

**BEFORE INDEPENDENT HEARING COMMISSIONERS
APPOINTED BY THE HAMILTON CITY COUNCIL**

IN THE MATTER of the Resource Management Act 1991 (**Act**)
AND

IN THE MATTER of an application for subdivision and land use
consent for the Amberfield development
pursuant to the Act.

APPLICANT Weston Lea Limited

CONSENT AUTHORITY Hamilton City Council

MEMORANDUM OF COUNSEL FOR WESTON LEA LIMITED

Dated: 17 May 2019

Solicitors on Record

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MAY IT PLEASE THE COMMISSIONER HEARING PANEL:

1. This memorandum is filed by counsel for Weston Lea Limited (**Weston Lea**).
2. Counsel refers to the ecological joint witness statement dated 14 May 2019 (**JWS**). It is clear from the JWS that little or no progress was made in respect of the Panel's' direction No.5, dated 13 May 2019, that:

In respect of those matters that remain outstanding, sufficient detail is to be provided to enable the commissioners to have a clear understanding of the areas of disagreement, the extent of that disagreement, and the reasons why.

3. The JWS states in relation to Topic 3, headed "*Appropriateness of avoidance, remediation, and mitigation ...*", that:

All agree the applicant will compile all management measures currently proposed and documented that are relevant to manage adverse effects on bats ...

[and]

We need to do this before we can progress on this topic.

4. Counsel understands from Weston Lea's ecological experts that they have agreed to compile, amongst other things, the following information:
 - (a) Planting design around the reserve areas, East/West Shelter Belt, and North/South Gully;
 - (b) Urban design guidelines, including such things as streetscaping;
 - (c) Buffer corridor profiles and cross-sections; and
 - (d) Engineering earthwork designs, including existing and proposed finished levels.
5. Counsel is informed that all the information listed under paragraph [4] is available under Weston Lea's:
 - (a) Technical reports that accompanied the application for consent and assessment of environmental effects;
 - (b) Response to HCC's request for further information; and
 - (c) Evidence-in-chief (**EIC**) and evidence-in-reply (**EIR**).

6. Counsel is concerned that ecological evidence has been filed by experts for the submitters opposing Weston Lea's application in the absence of a thorough understanding of the ecological management and mitigation material provided by Weston Lea in support of its application.
7. It is acknowledged that the application is supported by a significant body of technical information which informs the ecological measures that have been proposed. That said, each of the submitters' ecological statements of evidence confirm that they have been prepared in accordance with the Environment Court's Code of Conduct for expert witnesses.
8. The doors to Weston Lea's experts have remained open to experts for the submitters at least since the time the application was notified on 1 September 2018.¹ The experts for the opposing submitters could have sought clarification from Weston Lea concerning any technical aspect of the proposal (including an overview of the proposed ecological mitigation and related technical issues) at least up until the time their evidence was filed on 23 April 2019.
9. It is incumbent on an expert who has prepared their evidence under the Code of Conduct to be familiar with the material in respect of which they purport to advance an opinion. It is not appropriate to advance opinions in the absence of familiarity with the material under consideration. This is clear, amongst other things, from the Code of Conduct's protocols for expert caucusing which state:²

Sound preparation is essential and the parties must allow adequate time for the conferencing process to be completed. Experts should also be thoroughly familiar with their material, the positions of their counterparts and any other relevant evidence. They should also know the content of the statement of agreed facts and issues resolved/unresolved (to the extent they are relevant to the issues to be discussed), and understand their role in expert conferencing. [emphasis added]

¹ Records show that Weston Lea was formally consulting with Department of Conservation on ecological matters as earlier as March 2018.

² Environment Court Practice Note, Appendix 3 – Protocol for Expert Witness Conferences - (4) Preparation for Expert Conferencing.

10. Counsel is surprised that one of the witnesses for the submitters chose to leave caucusing for a meeting at 3.30pm on 14 May, a mere hour and a half after caucusing had commenced. Any witness familiar with expert conferencing should be aware that failure to attend conferencing is at their client's risk.
11. It is acknowledged that Dr Stuart Parsons' EIR included new information. That information was prepared in order to address issues and questions that arose during the presentation of RESI's evidence on 6 and 8 May 2019.
12. Weston Lea filed Dr Parson's EIR a day and a half before it was due³ to provide the other ecological experts with some opportunity to acquaint themselves with the new information for the purposes of facilitating expert caucusing.
13. In any event, counsels' concerns pertain to the submitter ecologists' lack of familiarity with the ecological material (and related technical material) set out under Weston Lea's application, EIC, and EIR (i.e. filed on 2 May 2019). The submitters' experts should have been familiar with all the material outlined under paragraph [4] at the time they prepared their EIC.
14. The inability of the experts for the submitters to advance the simple caucusing directions contained in direction No.5, on 14 May 2019, due to an unfamiliarity with the relevant application and evidence, undermines the planning experts and Panel's ability to understand any gaps "real or perceived" that might factually exist between the evidence.
15. The JWS's request for caucusing to reconvene in the week commencing 10 June 2019 means that there will be little time for further caucusing to yield anything of use to the parties of Panel beyond what it was anticipated would be provided on 14 May. This is because the s.42A officers (Ms Cockerell and Mr Kessels) must complete their final s.42A responses by 25 June 2019.
16. It is important that adequate time is allowed, following the production of any further joint witness statement, for the s.42A reporting officers (and the applicant's planners) to determine whether any modifications should be made to the proposed conditions of consent as a result of caucusing. This will ultimately assist Commissioners to determine whether the proposed

³ The evidence exchange timetable was changed in response to a memorandum of counsel on behalf of RESI (see Direction No.3 dated 25 March 2019). In particular, the date for filing submitter evidence was extended to a date after Dr Parsons was scheduled to leave be outside New Zealand to undertake fieldwork.

conditions appropriately address the potential adverse effects of the proposal on the long-tailed bat.

17. Finally, counsel for Weston Lea acknowledges Ms Mackintosh's email for HCC, as regulatory authority, advising that she has prior hearing commitments on 8 July 2019. Ms Mackintosh will obviously wish to address HCC's s.42A response when the hearing reconvenes. Counsel for Weston Lea support HCC's request for an alternative reconvened hearing date to enable Ms Mackintosh to address her s.42A response submissions.
18. In the meantime, counsel respectfully seeks the following directions:
 - (a) Weston Lea's experts provide the submitters' ecologists with an information package by 24 May 2019 identifying and outlining:
 - i. The existing material and related technical information contained in Weston Lea's application, EIC, and EIR concerning the proposed management of the potential adverse ecological effects of the proposal on bats; and
 - ii. The newer information contained in Dr Parson's EIR, which provides further information concerning the implementation of certain mitigation measures addressed in the material described under paragraph 18(a)i.;
 - (b) The ecological experts reconvene expert conferencing in the week commencing 31 May 2019;
 - (c) A joint witness statement should be produced at end of each day set down for caucusing sequentially addressing the matters listed under paragraph 18(f);
 - (d) That the submitters' ecologists comply with the Code of Conduct's expert conferencing protocol requiring them to be "*thoroughly familiar with their material, the positions of their counterparts and any other relevant evidence*" prior to further expert conferencing taking place;
 - (e) That the submitters' ecologists identify in writing "will say statements" prior to caucusing any views they have concerning the limitations of each of the mitigation measures proposed by the applicant and whether there is any merit in any of the mitigation measures proposed;
 - (f) All "will say statements" are to be attached to the joint witness statement(s) and provided the hearing administrator and parties at the conclusion of caucusing;

- (g) The joint witness statement(s) referred to under paragraph 18(f) shall address the areas of agreement and disagreement between the ecological experts, with sufficient detail and explanation to enable the planning experts and Panel to understand the reasons as to why any differences between the experts exist, concerning:
- i. the scale and duration of the potential effects described under Topic 3 (i.e. effects Nos. 1 to 8);
 - ii. any potential alternative mitigation that might address the effects of the proposed development (other than those measures already proposed by the applicant);
 - iii. The potential risk(s) that each of the applicant's proposed mitigation measures will not work including:
 - the nature, probability, and scale of effect of any potential risk; and
 - the measures that should be taken (incl. specific research and/or data) to manage any potential risk;
 - iv. The effects of the counterfactual scenario, where the proposed ecological measures are not implemented under the proposal and the land remains used for the present range of rural activities (i.e. the effect of doing nothing); and
- (h) The reconvened hearing date is amended from 8 July 2019 to sometime later in that week.

Dated this 17th day of May 2019



Robert Makgill / Kate Woods
Counsel for Weston Lea Limited