BEFORE THE INDEPENDENT HEARING PANEL

IN THE MATTER OF the Resource Management Act 1991

AND of the proposed Timaru District Plan

Legal Submissions

on behalf of the Director-General of Conservation *Tumuaki Ahurei*

Hearing B: B1 Rural Zones

Submitter No. 166 Further Submitter No.166

Dated: 12 July 2024

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MAY IT PLEASE THE HEARING PANEL

The following matters are submitted on behalf of the Director-General of Conservation, Tumaki Ahurei:

Introduction

1. The Director-General of Conservation (the **Director-General**) is the administrative head of the Department of Conservation and has all the powers necessary and expedient to enable the Department to perform its functions, as set out in s 6 of the Conservation Act 1987.[1] The Director-General has the specific statutory function of advocating for the conservation of natural and historic resources.[2]

2. Accordingly, the Director-General has a legal interest in ensuring that the proposed Timaru District Plan (**PTDP**) promotes sustainable management by protecting and maintaining ecosystems and indigenous biodiversity in the Timaru District.

3. These legal submissions relate to part B1 of Hearing B as relevant to the Director-General's submission and further submission. The topics are:

   (a) Proposed gravel extraction overlay; and
   (b) Blandswood rezoning request.

Legal framework

4. The Director-General's legal submissions presented for Hearing A submitted that the Panel's decisions in relation to the Director-General's interests in the PTDP should be underpinned by eleven core legal premises.[3] See Appendix A for an extract from the Director-General's earlier legal submissions. This framework remains directly relevant to the matters covered in Hearing B.

Proposed gravel extraction overlay

5. The Officer's section 42A report sets out the relevant submission points (the **relevant submission points**) which requested that the PTDP include a gravel extraction overlay.

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[1] Conservation Act 1987, ss 52 , 53.
[2] Conservation Act 1987, s 6(b).
[3] Legal submissions on behalf of the Director-General of Conservation, Hearing A, dated 30 April 2024, paragraph 4.

6. Each of the relevant submission points is the same. The submissions provide:

> *It is submitted that the proposed plan should introduce a gravel extraction overlay across land where **existing land-based gravel extraction** and clean fill deposition occurs. Such a layer should recognise and provide for this activity as well as protecting the sites from encroachment of sensitive activities in a way that the proposed plan has recognised and protected primary production. Land based gravel extraction is extremely important to continuity of supply and consistency of gravel quality.*

7. The Director-General opposed the relevant submission points in her further submission[4] on the following grounds:

> *The D-G does not support the creation of a new Gravel Extraction Overlay and consequential amendments. This is not considered necessary with other provisions of the plan managing gravel extraction. The D-G would be concerned if gravel extraction was permitted in areas in or near to SNAs or other sensitive areas such as habitats of threatened or at risk species. Gravel extraction in the beds of lakes and rivers will also require Regional Council approval.*

8. The Director-General filed evidence to support the further submission of the Director-General in relation to this issue from:

   (i) Dr Clement Lagrue (ecology – gravel extraction)
   (ii) Ms Elizabeth Williams (planning)

9. Evidence has now been filed by Mr Nathan Hole on behalf of the relevant submitters (Rooney Group Limited and Others). The evidence confirms that the submitters no longer seek an additional gravel extraction overlay.[5]

10. This clarification resolves the issue identified by the Director-General in its further submission, and accordingly the Director-General has advised that it will not be presenting evidence in relation to this issue.

Blandswood rezoning request

11. In the further submission filed on behalf of the Director-General,[6] the Director-General opposed the request to rezone the Blandswood residential area (the **Blandswood Area**) from Open Space Zone – Holiday Hut Precinct to Settlement Zone.

[4] Further submission of the Director-General of Conservation, FS166.30, 166.31, 166.32.
[5] Evidence of Nathan Hole, paragraph 10.
[6] Further submission of the Director-General of Conservation, FS166.33, 166.34, 166.35.

12. The following witnesses will appear and give evidence to support the further submission of the Director-General in relation to this issue:

    (i) Mr Richard Clayton (ecology);
    (ii) Ms Elizabeth Williams (planning)

13. As a preliminary point, the Director-General acknowledges the Council's Memorandum of Counsel and the statement of evidence of the s42A Officer (both dated 1 July 2024) filed in response to the Panel's Minute 10. The Director-General agrees with the legal position outlined in the memorandum, as to the scope of permissible amendments to address submissions.[7] The Director-General supports the recommendation of the 42A Officer that any amendments to the PTDP arising from the submissions and further submissions that relate to the zoning of the Blandswood Area should be further considered at a subsequent hearing (either the Hearing D Open Space Zone hearing or other hearing).[8] The Director-General has therefore prepared its evidence for this hearing on the basis that it will present further evidence on this issue at Hearing D (or other hearing).

14. The Director-General notes in particular that Mr Clayton has prepared his evidence without having undertaken a recent site visit of the area. This is due in part to the indication in the original section 42A report that the re-zoning request would be heard in Hearing D.[9] However in the event that the Panel considers it would be of assistance for Mr Clayton to undertake a site visit and provide further evidence to the Panel in relation to his evidence for Hearing B, this can be arranged and further evidence filed following the hearing.

Re-zoning to Settlement Zone is inappropriate in light of ecological values of Peel Forest and Blandswood area

15. The key aspect of the evidence presented on behalf of the Director-General is to emphasise the ecological importance of the Peel Forest Scenic Reserve (**Peel Forest**) and forested areas within the Blandswood Area.

[7] Memorandum of Counsel on behalf of Timaru District Council, 1 July 2024, paragraphs 9 – 13.
[8] Statement of evidence of Andrew Maclennan, 1 July 2024, paragraph 20.
[9] Section 42A report, paragraph 13.3.17.

16. Mr Clayton's evidence describes the ecological importance of these areas. In terms of Peel Forest itself, Mr Clayton's evidence is that it has regional and national ecological significance, scoring highly for all of the ecological significance criteria set out in the National Policy Statement for Indigenous Biodiversity (NPSIB) and the Canterbury Regional Policy Statement.[10] Mr Clayton's evidence is that the forested area of the Blandswood Area is also ecologically important for several reasons, including that: *'It functions as a critical, almost continuous ecological link between the surrounding parts of the Peel Forest…."*.[11] Mr Clayton's desktop analysis assesses that the area would score highly on at least three of the five ecological significance criteria (representativeness, naturalness, diversity/pattern) and likely scores highly in each of the other criteria.[12]

17. In light of Mr Clayton's evidence, Ms Williams in her planning evidence has reviewed the provisions of the Open Space Zone - Holiday Hut Precinct (as proposed in the PTDP) and compared those provisions to the Settlement Zone (as requested by submitters). Ms Williams' opinion is that: "*The zone objectives and policies for the Holiday Hut Precinct give recognition to the high natural and amenity values present in Blandswood"*,[13] and that: "…*the provisions within the Settlement Zone provide for a wider range of permitted activities and development that would be inappropriate for the Blandswood Area".*[14] Ms Williams points in particular to Policy PREC4-P1 which sets out that activities are only allowed where, amongst other criteria: *'…adverse effects on the natural environment are avoided",*[15] and notes that there is no comparable reference to the natural environment values of the Blandswood area or its setting in the objectives and policies for the Settlement Zone. Ms Williams' conclusions align with the section 42A Officer's recommendations.[16]

18. In reliance on this evidence, the Director-General considers that rezoning the Blandswood area as Settlement Zone would be inconsistent with the legal and policy framework set out in Appendix A for ensuring the maintenance and protection of indigenous biodiversity within the Timaru District. In particular, the Director-General emphasises that Peel Forest (and likely the Blandswood Area) meet the criteria for significant indigenous vegetation meaning that the PTDP should recognise and provide

[10] Evidence of Richard Clayton, paragraphs 20 – 31.
[11] Ibid. paragraph 34(b).
[12] Ibid. paragraph 34(c).
[13] Evidence of Elizabeth Williams, paragraph 25.
[14] Ibid. paragraph 26.
[15] Ibid, at paragraph 25.
[16] Section 42A report, paragraph 13.3.16.

for the protection of these values.[17] The Director-General considers that the proposed zoning in the PTDP of Open Space Zone - Holiday Hut Precinct is therefore much more appropriate than the requested Settlement Zone.

Bespoke zoning for Blandswood Area may be appropriate

19. The Director-General's further submission sought that the PTDP retained the notified Open Hut Precinct Zoning: *"…or a new specific zoning which appropriately protects the ecological values and indigenous biodiversity of the Blandswood area and surrounding area."*[18]

20. While, therefore, the Director-General opposes the request for the Blandswood Area to be rezoned as Settlement Zone, the Director-General acknowledges that a new bespoke zoning may be an appropriate approach. Any specific zoning would need to continue to provide the necessary protection for the ecological values present. This may require some further 'tightening' of the applicable settings.[19] As noted above at paragraph 13, the Director-General supports these issues being fully considered at a subsequent hearing at which the Director-General would provide further evidence.

Alice McCubbin-Howell
Counsel / Rōia for the Director-General

[17] Section 6(c) RMA.
[18] Further submission of the Director-General of Conservation, FS166.33, 166.34, 166.35.
[19] See evidence of Elizabeth Williams, paragraph 29, regarding the need for a greater setback from site boundaries that adjoin Natural Open Space Zones.

Appendix A: Paragraph 4, legal submissions on behalf of the Director-General of Conservation, Hearing A, dated 30 April 2024

Legal framework

4. The Director-General submits that the Panel's decisions should be underpinned by eleven core legal premises:

   (i) The Resource Management Act 1991 ('RMA') requires that decision-makers 'shall recognise and provide' for 'the ***protection*** of areas of significant indigenous vegetation and significant habitats of indigenous fauna' in order to achieve sustainable management (s 6(c) RMA).

   (ii) The protection of indigenous species from adverse effects is a s 5(2) RMA matter.[20]

   (iii) The legal framework protects ecosystems and indigenous biodiversity for their *intrinsic* value, i.e., not (solely) for any practical utility to humans.[21]

   (iv) The District Council has the function of establishing, implementing, and reviewing objectives, policies, and methods to:

      a. achieve integrated management of the effects of the use, development, or ***protection of land and associated natural and physical resources*** of the district (and natural resources includes all forms of plants and animals);[22]

      b. the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of— **…** the ***maintenance of indigenous biological diversity***.[23]

   (v) Within the current legal framework, District Plans are a critical tool for protecting threatened indigenous species and ecosystems.[24]

   (vi) The PTDP must give effect to national policy statements,[25] and the Director-General highlights the importance of the following:

      a. the *New Zealand Coastal Policy Statement 2010* ('NZCPS') – and the 'avoid' policies, in particular (i.e. policies 11,13 and 15) and

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[20] Section 2 RMA, indigenous species are part of 'natural and physical resources'; see e.g., *Pierau v Auckland Council* [2017] NZEnvC 90, [251] and *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81, [163].

[21] RMA s 7(d); *Te Mana o Te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020* (Department of Conservation, August 2020) p 43, core principles include '**Intrinsic value** – Species and ecosystems are valuable in their own right and have their own right to exist and be healthy and thriving now and in the future, regardless of human use and appreciation'.

[22] RMA, ss 2 and 31(1)(a).

[23] RMA, s 31(1)(b).

[24] *Te Mana o Te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020* (Department of Conservation, August 2020), pp 67, 69.

[25] RMA, s 75(3).

b. the *National Policy for Indigenous Biodiversity 2023* ('NPSIB') - and the objective to 'maintain indigenous biodiversity' so that 'there is a least no overall loss' by (amongst other things) 'protecting and restoring indigenous biodiversity'. 'Maintaining Indigenous Biodiversity' is defined in extensive terms in the NPSIB.[26]

(vii) The PTDP must also give effect to the Canterbury Regional Policy,[27] that contains a comprehensive cascade of policies (9.2.3, 9.3.1, 9.3.2), including the foundational policy 9.2.1 –

> *Halting the decline of Canterbury's ecosystems and indigenous biodiversity* The decline in the quality and quantity of Canterbury's ecosystems and indigenous biodiversity is halted and their life-supporting capacity and mauri safeguarded. [Note that halt means 'bring or come to an abrupt stop' (dictionary definition)].

(viii) The Panel may also have regard to *Te Mana o Te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020,* a national strategy with Ministerial approval, created to fulfil New Zealand's international law obligations under Article 6 of the Convention of Biological Diversity.[28] The Director-General submits that this Strategy is both relevant and persuasive.[29]

(ix) Accordingly, the legislative and policy framework requires the District Council to *maintain* indigenous biodiversity in general across Timaru, so that there is at least no overall loss, and to *protect* indigenous biodiversity where it has a level of significance warranting protection that marks it apart from the general indigenous biodiversity. Obvious examples of the later, will be where a species or ecosystem is endangered.[30]

(x) Plans can provide for greater protection of indigenous biodiversity than the NPSIB requires (cl 3.1(1), (2)) but plans cannot provide less than required by the NPSIB.

(xi) District Plan objectives are intended to be aspirational. As the Environment Court has stated, 'an objective in a planning document sets out an end state of affairs to which the drafters of the document aspire'.[31]

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[26] NPSIB, cl 1.7

[27] RMA, s 75(3).

[28] 1992 Convention on Biological Diversity 1760 UNTS 79, 31 ILM 818 (1992).

[29] RMA, s 41 and Commission of Inquiry Act 1908, s 4B(1): 'the Commission may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, whether or not it would be admissible in a Court of law'; see also *West Coast Regional Council v Friends of Shearer Swamp Inc* [2012] NZRMA 45, at [49].

[30] The core difference between 'maintain' and 'protection' is that protection requires ex ante protective action whereas maintenance can be obtained using a range of actions, including ex post facto actions. More detailed submissions will be made in the hearing for the ECO chapter.

[31] *Ngati Kahungunu Iwi Inc v Hawke's Bay RC* [2015] NZEnvC 50 at [42].