

**ENVIRONMENT COURT OF NEW ZEALAND
CHRISTCHURCH REGOSTRU**

**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

**MEMORANDUM ON BEHALF OF APPELLANT
12 July 2022**

Christchurch
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MAY IT PLEASE THE COURT:

1. The purpose to this Memorandum is to provide an update on the list of essential issues of fact and opinion which the Appellant says are to be resolved by the Environment Court.
2. As such, the Memorandum seeks to respond to the various matters identified by counsel for the Applicant in the Reporting Memorandum filed with the Court on 02 June 2022, and to make the conduct of the pre-hearing meeting as efficient as practicable.
3. A track change version of the amended "Facts and Issues" is included as Appendix A to this Memorandum, with a clean copy of the same included as Appendix B.

Request for Directions on Disclosure of Key Documents

4. A critical issue arising out of this appeal is the actual impact of the Applicant's Flyride proposal on nationally endangered and/or at-risk lizard populations at Conical Hill.
5. On this issue, the Respondent's decision to approve the Flyride proposal substantially defers to the wildlife permit process administered by the Department of Conservation under the Wildlife Act 1953. This process involves, amongst others, the preparation of a Lizard Management Plan for the Department's approval.
6. In advance of contributing to the original reporting memorandum of 02 June 2022 and in advance of preparing this update, counsel has asked both the Applicant and Respondent to provide full details of the proposal in respect of the management of lizard populations that will be impacted by the Flyride.
7. In requesting this information, counsel provided the usual undertakings as to confidentiality so as to ensure that any information received would not be made public, thereby increasing the risk to nationally endangered and at-risk lizard species at Conical Hill.
8. The Respondent advised that it did not hold any of the information requested.
9. The Applicant declined to provide the information on both occasions, citing its willingness to provide this information only to experts it considers to be suitably qualified in herpetology. The information has not been provided to Professor Ogilvie, the Appellant's ecological expert.
10. The Appellant did provide a copy of the Wildlife Permit issued by the Department of Conservation on 13 May 2022, which authorises the catching, holding in possession and killing of listed gecko/skink species. However, the Wildlife Permit does not include an assessment of the effects on lizard populations, nor

does it include any details as to the biodiversity compensation offered to address such effects.

11. It is understood the biodiversity compensation includes the offer of a QEII covenant, or similar, over private land. However, the details of the covenant including, but not limited to, its scale and the location of the property to be covenanted remain unknown.
12. A member of the Appellant Society also lodged an official information request with the Department of Conservation seeking a copy of all relevant documentation associated with the Wildlife Permit.
13. The response provided by the Department includes a heavily redacted Lizard Management Plan, one which completely fails to inform the reader as to how the effects on lizard populations have been quantified, and what is proposed in terms of compensation for these effects.
14. Given this is a key issue in the appeal, the Appellant will be significantly disadvantaged in its preparation for a hearing if all documentation associated with the Wildlife Permit is not made available in full i.e., without redaction.
15. The Appellant therefore seeks directions from the Court in respect of the disclosure of this documentation.
16. The Applicant's concerns regarding the potential disclosure of confidential information relating to the location of nationally endangered/at risk species can be resolved by the undertakings as to confidentiality referred to above.



Gerard Cleary

Solicitor for Friends of Conical Hill.

12 July 2022

List of the essential issues of fact and opinion

The Appellant has advised that the essential issues of fact 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/or at risk fauna (lizards) that are not appropriately avoided, remedied or mitigated by the measures contained in the Lizard Management Plan (LMP) prepared by the Applicant for the purposes of the Wildlife Act 1953 permit process? In that respect, the Appellant concurs with the view expressed by the Respondent's ecologist (Marieke Lettink) during the hearing of the Flyride Consent Application that: "adverse effects on all four lizard species are considered significant irrespective of their threat status and that: Considering the mitigation package in its entirety, I am of the view that there will be significant residual adverse effects if restricted to the proposed mitigation and remediation actions within the Reserve and the rodent monitoring...."*

The Applicant's ecologist (Dr. Tocher) has expressed the view that offsetting of effects on lizards is inappropriate: "The lack of adherence to at least three BBOP principles rules out the appropriateness of an offset in the case of the Flyride lizard values"¹. Assuming this opinion remains relevant, what compensation is the Applicant² offering to address effects on nationally endangered and threatened fauna, noting the full details of the compensation package, which purportedly includes the offer of a QE11 Covenant and lizard management plan, remain undisclosed to the Appellant and Respondent.

¹ Response to Peer Review of LMP by Mandy D Tocher dated 05 November 2021 at para 25

² BBOP = Business Biodiversity Offset Programme

- (ii) Is the biodiversity compensation appropriate to address the impact on nationally endangered and ~~threatened~~ at risk fauna lizards?
- (iii) If the answer to (iii) is yes, ~~are the biodiversity offset measures~~ is the proposed biodiversity compensation adequate to address the impact on nationally endangered and/or ~~at risk lizards~~ threatened fauna?
- ~~(iv) 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) The Appellants consider the effects on NZ Falcon known to nest at Conical Hill is a relevant effect for the Court to take into account under s 104 (1) of the Act. No evidence has been provided that indicates a comprehensive analysis of the sound power and sound frequencies produced by both the apparatus and the users has been undertaken and modelled, or the detrimental impacts these may have both on biodiversity and/or people.

(c) Conical Hill Reserve is identified in the Hurunui District Council's Reserve Management Plan (RMP) as one of the best-known features in Hanmer Springs. The Walkway was built in 1903 by Mr Duncan Rutherford who is commemorated on the plaque at the top. Consistent with the Government's development of Hanmer Springs as a spa resort, and following a 1902 visit by the Chief Balneologist, the zig-zag trail was specifically designed to enhance public health and general wellbeing.

(d) The RMP states that this walk has always been a significant aspect of the Hanmer Springs experience. The RMP further describes Conical Hill Reserve as an icon, central to the identity of Hanmer Springs. The Appellant considers that documentation of this nature establishes the historic heritage value of Conical Hill. Further evidence is available from a variety of sources pertaining to the heritage values of the Hill and the Walkway.

(e) The Appellant also considers that there is a strong historical, and inherent connection between the plaque atop the hill, the Walkway to the top of the Hill, and the Hill itself. The plaque commemorates the person who built and financially underwrote construction of the Walkway. Thus the Appellant considers it historically inaccurate to separate the plaque from the walkway and from the Hill.

(f) Further the lookout was an intentional terminus of the trail from the outset. The lookout celebrates views from the Hill, terminates the Walkway, and is fundamental to the experience of the Walkway and the Hill; thus the Appellant considers it historically and experientially inaccurate to separate the lookout from the Walkway and the Hill. -

(g) As such the Appellant says that effects on these heritage values have not been assessed by the Applicant, whose position is the heritage values are limited in scale to the footprint of the lookout and the brass plaque facing the lookout.

~~(v)(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.

~~(b)(h)~~ What are the impacts of the proposal on the amenity of users of Conical Hill Reserve and the Conical Hill Walkway? In particular, will these amenity values be affected by the noise and, to a lesser extent, visual effects of the Flyride?

~~(e)(i)~~ Are the conditions imposed on the proposal sufficient to appropriately mitigate noise associated with the proposal on affected residents and users of the Hill and the lookout? The Appellant's position is that Given the nature of the activity and the apparatus itself, there is no plausible mechanism by which mitigation can be implemented. Further, there is no feasible remedial treatment that could be proposed should the Flyride breach conditions.

~~(e)(i) The Appellant disputes the economic benefits of the proposed Flyride. An up-to-date comprehensive 'four-capitals' cost/benefit analysis for the proposal has either not been conducted and/or not publicly released, and the 2019 financial modelling in support of the application fails to demonstrate sustained net economic benefit to the Hanmer Springs community over the mid- to long-term. 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.?~~

17. *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 Appellants 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?*

List of the essential issues of fact and opinion

The Appellant has advised that the essential issues of fact and opinion to be resolved by the Environment Court are:

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- The Applicant's ecologist (Dr. Tocher) has expressed the view that offsetting of effects on lizards is inappropriate: "The lack of adherence to at least three BBOP principles rules out the appropriateness of an offset in the case of the Flyride lizard values"³, Assuming this opinion remains relevant, what compensation is the Applicant⁴ offering to address effects on nationally endangered and threatened fauna, noting the full details of the compensation package, which purportedly includes the offer of a QE11 Covenant and lizard management plan, remain undisclosed to the Appellant and Respondent.*
- (ii) *Is the biodiversity compensation appropriate to address the impact on nationally endangered and at risk lizards?*
- (iii) *If the answer to (ii) is yes, is the proposed biodiversity compensation adequate to address the impact on nationally endangered and/or at risk lizards?*
- (b) *The Appellants consider the effects on NZ Falcon known to nest at Conical Hill is a relevant effect for the Court to take into account under s*

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- (c) *Conical Hill Reserve is identified in the Hurunui District Council's Reserve Management Plan (RMP) as one of the best-known features in Hanmer Springs. The Walkway was built in 1903 by Mr Duncan Rutherford who is commemorated on the plaque at the top. Consistent with the Government's development of Hanmer Springs as a spa resort, and following a 1902 visit by the Chief Balneologist, the zig-zag trail was specifically designed to enhance public health and general wellbeing.*
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- (e) *The Appellant also considers that there is a strong historical and inherent connection between the plaque atop the hill, the Walkway to the top of the Hill, and the Hill itself. The plaque commemorates the person who built and financially underwrote construction of the Walkway. Thus, the Appellant considers it historically inaccurate to separate the plaque from the walkway and from the Hill.*
- (f) *Further the lookout was an intentional terminus of the trail from the outset. The lookout celebrates views from the Hill, terminates the Walkway, and is fundamental to the experience of the Walkway and the Hill; thus, the Appellant considers it historically and experientially inaccurate to separate the lookout from the Walkway and the Hill.*
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- (i) *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.*
- (h) *Are the conditions imposed on the proposal sufficient to appropriately mitigate noise associated with the proposal on affected residents and*

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18. The Appellant has advised that the legal issues to be decided by the Environment Court are:

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 - (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?*