

**ENVIRONMENT COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I MUA I TE KOOTI TAIAO O AOTEAROA
ŌTAUTAHI**

ENV-2022-CHC-007

Under the the Resource Management Act 1991 ("Act")
In the matter of an appeal under s 120 of the Act
Between **FRIENDS OF CONICAL HILL INCORPORATED**
 Appellant
And **HURUNUI DISTRICT COUNCIL**
 Respondent
And **HANMER SPRINGS THERMAL POOLS & SPA**
 Applicant

**REPORTING MEMORANDUM OF COUNSEL FOR THE RESPONDENT
AS TO PLANNING TOWARD A HEARING**

2 June 2022

MAY IT PLEASE THE COURT:

1. The parties attended mediation on 16 May 2022. However, the appeal was not settled at mediation.
2. This reporting memorandum is filed on behalf of the Respondent after conferring with counsel for the Appellant and counsel for the Applicant, as anticipated by the Mediation Heads of Agreement executed by the parties on 16 May 2022, and paragraph [12] of the Minute of the Environment Court dated 8 April 2022.

Leave sought for late filing

3. It was the parties' aim to provide feedback to enable this reporting memorandum to be filed by 30 May 2022 as anticipated by the Mediation Heads of Agreement. However, there has been a short delay in collecting and compiling feedback to enable the memorandum to be prepared.
4. The Respondent respectfully requests leave to file this reporting memorandum on 2 June 2022 on the following grounds:
 - (a) No party objects to the late filing. Accordingly, no prejudice will arise to any party.
 - (b) The delay in filing this reporting memorandum is short, being three working days.
 - (c) This reporting memorandum is being filed prior to the date anticipated by paragraph [12] of the Minute of the Environment Court dated 8 April 2022, which required a memorandum to be filed no later than 14 working days after the conclusion of mediation (i.e. no later than 3 June 2022).

List of the essential issues of fact and opinion

5. The Appellant has advised that the essential issues of facts and opinion to be resolved by the Environment Court are:
 - (a) Whether the proposal recognises and provides for the protection of a significant habitat of indigenous fauna under s. 6 (c) of the Act? In particular:

- (i) Whether the proposal will have significant effects on nationally endangered and threatened fauna that are not appropriately avoided, remedied or mitigated?
 - (ii) If not avoided, remedied or mitigated, what specific biodiversity offsets are offered by the Applicant, noting these details were not before the first instance decision-maker?
 - (iii) Are the biodiversity offset measures proposed appropriate to address the impact on nationally endangered and threatened fauna?
 - (iv) If the answer to (iii) is yes, are the biodiversity offset measures proposed adequate to address the impact on nationally endangered and threatened fauna?
 - (v) What are the 'residual effects' on nationally endangered and threatened fauna that are not able to be offset, but are instead compensated for? How, specifically, are they compensated (again noting that these details were not before the original decision-maker)? And are the residual effects appropriate for nationally endangered and threatened species?
- (b) Whether Conical Hill has historic heritage for the purposes of s 6 (f) of the Act?
- (i) If the answer to (b) is yes, whether the proposal is inappropriate development which fails to recognise and provide for the protection of its heritage values? The Appellant's position is Conical Hill and its walkway are central to the heritage and historic fabric of Hanmer Springs. The Appellant's position is that the proposal will result in profound changes to the natural historic character of the Conical Hill Reserve, resulting in effects to the Hill as an experiential whole that will be significantly adverse.
- (c) What are the impacts of the proposal on the amenity of users of Conical Hill Reserve and the Conical Hill Walkway?
- (d) Are the conditions imposed on the proposal sufficient to appropriately mitigate noise associated with the proposal on affected residents?

- (e) What are the economic benefits of the proposal, noting the reliance of the first instance decision-maker on an approved application to the Provincial Growth Fund, a document not in evidence at the Council hearing?
6. The Appellant has advised that the legal issues to be decided by the Environment Court are:
- (a) Whether compensation measures offered by the Applicant should form part of the assessment of whether the effect is significant or not and whether, as a consequence, the Decision erred in concluding that the Applicant did not need to consider alternative sites pursuant to the Fourth Schedule to the Act. More specifically, the Appellant's position is that:
 - (i) Compensation does not fit within the avoid-remedy-mitigate (ARM) hierarchy of the RMA. Offset was added as a 4th option in 2017, only when none of the first three is possible. Compensation, by definition, neither offsets nor mitigates the effect for which it compensates. Compensation accepts that there will be an effect, and offers compensatory (not remedial) measures.
 - (ii) Accordingly, to include compensation in the assessment of whether the effects of the proposal will be significant or not circumvents the hierarchy of the RMA.
 - (b) Whether it is appropriate to consider 'all measures' offered as per under s. 104(1)(ab) of the Act, even those measures are demonstrably inconsistent with regional, national, and international provisions regarding the adequacy and/or appropriateness of biodiversity compensation and lizard protection.
 - (c) What is the relevance of/weight to be given to the Wildlife Permit granted to the Applicant?

Matters not in Dispute

7. The Commissioner's Decision addresses the issue of transportation effects associated with the proposal, the conclusion being that these effects were appropriately managed through the imposition of a suite of conditions, being conditions 4-11 of Appendix 1 to the Decision.

8. The Appellant does not challenge this aspect of the Decision.
9. The Appellant further accepts the findings in the Decision on the following effects:
 - (a) Fire risk;
 - (b) Impact on horse trails; and
 - (c) Risk of natural hazard.
10. To the extent that effect on property values was raised as an issue by members of the Appellant society in their individual capacity, the Appellant accepts that this is not a relevant matter.

Applicant's position

11. The Applicant does not consider that the list of essential issues of fact and opinion, nor the legal issues are framed with enough particularity, or in the context of the considerations the Court is required to make under s104, to enable it to properly make decisions about the witnesses it needs to call, nor the extent of expert conferencing that would be beneficial. At present the list of witnesses is probably much longer than it needs to be as it is unclear which matters are actually in dispute.
12. Issue 5(a)(i) is posed as a question and does not set out the actual or potential effects that the Appellant alleges will occur on the habitat of indigenous fauna. It is therefore not clear what matters are in dispute.
13. In particular it is not clear whether the habitat referred to, and therefore the effects on that habitat, relates to the habitat of rough geckos and other lizards, or birds (New Zealand falcon) or both.
14. It is not possible to ascertain the answer to these questions by reference to the Appellant's witness list as Professor S Ogilvie appears to have general ecology qualifications but no specific expertise in relation to lizards or falcons. This also makes it difficult to determine whether it would be helpful for the Applicant's herpetologist to participate in expert conferencing with Professor Ogilvie and whether the Applicant needs to call an ornithologist and have that person participate in conferencing with Professor Ogilvie.
15. Issue 5(b) asks a question whether Conical Hill has historic heritage for the purposes of section 6(f). Conical Hill has no heritage listing or status and it is

unclear what the heritage values are that the Appellant alleges exist, nor what the effects on those values are alleged to be in order that witnesses can be called to address those alleged effects.

16. In Issue 5(b)(i) it is further stated that the Appellant's position is that the proposal will result in profound changes to the "natural historic character" of the Conical Hill Reserve. Is that the same as alleged effects on historic heritage or are they effects on natural character to be addressed by witnesses in the fields of landscape (natural character), recreation and noise? This issue may be clarified by the identification of the Appellant's historic heritage witness so that the Applicant can ascertain whether it also needs to call an additional expert with regard to historic heritage or whether the issues more properly lie in the fields of landscape, noise and recreation and it is those experts who need to participate in expert conferencing with the expert in historic heritage.
17. With regard to Issue 5(c), the alleged effects on the amenity of users of the Conical Hill Reserve and Walkway are not specified. The Applicant seeks some particularity as to whether the effects are noise, landscape and visual and/or recreational so that it can decide which experts it needs to call and whether the noise expert needs to prepare to cover this topic at conferencing and in evidence as well.
18. Issue 5(d) raises the effects of noise on residents (which is clear and understood) but it would be helpful to know whether the Appellant's noise witness will be covering effects on other issues such as lizards, falcons, historic heritage, natural character, recreation so that the scope of noise expert conferencing can be ascertained.
19. Issue 5(e) asks what are the economic benefits of the proposal but does not state whether those matters are in dispute. The issue then refers to the fact the proposal is being funded through the Government's Provincial Growth Fund. It is unclear how the funding of the proposal relates in any way to the economic benefits which arise from the proposal proceeding? The Applicant seeks some clarity as to whether the economic benefits are in dispute so that it can decide whether it needs to retain and call an economist.

Number of witnesses to be called

20. The Appellant has confirmed it has, or intends to engage, three expert witnesses to provide evidence in relation to the following areas of expertise:
 - (a) Ecology (Prof S Ogilvie);
 - (b) Noise (Prof J Pearse);
 - (c) Historic heritage (TBD).

21. The Appellant will also be calling evidence from Professor Ann Brower, who has academic expertise in biodiversity offsetting and compensation.

22. The Applicant has advised that until issues are further clarified by the Appellant it will have to take a wide view of the witnesses it needs to call (and reserves its position on costs). At present until further clarity is gained the Applicant anticipates having to call the following witnesses:
 - (a) Herpetology (Dr Tocher);
 - (b) Ornithology (Graham Parker – to be determined if required after the issues raised in paragraphs 11-14 are resolved);
 - (c) Noise (Dr Trevathan – scope of evidence to be determined after the issues in paragraphs 16-18 are resolved);
 - (d) Recreation (Mr Greenaway – to be determined if required after the issues in paragraphs 15-18 are resolved);
 - (e) Historic heritage (to be determined if required after the Appellant has advised the name of their expert);
 - (f) Economics (to be determined if required after the issue in paragraph 19 is resolved);
 - (g) Landscape and visual (Mr Milne - to be determined if required after the issues in paragraphs 16-18 are resolved);
 - (h) Planner (Jane Whyte).

23. The Respondent will call 3 witnesses in relation to the following areas of expertise:
 - (a) Herpetology (Dr Lettink);

- (b) Noise (Mr Walton);
- (c) Planner (Ms Bewley).

Expert conferencing, sequencing and facilitation

- 24. Expert witnesses are ready and willing to engage in expert conferencing where the Appellant and the Applicant/Respondent have an appropriate independent witness with relevant and generally matching expertise on any particular topic.
- 25. The following sequencing is proposed for expert conferencing to occur:
 - (a) Herpetologists conferencing to be completed no later than **18 July 2022**. This is subject to confirmation that Professor Ogilvie considers he has the appropriate qualifications and independence to participate in conferencing on this topic;
 - (b) Noise expert conferencing on effects on residential amenity (and any other areas of noise effects the Appellant advises are in dispute) to be completed by no later than **18 July 2022**.
- 26. The Applicant and Respondent advise that they do not consider Professor Brower to be an independent expert witness as she is an original submitter. The Applicant and Respondent are also not at this stage intending to call a witness with academic expertise in biodiversity offsetting and compensation.
- 27. As part of completing expert conferencing, the experts will circulate a joint statement identifying the issues, both agreed and not agreed, accompanied by the experts' reasoning set out as succinctly as the circumstances will allow.
- 28. The parties do not consider facilitation by an Environment Commissioner is required for expert conferencing.

Filing and exchanging of evidence

- 29. The Appellant's evidence is to be filed with the Environment Court and served on all parties by **12 August 2022**.
- 30. The Applicant's and the Respondent's evidence is to be filed with the Environment Court and served on all parties by **9 September 2022**.
- 31. The Appellant's reply evidence is due **23 September 2022**.

Estimated duration of the hearing

32. An estimate is difficult to make at this stage until the Applicant has more certainty as to the witnesses it needs to call. At this stage it is estimated that the hearing will last approximately one week but that is highly dependent on getting more clarity on the issues in dispute and therefore the number of witnesses who need to be called.

Any other matters to ensure the fair, orderly and efficient hearing of the proceeding

33. The Applicant and Respondent consider a conference with Her Honour would be of assistance to assist the parties in preparing a more concise synopsis of facts, issues and legal questions that require determination and to narrow the issues to be determined by the Court, and therefore the number of witnesses to be called and to enable a more efficient and potentially shorter hearing process. Counsel for the Applicant and Respondent respectfully suggest that a teleconference is likely to be the most expedient way to deal with these matters.

Dated 2 June 2022



C Carranceja
Counsel for the Respondent