

Before an Independent Hearing Commissioner at Hurunui District Council

under: the Resource Management Act 1991

in the matter of: application RC210098 for land use consent to install
and operate a Gravity-Based Recreation Activity within
the Conical Hill Reserve, Hanmer Springs

between: **Hanmer Springs Thermal Pools & Spa**
Applicant

and: **Hurunui District Council**
Consent Authority

Opening legal submissions on behalf of Hanmer Springs Thermal
Pools & Spa

Dated: 7 October 2021

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OPENING LEGAL SUBMISSIONS ON BEHALF OF HANMER SPRINGS THERMAL SPRINGS & SPA

May it please the Commissioner

INTRODUCTION

- 1 This hearing will determine an application (the *Application*) by Hanmer Springs Thermal Springs & Spa (*HSTPS*, the *Applicant*) for land use consent under the Resource Management Act 1991 (*RMA*) to install and operate a gravity-based recreation activity within the Conical Hill Reserve, Hanmer Springs (*Flyride*).
- 2 The Application is for a discretionary activity under the Hurunui District Plan (*District Plan*). This provides the Commissioner the ability to either grant or refuse the Application, and impose any conditions the Commissioner sees fit should the Application be granted.
- 3 The application documentation includes an application for land use consent lodged in June 2021 and an addendum to that application, lodged in June 2021. The application and addendum are supported by an assessment of environment effects (*AEE*) and a range of technical reports.
- 4 A revised set of conditions, prepared following receipt of, and in response to, submitter evidence is attached to these submissions. A full set of revised conditions will be tabled by Jane Whyte during the hearing.

OUTLINE OF SUBMISSIONS

- 5 These submissions are structured as follows:
 - 5.1 Outline of HSTPS's case;
 - 5.2 Separate approvals required;
 - 5.3 Effects on the environment;
 - 5.4 Response to section 42A Officer's Report (*Officer's Report*);
 - 5.5 Evidence and key issues;
 - 5.6 Other outstanding matters;
 - 5.7 Witnesses and evidence to be presented.

OVERVIEW OF HSTPS'S CASE

- 6 The case for HSTPS is:
- 6.1 Tourism and recreation are integral to providing for the social and economic wellbeing of people and communities in the Hurunui District, the region and the nation generally.
 - 6.2 Hanmer Springs is an internationally renowned tourist destination, known mostly for the thermal pools complex operated by HSTPS. However, there is a distinct lack in current offering of paid activities in Hanmer Springs, particularly in the \$15 to \$100 price bracket.¹
 - 6.3 Tourism destinations need to expand and upgrade to remain competitive, particularly in light of the impact of COVID-19 on the tourism industry. You will hear from Graeme Abbot, the Flyride proposal provides an opportunity to attract visitation and expand recreational offering in Hanmer Springs.
 - 6.4 Adverse effects of the proposal are avoided, remedied or mitigated and the imposition of conditions of consent will ensure effects are no more than minor. The monitoring and review conditions also ensure robust mechanisms to identify and address any unexpected environmental effects.
 - 6.5 As well enhancing recreational offering, the proposal will enhance native revegetation on Conical Hill, and improve the management of lizards through the implementation of a comprehensive lizard management plan.

SEPARATE APPROVALS REQUIRED

- 7 In addition to the application for resource consent, there are two additional statutory approvals required for the Flyride. These other approvals are separate processes under other legislation that are additional to requirements under the RMA. These separate approvals do not form part of this hearing process, but are briefly explained below for completeness.

Wildlife Act 1953

- 8 Approval from the Department of Conservation (*DOC*) is required under the Wildlife Act 1953 to install and operate the Flyride. This is because there are four lizard species known to reside on Conical Hill, and the Wildlife Act provides for an absolute protection of all indigenous lizards species.²

¹ See the evidence of Graeme Abbot at [51]-[52].

² Wildlife Act 1953, section 3.

- 9 Wildlife approvals are granted by DOC. A lizard management plan has been prepared by Dr Mandy Tocher in consultation with DOC which documents the lizard values within the project footprint and the actual and potential effects of works to construct and operate the Flyride on lizard values. It then details the avoidance, remediation and mitigation measures that will be implemented to address anticipated effects and losses.
- 10 Although the Wildlife Act authority is a separate statutory process, the Applicant has offered a resource consent condition requiring a permit be obtained from DOC prior to construction. This should satisfy the Commissioner that resource management considerations are given effect to through the wildlife approval.

Reserves Act 1977

- 11 The Flyride is based within the Conical Hill Reserve, held under the Reserves Act 1977. To use this land for the Flyride, HSTPS will rely on section 54 of the Reserves Act, which provides for leases or licences to be granted in respect of recreation reserves.
- 12 As recorded in the application documentation, HSTPS will be seeking a lease from the Council to undertake the activity and is aware that the Flyride will need to comply with the requirements of any permission granted under both the RMA and the Reserves Act.³ As explained in Mr Greenaway's evidence, the proposal is an appropriate development for the Conical Hill Reserve.⁴

EFFECTS ON THE ENVIRONMENT

- 13 The effects associated with the Flyride are discussed in detail in the evidence of Jane Whyte and the evidence of the various experts on behalf of HSTPS. These will not be repeated here.
- 14 It will be clear from the Application itself as well as the evidence before you that HSTPS is committed to ensuring the Flyride – if consented – is considerate to the environment. HSTPS has sought expert advice throughout the pre-application and application process. This is evident in the body of evidence before you, including HSTPS' engagement of a rural veterinarian when equine related issues were raised in one submission and in the s42A Report.
- 15 In short, HSTPS's expert evidence is that the Flyride will not result in any adverse effects on the environment that cannot be avoided, remedied or mitigated through conditions.

³ Resource Consent Application, paragraph 62.

⁴ See Statement of Evidence of Robert Greenaway at paragraph 20.

- 16 There are significant economic, social and recreational benefits associated with the proposed Flyride. Graeme Abbot will give evidence that the Flyride will:
- 16.1 provide enhanced recreation opportunity within Hanmer Springs and fill a "gap" in existing activities in the \$15 to \$100 price bracket; and
 - 16.2 become a "must-do" attraction for both regular and new visitors to the village, bringing national and international attention to Hanmer Springs;
 - 16.3 create 23 new jobs and inject \$4 million into the local economy in its first five years;
 - 16.4 ensure Conical Hill receives some much needed ongoing investment through supporting and expanding native plants on the hill; and
 - 16.5 enable lizard populations within Conical Hill Reserve and adjacent areas to be maintained at higher levels than observed presently.
- 17 HSTPS also continues to contribute to the local communities, including hosting schools, sponsoring sports teams and supporting a number of large events in the village.
- 18 In mid-2019 HSTPS applied for funding from the Provincial Growth Fund (*PGF*). Criteria for this funding included employment benefits, sustainable economic growth, creating additional value and encouraging environmental sustainability.
- 19 The Hurunui District Council was granted \$2.2 million from the Provincial Growth Fund in August 2020 for the construction of a downhill amusement ride on Conical Hill. I submit that this is a clear indication from the Government that this proposal is valuable and necessary to support the domestic tourism market.

RESPONSE TO OFFICER'S REPORT

- 20 The Officer's Report concludes that a recommendation is unable to be made until such time as sufficient information is provided to enable an assessment of the effects of the proposal on Kārearea/New Zealand falcon.⁵ The Officer's Report also records

⁵ Section 42A Officer's Report prepared by Kelsey Bewley, dated 16 September 2021 at paragraph 247.

uncertainty as to the effects of noise on horses using the nearby mixed-use track.⁶

- 21 Those uncertainties to one side (and they are addressed in evidence), it observes that the Flyride would have a number of positive benefits including providing an additional recreational activity and positive economic benefits to the wider community, and outlines some proposed conditions of consent should the Commissioner be minded to grant consent.
- 22 With respect to the two areas of uncertainty:
- 22.1 Dr Mandy Tocher will provide expert evidence addressing actual and potential effects (including adverse and positive effects) of the Flyride project construction and operation on eastern kārearea/falcon. Her evidence also outlines planned eastern kārearea/falcon management during the construction and operation of the Flyride. Dr Mandy Tocher's evidence concludes that provided the forestry protocols and recommended adaptive management plan is adhered to, she is confident the Flyride project will not impact significantly on the local eastern kārearea/falcon population.⁷ Jane Whyte proposes consent conditions 10a. and 10b. to ensure Dr Mandy Tocher's recommendations occur.⁸
- 22.2 The Applicant sought expert advice from a rural veterinarian on potential effects on horses using the adjacent existing track. Nathan Broerse undertook a site visit and considers the Flyride will not compromise horse welfare and will not create an unsafe riding environment.⁹ Mr Broerse suggests an appropriate mitigation measure would be to install appropriate signage on the track to offer users of the track to be aware of the Flyride's operation.¹⁰
- 23 With the exception of those two areas of uncertainty, which have now been addressed through expert evidence, the planning assessments by Jane Whyte and Kelsey Bewley demonstrate a very high level of agreement in relation to their assessment of the relevant matters specified in the RMA, the Reserves Act 1977 and the effects on the environment.

⁶ Section 42A Officer's Report prepared by Kelsey Bewley, dated 16 September 2021 at paragraph 101-102.

⁷ Evidence of Dr Mandy Tocher at paragraph 65.

⁸ Evidence of Jane Whyte at Appendix 1, page 22.

⁹ Evidence of Nathan Broerse at paragraph 35.

¹⁰ Evidence of Nathan Broerse at paragraph 34.

EVIDENCE AND KEY ISSUES

24 At this stage in the process, the key issues appear to be:

24.1 Traffic and car-parking;

24.2 Noise; and

24.3 Ecology.

25 I briefly address each of these below.

Traffic and car-parking

26 Several submitters have expressed concern about the potential for transport related effects, including effects on on-street parking, traffic congestion and an impact on safety.

27 The Commissioner has the benefit of three expert reports on traffic effects. Tellingly, no traffic expert considers consent should be declined on the basis of traffic-related concerns.

28 Mr Simon de Verteuil's evidence is that the level of parking demand and traffic generation will not compromise safety or efficiency, and that there is sufficient kerbside parking available to accommodate the parking demand when the Flyride is operating at full capacity.¹¹

29 To provide confidence that the Flyride will have acceptable and, at the most, not more than minor parking related effects, HSTPS proposes monitoring conditions to identify and address any unanticipated parking related effects associated with the proposal. The information collected through the monitoring is able to trigger the section 128 condition proposed. Even if a review is triggered (and HSTPS is confident it won't be), there are options that can be implemented.

Noise

30 There are large areas of agreement among the noise experts. These are Dr Jeremy Trevathan on behalf of the Applicant, Mr Gary Walton who peer reviewed Dr Trevathan's assessment of noise effects for the Council, and Malcolm Hunt who has provided some comments on appropriate noise conditions for submitters.

31 Following receipt of Mr Hunt's letter, Dr Trevathan and Mr Walton have met to discuss the conditions recommended by Mr Hunt. Dr Trevathan will update you to the extent needed, but himself and Mr Walton are in agreement that the refined conditions relating to a

¹¹ Evidence of Simon de Verteuil at paragraph 9 and 57.

noise limit and noise monitoring address any actual or potential noise related effects associated with the Flyride.

Ecology

- 32 A number of submitters raised concerns regarding the impact on wildlife on Conical Hill. Specifically, concerns relate to the impact on lizards and falcons known to be present on Conical Hill.
- 33 In particular, the evidence of Vicki Barker on behalf of the Friends of Conical Hill suggests further evidence is required in relation to the assessment of effects on lizards.¹² In her summary, Dr Mandy Tocher will provide an outline of the lizard management plan including the comprehensive mitigation package that will be implemented through the DOC wildlife approval process to avoid, remedy and mitigate anticipated effects on lizards.
- 34 Although the Applicant is relying on the wildlife authorisation process to address the potential effects of the development on lizards and biodiversity more generally, a condition of consent is offered to ensure that resource consent considerations are given effect to through the wildlife approval. That is, the resource consent cannot go ahead without HSTPS first providing confirmation of having obtained a wildlife permit to the Council.
- 35 In relation to the potential impacts on falcon populations, Dr Mandy Tocher's evidence is that the Flyride proposal will not have a significant impact, provided adaptive management is applied, planning pest management is effective, and forestry protocols are adhered to. Jane Whyte has endeavoured to capture these recommendations into the conditions of consent proposed in relation to Kārearea/falcon.

Summary

- 36 HSTPS has taken all steps practicable to minimise the impact of the Flyride on the environment and to the degree that this is not achievable it has offered a number of conditions of consent to ensure effects do not adversely impact the surrounding environment.

OTHER LEGAL ISSUES

Precedent effects

- 37 Two submitters raised a concern about the potential for the proposal to set a precedent for future resource consent applications to not provide for carparking.¹³

¹² Evidence of Vicki Barker at paragraph 7.29.

¹³ Joanne Adams; Scott Currie & Angela Renwick.

- 38 Precedent effect is a legitimate consideration under section 104(1)(b)(vi) of the RMA.¹⁴ Any precedent resulting from granting a resource consent is not an effect on the environment per se but may be a relevant factor. However, mere non-compliance with the Plan does not itself create a precedent effect.¹⁵
- 39 Importantly, in order to create a precedent from the grant of a resource consent, you must have a situation of "like for like".¹⁶ While the granting of one consent may well have an influence on how another application should be dealt with, the extent of the influence will obviously be dependent on the extent of similarities between the two proposals.
- 40 The leading authority on precedent effects is *Dye v Auckland Regional Council*¹⁷ where the Court of Appeal found that there is no strict precedent effect in the legal sense,¹⁸ as a consent authority is not bound by its previous decisions.
- 41 The highly specific and unique nature of this proposal for a gravity-based recreation activity within Conical Hill Reserve, means that the chances that there will be another future proposal similar to this one within the same area is highly unlikely and, I submit, fanciful.
- 42 Nevertheless, granting consent to one application does not necessarily mean consent has to be granted to a later, similar application:

Even if those... same matters could be found in another case, it would be naïve to suggest that this would **require** the consent authority to grant approval, irrespective of all the particular features of the application.

[Emphases added]

- 43 The risk of precedent effects arising from this Application are, therefore, non-existent.
- Relevant plan provisions**
- 44 The AEE, Officer's Report and Jane Whyte's evidence have addressed the relevant plan provisions that apply to the Application.
- 45 These submissions do not repeat the planning provisions or assessment, and support Jane Whyte's conclusion that provided the

¹⁴ *Progressive Enterprises Ltd v North Shore City Council* HC Auckland CIV-2008-485-2584, 25 February 2009 at [66].

¹⁵ *Rosscroft Orchards Ltd v Waimakariri DC* EnvC C160/01 at [28].

¹⁶ *Dye v Auckland RC* [2002] 1 NZLR 337 (CA) at [49].

¹⁷ *Dye v Auckland RC* [2002] 1 NZLR 337 (CA).

¹⁸ *Dye v Auckland RC* [2002] 1 NZLR 337 (CA) at [32].

effects are appropriately managed, the proposal is supported by the applicable planning framework and further, there is no statutory planning provisions which would militate against the grant of consent.¹⁹ In particular, Ms Whyte concludes the proposal is consistent with Chapter 9 of the Canterbury Regional Policy Statement (CRPS) – to the extent it is relevant here. In summary, the evidence from Ms Whyte is to the effect the same outcome is achieved whether you have recourse to Chapter 9 of the CRPS or not. Because of this, it is submitted do not need to trouble yourself about whether – or the extent to which – you need to have regard to Chapter 9 CRPS.

Assessment of Part 2 matters

- 46 Section 104(1) RMA states that the consent authority must have regard to the matters listed in that section subject to Part 2 RMA.
- 47 The Court of Appeal has confirmed in the *RJ Davidson Family Trust* case that in the context of resource consent applications *King Salmon* does not *prevent* recourse to Part 2.²⁰ Where a plan has been prepared with appropriate regard to Part 2 and with a “*coherent set of policies designed to achieve clear environmental outcomes*”, consent applications should be assessed with regard to the provisions of the plan and may leave little room for Part 2 to influence the outcome.²¹ Where there is doubt over the preparation of a plan appropriately reflecting the provisions of Part 2 it will be “*required to give emphasis to Part 2*”.²²
- 48 In this case, the relevant planning documents have been prepared in accordance with Part 2 of the RMA and consideration against those relevant plans is therefore the primary framework for assessing the Application.
- 49 Ms Whyte concludes the proposal is consistent with Part 2 of the RMA – again, to the extent Part 2 is relevant here.²³ Put another way, the evidence of Ms Whyte is that the same outcome is reached whether you have recourse to Part 2 or not.
- 50 With regard to section 5, the Officer’s Report notes that without understanding the effects of the New Zealand falcon and noise effects on horses, a conclusion on Part 2 matters is unable to be

¹⁹ Evidence of Jane Whyte at paragraphs 10 and 11.

²⁰ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [82].

²¹ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [82].

²² *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [75].

²³ Evidence Jane Whyte at paragraphs 125 and 126, referring to the assessment against Part 2 matters in paragraphs 169 to 176 of the AEE.

reached.²⁴ As outlined earlier in my submissions, these uncertainties have now been addressed in the evidence of Dr Mandy Tocher and Nathan Broerse.

EVIDENCE AND WITNESSES TO BE PRESENTED

- 51 HSTPS proposed order of witnesses is:
- 51.1 Graeme Abbot (company representative);
 - 51.2 Robert Greenaway (recreation);
 - 51.3 Tony Milne (landscape and visual amenity);
 - 51.4 Simon de Verteuil (traffic);
 - 51.5 Dr Jeremy Trevathan (noise);
 - 51.6 Nathan Broerse (veterinary);
 - 51.7 Dr Mandy Tocher (ecology); and
 - 51.8 Jane Whyte (planning).
- 52 Each witness will now provide a brief summary of their evidence, will comment on issues raised in submitter's subsequent evidence and will answer any questions the Commissioner might have.

Dated: 7 October 2021

Jo Appleyard

Counsel for Hanmer Springs Thermal Springs & Spa

²⁴ Section 42A Officer's Report prepared by Kelsey Bewley, dated 16 September 2021 at paragraph 243.