The applicant's are represented by two skillful lawyers, but in my respectful opinion their arguments on this matter are legal conceits. The generalist suggestion that 'if the panel do not apply the permitted baseline it would signal to landowners they should or could eradicate biodiversity values as a right under the permitted rules' is unsupportable. The rules in the CODP that provide the exceptions in this matter only apply to previously freeholded land as listed in the Plan. As Ms Williams explains, those listed areas have Conservation Covenants on them (see her Appendix 3). There is no information before the Panel about the quality of those lands outside the covenanted areas, activities on them, zoning, consents etc. Other un-freeholded lands are subject to the general standards concerning significant natural areas and vegetation clearance etc. The notion that *this* decision is going to spur other landowners to clear vegetation rather than pursuing what they want to do with their land (even through consenting) is fanciful.

51. The Panel should exercise their discretion not to apply the permitted baseline in this matter.

52. If the Panel *do* decide to apply the permitted baseline, the parameters of the comparative test are set by the statute i.e., what a NES or plan permits (controlled activities are not part of the permitted baseline), supplemented by common law tests. The common law test are that the comparison is 'not fanciful'[45] and the effects of the comparator and proposal are 'similar'.[46]

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[45] *Smith Chilcott Ltd v Auckland City Council* [2001] NZRMA 503. (NB: First question is *can* the baseline apply, the second is *should* it apply.)

[46] *Auckland Regional Council v Living Earth Ltd* (HC) CIV 2006-404-6659, 19.02.07 and (CA) [2008] NZCA 349.

53. Mr Brown suggests various permitted activities —farming, horticulture, viticulture, earthworks etc.—that, in his view would impose similar effects as land clearance for a 30 lot subdivision and development. He states that his comparator "would likely comply with (but would still need to be scrutinised under the various standards)" at [4.1]. In my submission, there is inadequate evidence before the Panel that the effects are similar in type or scale. Some ecological evidence is required.

54. To explain, why, I will give an example. At [4.5] in his PB analysis, Mr Brown says various forms of grazing can be carried out. The effects of grazing on the indigenous biodiversity present are not similar to the effects of a 30 lot subdivision and development: see Mr Ewans at [80] – grazing *is* compatible with existing indigenous biodiversity.

55. Further, the other activities that Mr Brown suggests form a permitted baseline (such as earthworks, extraction and excavation of material, and viticulture) are certainly fanciful on the covenanted area - they could not occur on that area because of Conservation Covenant (that the CODP relies upon to protect s 6(c) values). The rational for the PB is that the community has sanctioned those effects – but in this instance, they patently did not. Rather the emphasis was on a different method to achieve the objectives and policies of the Plan.

56. In all the circumstances, the use of the PB is inappropriate in this matter.

Both Mr Brown and Mr Baxter confuse the PB test

57. Further, it is also important to point out that Mr Brown and Mr Baxter (and at times Mr Vincent) confuse the PB test in their general assessments of effects.

58. They make a comparison between the proposal and with residential development that they say "is anticipated by the Plan" —and by that they mean

controlled activities in the development zone. They do so for various reasons, but predominantly to justify conclusions that effects on the environment from the proposal would be minor. This is PB reasoning – but flawed – because attempting to use using controlled activities in PB reasoning is impermissible.

59. For example, in assessing effects on landscape, Mr Baxter states (at [140]), "The development is predominantly located within the Rocky Point Recreation Zone within which clustered housing and travellers' accommodation is anticipated by the Plan".

60. In respect of Mr Brown's evidence he makes this error:

61. At [4.52] addressing cultural effects: "While the Proposal is not fully compliant with the zone provisions, it is clear that a complying development [NB: and by this he means a controlled activity] would change the landscape, and that is the appropriate starting point to assess the Proposal. The various departures from the provisions do not change the fact that the District Plan anticipates change in this landscape".

62. And at [4.12] "... Either way, the [controlled activity] development, give or take a few lots, would change the environment."

63. And at [4.13] "... development of the site ...could potentially occur as a controlled activity to give effect to the anticipated purpose of the RuRA2 Concept Plan area."

64. And at [4.57] "Overall I consider that the adverse effects of the proposal are no more than minor. This reflects the potential adverse effects already anticipated by the District Plan (through permitted and controlled activities)."

65. And, at [5.15], "While in a rural zoning, the proposal enables residential activity in a "Development Area" as set out in the ODP, which is an area which *anticipates* this type of activity (emphasis added)."

66. And in 6.1 (a) "The Proposal has no more than minor adverse effects on the environment, taking into account the Zone's permitted and controlled activities".

67. And (in responding to s 42A report assessment that the proposal does not comply with the CODP *objectives and policies*) at p 41 "The Proposal has no more than minor adverse effects on the environment, taking into account the Zone's permitted and controlled activities."

68. And at [4.18] in justifying his preference of the applicant's ecological evidence: "I prefer the reporting and evidence of Mr Beale, Dr Wells and Ms King – as informed by the suite of specialist investigations and reports by the other experts – over the views of Mr Harding, for the following reasons: (a) The permitted baseline and receiving environment, as discussed in paragraphs 4.1 – 4.15 above; I reiterate that: • notwithstanding Section 6(c) of the Act and the higher order instruments, the District Plan does not protect the ecological values of the site from the potential adverse effects of permitted activities (for example the rules do not prevent vegetation removal, or earthworks, across the site); and • a controlled activity consent for a complying development, including construction of roads, building platforms, and services, and their ongoing use, would undoubtedly change the site's environmental conditions."

69. Despite his brief assertion in [4.57] that the effects are minor with or without baseline reasoning, as Mr Brown's evidence is replete with this (impermissible) reasoning, it is difficult to tease out how much of his conclusions rely on this reasoning or not. Accordingly, in my respectful submission little weight should be given to his evaluation of the degree of effects.

s 104(1)(ab) ***any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to <u>offset or compensate</u> for any adverse effects on the environment that will or may result from allowing the activity***

70. The applicant relies on proposed offsetting to address residual effects.[47]

71. The offsetting model is predicated on the baseline data of the values on the development site, obtained by Mr Beale. As Mr Ewans' evidence and Ms Wardle's submission shows, this baseline data is inadequate. It cannot provide an adequate basis for the offsetting model and so the model is unreliable.[48]

72. If this primary submission is not accepted by the Panel, the Director-General's submission is that the offsetting proposal is problematic as it does not accord with necessary characteristics <u>set out in the law</u>. I address this point next.

Legal framework in respect of offsetting

73. Principles for offsetting have been refined over time and are now contained in National Policy Statement for Indigenous Biodiversity 2023 (NPSIB) (see Appendix D) (and also in the National Policy Statement for Freshwater Management 2020 (NPS FM) and ORPS / pORPS).

74. Mr Harding concludes that the offsetting proposal is inconsistent with (at least) five of the 11 principles for offsetting in the NPSIB – no net loss, equivalence, leakage, long-term outcomes, and appropriateness.[49] Richard Ewans' evidence suggests that the proposal is also likely to be inconsistent with Principle 2(a)-irreplaceability.[50]

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[47] NB: It is unclear if any other remediation including translocation of Threatened and At Risk plants is still proposed (c.f. Statement of Evidence of Simon Beale, 4th November with original EcIA).
[48] Statement of Richard Ewans, 11th November 2024, at [103].
[49] Report prepared by Mike Harding, September 2024, at [6].
[50] Statement of Richard Ewans, 11th November 2024, at [93].

75. I address the legal tests for considering three of these principles: equivalence, irreplaceability and long-term outcomes.

Equivalence

76. Offsetting requires,

> no net loss and preferably a net gain demonstrated by **a like-for-like** quantitative loss/gain calculation, and is achieved when the extent or values gained at the offset site (measured by **type, amount and condition**) are equivalent to or exceed those being lost at the impact site.'[51] (emphasis added)

77. The NPSIB defines 'like for like' as:

> the degree of similarity in biodiversity values between impact and offset sites across; the type of biodiversity; amount of biodiversity; biodiversity condition; equivalence over time; and spatial context. Biodiversity offsets are designed to ensure biodiversity impacts are offset with biodiversity that is very similar to the biodiversity that is being impacted in that **it has the <u>same</u> ecosystems, vegetation, habitats and species**. (emphasis added)

78. The proposed offsetting does not have the <u>same</u> ecosystems, vegetation or species.

79. In *East West Link*, the Supreme Court stated that avoid policies may be met with offsetting. However, the Court also confirmed that offsetting requires like-for-like measures, and avoid policies cannot be met with like-for-unlike measures. The relevant paragraphs are set out below:

> [176] The relevant question is not how to define an offset or what kinds of offsets can satisfy avoid policies; **it is whether the relevant adverse effect can be avoided in fact.**

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[51] NPSIB Appendix 3 Principles for Biodiversity Offsetting, Principle 3.

> [177] The scale of the EWL meant it was both necessary and preferable to take a holistic approach in which some unavoidable adverse effects could be balanced against benefits to other elements or values within the affected ecosystem. This is essentially the compensation aspect of ss 104(1)(ab) and 171(1B). The Board found that this "bucket approach", as it was unattractively described, was consistent with the requirements of ss 104 and 171.
>
> [178] Royal Forest and Bird submitted that this was incorrect, at least as applied to avoid policies. This must be correct, for the reasons already discussed, at least insofar as avoid policies are concerned. **It is plainly not correct to suggest that unrelated environmental benefits could be offered up to avoid other adverse environmental effects.** In reality, it appears that the Board, while purporting to apply avoid policies, accepted that they could be breached, provided the breach was acceptable in light of other compensatory measures, all considered by means of an overall judgment. This was impermissible. (emphasis added)

80. Glazebrook J's opinion is particularly strong on the issue:

> [229] I accept that offsets may also as a matter of law mean avoidance policies can be met if they bring down the harm to less than material or significant (as the case may be). The harm could only be so reduced if the offsets relate to the values protected by the particular avoidance policies and usually would require them to operate at the point of impact of the proposed activity. Otherwise, the offset would not be capable of reducing the harm protected by the values to the requisite levels.
>
> [230] Offsetting also usually includes a level of uncertainty about its effectiveness in countering the environmental harm at issue. In determining whether offsets can reduce harm to a less than material or significant (as the case may be) level, **the decision maker must therefore as a matter of law take a <u>precautionary</u> approach, considering the extent of the risk to the protected value, the importance of the activity, the degree of uncertainty and the extent to which any offset will reduce risk and uncertainty (including the risk of non or partial compliance).**
>
> [307] If, within the bucket, harms to a bird species are balanced,

for example, against measures of general benefit to the environment (but which do nothing to help that bird species), then the latter, while providing environmental benefits of another kind, cannot operate to bring harm down to less than material or significant in line with the avoidance policies. It was not open to the Board to engage in a trade-off of this kind to the extent it balanced breaches of the avoidance policies against benefits to other environmental values.

81. Glazebrook J use different species of fauna to illustrate the point, but of course this reasoning equally applies with different species of flora. Her Honour also notes, where the planning framework requires effects are avoided,

> [311] [f]ailure to avoid adverse effects in contravention of avoidance policies will be an error of law.[52]

82. In the Director-General's submission, the applicant's proposals are *not* offsetting as they do not constitute like-for-like measures. Mr Harding states that the character of the proposed offset 'is different to the vegetation/habitat that will be lost... and does not provide a like-for-like gain in the condition (structure and quality) of the indigenous biodiversity present'.[53] Mr Ewans states:

> this potential future transition does not justify the applicant's proposal to offset the loss of indigenous cushionfield, supporting Threatened and At Risk plant species, with woody revegetation plantings dominated by common (Not Threatened) species.[54]

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[52] Her Honour continues: at [311 – ft 372] 'To give an obvious example, if a given avoidance policy (properly constructed) was intended to protect birds, then offsets which only benefitted lizards could not (as a matter of law) satisfy that avoidance policy. Similarly, if a given offset delivers some benefit to an ecological value protected by an avoidance policy but cannot bring the harm down to less than material or significant (as the case may be), it cannot meet the avoidance policies'.

[53] Report of Mike Harding, September 2024, at [6.2]

[54] Statement of Richard Ewans, 11th November 2024, at [26].

83. In an ecological sense, the transitional model is highly uncertain and likely flawed. As Mr Ewans states, it is premised on simple linearity and does not account for multiple scenarios, such as fire, management, fluctuations in herbivory:

> This proposal is predicated on simplistic, linear predictions of future site state, overestimates the rate of change and establishment of a 'climax' woody community, and does not meet statutory principles for offsetting.[55]

84. Further, a natural sequence would include a rich mosaic of vegetation structures 'with most current species remaining in the landscape and result in an ecosystem quite different' to the proposed offsets.[56]

85. Properly understood the proposal constitutes compensation.[57] Compensation cannot be used to address avoid policies[58] because, as the Supreme Court states, the relevant adverse effects – i.e. here, the loss of 4 ha of cushionfield and the Threatened and At Risk flora within them, "cannot be avoided in fact".

86. Further, there is no case law that I am aware of that supports the novel argument that some potential future ecological state can be considered like-for-like measures for the purposes of offsetting. If the applicant produces case law to support this contention, I would like the opportunity to consider it and respond with additional legal submissions if necessary.

87. For completeness, I note that Mr Beale argues that ss 6(c) and 31 —while requiring protection and maintenance— do not include 'any qualification concerning existing biodiversity'.[59] I do not accept Mr Beale's analysis. In *Oceana Gold (New Zealand) Ltd v Otago Regional Council*, the Court stated that

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[55] Statement of Richard Ewans, 11th November 2024, at [26].
[56] Statement of Richard Ewans, 11th November 2024, at [90]-[91].
[57] Statement of Richard Ewans, 11th November 2024, at [94].
[58] And the relevant Supreme Court decisions <u>do not</u> include compensation as a means as avoiding effects (see e.g. *East West Link* and *Port Otago Ltd v EDS* [2023] NZSC 112).
[59] Statement of Simon Beale, 4th November 2024, at [4.3].

the Local Authority functions required the *maintenance* of an *'existing quality'* of biological diversity.[60] Further, *protection* is an ex-ante measure or pro-active (i.e. before the harm occurs) and so must by definition encompass the existing state.

Irreplaceability

88. Offsetting / compensation is not appropriate where the indigenous biodiversity affected is irreplaceable or vulnerable.[61]

89. The NPSIB defines 'irreplaceability' as:

> a measure of the uniqueness, replaceability and conservation value of biodiversity and the degree to which the biodiversity value of a given area adds to the value of an overall network of areas. **It interacts with vulnerability, complexity and rarity to indicate the biodiversity value and level of risk for a given area.** (emphasis added)

90. The NPSIB defines 'vulnerability' as:

> **an estimate of the degree of threat of destruction or degradation that indigenous biodiversity faces from change, use or development**. It is the degree to which an ecosystem, habitat or species is likely to be affected by, is susceptible to or able to adapt to harmful impacts or changes. It interacts with the irreplaceability, complexity and rarity to indicate the biodiversity value and level of risk for a given area. (emphasis added)

91. Mr Ewans, Mr Harding (and Ms Wardle) all assess the kanuka-cushionfields as irreplaceable and vulnerable.

92. Mr Wells contends that vulnerability and irreplaceability is not simply premised on threat status, but also the effects on those values and protective mechanisms available. The problem with his reasoning concerns risk – i.e. the risk that the human-management processes may fail (and on this point, see the

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[60] *Oceana Gold (New Zealand) Ltd v Otago Regional Council* [2019] NZEnvC 41, [63].

[61] NPS IB Appendix 3 Principles for Biodiversity Compensation, cl 2. See e.g. *Oceana Gold (New Zealand) Ltd v Otago Regional Council* [2019] NZEnvC 41.

discussion below). Mr Ewans, Mr Harding and Ms Wardle all set out how (any) protective mechanisms have actually failed cushionfield communities in Central Otago. But more fundamentally, Mr Wells reasoning leads to a slippery slope – if an area's threat status is insufficient to establish vulnerability and irreplaceability in this context, at what point, following repeated loss, would an ecosystem ever be irreplaceable?[62] Death by a thousand cuts would ensue.

Long-term outcomes

93. As Glazebrook J states in *East West Link*, a precautionary approach must be taken to offsetting.[63] Consideration must be given to 'the extent of the risk to the protected value .. the degree of uncertainty ... and the risk of non- or partial compliance". Mr Harding notes that the achievability and sustainability of the proposed offsetting 'in a drought prone and high fire-risk environment are uncertain'.[64]

94. Glazebrook J's latter comments – i.e. the risk of non- or partial compliance - align with Principle 6 in the Principles of Biodiversity Offsetting in the NPSIB,

> **Long-term outcomes:** A biodiversity offset is managed to secure outcomes of the activity that last at least as long as the impacts, and preferably in perpetuity. Consideration must be given to long-term issues around **<u>funding, location, management and monitoring</u>**. (emphasis added)

95. I address issues of funding, management and monitoring next.

Replacing the Conservation Covenant with private covenants

[62] Statement of Evidence of Andrew Wells, 4th November 2024, at p 21.
[63] Here based on NPSIB policy 3 rather than NZCPS policy 3 (as was the case in EWL).
[64] Report prepared by Mike Harding, September 2024, at [7].

96. Mr Wells considers that the offsetting / compensation planting will result in 'no net loss outcome of biodiversity' and will 'become self-sustaining' in 30 years.[65] The planting needs to be maintained ideally in perpetuity (NPSIB) and / or on the applicant's evidence, for 30+ years.[66] Mr Wells accepts the efficacy of the offsetting (and requirement to meet Principle 6 - long term outcomes) is predicated on the success of the Ecological Enhancement and Management Plan (EEP).[67]

97. Yesterday, in response to the Chair's comment that 'it is important that offsetting is absolutely guaranteed', Counsel for the applicant responded, 'I absolutely agree'.

98. The EEP includes a comprehensive suite of land management that *must* be undertaken to achieve this result including:
    a. staged planting on 7 sites over 5 years, that includes
        i. micro-siting of particular species,[68]
        ii. nutrient management,
        iii. browser protection / sleeves for each plant
        iv. grass and weed suppression around each plant,
        v. irrigation for 5 years,
        vi. replacement planting for failures,
        vii. hand pulled weed control, in the sleeves of the new plants,
    b. property wide weed control twice yearly,
    c. monitoring by an ecologist annually, including monitoring of saline plots, annual photographs, RECCE plots;
    d. ongoing professional rabbit and goat control (via helicopter) that includes:

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[65] Statement of Evidence of Simon Beale, 4th November 2024, at [21].
[66] See also s 42A Report, March 2024, [6.33] 'maintained and managed in perpetuity'
[67] Statement of Evidence of Andrew Wells, 4th November 2024, at [71].
[68] Statement of Evidence of Andrew Wells, 4th November 2024, at [72].

i. twice yearly monitoring to 'programme' the controls,

ii. 3 monthly rabbit monitoring,

iii. annual monitoring for goats,

e. annual reporting to Council.

99. The EEP has not been costed. How is this extensive and (likely very) expensive programme going to be implemented?

100. As Mr Garden stated, the applicant will not be responsible for the sustainability of the offsetting / compensation, or the EEP. The applicant proposes that the Conservation Covent be replaced (or overlaid - which is conceptually problematic, as I explain below) with private covenants on the individual land titles and over the common area, and that the EEP be implemented through those private covenants. In effect, the title holders will be responsible for governing, funding and implementing the EEP.

101. As explained above, the Panel is required to address the risks of failure including the risks of non- or partial compliance. In doing so, it is important to consider the legal robustness of private covenants.

102. Private covenants are entirely subject to enforcement by the private land owners.[69]

a. Private covenants are only as good as a private individual's willingness to enforce them in court.

b. If the convent was breached, it would require a beneficiary (i.e. the body corporate or an individual title holder) being willing to file proceedings in court against their neighbour, and assume the litigation risk of doing so.[70]

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[69] Beneficiaries may include the body corporate (that is co-owned and governed by the title holders) and / or individual title holders in the sub-division, depending on the way the agreements are structured.

[70] These litigation risks include the prospect of paying for your own costs and having a costs order made against you for the other parties cost if you lose. It is not unrealistic for costs of contested litigation in the High Court to run from tens of thousands into hundreds of thousands of dollars. See,

c. They are not enforceable by the Crown or the Local Authority.

d. Private covenants may be altered or removed without any external oversight, either through:

    i. agreement (of the persons with the benefitted and burdened land), or

    ii. (if there is disagreement) by an application to court pursuant to s 317 of the Property Law Act 2007. The Supreme Court has confirmed that there is not any wider, legal presumption *against* extinguishing private covenants - the simple test is that one of the s 317 criteria simply have to be met (*contra.* to previous Court of Appeal decisions).[71]

103. Mr Garden accurately describes the proposal as 'self-management'.[72] The body corporate (RPSL) will be owned and governed by all title holders. It will be responsible for levying fees on those same title holders for the EEP programme.[73] However, there is no external oversight on the body corporate. The RPSL could determine <u>not</u> to levy fees and or to <u>modify</u> the Service Agreement. This fact is important. There may be no 'active management' of the common area, and neither the Local Authority or DOC would be able to enforce any actions under the private covenants.

104. In relation to the common area, if all decide to sell and divide the proceeds, they could. If some owners did not agree, any one of the individual title owners could apply to court pursuant to s 317 of the Property Law Act 2007 to modify or remove the covenant. Further, any one of the property owners could apply to court for the removal or alteration of covenants on their individual title.

Devika Dir 'The insurmountable $147,725 cost to fight your corner in court', 25th January 2023, Newsroom; Rob Stock 'Many Kiwis just can't afford to fight rip-offs and sue companies, Justice Minister says', 2nd February 2020, Stuff.co.nz.

[71] *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157.

[72] Garden, [35]

[73] Garden, [26(d)]

105. The EEP may be included in RMA consent conditions. Commissioner McPherson helpfully suggested that a 'no further subdivision' condition could be imposed in the common area. That is a useful suggestion but it is important to note, of course, that consent conditions may be varied and cancelled by an application from the title holder under ss 127, 221(3), and registration removed under s 221(5). This variation could occur on a <u>non-notified basis</u> – and it is important to note that that subdivision and land use consents of the adjoining land *also subject to the Conservation Covenant* was granted on a non-notified basis by CODC. Further, there is no evidence before the Panel as to the capacity of CODC to enforce consent conditions that require intensive ongoing work / monitoring.

106. I make this later point, because as the Environment Court has stated,

> We consider the time has passed when conditions of consent can be based on statements of intent as to what will be done at some time in the future. **We will require greater certainty of what will occur, by when, what outcomes are to be achieved, who will be responsible and what enforcement mechanisms will be available.**[74] (emphasis added)

107. I also note that there is uncertainty as to how the offsetting conditions <u>off site</u> could legally be ensured. I am unable to assist the Panel in this regard however I do note that the adjacent plots were being marked for sale with Bayley's. In my submission, evidence should be before the Panel on this issue and in particular, whether the off-site areas have been legally secured before any decision is made.

108. Returning to Glazebrook J's comments, taking all these factors into account, in my submission, there is a <u>real</u> risk of 'non- or partial compliance' with the mitigation measures, including management of the offsetting, so impacting efficacy.

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[74] *Port of Tauranga Ltd v Bay of Plenty Regional Council* [2023] NZEnvC 270, [26] - a decision of the Chief Environment Court Judge and Commissioners Hodges, Leijnen and Paine.

109. I want to now address an argument pressed by Mr Shanon.

110. Mr Shanon argues the counterfactual – i.e. ecological management with residential development and the private covenants will be superior to that under pastoral farming and the Conservation Covenant.[75] Mr Ewans explains why that assessment is ecologically incorrect – (i.e. because pastoral faming is compatible with the current ecology)[76] but it is also important to address the legal argument.

111. In respect of the relative robustness of conservation covenants compared to private covenants, conservation covenants provide a high level of legal protection because:

    a. They are subject to Ministerial supervision and enforcement.
    b. There is no explicit statutory provision to remove conservation covenants.
    c. *Contra.* to Applicant's legal submissions, they <u>cannot</u> be removed by s 317 of the Property Law Act 2007 (because Conservation Covenants do not fall within the definition of covenant in s 316).[77] There is no case law on removing Conservation Covenants by s 317 (presumably because no one has ever assumed it can be done).
    d. The Minister may agree to amend or revoke a Conservation Covenant (by virtue of s 48 Legislation Act 2019) but *only* if the protected values are no longer present (i.e., s 77 of the Reserves Act is 'reverse

[75] Statement of Evidence of Shanon Garden, 4th November 2024 at [26 [d]] – NB: his assessment of permitted activities on site is incorrect as vineyears would likely not be permitted. Mr Vincent suggests that a QEII covenant would be required to protect the common area (S 42A Report, 27 September 2024, p 9). In response, Mr Garden has agreed that if the consent is granted, a further evaluation is needed to understand the best form of legal mechanism for the land management (Statement of Evidence of Shanon Garden, 4th November 2024, [25(g)]).
[76] Statement of Evidence of Richard Ewans, 11th November, at [XX]
[77] Section 317 provides a process to remove a 'positive covenant' or a 'restrictive covenant' (see s 316). Both terms are defined in s 2. Conservation covenants are covenants in gross and not included in the definitions of covenants that are subject to ss 316, 317. Conservation covenants are a form of restrictive covenant in gross but not 'implied in an easement'.

engineered'). If the values are still present, the Minister would be at significant risk of judicial review.

112. The fact is that the significant values of the site *have* been preserved under the Conservation Covenant.

113. For completeness, I note that any consent could not be implemented without removal of the Conservation Covenant. As explained above, it may be not possible to remove the Conservation Covenant.

114. To suggest that private covenants could be layered on top of the Conservation Covenant to provide a 'double whammy of legal protection' is a legal fiction or conceptual artifice. This is because unless the Conservation Covenant were removed, there could be no development on the covenanted area and so the 'double layering' could never happen.

115. In summary, the Director-General's submission in respect of s 104(1)(a) is that significant residual effects on vulnerable and irreplaceable indigenous biodiversity remain, that cannot be offset or compensated for. Significant effects on historic heritage and outstanding natural landscape values also remain.

S 104(1)(b) ***any relevant provisions of the planning framework***

General approach to planning instruments in the scheme of s 104

116. The Panel must, subject to part 2 of the RMA, have regard to any relevant provisions in the relevant planning instruments.

117. In *RJ Davidson v Marlborough DC,* the Court of Appeal stated that, 'it may be, of course, a fair appraisal of the policies means the appropriate response to the consent is obvious'[78] and that,

> If a plan has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1).[79]

118. Both Mr Vincent and Ms Williams opine that the relevant higher order planning instruments (NPSIB, pORPS and ORPS),[80] and the objectives and policies of the CODP provide a clear direction, that the proposal is inconsistent with that clear direction, and that the appropriate response to the application is to refuse consent.

119. However, if the Panel determines that recourse to Part 2 is required, ss 6 (b),(c and (f) are relevant. It is important to note that the protection in s 6(c) is definitive, and does not have the qualifier of protection 'from inappropriate subdivision, use and development'.

Weight to be given to planning instruments

120. Section 104(1)(b) instructs decision-makers to 'have regard' to all relevant polices and plans, including proposed plans. The question of weight to be attached to those policies and plans are a matter for the Panel depending on the context.

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[78] *RJ Davidson v Marlborough DC* [2017] NZCA 194, at [73].
[79] *RJ Davidson v Marlborough DC* [2017] NZCA 194, at [75].
[80] The NPS-UD is not legally relevant because it explicitly specifies applicable cities and districts subject to its provisions, and CODC is not included. It is legally incorrect to work on the basis that CODC may be included in the future and so the NPS-UD provisions are relevant to this application.

121. In respect of the planning framework, I address three particular issues of weight below: namely, the impact of the Resource Management (Freshwater and Other Matters) Amendment Act 2024 on the NPSIB; the weight to be given to the pORPS and the ORPS, including the relevance of mapped versus unmapped SNAs in each; and the weight to be given to 'anticipated ' uses under the CODP.

NPSIB and the Amendment Act

122. It is important to be clear that the NPSIB created a consistent approach to mapping SNA's and a mandatory approach to including them for protection in plans. The Amendment Act removed the obligation to follow that consistent approach to mapping. It did not remove the necessity for plan to 'recognise and provide for s 6(c) matters in some way'. The Explanatory Note to the Bill (see Appendix F) makes this clear:

> The Bill clarifies that it does not affect councils' existing obligations under the RMA for indigenous biodiversity which includes the requirement to recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

Weight to be given to ORPS

123. The applicant's (July) legal submissions contend that the ORPS is the weightier document and the pORPS should be given little or no weight.

124. For the purposes of the ORPS, significant natural areas do not need to be mapped for protection. The definition of significant natural areas is simply 'areas of significant indigenous vegetation and significant habitats of indigenous fauna that are located outside the coastal environment' that accord with the criteria in APP2. Mr Ewans has assessed the site against these

criteria and concludes it is a significant natural area.[81] Accordingly, the ORPS avoidance policies would apply to the site.

Weight to be given to the pORPS

125. The applicant's legal submissions suggest that little or no weight be given to the pORPS because it is subject to appeal.

126. Case law has confirmed that weight can be given to proposed regional policy statements in their early stages and / or subject to appeal because —unless they do not accord with part 2— the RPS is unlikely to change significantly during the appeal process.[82] The simple fact a proposed plan is subject to appeal does not mean it should automatically be disregarded or little weight placed on it. Ms Williams addresses the correct considerations for the Panel in determining what relative weight to give to operative as opposed to proposed plans, in her evidence.[83]

127. In the Director-General's submission, the pORPS should be given weight because it *does* give effect to the NPSIB (*contra.* OPRS and CODP). The pORPS ECO-O1 states:

> **Indigenous biodiversity**
> Otago's indigenous biodiversity is healthy and thriving and any decline in quality, quantity and diversity is halted.

(NB: Halted means to bring to an immediate stop.)

128. The pORPS does differentiate between mapped and unmapped areas, but in my submission, this does not assist the applicant. In accordance with the

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[81] Statement of Richard Ewans, 11th November 2024, at [37].
[82] *Clark v Tasman DC W004/95 (PT). See multiple other authorities including Body Corporate 97010 v Auckland CC [2000] 3 NZLR 513; (2000) 6 ELRNZ 303; [2000] NZRMA 529 (CA), The Trustees of the Estate of Chisnall v Tasman DC W093/95 (PT), Sutherland v Tasman DC W038/95 (PT), Freda Pene Reweti Whanau Trust v Auckland RC 9/12/05, Courtney J, HC Auckland CIV-2005-404-356.*
[83] Statement of Evidence of Elizabeth Williams, 11th November 2024, at [45].

pORPS, adverse effects on the significant indigenous biodiversity of the site must be avoided. In respect of other indigenous biodiversity that is not a significant natural area, ECO-P6 applies the Effects Management Hierarchy. I note that after following the cascade of management approaches, if effects cannot be compensated for, the activity itself is avoided.

129. As explained (in my legal submissions and also Mr Ewans' evidence), properly understood, the current proposal is for compensation not offsetting, and —in accordance with Principle 2 of the Principles for Biodiversity Compensation in the NPSIB— compensation is <u>not</u> appropriate where ecosystems are irreplaceable or vulnerable. Accordingly, ECO-P6 militates against consent in this matter.

130. Neither reliance on the ORPS or the pORPS assists the applicant.

Weight to be given to 'anticipated uses' under the CODP

131. Mr Vincent notes that the rules in the CODP categorise some sub-division and development in the 'development area' in Schedule 19.16 as a **controlled activity,** if it complies with the relevant standards[84] and the 'concept plan' (included in the map notation in Schedule 19.16).

132. Mr Brown's analysis places considerable weight upon this provision to justify his evaluation in various ways (as discussed above).

133. However, the significant *extent* to which the proposal is contrary to what the COPD contemplates in terms of the type, extent and form of development for this location is relevant and should carry weight in the decision. That degree

[84] Including standards in 4.7.2 (ii) a i

of contrariness can be demonstrated by comparing the applicable resource management framework applying to the RuRA(2) zone with the proposal itself.

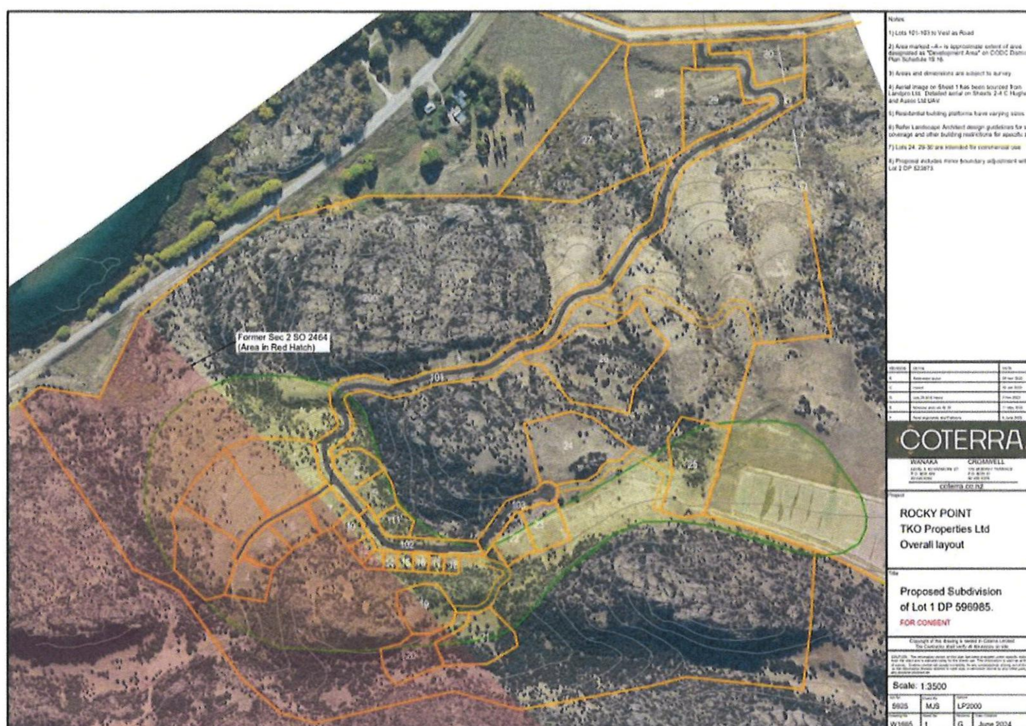
134. It is important to note that:

   a. The only area the COPD expressly contemplates development for this location is the area within the allocated Development Area shown in the Schedule 19.16 Concept Plan;
   b. Any activities within the Allocated Development Area are subject to the restrictions in Conservation Covenant 5009824.9 (attached to Ms Williams' statement of evidence); and
   c. The proposal contradicts virtually all of the controls in the RuRA(2) zone that give effect to the objectives and policies of the Plan. I set out this analysis in Appendix E.

135. To discuss this issue further, it may be useful to take the Panel back to the design of the subdivision proposal, which is set out in the first plan included in Attachment 3 to the applicant's updated June 2024 AEE.

136. This plan shows the location of the proposed 34 allotments (30 of which are proposed for residential/traveller accommodation or commercial use, three are proposed for roading, and the balance lot to be held in shared ownership by the owners of lots 1 to 30)[85], and how they intersect with the Development Area in Schedule 19.16 of the Plan, and Conservation Covenant 5009824.9.

[85] AEE section 1.41.



137. The scheme plan shows the location of:

a. the boundaries of the proposed 34 allotments in orange;

b. the allocated Development Area[86] in Schedule 19.16 of the COPD in **green**; and

c. Conservation covenant 5009824.9 which requires the land to be managed for the purposes and conservation objectives set out in Recital C to the covenant in pink wash.

138. From this plan we can see that of the **thirty** allotments proposed for private use, **only six** of the proposed allotments are fully:

a. within the RuRA(2) Development Area in schedule 19.16; AND

b. outside of the area protected by the Conservation Covenant.

[86] See footnote 1 on page 24 of the AEE which reproduces the note on Schedule 19.16 of the COPD relating to the "Development Area" which is described as the "Area designated for travellers accommodation and clustered dwellings subject to the recommended rules and design guidelines within this report. Approximately 21ha (10.5%) of the proposed zone is allocated as the Development Area."

139. In addition, of those **six** allotments, none comply with all of the applicable standards for development in the RuRA(2) zone. As can be seen from the table in Appendix E, this is largely due to the proposed subdivision having been designed with allotments of such a small size that the relevant COPD standards cannot be met. Further, it is relevant to note that if the application met all of the controlled activity standards, the Council's matters of control include *the effects of closer development and / or settlement patterns on heritage sites ... and ... areas of significant indigenous vegetation* (CODP 4.7.2.iii). Accordingly, (on my understanding), the Council could place controls on where development took place within the development zone to protect significant indigenous biodiversity.

140. The proposed development is in fact contrary to virtually all of the provisions which give effect to the relevant objectives and policies of the District Plan.

141. To conclude, in relation to s 104(1)(b), in the Director-General's submission the proposal does not accord with the planning framework.

S 104 (1)(c) *any other matter the consent authority considers relevant and reasonably necessary to determine the application*

142. The discretion under s 104(1)(c) is a wide one. As the courts have stated, the only fetter is that the discretion must not be exercised "for a purpose, or in pursuit of a policy, extraneous or contrary to the Act". [87]

143. The Director-General's submission is that the Conservation Covenant can be considered under s 104(1)(c) and is highly relevant to the decision.

[87] *Hastings District Council v Minister of Conservation* [2002] NZRMA 529, at [42]. [NB: the provision number was s 104(1)(i) at the time of this case but the wording is identical to that in s 104(1)(c)]. See also *New Zealand Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419, for High Court confirmation of the approach.

The Conservation Covenant

144. The applicant's legal submission is that the Conservation Covenant is irrelevant to the decision because "land covenants are private arrangements", and considering it under s 104(1)(c) would be "contrary to established principles".[88] This submission is incorrect for two reasons.

145. First, the categorisation of the Conservation Covenant as a "private arrangement" is reductionist. It misconstrues the nature of covenants in general and the Conservation Covent in particular.

146. Covenants are diverse. They include agreements, contracts, deeds, grants or memorandum that create legal or equitable rights in relation to land. Covenants may have been created in equity, the common law or through various statutes. They are created by many different bodies, for many different purposes. Some may be created between private individuals for the benefit of discrete private property interests. Others may be created through statute for the benefit of the public.[89]

147. The Conservation Covent in this matter was created pursuant to s 77 of the Reserves Act 1977, to protect the values of the property for the benefit of the public. Section 77(1) of the Reserves Act empowers the Minister of Conservation to enter into a covenant that would enable land to be,

> managed so as to preserve the natural environment, or landscape amenity, or wildlife or freshwater-life or marine-life habitat, or historical value.

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[88] Memorandum of Counsel for the Applicant, 26th July 2024, [28] – [30].

[89] For further discussion, see D W McMorland, *McMorland on Easements, Covenants and Licences* (5th ed) (LexisNexis, 2023), part 2.

Accordingly, the purpose of conservation covenants directly aligns with the purpose and policy of the RMA, particularly section 6 matters (ss 6 (b), (c), (f)).

148. Parties to conservation covenants include the Crown and Local Authorities (or other public bodies). Any purchase price may be funded by parliamentary (or Local Authority) appropriations.[90] In respect of the Bendigo Conservation Covenant, the Covenant was part of the consideration for public lands being freeholded into private ownership under the tenure review process.[91] To ensure adequate compensation to the public during that process, areas with the most important biodiversity, natural character and heritage values were protected in perpetuity by the Conservation Covenant.

149. To categorise the Conservation Covenant as a "private land arrangement" in order to dismiss it from consideration, is incorrect.

150. Secondly, case law confirms that the Covenant *can* be considered under s 104(1)(c), *even if* (contrary to my submissions) it is categorised as a 'private land arrangement'.

151. In *Congreve and Murray v Big River Paradise Ltd* (a case concerned with the relevance of a private covenant in resource consent proceedings), the High Court summarised the relevant case law and stated:

> ... in considering applications under the [RMA] a consent authority may take into account, and also determine, private property rights to the extent that those rights are relevant to and reasonably necessary for the purpose of resolving an issue arising under the Act.[92]

[90] Reserves Act 1977, s 77(6),(7).
[91] Pursuant to Crown Pastoral Land Act 1988.
[92] *Congreve and Murray v Big River Paradise Ltd* [2006] BCL 777 BC200661509, at [30].

152. In *Deegan v Southland Regional Council*, the Environment Court traversed a number of cases where the Court had taken into account various 'property rights' at common law and under statute.[93] The Court stated that,

> those decisions all recognise that the RMA does not exist in a vacuum but in a context of (property) rights and duties that need to be ascertained before the Court can state rights and duties under the Act itself ... I hold that I do have the power to declare what the parties rights are at common law or under another statute if it is necessary to do so in order to resolve an issue under the Act.[94]

153. The applicant's submission that, 'to place weight on the covenant in the Application, and interpret its meaning and effect, would be contrary to established principles under s 104 of the Act'[95] is legally incorrect.

154. For completeness, I note that the counsel for the applicant relies upon *Action for Environment Inc v Wellington City Council* to suggest that 'private instruments ... are irrelevant to determining resource consent matters' (see Legal Submissions at [56-57]). Counsel includes a quote from the case to make the point. The problem is that the quote is incomplete. It omits a critical footnote that references the High Court case that the Environment Court relies upon. And it omits critical words. The correct quote is as follows:

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93 *Deegan v Southland Regional Council,* C110/98, [14]

94 *Deegan v Southland Regional Council,* C110/98, [15]

95 Memorandum of Counsel for the Applicant, 26th July 2024, [30]

Analysis

[24] As both the Council and Wellington Badminton argued, the RMA, and in particular s 104, provide a code for the consideration of applications for resource consents.[13] 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, and as the Council and Wellington Badminton submitted, 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

13 *Springs Promotion Limited v Springs Stadium Residents Association Inc* [2006] NZRMA 101 (HC) at [61].

155. *Springs Promotions* was a case concerning existing use rights, not resource consents. In that case, the High Court stated:

> [62] Key elements in determining whether the Act provides a complete code on any specific topic are the extent of detail in the relevant provisions; whether the provisions expressly or impliedly leave open the possibility of the application of law from other sources; whether other statutory provisions or rules of common law on equity bear on the issue; and whether there are any other indicators of statutory intention. In the end, it is a matter of statutory construction against the background of the general law.

156. This authority *does not* support the applicant's legal submissions. In fact, it supports the submissions of the Director-General. In all the circumstances, the Conservation Covenant is clearly a matter that is relevant and reasonably necessary to determine the application, under s 104(1)(c).

157. Further, the Conservation Covenant should be given significant weight in the s 104 analysis for two reasons.

158. Firstly, returning to first principles: plans contain objectives, policies and methods to give effect to these objectives and policies. Rules are one type of

method but there are many additional valid methods[96] (note that district plan rules are actually optional under the RMA!).[97]

159. It is quite clear when the wider context of the plan is taken into account, that Conservation Covenants are seen as acting in acting in lieu of rules in the District Plan. Elizabeth Williams addresses this comprehensively in her evidence at [51-58]. Mr Brown for the applicant also accepts the relevance of the Conservation Covenant where he states:

> Bendigo Station is listed in Schedule 19.6.3 as it was freeholded under a tenure review process, and there **has been an alternative statutory means to identify and address the values of these landscapes and features (conservation covenant).[98]**

160. I invite the Panel to closely read Methods of Implementation 4.5.2(iv) and also 4.6.7 of the CODP (both included in Appendix B), that make it clear that the CODC relies on conservation covenants to protect s 6(c) values.

161. Further, the Conservation Covenant <u>must</u> be acting in lieu of rules because if it were not, the Plan would be inadequate and contrary s 30 and s 6 of the RMA, the objectives and policies of the Plan itself, the ORPS, pORPS, , and the NPSIB. The Environment Court struck down rules exempting general indigenous vegetation clearance provisions for land that had been freeholded under part 2 of the Crown Pastoral land Act 1998 in the Waitaki District Plan, for these exact reasons.[99] Accepting the Conservation Covenant acts as a method to give effect to the objectives and policies of the Plan remedies this omission (to some extent).

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[96] RMA, s 75(2)(b).
[97] RMA, s 75
[98] Statement of Evidence of Jeffrey Brown, 4th November 2024, at p 39 (ft 8).
[99] *Royal Forest and Bird Protection Society of New Zealand Inc v Waitaki District Council* [2012] NZEnvC 252.

162. As an analogy, in *Howick Residents and Ratepayers Assn Inc v Manukau CC,*[100] the Environment Court confirmed that a management plan prepared under the Reserves Act 1977 was a relevant consideration under s 104(1)(c) precisely because reserves' management plans were recognised in the district plan as a relevant method for land management.

163. In my submission, rather than there being no legal constraint on vegetation clearance on the covenanted area of the site (as per the exception in the rules), the Conservation Covenant sets the management regime in accordance with law.

164. Second, the Conservation Covenant has a clear purpose and objectives that align with RMA, objectives and policies of the Plan, relevant objectives and policies of the operative and proposed ORPS, and the NPSIB. As the evidence of Mr Ewans states,[101] it helps to support one of the priorities in the *Statement of National Priorities for Protecting Rare and Threatened Biodiversity on Private Land 2007.* It also facilitates the objectives of *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020.*[102]

165. The explicit objective of the Bendigo Conservation Covenant (in Recital C) is "that the land be ***managed***" to:

    a. ***Protect and enhance*** "the ***natural character*** of the land with ***particular regard to the natural functioning of ecosystems and to the native flora and fauna*** in their diverse communities and dynamic inter-relationships with their earth substrate and water courses and the atmosphere"

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[100] *Howick Residents and Ratepayers Assn Inc v Manukau CC* EnvC A001/09.
[101] Statement of Evidence of Richard Ewans, 11th November 2024 [38].
[102] Both the *Statement of National Priorities for Protecting Rare and Threatened Biodiversity on Private Land 2007* and *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020 are* Government strategy documents that can be considered under s 104(1)(c). The later was introduced to ensure New Zealand complies with its international law obligations under the Convention on Biological Diversity 1992.

b. ***Protect*** "the land as an ***area representative of a significant part of the ecological character of the Dunstan Ecological District*** as referred to in the draft survey report for the Protected Natural Areas Programme for the Lindis Pisa and Dunstan Ecological Districts dated February 1987"

c. ***Maintain*** "the ***landscape values"***

d. ***Maintain*** "the ***historic values*** of the land".

166. The Covenant explicitly states that "the landowners and the Minister mutually covenant that the land shall be **managed** for the **purpose and objectives** listed in recital C above". Thus, the responsibility placed on the parties to the Covenant is clear and explicit.[103] For completeness, I note that the Covenant also includes additional particularised conditions. However, it is incorrect to confine the legal effect of the Conservation Covenant to the particularised conditions.

167. To date —and prior to the filing of the applicant's legal submission on 26th July 2024— there have been no questions as to how the Covenant is to be interpreted and managed. The fact that the values sought to be protected, enhanced and maintained *have in fact* been protected, enhanced and maintained, demonstrates that the Covenant has been managed in accordance with its clear objectives.

168. The applicant's legal submissions suggest that no weight should be placed on the Conservation Covenant because of its age, ambiguity in wording and uncertain purpose. There is no basis to find that the Covenant is ambiguous or uncertain.[104] The Covenant was entered into 'in perpetuity' and for the last quarter of a century has clearly achieved its purpose.

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[103] I note that the Coterra report omits to address the Recital C Objectives.

[104] Memorandum of Counsel for the Applicant, 26th July 2024, [30].

Other matters s 104(1)(c)

Setting a precedent

169. The precedent effect can be considered under s 104(1)(c).[105] The precedent effect requires that like cases be treated alike. It is an important principle of the rule of law and administrative justice, encompassing the principle of legitimate expectations and ensuring that justice is seen to be done.

170. The Director-General is concerned that this application will set a precedent for other residential developments and subdivisions in the Rural Resources Zone of the CODP in two ways: (1) the manner in which the Panel approaches the determination (i.e., if the Panel decides the application without adequate evidence as to the baseline and in turn, effects), and (2) if the application is consented to.

171. In respect of the first matter, as Mr Harding and Mr Ewans state, an ecological survey of the development footprint has been replaced with inadequate sampling. If this evidence was considered acceptable, it would set a dangerous precedent.

172. In respect of the second matter, the precedent effect does not require proposals to be factually identical (an impossible test) but rather works by establishing a framework for comparison. If the current application is consented to, the comparative framework will be as follows:

- Site is ONL (in part)
- Site is a significant natural area, under the ORPS and NPSIB
- Site is (in part) critically endangered land environment

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[105] *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA)

- Activity is non-complying activity on District Plan
- Adverse effects on Threatened and At Risk species are left un-remediated

173. If the Panel consents to this application, that is the precedent framework –and low bar– that risks being established.

Alternatives

174. Clause 1(b) of Schedule 4 requires an assessment of the effects on the environment to include a description of any possible "alternative locations or methods" for undertaking an activity where the activity would result in any *significant* adverse effect on the environment.

175. Case law is clear that when there are effects on matters of national importance, alternatives should be presented. In *TV3 Network Services Ltd v Waikato District Council,* AP55/97 the High Court stated,

> As a matter of commonsense, a consideration of whether there are suitable alternatives strikes me as a fundamental planning concern ... When an objection is raised as to a matter being of 'national importance' on one site, the question of whether there are other viable alternative sites for the prospective activity is of relevance.[106]

176. No alternatives have been presented that would avoid effects on s 6 matters. It may not be possible, which is even more reason to decline consent.

If the Panel decides to grant consent, the Director-General makes the following submissions concerning conditions:

s 108 *Conditions*

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[106] *TV3 Network Services Ltd v Waikato DC,* AP55/97, at 25.

177. The offsetting / compensation areas situated off site are on land with Conservation Covenant on it. As Ms Williams notes, the applicant will likely need to obtain the consent of the Minister of Conservation to planting up large areas on the site. Imposing conditions that require the consent of third parties are likely to be ultra vires in the absence of that consent.

178. The experts for the Director-General have not commented on the draft conditions. They would be able to comment on the proposed conditions once finalised, if the Panel were to find that helpful.

Ceri Warnock
Counsel for the Director-General
18th November 2024

APPENDIX A

The Director-General says a fulsome and integrated approach needs to be taken to assessing the adverse effects of the proposal in order for the Panel to determine the application. The scheme of the Act directs this approach, including through the combination of:

(a) The broad definition of "effect" in s 3;

(b) The detailed information required for all applications in clause 2 of Schedule 4 to the Act, including a description of any other activities that are part of the proposal, and a description of any other resource consents required for the proposal;

(c) Section 41C which allows you to request further information from the applicant or commission reports before or at the hearing, and adjourn the hearing for this purpose;

(d) Section 91 which provides for the deferral of the notification or hearing of an application where other resource consents will also be required in respect of the proposal, and it is appropriate for the purpose of better understanding the nature of the proposal, that applications for any one or more of those other resource consents be made before proceeding further;

(e) Section 92 which provides for the consent authority to request further information and commission reports relating to the application;

(f) Section 104(1)(a) which requires the consent authority to consider any actual and potential effects on the environment of allowing the activity;

(g) Section 102 which provides joint hearings as the default where consent applications for a proposal are made to two or more consent authorities; and

(h) S 104(3)(d) which prohibits a consent authority from granting consent where the application should have been notified but was not.

APPENDIX B

CODP

4.5.2(iv) Significant Indigenous Vegetation and Significant Habitats of Indigenous Fauna

Cross Reference: Policy 4.4.7

With respect to areas of significant indigenous vegetation and habitats of indigenous fauna, the Council shall:

a. Encourage and advocate to the Minister of Conservation that the Department of Conservation negotiate directly with landowners (and adjoining landowners that may be affected) whose properties may contain areas of significance, worthy of protection.

b. Encourage and advocate to central Government, that in consultation with affected lessees, areas of significance be appropriately protected through the tenure review process.

c. Encourage landowners to provide voluntary protection and enhancement for areas of significant indigenous vegetation and significant habitats of indigenous fauna and areas with particular landscape values, through the following methods:

Developing sustainable land management plans that take into account the values of those areas.

Utilising covenants under the QEII Trust, Conservation and Reserves Acts, and other covenants.

Sale to public bodies.

Fencing off such areas to enable more control over management.

Regular weed and pest eradication.

By taking account of the benefits provided by such voluntary protection and/or environmental compensation when considering applications for resource consents.

d. Review the extent to which significant areas are protected by being included in the conservation estate or made subject to restrictions to protect natural values within 5 years of the operative date of this District Plan. A plan change may be initiated to revise relevant provisions of the District Plan within this 5 year period.

Reason

At the time of preparing this plan [1998], in excess of 48,000 hectares of land within the District is held in the conservation estate (see Schedule 19.6.1). This figure may increase significantly as the Crown completes the tenure review process in the district. The tenure review process which involves full consultation with affected runholders, conservation, recreation and other interested groups is considered the most practical, appropriate and cost effective method of identifying and protecting areas of significant indigenous vegetation and habitats of indigenous fauna.

The tenure review process is proceeding and central Government has indicated that it is likely to prepare a national policy statement to address effects of land use on biodiversity. In these circumstances it is considered appropriate to conduct a review with respect to natural values within a 5 year period. It is anticipated that such a review and, if appropriate, the formulation of a plan change to address relevant matters will involve a process of consultation with all interested parties.

Council will also actively promote to landowners that they provide voluntary protection of areas that may have significance for their intrinsic values or landscape values. The resource consent process also provides an opportunity to consider this issue where appropriate, and a degree of regulation (through rules) is justified with respect to landscape values.

4.6.7

The Department of Conservation also has a role in this regard and has the function of managing the Crown conservation estate and other natural and historic resources entrusted to it. Section 7 requires Council to have particular regard to Kaitiakitanga (7(a)); the ethic of stewardship (7(aa)); the intrinsic value of ecosystems (section 7(d)) and recognition and protection of heritage values of areas (section 7(c)) and the maintenance and enhancement of the quality of the environment (section 7(f)). Council's role in protecting such resources is considered complementary to the Department of Conservation's statutory functions and the relevant provisions of the plan are consistent with the Regional Policy Statement for Otago.

The tenure review process is proceeding and central Government has indicated that it is likely to prepare a national policy statement to address effects of land use on biodiversity. In these circumstances the Council has determined that it is appropriate to conduct a review with respect to natural values within a 5 year period.

APPENDIX C

Extract from: Kelvin Lloyd, Della Bennet, Sam King, Vikki Smith 'Review of the Ecological Information in an Application for a Solar Farm, Balmoral Station, Mackenzie Basin' (March 2023, Wildlands), at p 2

3.3 Evaluation of ecological effects (3.7)

The ecology report then sets out a complex approach to determining the level of effects, following the non-statutory EIANZ framework. A key first step in this process is assigning ecological values, and in this instance non-statutory frameworks (Tables 1-2 of the ecology report) different to the statutory criteria outlined above, are used. It also promotes a formulaic approach to assigning value, which for species is based solely on national threat classifications (Table 2 of the ecology report). This excludes consideration of species population sizes or the ecological roles and functions of species. For some groups, such as invertebrates, many species have yet to be assigned a threat status so cannot be assigned value based on threat status. A similar non-statutory framework is used to define the 'overall value' of areas (Table 3 of the ecology report). The magnitude of effects is then determined (Table 4 of the ecology report). Finally, an overall 'level of effect' is defined using a pre-determined matrix of effect magnitude and ecological value. The matrix outputs have been subjectively determined, and variously use an averaging, lowest common denominator, or additive effect. For example, a 'very high' magnitude of effect on 'moderate' value feature is determined as a 'high' overall effect (an averaging approach). But a 'high' magnitude effect on a 'low' value feature is assessed as having a 'low' overall effect (lowest common denominator approach). In other cases, the overall effect is higher than either the magnitude or the value, for example a 'high' effect on a 'high' value has a 'very high' overall effect (an additive approach). Overall effects assessed as 'low' or 'very low' are a key concern, as EIANZ guidance indicates that this level of effects is often considered not to require mitigation. Many of the effects assessments in Section 6 of the ecology report conclude that overall effects are 'low' or 'very low'.

These limitations of the EIANZ approach means it provides biased guidance on effects. The RMA does not require a 5-level effects assessment, and statutory criteria should be used to determine ecological values. The key issues are the identification of the ecological values, the significance of those values, the effects on those values, and what actions are undertaken to avoid, remedy, and/or mitigate any adverse effects.

APPENDIX D

NPS IB 2023

Appendix 3: Principles for biodiversity offsetting

These principles apply to the use of biodiversity offsets for adverse effects on indigenous biodiversity.

(1) **Adherence to effects management hierarchy:** A biodiversity offset is a commitment to redress more than minor residual adverse effects and should be contemplated only after steps to avoid, minimise, and remedy adverse effects are demonstrated to have been sequentially exhausted.

(2) **When biodiversity offsetting is not appropriate:** Biodiversity offsets are not appropriate in situations where indigenous biodiversity values cannot be offset to achieve a net gain. Examples of an offset not being appropriate include where:

(a) residual adverse effects cannot be offset because of the irreplaceability or vulnerability of the indigenous biodiversity affected:

(b) effects on indigenous biodiversity are uncertain, unknown, or little understood, but potential effects are significantly adverse or irreversible:

(c) there are no technically feasible options by which to secure gains within an acceptable timeframe.

(1) **Net gain:** This principle reflects a standard of acceptability for demonstrating, and then achieving, a net gain in indigenous biodiversity values. Net gain is demonstrated by a like-for-like quantitative loss/gain calculation of the following, and is achieved when the indigenous biodiversity values at the offset site are equivalent to or exceed those being lost at the impact site:

(a) types of indigenous biodiversity, including when indigenous species depend on introduced species for their persistence; and

(b) amount; and

(c) condition (structure and quality).

(2) **Additionality:** A biodiversity offset achieves gains in indigenous biodiversity above and beyond gains that would have occurred in the absence of the offset, such as

gains that are additional to any minimisation and remediation undertaken in relation to the adverse effects of the activity.

(3) **Leakage:** Biodiversity offset design and implementation avoids displacing harm to other indigenous biodiversity in the same or any other location.

(4) **Long-term outcomes:** A biodiversity offset is managed to secure outcomes of the activity that last at least as long as the impacts, and preferably in perpetuity. Consideration must be given to long-term issues around funding, location, management and monitoring.

(5) **Landscape context:** Biodiversity offsetting is undertaken where this will result in the best ecological outcome, preferably close to the impact site or within the same ecological district. The action considers the landscape context of both the impact site and the offset site, taking into account interactions between species, habitats and ecosystems, spatial connections, and ecosystem function.

(6) **Time lags:** The delay between loss of, or effects on, indigenous biodiversity values at the impact site and the gain or maturity of indigenous biodiversity at the offset site is minimised so that the calculated gains are achieved within the consent period or, as appropriate, a longer period (but not more than 35 years).

(7) **Science and mātauranga Māori:** The design and implementation of a biodiversity offset is a documented process informed by science and mātauranga Māori.

(8) **Tangata whenua and stakeholder participation:** Opportunity for the effective and early participation of tangata whenua and stakeholders is demonstrated when planning biodiversity offsets, including their evaluation, selection, design, implementation, and monitoring.

(9) **Transparency:** The design and implementation of a biodiversity offset, and communication of its results to the public, is undertaken in a transparent and timely manner.

Appendix 4: Principles for biodiversity compensation

These principles apply to the use of biodiversity compensation for adverse effects on indigenous biodiversity:

(1) **Adherence to effects management hierarchy:** Biodiversity compensation is a commitment to redress more than minor residual adverse effects, and should be contemplated only after steps to avoid, minimise, remedy, and offset adverse effects are demonstrated to have been sequentially exhausted.

(2) **When biodiversity compensation is not appropriate:** Biodiversity compensation is not appropriate where indigenous biodiversity values are not able to be compensated for. Examples of biodiversity compensation not being appropriate include where:

   (a) the indigenous biodiversity affected is irreplaceable or vulnerable;

   (b) effects on indigenous biodiversity are uncertain, unknown, or little understood, but potential effects are significantly adverse or irreversible;

   (c) there are no technically feasible options by which to secure a proposed net gain within acceptable timeframes.

(3) **Scale of biodiversity compensation:** The indigenous biodiversity values lost through the activity to which the biodiversity compensation applies are addressed by positive effects to indigenous biodiversity (including when indigenous species depend on introduced species for their persistence), that outweigh the adverse effects.

(4) **Additionality:** Biodiversity compensation achieves gains in indigenous biodiversity above and beyond gains that would have occurred in the absence of the compensation, such as gains that are additional to any minimisation and remediation or offsetting undertaken in relation to the adverse effects of the activity.

(5) **Leakage:** Biodiversity compensation design and implementation avoids displacing harm to other indigenous biodiversity in the same or any other location.

(6) **Long-term outcomes:** Biodiversity compensation is managed to secure outcomes of the activity that last as least as long as the impacts, and preferably in perpetuity. Consideration must be given to long-term issues around funding, location, management, and monitoring.

(7) **Landscape context:** Biodiversity compensation is undertaken where this will result in the best ecological outcome, preferably close to the impact site or within the same ecological district. The action considers the landscape context of both the impact site and the compensation site, taking into account interactions between species, habitats and ecosystems, spatial connections, and ecosystem function.

(8) **Time lags:** The delay between loss of, or effects on, indigenous biodiversity values at the impact site and the gain or maturity of indigenous biodiversity at the compensation site is minimised so that the calculated gains are achieved within the consent period or, as appropriate, a longer period (but not more than 35 years).

(9) **Trading up:** When trading up forms part of biodiversity compensation, the proposal demonstrates that the indigenous biodiversity gains are demonstrably greater or higher than those lost. The proposal also shows the values lost are not to Threatened or At Risk (declining) species or to species considered vulnerable or irreplaceable.

(10) **Financial contributions:** A financial contribution is only considered if:

(a) there is no effective option available for delivering biodiversity gains on the ground; and

(b) it directly funds an intended biodiversity gain or benefit that complies with the rest of these principles.

(11) **Science and mātauranga Māori:** The design and implementation of biodiversity compensation is a documented process informed by science, and mātauranga Māori.

(12) **Tangata whenua and stakeholder participation:** Opportunity for the effective and early participation of tangata whenua and stakeholders is demonstrated when planning for biodiversity compensation, including its evaluation, selection, design, implementation, and monitoring.

(13) **Transparency:** The design and implementation of biodiversity compensation, and communication of its results to the public, is undertaken in a transparent and timely manner.

APPENDIX E

Lot No.	Lot size[1]	Type of Development[2]	Within Development Area[3]?	Outside conservation covenant[4]?	Complies with all other RuRA(2) standards[5]?
1	9,077m²	Residential/ Travellers accommodation[6]	Yes	No. Mostly within covenanted area	Potentially visible from Lake Dunstan. Does not meet minimum yard setback from boundaries.
2	7,547m²	Residential/ Travellers accommodation	Yes	No. Entirely within covenanted area	Potentially visible from Lake Dunstan. Does not meet minimum yard setback from boundaries.
3	7,442m²	Residential/ Travellers accommodation	Yes	No. Entirely within covenanted area	Potentially visible from Lake Dunstan. Does not meet minimum yard setback from boundaries.
4	2,657m²	Residential/ Travellers accommodation	Yes	No. Entirely within covenanted area	Potentially visible from Lake Dunstan. Does not meet minimum yard setback from boundaries.
5	2,163m²	Residential/ Travellers accommodation	Yes	No. Entirely within covenanted area	Potentially visible from Lake Dunstan
6	2,307m²	Residential/ Travellers accommodation	Yes	No. Entirely within covenanted area	Potentially visible from Lake Dunstan. Does not meet minimum yard setback from boundaries.
7	1,964m²	Residential/ Travellers accommodation	Yes	No. Approx ½ is within covenanted area	Potentially visible from Lake Dunstan. Breaches minimum 2,000m² area for travellers accommodation.

[1] Table 1, AEE pages 10 – 13.
[2] Table 1, AEE pages 10 – 13.
[3] Allocated Development Area in COPD Schedule 19.16 concept plan as shown on Overall Scheme Plan in Attachment 3 to the AEE. Development outside the Development Area breaches Rule 4.7.2(ii)(a)(iii)).
[4] As shown on Overall Scheme Plan in Attachment 3 to the AEE.
[5] Information taken from Table 2 and section 2.1.1 AEE, pages 25 – 45. See in particular Note 6 on page 45 which states that the proposed subdivision is a:

> "Non-Complying activity consent pursuant to Rule 4.7.5.iii for a subdivision that does not comply with Rule 4.7.2.ii.a.i (lots created that do not meet the minimum allotment standards (bulk and location and open space and minimum lot size for travellers accommodation)".

[6] Table 1 AEE page 26 notes travellers accommodation for up to six guests is proposed on all residential lots.

Lot No.	Lot size[1]	Type of Development[2]	Within Development Area[3]?	Outside conservation covenant[4]?	Complies with all other RuRA(2) standards[5]?
					Does not meet minimum yard setback from boundaries.
8	2,395m²	Residential/ Travellers accommodation	Yes	Yes	Does not meet minimum yard setback from boundaries.
9	2,127m²	Residential/ Travellers accommodation	No. A slither is outside	Yes	Does not meet minimum yard setback from boundaries.
10	1,355m²	Residential/ Travellers accommodation	Yes	No. Approx ½ is within covenanted area	Potentially visible from Lake Dunstan. Breaches minimum 2,000m² area for travellers accommodation. Does not meet minimum yard setback from boundaries.
11	1,507m²	Residential/ Travellers accommodation	Yes	Yes	Breaches minimum 2,000m² area for travellers accommodation. Height limit of 5.5m will be exceeded for future dwellings on this allotment. Does not meet minimum yard setback from boundaries.
12	737m²	Residential/ Travellers accommodation	Yes	No. Mostly within covenanted area	Breaches minimum 2,000m² area for travellers accommodation. Height limit of 5.5m will be exceeded for future dwellings on this allotment. Does not meet minimum yard setback from boundaries.
13	4,565m²	Residential/ Travellers accommodation	Yes	No. Mostly within covenanted area	Height limit of 5.5m will be exceeded for future dwellings on this allotment. This allotment is not capable of complying with the 500m² landscaped area requirement. Does not meet minimum yard setback from boundaries.
14	479m²	Residential/ Travellers accommodation	Yes	No. A slither is within	Breaches minimum 2,000m² area for travellers accommodation.

Lot No.	Lot size[1]	Type of Development[2]	Within Development Area[3]?	Outside conservation covenant[4]?	Complies with all other RuRA(2) standards[5]?
				covenanted area	Height limit of 5.5m will be exceeded for future dwellings on this allotment. This allotment is not capable of complying with the $500m^2$ landscaped area requirement.
15	$535m^2$	Residential/ Travellers accommodation	Yes	Yes	Breaches minimum $2,000m^2$ area for travellers accommodation. Height limit of 5.5m will be exceeded for future dwellings on this allotment. Does not meet minimum yard setback from boundaries.
16	$522m^2$	Residential/ Travellers accommodation	Yes	Yes	Breaches minimum $2,000m^2$ area for travellers accommodation. Height limit of 5.5m will be exceeded for future dwellings on this allotment. This allotment is not capable of complying with the $500m^2$ landscaped area requirement. Does not meet minimum yard setback from boundaries.
17	$515m^2$	Residential/ Travellers accommodation	Yes	Yes	Breaches minimum $2,000m^2$ area for travellers accommodation. Height limit of 5.5m will be exceeded for future dwellings on this allotment. This allotment is not capable of complying with the $500m^2$ landscaped area requirement. Does not meet minimum yard setback from boundaries.
18	$504m^2$	Residential/ Travellers accommodation	Yes	Yes	Breaches minimum $2,000m^2$ area for travellers accommodation. This allotment is not capable of complying with the $500m^2$ landscaped area requirement.

Lot No.	Lot size[1]	Type of Development[2]	Within Development Area[3]?	Outside conservation covenant[4]?	Complies with all other RuRA(2) standards[5]?
					Does not meet minimum yard setback from boundaries.
19	4,040m^2	Residential/ Travellers accommodation	Yes	No. Approx ½ is within covenanted area	Does not meet minimum yard setback from boundaries.
20	4,598m^2	Residential/ Travellers accommodation	No. About half is outside Development Area	No. Mostly within covenanted area	Does not meet minimum yard setback from boundaries.
21	5,426m^2	Residential/ Travellers accommodation	No. About half is outside Development Area	No. Partly within covenanted area	Does not meet minimum yard setback from boundaries.
22	2,331m^2	Residential/ Travellers accommodation	No. Part is outside Development Area	Yes	Does not meet minimum yard setback from boundaries.
23	2,869m^2	Residential/ Travellers accommodation	No. Part is outside Development Area	Yes	Potentially visible from SH8. Does not meet minimum yard setback from boundaries.
24	9,429m^2	Communal/ Commercial	No. Entirely outside Development Area	Yes	Potentially visible from SH8. Does not meet minimum yard setback from boundaries.
25	8,360m^2	Residential/ Travellers accommodation	No. Part is outside Development Area	Yes	Potentially visible from SH8. Does not meet minimum yard setback from boundaries.
26	15,240 m^2	Residential/ Travellers accommodation	No. Entirely outside Development Area	Yes	Potentially visible from SH8.
27	21,080 m^2	Residential/ Travellers accommodation	No. Entirely outside Development Area	Yes	Potentially visible from SH8. Does not meet minimum yard setback from boundaries.
28	11,240 m^2	Residential/ Travellers accommodation	No. Entirely outside Development Area	Yes	Potentially visible from SH8. Does not meet minimum yard setback from boundaries.

Lot No.	Lot size[1]	Type of Development[2]	Within Development Area[3]?	Outside conservation covenant[4]?	Complies with all other RuRA(2) standards[5]?
29	7,706m²	Residential/ Travellers accommodation / Commercial[7]	No. Entirely outside Development Area	Yes	Potentially visible from SH8. Does not meet minimum yard setback from boundaries.
30	5,059m²	Communal/ Commercial	No. Entirely outside Development Area	Yes	Potentially visible from SH8. Height limit of 5.5m will be exceeded for future dwellings on this allotment. Does not meet minimum yard setback from boundaries for residential.
101	-	Road	No. Mostly outside Development Area	Yes	
102	-	Road	Yes	Yes	
103	-	Road	No. 99% outside Development Area	Yes	
200	46.95 ha	Balance/ Common			

[7] Note (7) to the Scheme Plan records that Lots 24 and 29 – 20 are intended for commercial use.

APPENDIX F

Resource Management (Freshwater and Other Matters) Amendment Act 2024 – Explanatory Note to the Bill

Modifying local authority obligations under NPSIB 2023 to identify new SNAs and include them in district plans for 3 years

The NPSIB 2023 directs local authorities on how to discharge RMA requirements regarding indigenous biodiversity. It provides a consistent framework and assessment criteria for councils to identify and include SNAs within their policy statements and plans, and to manage the effects of development on SNAs. It also specifies time frames for those actions.

The Bill suspends NPSIB 2023 requirements for councils to identify and notify new SNAs using the NPSIB 2023 assessment criteria and principles for 3 years. This suspension does not affect NPSIB 2023 obligations on councils for SNAs already existing in policy statements, proposed policy statements, plans, proposed plans, or plan changes before the commencement of this Bill. The 3-year suspension period for the implementation of new SNAs will allow time for a review of the operation of SNAs more broadly.

The Bill also amends timing provisions within the NPSIB 2023 for when local authorities must publicly notify any policy statement or plan or changes necessary to give effect to NPSIB 2023 provisions about SNAs (subpart 2 of Part 3 of the NPSIB), except indigenous biodiversity outside an SNA (see clause 3.16 of the NPSIB 2023). The date is extended to 31 December 2030.

The Bill clarifies that it does not affect councils' existing obligations under the RMA for indigenous biodiversity which includes the requirement to recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

The changes in the Bill do not affect or prevent identification or notification of new SNAs in policy statements, proposed policy statements, plans, proposed plans or plan changes during the 3-year suspension period if required by a court order or other outcome as a result of existing proceedings or processes, which are preserved by sections 32 to 33 of the Legislation Act 2019.