

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the hearing of submissions to Variation 3 to the
Proposed Thames Coromandel District Plan
(Taiwawe Catchment Structure Plan)

**OUTLINE OF LEGAL SUBMISSIONS IN REPLY
FOR HOT WATER BEACH (NZ) LIMITED**

Dated 23 September 2021

MAY IT PLEASE THE COMMISSIONERS

Introduction

1. These submissions have been prepared in reply to evidence given and issues raised during the course of the hearing on 9 September 2021.
2. They present the points addressed by counsel prior to conclusion of the hearing by way of oral reply, in writing.
3. They also address in more detail aspects of the further supplementary evidence presented by Ms Resl on behalf of the Council, received in written form after the hearing concluded (on 10 September 2021).
4. Finally, they respond to questions put by Commissioner Cooney on the issue of legal mechanisms to secure the performance of consent obligations, both prior to and post the issuing of a certificate under s 224 of the RMA (and in particular, as to the potential for imposition of a bond condition).

Legal Mechanisms

5. After counsel had presented opening submissions, Commissioner Cooney asked a question as to how the various legal mechanisms to secure performance of consenting obligations would operate.
6. Counsel explained that there were various “layers” to the overall structure operating in combination to provide (I submit) an effective and robust regime to secure compliance, particularly in relation to the landscape and ecological restoration objectives, namely:
 - (a) The requirement for a Landscape Planting and Ecological Management Plan to be prepared by suitably qualified experts, addressing the various matters (objectives and performance standards) prescribed at Rules 1.1 f) and m);
 - (b) Whereby compliance with and implementation of those plans is a performance standard for subdivision under Rule 1.1d);
 - (c) The Landscape Planting and Ecological Management Plans would identify works to be completed before the issue of a s 224 certificate, and those works and programmes which would be ongoing (Rules 1.1 f) v) and 1.1m) vii));
 - (d) The former identified works would need to be completed by the current owners prior to issue of an s 224(c) certificate;
 - (e) Conversely, ongoing obligations would be the subject of a consent

notice (Rule 1.1(q)(ii) and (iii)¹) requiring both the Incorporated Society and lot owners/ successors in title to meet those obligations (joint and several liability); and

- (f) As well as individual (current and future) landowner responsibility, the legal entity (incorporated society) would have responsibility for compliance with conditions setting continuing obligations (Rule 1.1(p)).
7. In addition to that, and bearing in mind that a consent notice is a form of covenant (s 221(4)), restricted discretionary assessment criteria Matter 6 (Table 2) would enable the Council to consider whether covenants with third parties (such as under the Conservation Act 1987, QEII or their equivalent, providing for eg Ngāti Hei to be covenantee), were proposed.
8. It is in that context that the issue of whether provision for imposition of a bond would be necessary or appropriate.
9. To the extent that the Commissioners consider that the bond mechanism could usefully supplement the compliance regime as outlined above, and bearing in mind Commissioner Cooney's point that it is not possible to impose *both* a bond and a consent notice (refer s 221(1) of the RMA), Rule 1.1(q)(ii) and (iii) have been amended (in Version 14 of the Structure Plan appended to this reply) to provide for a bond as an alternative (whereby the consent notice is required unless such a bond has been imposed as a consent condition).

Variation to House Sites – Geotechnical Issues

10. Mr Kelsey was asked about the extent to which building platforms might need to be moved, relative to those shown on the Overall Development Concept Plan.
11. Mr Kelsey replied that for three of the four lots that may need to be moved (as identified at paragraphs 28 and 29 of Mr Kelsey's evidence²), the distance involved would be 10 metres or less, but for Lot 16 it could be up to 20 metres. The extent of such movement would be determined on further geotechnical investigations, with the setbacks conservatively identified in the meantime
12. In reply on that point, and as observed at the hearing, assessment Matter 9 in Table 2 has been specifically set to confine the circumstances in which there is any ability to revise the location of a Defined Building Area shown on the Overall Development Concept Plan at the subdivision approval stage, to situations such as the need to avoid geotechnical instability constraints.

¹ Noting a minor revision to the latter to ensure consistency of wording in this respect, in the appended Version 14.

² As amended, refer revised paragraph 29 submitted on 6 September with Mr Kelsey's summary statement.

13. The Council would be able to decide whether the movement was necessary for that purpose (Criterion 9(c)), and the extent to which any additional landscape or visual effect would arise, and can be mitigated (refer Criterion 9(b)). Any revised location could be declined, if not satisfied on these matters.

Provision for Additional Lots

14. The Commissioners asked counsel and a number of witnesses (including Mr Chapman and Mr Brown) questions relating to the prospect of up to 35 lots being established as a full discretionary activity, as provided for under Rule 1.5.
15. While Mr Chapman confirmed that his assessments were sufficiently conservative to the point that he was confident of a net hydrological improvement even with 10 additional lots, Mr Brown responded that 10 additional lots (beyond the 25 proposed under Rule 1.1a)) could not easily be accommodated.
16. For this reason, and to address any concerns the Commissioners might have about the total number of buildings that could be accommodated under the Structure Plan, and as signalled at the hearing, the proponent would be willing to abandon provision for 10 additional lots as a discretionary activity.
17. Version 14 of the Structure Plan as appended to this reply now makes any more than 25 lots for residential purposes³ a prohibited activity accordingly.

Width of Taiwawe Lane

18. Commissioner Watson asked Mr Burgess questions about the proposed 5.0 to 5.5 metre (rather than 6 metre) width of Taiwawe Lane as identified on Diagram C.
19. Mr Burgess advised that this was a topography issue, and that the width would still be acceptable from a traffic management perspective.
20. Mr Lawrence gave additional information as to the proposed reasons for the 0.5 metre reduction, including that this was a low traffic generation environment involving a non-exit road, and whereby the width reduction (in response to topography) would not only minimise earthworks, but increase the land available for roadside swales.
21. The proponent's preference remains for a 5.0 to 5.5 metre width minimum requirement for the hill section of Taiwawe Lane accordingly.

³ The wording being framed in that way so as not to preclude eg subdivision for vesting of roads or services.

Dogs

22. The proponent's preference, for the reasons addressed at the hearing, remains for a managed dog control regime rather than an outright ban on dogs. This is submitted to be more realistic and achievable for owners (with oversight from the Incorporated Society) than an outright ban.
23. Version 14 retains that provision, but also includes an alternative involving a complete ban on dogs, in case the Commissioners are minded to impose that as (in their view) more enforceable, including after considering submitter evidence on the point.

Baseline Faunal Studies

24. In response to questions put to Mr Goldwater, regarding the breadth and coverage of the baseline surveys proposed under Rules 1.1i) and m) iv), these rules have been amended to include both indigenous forest and wetland birds.

Minor Units

25. Various questions were put to witnesses regarding provision for minor units (to Mr Brown and Mr Lawrence, in particular).
26. The proponent's preference remains to retain the ability to establish minor units, to the extent accommodated by revised Rule 2.
27. Mr Brown advised that he was comfortable with the prospect of minor units being included (as a potential third building on a given site), provided they are contained within the Defined Building Areas as required under Rule 2.1 and 2.2.
28. Rule 2.1 provides for a minor unit within the cumulative 350m² limit on building footprint set in Table 3 as a permitted activity (subject to the other standards in Rule 2.1 also being met). Rule 2.2 provides for minor units up to a cumulative building footprint of 430m² as a restricted discretionary activity.
29. In response to evidence given by Ms Lamason, Version 14 amends the matters of discretion in Rule 2.2A (now 2.3) to refer to Table 2 Matters 3, 7 and 8 to ensure that a comprehensive assessment of any potential effects arising from minor units which would result in the cumulative 350m² limit on building footprint being exceeded.

Reverse Sensitivity

30. Similarly, in response to Ms Lamason's evidence on the topic of reverse sensitivity, and addressing the need to protect *future* lawfully established rural activities, a minor amendment has been made to the assessment criterion for

Table 2 Matter 10, so that it covers both existing and lawfully established rural activities on the property at 151 Boat Harbour Road.

31. Beyond that, the proponent submits that there is no basis, in terms of landscape considerations, reverse sensitivity or otherwise, to delete Lots 14 to 16 from the Structure Plan as sought by Ms Lamason's client,⁴ and to do so would undermine the critical mass needed to sustain the level of stewardship investment contemplated under the Structure Plan.
32. In particular, as Mr Brown explained at the hearing, the topography is such that visibility of these lots is limited from the public domain. There would be no or very limited visibility of these lots from this submitter's property either (as Mr Brown confirmed in his primary evidence, paragraph 51).

Purpose of Landscape Planting Areas

33. Questions were put to Mr Brown about the purpose of the various landscape planting areas shown on the Overall Development Concept Plan and Conservation and Landscape Planting Plan, as subject of Rules 1.1(f) and 1.1(g) respectively.
34. Mr Brown explained that the only area of overlap of purpose was in relation to Areas R8 and R9, with all other planting areas shown on Attachment 2 being for ecological purposes alone.
35. Having said that, Mr Brown also confirmed that the ecological restoration plantings would have landscape benefits, the point being they have not been set for that specific purpose (as opposed to visual landscape mitigation).
36. Furthermore, there is a mapping overlap, with *Areas R8 and 9 and LV 1 to 5* shown on both Attachments 1 and 2 (creating a drafting challenge in separating reference to each Attachment completely).
37. Amendments are included within Version 14 to clarify the respective purpose of the planting areas accordingly, essentially confining landscape planting to the Overall Development Concept Plan (Attachment 1) and ecological protection or restoration planting to areas shown on Attachment 2 (with the exception of Areas R8 and 9, to be planted under Rule 1 (f)).
38. Conversely, the other mapping overlap areas (LV 1 to 5, i.e. as shown on both Attachments) would be planted under Rule 1 (g), and the wording of Rule 1 f) is set accordingly.

⁴ Paragraph 4.10 of Ms Lamason's statement of evidence dated 1 September 2021.

Relationship between Structure Plan and District Plan

39. In addressing issues of consent status, Mr Lawrence explained that for full discretionary activities, such as the scenario whereby a building might not meet one of the standards in Table 3, all relevant objectives and policies in the District Plan would be engaged.
40. I submit that this view is correct having regard to s 104 of the RMA and in particular s 104(1)(b).
41. Neither the District Plan nor the Structure Plan “carve out” operation of that section of the RMA, which would make all relevant provisions of the District Plan mandatory considerations.
42. Rule 27.1.2 provides that the special purpose provisions of the Structure Plan would supersede any overlay, district wide or zone provisions *to the extent of any conflict*.
43. There is nothing in the proposed TCSP to say that the broader set of objectives and policies in the plan would not apply to a full discretionary activity (so no such conflict arises).
44. It was in part for that reason that Mr Lawrence gave the opinion that a non-complying activity status for breach of development standards in Table 3, was (generally) not necessary. All relevant effects and policy dimensions would be in play.
45. In his supplementary statement (31 March 2021, page 10) Mr Lawrence explains where non-complying activity status is justified, for example on specific ecological grounds as to the wetland setback rule in Table 3.
46. Further, given the provenance and significance of the Defined Building Areas, any building outside of a defined building area (as approved on subdivision) is a non-complying activity as well.⁵
47. The Commissioners are referred to this section of Mr Lawrence’s evidence for an explanation of the allocation of discretionary and non-complying activity status within Rule 2 in this regard.

Supplementary Evidence of Ms Resl

48. In addressing her supplementary evidence (as since received in writing) Ms Resl noted that she was “planner for the Council”.
49. The proponent notes in that regard that the Council in this case is not simply

⁵ Page 9 of Mr Lawrence’s supplementary statement of 31 March 2021.

the local authority responsible for administration of the District Plan (and consent authority) but also a submitter in opposition to the Structure Plan.

50. With respect, and as observed during the hearing, the proponent submits that Ms Resl has demonstrated a manifest lack of objectivity in her reporting on this matter.
51. Notwithstanding the very significant lengths which the proponent has gone to, to address or respond to all matters raised in her original and supplementary s 42A reports,⁶ Ms Resl could find nothing positive to say about the Structure Plan.
52. At no point does she record or acknowledge that independent experts have given evidence to confirm that the Structure Plan would have positive ecological, hydrological and landscape benefits including as now comprehensively secured through the range of Structure Plan controls that have been considerably tightened and expanded, to address the various concerns raised in her original report about a lack of certainty and detail.
53. Notably also, even the provision of supporting evidence from Mr Davis, and a Māori values assessment was cast as a negative (*'regrettable'*, *'premature'*) in her supplementary statement.⁷
54. In addition to this lack of objectivity, I submit Ms Resl demonstrably strayed outside of her areas of expertise⁸ particularly in relation to the nature and extent of comments made regarding stormwater and ecology considerations.⁹
55. For these two principal reasons, the proponent submits that the Commissioners should not give any weight to Ms Resl's supplementary evidence.
56. That evidence may be admissible in RMA proceedings, but the caution applied by the Courts to the acceptance of opinion evidence, as an exception to the general rule, is well established. The evidence must be within expertise, and objective.¹⁰
57. Ms Resl advocated for a peer review on both the stormwater and ecology topic.¹¹
58. This matter was addressed by counsel in a memorandum filed with the

⁶ Including as summarised in counsel's opening submissions and supporting Table 2.

⁷ Paragraphs 66 and 67.

⁸ Noting that she has a Master of Applied Science Degree, no evidence was given by her to demonstrate specific qualifications or experience in hydrology and ecology.

⁹ Paragraphs 8 to 25 of Ms Resl's supplementary evidence.

¹⁰ Refer Environment Court Code of Conduct in this respect.

¹¹ Paragraphs 9 and 16 of her supplementary evidence.

Commissioners on 9 April 2021 (copy **appended**¹²).

59. Counsel adopts the arguments made at that stage, being that no further peer review reports are necessary or appropriate at this stage of the process, including for the reasons stated in that memorandum.
60. In essence, and accepting that this would be a matter for the Commissioners to determine, the proponent's position is that the Commissioners have more than adequate independent expert opinion on all relevant matters, to enable an informed decision to be made that the Structure Plan has resource management merit and would deliver significant ecological, hydrological and landscape benefits for the Taiwawe Stream catchment areas subject of that Structure Plan.
61. I submit a sense of proportionality must be applied.
62. This is not a case where significant resources are being adversely affected.
63. It is instead a case where degraded pastoral land is being restored with any significant ecological resources being both protected and restored.
64. Simply put, what would a further peer review possibly demonstrate (or contest), but the extent of the *benefits* being advanced?
65. Were this a case where the applicant was (for example) advancing some no net loss argument, and the precise calculus of adverse and positive effects was in question, the situation might well be different.
66. But whether, for example, the extent of the hydrological benefit is 2%, 5% or 10% is not, with respect, material.
67. As to ecology, the reality is that however significant the resources are, and whatever specific species (flora and fauna) they comprise or contain in whatever numbers, those resources will be protected.
68. What exactly, in that situation, would a peer review add by way of value to this process?
69. As a matter of completeness, filed with this reply are notes prepared by Mr Goldwater and Mr Chapman in response to the specific points made by Ms Resl in her supplementary evidence on these matters, being points not previously made and able to be covered by these experts. As a matter of procedural fairness, the Commissioners are requested to consider those responses, which can be filed in affidavit form, if so directed for the purpose.

¹² And subject of the Commissioners' Fourth Direction.

70. In summary, the proponent submits that the suggestion of peer reviews on ecology and hydrology is without substance, and that there is no legitimate basis to prolong this process any further, on these topics.
71. In the event that the Commissioners determine otherwise, the proponent would necessarily (and as a matter of natural justice) reserve the right to respond in turn, to any additional or fresh evidence raised in the peer review reports.
72. That in itself begs the question, just when and how would this process end?

Road Safety Audit

73. As Mr Burgess explained in his evidence, the proponent has been waiting for the Council's long promised road safety audit for (now, counsel understands) nearly 10 months.
74. The proponent stands behind Mr Burgess' opinion that either the existing or proposed revised intersection planned¹³ is safe and would operate efficiently with the additional traffic generated from the Structure Plan, including on a conservative basis.
75. If the Commissioners prefer to wait (for a reasonable period of time) to enable that road safety audit to be forthcoming, then the proponent obviously would need to abide by that, but again reserve an opportunity to respond to any new or fresh evidence generated through it.
76. They would say however that the Council has had more than sufficient time to complete the road safety audit and again that the Commissioners have sufficient information to make an informed decision on this topic, bearing in mind that as Ms Resl herself points out, specific engineering design would be approved at the subdivision stage.¹⁴

Other Matters

77. In terms of other specific matters raised in Ms Resl's supplementary evidence, the proponent submits as follows:
 - (a) The issue of discretionary activity status for subdivision is now moot¹⁵ but regardless, operation of the objectives and policies of the District Plan for a full discretionary activity is as addressed above (and prohibited activity status for more than 25 lots otherwise addressed as well).

¹³ Diagram B to the Structure Plan .

¹⁴ Paragraph 31 of Ms Resl's supplementary evidence.

¹⁵ Paragraphs 36 to 40 of Ms Resl's supplementary evidence.

- (b) Rule 1.2 has been amended to address the point made at paragraph 41, it never being intended that the size of the Defined Building Area could be increased as a restricted discretionary activity.
- (c) The points made at paragraph 42 as to the framework for delivering ecological benefits lack substance, including for reasons addressed above and in Mr Goldwater's evidence and comments appended hereto.
- (d) As to paragraph 44, Mr Goldwater had surveyed the proposed realignment to confirm it would not affect the wetland (as addressed in Mr Goldwater's supplementary notes).
- (e) As to paragraph 45, the point raised is academic as reverse sensitivity is now addressed directly within the Structure Plan.
- (f) As to paragraph 46, Ms Resl is wrong. Regardless of the subdivision standards, such a conservation covenant could be set through a consent condition (Matter 6, Table 2). Regardless, as noted above, the subdivision standard requires a consent notice as to the conservation area, which is a form of covenant in its own right (as addressed at the outset of these reply submissions).
- (g) The remaining matters raised including as to the workability of Version 13 do not (with respect) warrant further comment. The proponent stands behind its submissions and evidence regarding the rationale for, comprehensive nature and effectiveness of, the TCSP as now advanced. Regardless, some of the more detailed aspects touched on by Ms Resl have been addressed, including through the further refinements in Version 14 as also specifically addressed in this reply.

Conclusion

78. The proponent maintains its opening submissions to the effect that the TCSP is a demonstrably better outcome in both s 32 and broader sustainable management terms than the status quo option and Variation 3 should be approved accordingly.



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Dated: 23 September 2021