

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

**AND** of the Resource Management Act 1991 (the RMA) and an application to the Hamilton City Council by David and Barbara Yzendoorn to establish a duplex dwelling in the Natural Open Space Zone and Waikato Riverbank and Gully Hazard Area overlays and Significant Natural Area at 29 Petersburg Drive, Flagstaff, Hamilton.

## **INTRODUCTION**

---

### ***DEFINITIONS***

In this Decision I use the following terms:

Applicant	David and Barbara Yzendoorn
Council	Hamilton City Council
District Plan/ODP	Operative Hamilton District Plan
Gateway tests	RMA s104D(1)(a) and s104D(1)(b)
NOSZ	Natural Open Space Zone
NPS-IB	National Policy Statement for Indigenous Biodiversity 2023
RMA	Resource Management Act 1991 and its amendments
Site	29 Petersburg Drive, Flagstaff, Hamilton

## **THE APPLICATION**

---

1. Resource consent has been sought to erect a duplex dwelling on the 1716m<sup>2</sup> site at 29 Petersburg Drive, Flagstaff. The site is zoned Natural Open Space. Whilst there are currently no permanent buildings or structures on the land, at the time of my site visit there was a shipping container on the land.

2. The application, as revised, seeks land use consent to establish a two-storey duplex dwelling, which will constitute two residential units. No concurrent subdivision has been applied for as part of the proposal. The duplex dwelling:
  - Exceeds the permitted 5m height, having a maximum height of 8.319m
  - Exceeds the 50m<sup>2</sup> maximum site coverage; having a building coverage of 189m<sup>2</sup>
  - A large portion of the dwelling is located within the gully hazard area/minimum 6m building setback of the gully hazard area
  - Includes the removal of trees and other vegetation in excess of 100m<sup>2</sup>
  - A large proportion of the building falls within the Significant Natural Area (SNA) established by Proposed Plan Change 9 (which in relation to the SNA, the rules of which have immediate effect).

## **APPOINTMENT AND PROCESS**

---

3. I have been appointed by the Council as an Independent Commissioner in terms of s34A of the Resource Management Act 1991, to hear the applicant, submitters, and the Council's reporting officer and to determine the application.
4. I was initially appointed to Chair a hearing to be held in May 2022. However, the date of the hearing has been delayed on a number of occasions at the request of the applicant, to enable them to respond to matters raised by the Council.
5. The information available to me prior to the hearing included the application material, assessment of environmental effects (AEE) report, the submissions, the s42A report and Supplementary s42A report, and expert technical evidence on behalf of the applicant.
6. The Hearing was held on the 16<sup>th</sup> November 2023.
7. I issued seven Directions and one Minute; those relevant to the delayed hearing held on the 16 November 2023 are:
  - Direction 4 - 18<sup>th</sup> July 2023, regarding the postponement of the hearing from 9<sup>th</sup> August 2023.
  - Direction 5 - 31<sup>st</sup> July 2023 confirming a new date for the hearing of 27 September 2023, and dates for the exchange of evidence.
  - Direction 6 - 15<sup>th</sup> September 2023, rejecting a request from the applicant made under s37, that the hearing be further postponed and amending the dates for the exchange of evidence for the 27 September 2023 hearing.
  - Direction 7 – 22<sup>nd</sup> September 2023, responding to a request by the applicant that the application be suspended under s91, and after the Council confirmed that such a suspension was not available due to the time delays which had already occurred, that the processing of the application

be extended under s37 and s37A, and setting a new date for the hearing of 16 November 2023 along with a timetable for the provision of evidence.

- Minute 1 – confirmed that having received the Applicant’s written closing submissions, reading these, and considered whether I had sufficient information to make a decision, I closed the hearing on the 8<sup>th</sup> December 2023.

## **THE SITE & SURROUNDING ENVIRONMENT**

---

8. The site is located on the west side of Petersburg Drive, approximately 45m south of the intersection with Cumberland Drive. Its east boundary is with Petersburg Drive. It is broadly rectangular in shape, with its long boundaries to the east and west. Whilst in private ownership, the site has the appearance of being part of the reserve area which adjoins its north, west and south sides.
9. The site was originally formed as part of a residential subdivision granted in 2005. The land was at that time zoned Residential with an Environmental Protection Overlay. As such a single dwelling could have been erected as a permitted activity (subject to compliance with zone and overlay standards).
10. The site was rezoned to Natural Open Space, with the Waikato Riverbank and Gully Hazard Area overlay, when what is now the Operative District Plan was notified in 2012. It is clear from the evidence before me that the applicant was aware of this zoning when they purchased the site in 2017.
11. Land to the east side of Petersburg Drive and surrounding the Natural Open Space area (including the adjoining reserve) are all zoned Residential.

## **NOTIFICATION**

---

12. The application was limited notified on 20 January 2022, with the submission period closing on 18 February 2022. After the close of submissions, the applicant revised the design of the duplex building. Consequently, the application was re-notified on 22 May 2023, with the submission period closing on 16 June 2023.
13. When the application was first limited notified, four submissions were received, all in opposition to the proposal (an additional submission was received from a property owner who was not notified - this submission was not accepted by the Council). Submissions were received from:
  - William and Ngaire Botherway, 4 Everleigh Court
  - Peter Storey and Karen Rogers, 6 Everleigh Court
  - G and M Donald Family Trust, 11 Karl Michael Crescent
  - Alexander McClennan, 13 Karl Michael Crescent

14. When the application was notified for the second time, in May 2023, submissions were received from:
- Gary & Paula Whiteman 144 Cumberland Drive
  - Peter Storey & Karen Rogers 6 Everleigh Court Oppose
  - William & Ngaire Botherway 4 Everleigh Court
  - G&M Donald Family Trust 11 Karl Michael Crescent
15. As summarised in the s42A report<sup>1</sup>, the key matters highlighted by the submissions were:
- Duplex dwellings are not an acceptable outcome within the Natural Open Space Zone and represent a significant departure from the development outcomes anticipated within the zone.
  - The design of the building is significantly out of character with existing dwellings within the area.
  - The proposal generates a number of non-compliances with the provisions of the District Plan; notably height and site coverage.
  - Of the numerous non-compliances with the District Plan provisions, the non-compliance with height was raised by all submitters as a key area of concern due to potential visual effects.
  - The size, bulk and location of the dwellings are out of character with the area and adversely affect amenity values.
  - Ecological effect associated with the removal of trees and other vegetation.
  - The proposal fails to recognise Te Ture Whaimana o te awa o Waikato/The Vision and Strategy for the Waikato River and the Waikato-Tainui Environmental Plan.
  - Potential traffic related effects in relation to the topography of the road.

## ACTIVITY STATUS

---

16. The s42A report sets<sup>2</sup> out that:

*33. The Section 95A report, dated 7 July 2021, records that the proposal to establish a duplex dwelling in the Natural Open Space Zone is a Non-complying Activity pursuant to Rule 15.3 II), which classified any activity not listed in the activity status table as Non-complying. On 23 July 2021, Rule 15.3. II) was deleted from the Operative District Plan (District Plan) under clause 20a of Schedule 1 to the RMA.*

---

<sup>1</sup> s42A report, paragraph 42

<sup>2</sup> s42A report, paragraphs 33 and 34

*34. This subsequent change to the District Plan does not alter the Non-complying Activity status of the proposal. Section 1.1.8 sets out the process for determining activity status, which is via the flow chart in Figure 1.1.8a. The answer to the question in Box A, 'Is an Activity Status identified in the applicable zone chapter?', is no. Moving then to Box C, the answer to the question 'Is an Activity Status identified in any of the following chapters?', is also no as Chapter 15 Open Space Zones is not listed. The outcome is that the proposal retains **Non-complying Activity** status under Section 1.1.8.1.*

17. The s42A report further confirms non-compliances with key zone provisions.<sup>3</sup>
18. Plan Change 9 to the ODP was notified by the Council on 22<sup>nd</sup> July 2022, with submissions closing on the 2<sup>nd</sup> September 2022. The plan change focuses on historic heritage and the natural environment. The rules of this plan change have immediate legal effect (excluding the provisions for notable trees) in accordance with section 86B(3) of the RMA. PC9 is part-heard, with further hearings to continue into 2024.
19. The site is located within a Significant Natural Area (SNA) identified within PC9; the 'Katapaki Gully – Downstream'. The Applicant has submitted in opposition to PC9 and the establishment of the SNA on the subject site. The PC9 s42A report recommended the SNA on the site be retained, but noted that there was an area around the culvert that is required by covenant to be kept clear of vegetation, so suggested the small covenanted area be excluded. The applicant's submission has been heard by an Independent Hearings Panel. A decision on PC9 relating to the SNA is not expected until later in 2024.

## **PRELIMINARY MATTERS**

---

20. Mr Gibbons (legal counsel for the applicant) and a number of the applicant's witnesses have suggested that the current zoning is erroneous, I accept Mr Muldowney's submission<sup>4</sup> that it is beyond the scope of this application for me to look to remedy a previous zoning error (if the existing zoning was such), and that any decision should be made on the basis of the ODP provisions as I see them today. I note that Mr Donald, who whilst appearing as a submitter has relevant qualifications and experience, expressed a similar view at the hearing.

---

<sup>3</sup> s42A report, paragraph 35

<sup>4</sup> Provided verbally at the hearing.

21. In his closing submissions Mr Gibbons questioned the role of Mr Muldowney<sup>5</sup>. I confirm that throughout my involvement with the application and during the hearing, I have proceeded on the basis that Mr Muldowney is acting as Counsel for HCC, and that my reliance on his submission or advice is a matter for my discretion.
22. In both his opening and closing submissions, Mr Gibbons indicated that he considered the s42A report to be advocacy based and not balanced<sup>6</sup>. I do not agree with this view, and consider that the s42A report, and expert evidence provided on behalf of the Council, was balanced. All witnesses, for both the Council and Applicant, confirmed that they were complying with the Environment Court code of conduct 2023, did not advocate for the Council or Applicant and impartially assisted me. Ultimately, what weight I place on individual assessments and opinions is a matter for my discretion.

## STATUTORY PROVISIONS CONSIDERED

---

23. As the proposal is a Non-Complying Activity consent can only be granted if the application passes one of the two 'gateway tests' under Section 104D of the RMA:

***104D: Particular restrictions for non-complying activities***

*(1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—*

*(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or*

*(b) the application is for an activity that will not be contrary to the objectives and policies of—*

*(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or*

*(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or*

*(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity*

24. It is usual practice that the s104D 'gateway tests' be considered before any assessment under s104(1). Should the application pass through either of the 'gateway tests', it is a requirement to consider all relevant matters as outlined by s104 of the RMA as follows:

---

<sup>5</sup> Applicant's reply, paragraph 19.

<sup>6</sup> For example, applicants closing submissions, paragraph 53

### **Section 104: Consideration of applications**

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2 and section 77M, have regard to—

- (a) any actual and potential effects on the environment of allowing the activity; and
- (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and
- (b) any relevant provisions of—
  - (i) a national environmental standard:
  - (ii) other regulations:
  - (iii) a national policy statement:
  - (iv) a New Zealand coastal policy statement:
  - (v) a regional policy statement or proposed regional policy statement: (vi) a plan or proposed plan; and
- (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

25. As a non-complying activity application, it may either be granted or refused consent, and if granted, conditions may be imposed under s108 of the RMA<sup>7</sup>.

### **PRINCIPAL MATTERS IN CONTENTION**

---

26. Having considered the application, submissions and evidence provided, I consider that the principal issues of contention are:
- Whether the proposal passes one of the 'gateway tests'.
  - If the proposal does pass one of the gateway tests, the character and amenity and ecological effects of the proposal.

### **EVIDENCE AND SUBMISSIONS**

---

27. It is not intended to record matters addressed in the legal submissions, evidence (expert or from submitters) or in the s42A report in this section, only to record those who appeared at the hearing and from who legal opinion and evidence was received (including evidence in chief and rebuttal evidence). All written evidence and written legal submissions are available on the Council's website. Relevant parts of the s42A report, evidence and submissions are referred to in the Main Findings section of this decision, where it forms a component of my findings in deciding the application.

---

<sup>7</sup> s104B RMA

### **Applicant**

- Mr Gibbons - opening and closing legal submissions
- Mr Bilimoria - planning
- Mr Bydder - architecture
- Mr Hogan – landscape and visual effects
- Ms Andrews - ecology
- Mr Lester – planning
- Mr Yzendoorn - applicant
- Mrs Yzendoorn – applicant

### **Submitters**

- Mr Donald (on behalf of G and M Donald Family Trust), 11 Karl Michael Crescent
- Mr Storey and Ms Rogers, 6 Everleigh Court
- Alex McClennan, 13 Karl Michael Crescent

### **Council**

- Mr Muldowney – legal
- Mr Moran – reporting planner
- Mr Foster – urban design
- Ms Davis – landscape and visual effects
- Ms Parsons – traffic
- Mr Markham - ecology

## **MAIN FINDINGS – WHETHER THE PROPOSAL PASSES ONE OF THE S104D ‘GATEWAY TESTS’**

---

### ***S104D(1)(a) and whether the adverse effects of the activity on the environment will be minor***

28. Both Mr Billimoria and Mr Moran provided an assessment of the effects of the activity, with each of these informed by their experts.
29. Mr Billimoria’s assessment utilised ODP assessment criteria as a means to consider the effects of the development; 1.3.3(A3) of the ODP confirms this as an appropriate method. However, he notes that:

*‘11.9 In assessing the degree of adverse effects for s104D, reliance is placed on the broad assessment and conclusion for the s95A adverse effects assessment under*



*the respective planning frameworks. This includes adoption of the conclusion for the relevant “permitted baseline”, applied in the context of s104(2).’<sup>8</sup>*

30. I have some concerns regarding this assessment:
  - a. The assessment has a significant focus on the residential character of the wider area, to the exclusion of the consideration of the nature and character of the site itself and the land to the immediate north, west and south.
  - b. S104D(1) states that the ‘gateway tests’ are carried out ‘*Despite any decision made for the purpose of notification in relation to adverse effects....*’, as Mr Billimoria’s assessment is based on his s95A assessment it is not independent of that assessment.
31. In view of the above, I do not consider that I can rely upon the methodology that Mr Billimoria has used to for his s104(1)(a) assessment, and for that reason I cannot adopt his assessment.
32. Mr Moran’s assessment has been prepared independently of any other effects assessment. He considered the permitted activities enabled in the NOSZ but concluded that those activities are sufficiently distinct from the proposed residential duplex to exercise his discretion that the permitted baseline not be used in his assessment of the effects of the proposal<sup>9</sup>. I accept that position. Mr Moran concludes that traffic<sup>10</sup> and stormwater<sup>11</sup> effects are no more than minor, and that the development can be carried out without causing any natural hazard risk<sup>12</sup>.
33. I note that Mr McClennan raised concerns regarding traffic and pedestrian safety, and note that Ms Parsons suggested in response that conditions could be added to the consent if it is granted to address some of the effects of parking as raised by Mr McClennan<sup>13</sup>. Other than this, there was no expert evidence before me which contested these matters, I therefore accept Mr Moran’s view on these, and consider that the remaining environmental effects to be considered are:
  - a. Character and amenity
  - b. Ecological

---

<sup>8</sup> Evidence of Mr Billimoria, paragraph 11.9

<sup>9</sup> s42A report, paragraph 58

<sup>10</sup> s42A report, paragraph 95

<sup>11</sup> s42A report, paragraph 96

<sup>12</sup> s42A report, paragraph 90

<sup>13</sup> As noted by Ms Parsons at the hearing.

34. These are considered in turn below.

***Character and amenity***

35. In relation to character and amenity, Mr Moran states:

*61. In considering the amenity and character effects, I am guided by the relevant Open Space Zone objectives and policies which seek to minimise the adverse amenity effects on the surrounding environment from buildings/structures and activities. Such effects include visual intrusion, loss of sunlight and daylight, noise, glare, lighting and traffic. The scale of built development within the Natural Open Space Zone is further intended to be limited to be consistent with and contribute to the conservation and restoration of natural character values of the zone.<sup>14</sup>*

36. He confirms that in his view the key amenity effects associated with the proposal are visual effects related to the size, location and bulk of the building, rather than the actual use of the site for residential purposes.<sup>15</sup> Noting that Mr Foster has not raised concerns regarding the urban design effects of the proposal<sup>16</sup>, in the Addendum s42A Mr Moran considers the differences between Urban Design and Landscape and Visual Assessments, pulling upon Mr Foster’s supplementary evidence where Mr Foster<sup>17</sup> states:

*...the Urban Design Assessment is based on urban outcomes and urban design considerations of the application in its context. The LVA deals with the landscape and visual effects of the proposal on the receiving environment including the visual effects and views from the surrounding properties and effects on natural character.<sup>18</sup>*

37. Whilst there can often be overlap between these two disciplines, and I note that Mr Gibbons believes this to be the case in this instance<sup>19</sup>, I consider that as separate urban design and landscape and visual effects assessments are provided on behalf of the Council, I accept this distinction. Given Mr Foster’s acceptance of the amended proposal, I therefore only consider landscape and visual matters.

---

<sup>14</sup> s42A report, paragraph 61

<sup>15</sup> s42A report paragraph 64

<sup>16</sup> s42A report, paragraph 66, and s42A report Appendix A – urban design assessment

<sup>17</sup> Additional Evidence, Urban Design, Mr Foster, 31 October 2023

<sup>18</sup> Additional Evidence, Urban Design, Mr Foster, paragraph 6

<sup>19</sup> Applicants reply, paragraph 29

38. Mr Hogan provides landscape and visual evidence on behalf of the applicant. Whilst Mr Hogan does provide a detailed description of the site and local area, he completes his description of the site and immediate surrounds with:

*'In general, the local area presents a comfortable established residential setting in which the residents benefit from the agreeable combination of landform, relative spaciousness and quality built development, juxtaposed against the natural vegetated swathe of the Te Awa O Katapaki Stream Gully'.<sup>20</sup>*

39. I note that Ms Davis has concerns regarding the landscape descriptions provided by Mr Hogan, in so much as they appeared overly focused on the constructed suburban environment<sup>21</sup>, that the site is of a different landform and nature than it's suburban environment and has an associated higher level of landscape sensitivity.<sup>22</sup> I accept these points.
40. Mr Hogan confirms that the main potential viewing audience will be road users and pedestrians in the local area; and local residents.<sup>23</sup> He provides three representative viewpoint locations.
41. At the hearing Ms Davis confirmed that she maintained her view that cross sections would be helpful to ground truth the context of the development, its relationship to neighbouring situations, and the expected scale of the planting. She also confirmed that additional perspectives would have been useful. Given the varied visual information provided by Mr Bydder, Cadabra and Mr Hogan (LA4)<sup>24</sup>, I agree with Ms Davis. Whilst I note that Mr Hogan indicates that that the viewpoints selected provide a suitable range of views for the audiences who may be affected by the proposal<sup>25</sup>, I share Ms Davis' and Mr Donald's concerns regarding the representativeness of the three selected viewpoints, in particular that:
- a. Viewpoint 1 – whilst this is representative of the view experienced by road users, it is from a location where there is no pedestrian footpath and is lower than the dwellings in Everleigh Court.
  - b. Viewpoint 2 - would only be experienced by the occupiers of eleven dwellings in Trent Lane rather than the larger number of road users, pedestrians and local

---

<sup>20</sup> Evidence of Mr Hogan, paragraph 4.11

<sup>21</sup> Supplementary evidence of Ms Davis, paragraph 3

<sup>22</sup> Supplementary evidence of Ms Davis, paragraph 10

<sup>23</sup> Evidence of Mr Hogan, paragraph 7.12

<sup>24</sup> Supplementary evidence of Ms Davis, paragraph 17(c)

<sup>25</sup> Evidence of Mr Hogan, paragraph 9.3

residents in the local area who would pass by a location to the south of the site in Petersburg Drive (such as at the intersection of Trent Lane with Petersburg Drive).

- c. Viewpoint 3– whilst taken from the rear of 13 Karl Michael Crescent, it is approximately 5m below the house and 13m to front of the house.
42. I note Mr Hogan’s responses to the matters raised by Mr Donald, and that the dwelling has been designed to ‘fit’ with the site, and that its profile responds to the sites contour<sup>26</sup>, and his conclusion that the likely landscape and visual effects of the proposed development would be low to very low within a relatively short period, and that the development would become suitably integrated into the setting<sup>27</sup>.
43. However, given my concerns above regarding the focus given to the urban character of the surrounding land rather than to the characteristics of the site itself and its immediate setting, and my concerns regarding the representativeness of the viewpoints, I accept Ms Davis’ stated opinion that the site’s location adjacent to a vegetated, incised gully is not a location that will readily absorb a built form of approximately twice the permitted height and footprint, or a marked volume of earthworks on site, and that the proposal would undermine the landscape values imbedded in the site’s landscape attributes.<sup>28</sup>
44. In view of this I accept Mr Moran’s view, confirmed at the hearing, that the character and amenity effects of the proposal would be greater than minor.

### **Ecological**

45. Ms Andrews, on behalf of the applicant, opined that:

*‘19. The planted indigenous vegetation is a modified, early successional stage habitat with canopy gaps and frequent pest plants. However, it is considered of moderate ecological value on the basis that it provides buffering to the stream, potential habitat for indigenous fauna, and is part of an ecological corridor.’*

*‘25. The planted indigenous shrubland meets criteria 3 of the SNA criteria on the basis that it likely (although not confirmed) provides habitat for At Risk lizards and Threatened bats (foraging habitat only), and criteria 11 in the context of the wider landscape as it is part of an important ecological corridor. The network of riparian habitats that the site is part of acts as a flight corridor for indigenous bats, and buffers the Te Awa O Katapaki Stream, which discharges into the Waikato River.’*

---

<sup>26</sup> Rebuttal evidence of Mr Hogan, paragraph 2.1

<sup>27</sup> Evidence of Mr Hogan, paragraph 10.4

<sup>28</sup> Supplementary evidence of Ms Davis, paragraphs 18 and 19

*'27. While a full assessment of the planted indigenous scrub against the NPS-IB criteria for identifying SNA (Appendix 1 of the NPS-IB) has not been provided, it is expected to meet multiple attributes of the criteria...'*

*'33. The applicants (David and Barbara Yzendoorn) have indicated that due to other site constraints, there is no practicable alternative location for the development at the site. As such, they have determined that there is a functional need for the proposed development location. Given this, avoidance and remediation (being the first and second effects management measures in the effects management hierarchy) for the loss of indigenous vegetation are not achievable. An offset approach has therefore been used to address the residual effects as discussed below.'*

*'34. Effects of loss of indigenous vegetation extent can be offset through c.427 m<sup>2</sup> of revegetation planting. A Biodiversity Offset Accounting Model was prepared, which concluded a positive Net Biodiversity Value (i.e., a net increase in values) (Appendix 2). In addition, infill and enrichment planting and pest control within the remaining vegetation on site aims to provide further ecological benefits.'*

*'36. Provided all the avoidance, minimisation, and offsetting measures are appropriately implemented, the overall final level of adverse effects is expected to be low (or less than minor)...'*

46. Mr Markham responded that Ms Andrews has relied upon the applicants view/statement that there is no practical alternative location for the building to consider mitigation as the only available option. He considers it usual for an ecologist to first consider avoidance and in this instance consider a reduced building platform outside of the SNA.<sup>29</sup> Further, he has concerns regarding the discount applied within Ms Andrews' Biodiversity Offset Accounting Model, and considers that 500m<sup>2</sup> of revegetation planning is required, not the 427m<sup>2</sup> of offset planting provides (in lieu of the 347m<sup>2</sup> of SNA planting lost).<sup>30</sup> I note that Mr Storey, a submitter with relevant technical knowledge raised similar concerns regarding the appropriateness of the discount. Further, Mr Markham notes that there has been no detailed assessment against the offset principles of the NPS-IB to assist with reaching a conclusion regarding the appropriateness of the offset.<sup>31</sup>

47. He states:

*'... Without minimisation measures put in place both effects are serious and long term. In my opinion the ecological value for long-tailed bats is underestimated and*

---

<sup>29</sup> Supplementary Evidence, Mr Markham, Paragraph 5

<sup>30</sup> Supplementary evidence, Mr Markham, paragraph 6

<sup>31</sup> Supplementary Evidence of Mr Markham, paragraph 7

*could be very high or high based on the treat status being Threatened: Nationally Critical which is one level from extinct. Without minimisation measure this would result in an initial level of effect of high rather than moderate.'<sup>32</sup>*

48. He opines that based on the proposed application and information supplied to date, the potential adverse ecological effects remain unacceptable<sup>33</sup> and that he remains of the opinion that:

*'...Changes in the level of ecological effect could be possible as the quantum of impact (vegetation loss) maybe underestimated which in turn has knock on changes to the quantum of offset or compensation to achieve either a net gain or positive effect to indigenous biodiversity. As the application currently stands, a determination of the overall level of ecological effect, residual ecological effects (more than minor residual adverse effects) and adequate offset or compensation actions can't be determined, and it could be unlikely that either a net gain or positive effect to indigenous biodiversity outcome will be achieved.'<sup>34</sup>*

49. Having considered the evidence of Ms Andrews and Mr Markham, I consider that Ms Andrews has placed undue weight on there being no practicable alternative location for the development at the site. The development proposed is not anticipated on the land, as the duplex dwelling is a non-complying activity within the Natural Open Space Zone and the building is a non-complying activity in the SNA. I therefore accept Mr Markham's view that it would have been more appropriate to first consider other options rather than moving direct to the consideration of mitigation. Further, given the evidence of Mr Markham, I am not convinced that the level of offset planting proposed will provide sufficient mitigation to overcome the adverse effects of the proposal.
50. I accept Mr Moran's view that *'...potential ecological effects remain unacceptable...'*<sup>35</sup>; i.e. they will be more than minor.
51. Overall, I consider that the proposal would have more than minor effects on both character and amenity and ecological matters.

---

<sup>32</sup> Supplementary evidence of Mr Markham, paragraph 8

<sup>33</sup> Supplementary evidence of Mr Markham, paragraph 12

<sup>34</sup> s42A Appendix B, Ecology, paragraph 25

<sup>35</sup> Supplementary s42A report, paragraph 38

***S104D(1)(b) and whether the application is for an activity that will not be contrary to the objectives and policies of the plan***

52. The applicant's case is that given the anomaly of the zoning of the site, attention can be given to the residential zone provisions. Both Mr Lester<sup>36</sup> and Mr Bilimoria<sup>37</sup>, on behalf of the applicant, suggests that it is appropriate to consider and to give weight to the ODP General Residential Zone provisions in determining the application. At the hearing I asked both Mr Gibbons and Mr Muldowney as to what weight I should give to the General Residential Zone objectives and policies in my consideration of S104D(1)(b).

53. Mr Gibbons responded in his reply:

*The second limb of the gateway test under s 104D(1)(b) is aimed at whether the proposal is contrary to the objectives and policies of the relevant plan and relevant proposed plan. Clearly, the Hamilton ODP has a range of objectives and policies spread across different chapters, as does PC9 as a proposed plan. That means that there is not simply one set of objectives and policies to consider under s 104D(1)(b). That is, it is not only the NOS zone objectives and policies of chapter 15 that are relevant, but – at least according to the section 42A report - also those of chapters 21 (gully) and 20 (SNA).<sup>38</sup>*

54. Mr Gibbons continues that:

*8. Moving beyond s 104D, the test under s 104 is broader: the consent authority is to have regard to “any relevant provisions of” a plan or proposed plan (s 104(1)(b)(vi). It is here, under s 104, that the residential zone provisions assume greater importance.<sup>39</sup>*

55. I note that Mr Gibbons does not go so far as to say that the Residential zone objectives and policies should be considered as part of the s104D(1)(b) test, only that *‘that there is not simply one set of objectives and policies to consider’*.

56. At the hearing, Mr Muldowney indicated that the only relevant Objectives and Policies to consider in the s104D(1)(b) test are those within the Natural Open Space Zone and any wider city-wide Objectives and Policies which have overarching relevance; those in the residential zone are not relevant. He said that it would be an error of law to go beyond this.

---

<sup>36</sup> Evidence of Mr Lester, paragraphs 41 Rebuttal of Mr Lester, paragraphs 14 to 18)

<sup>37</sup> Evidence of Mr Bilimoria, paragraph 9.32 where he considers General Residential objective 2.2.6 and its associated policies and 10.4 where he considers the 1.4.2 residential design guide

<sup>38</sup> Applicants Reply, paragraph 5

<sup>39</sup> Applicant's Reply, paragraph 8

57. I accept the submission of Mr Muldowney and do not consider the Residential Zone objectives and policies to be relevant to my consideration of the s104D(1)(b) test, I therefore confine my consideration to the Natural Open Space Zone objectives and policies and to wider city-wide objectives and policies which have relevance.
58. Mr Moran provided a s104D (1)(b) assessment against the objectives and policies he considered to be relevant to the application in section 9 of the s42A report, supplemented by the Addendum s42A report:
- i. Chapter 15 – Open Space Zones
  - ii. Chapter 25.2 – Earthworks and Vegetation Removal
  - iii. Chapter 25.13 – Three Waters
  - iv. Chapter 25.14 – Transportation
  - v. Chapter 25.15 – Urban Design
  - vi. Chapter 21 – Waikato River Corridor and Gulley System<sup>40</sup>
  - vii. Plan Change 9
59. In coming to his conclusion on these he confirmed that:

*‘...it is important that all objectives and policies are taken into account and that they are not ‘cherry picked’ to back up a certain point of view. This is where it is important to undertake a weighting exercise as the overall relevance of the various objectives and policies. For example, in very few instances is a proposal contrary (or otherwise) to every single objective and policy in a certain Plan or Proposed Plan. In this instance, there are a number of more generic objectives and policies associated with three waters infrastructure and roading, that the application is not contrary to.’<sup>41</sup>*

60. He concludes:

*‘124. However, in my view, the critical objectives and policies are those associated with the design, siting, scale and bulk of building and the impact on the natural character conservation outcomes of the Open Space Zone in Chapter 15 of the Plan and the City Wide Objective 25.2.2.1 and the associated Policy relating to Earthworks and Vegetation Removal which have a dominant influence in the context of this proposal to establish a duplex dwelling in the Natural Open Space Zone and within significant vegetation; and the key objectives and policies identified within PC 9 associated with the removal of indigenous vegetation located within a designated SNA.*

---

<sup>40</sup> Included at paragraph 70 to 74 of the Supplementary s42A report

<sup>41</sup> s42A report, paragraph 123



125. *This is where a weighting exercise is necessary, and this enables me to formulate an overall conclusion; which is as follows.*

126. *I conclude that the proposal is contrary to several objectives and policies of the Natural Open Space Zone and the City-Wide Objective 25.2.2.1 and policy 25.2.21a relating to earthworks and vegetation removal as identified above. I conclude that these objectives and policies are central to this proposal and are to be afforded greater weight in my assessment rather than the more generic objectives and policies referenced above.*

127. *Given the proposal requires the removal of an area of SNA, I have given the objectives and policies identified in PC9 an elevated weighting over and above more generic objectives and policies. This is supported by the fact that the RMA gives this s6c matter of national importance immediate legal effect with the notification of PC9. On this basis I have made an overall conclusion that the proposal is contrary to the objectives and policies of PC9.*

128. *In conclusion, based on my above assessment, I am able to draw the overriding conclusion that the proposal is contrary to the most relevant objectives and policies central to this application.*<sup>42</sup>

61. Mr Moran, confirmed in the Supplementary s42A<sup>43</sup> report that following consideration of the additional information provided by the applicant he maintained this opinion.
62. Mr Billimoria provided an assessment of objectives and policies in section 9 of his evidence. With regard to s104D(1)(b)<sup>44</sup>, he concludes that the proposal will not be contrary to the objective and policies of both the District Plans<sup>45</sup>.
63. Mr Billimoria's consideration of the Natural Open Space Zone and Open Space Zone<sup>46</sup> objectives and policies (which I agree with Mr Moran are critical policies to the s104D(1)(b) assessment) provides comment on these but does not include a clear overall conclusion.
64. Mr Billimoria does state that *'Although the proposed residential development is not consistent with the purpose of the zone being Natural Open Space, the development*

---

<sup>42</sup> s42A report, paragraphs 124 to 128

<sup>43</sup> Supplementary s42A report, paragraph 76

<sup>44</sup> Evidence of Mr Billimoria, paragraph 11.7

<sup>45</sup> I note that Mr Billimoria does not follow good practice and carry out a full assessment of the objectives and policies solely for the purpose of s104D(1)(b), but instead prepared a general consideration of the objectives and policies with his paragraph considering s104D(1)(b) being later in his evidence.

<sup>46</sup> Evidence of Mr Billimoria, paragraph 9.1 to 9.15

*is consistent with the intended use of the area.*<sup>47</sup> I consider this a moot point, and potentially circular argument, in so much as there was debate between the parties around the ‘intended use’ of the area, and whether this is the use of the land for residential use, as was originally planned when the land was subdivided in 2005, or as Natural Open Space as currently anticipated by the ODP. In respect of this matter, I return to the submission of Mr Muldowney that my decision should be made on the basis of the ODP provisions as I see them today. On that basis I take it from Mr Billimoria that the proposed residential development is not consistent with the purpose of the Natural Open Space zone.

65. Overall, I prefer the assessment provided by Mr Moran, as it is better aligned to the requirements of s104D(1)(b) and more clearly considers whether the application is for an activity that will not be contrary to the objectives and policies of the plan.
66. While I accept that a proposal does not need to be aligned with every objective or policy in the ODP, overall, I consider that the proposal is contrary to the most relevant objectives and policies. While there may be some degree of alignment with the objectives and policies of the residential zone, as set out above, these provisions are not directly relevant and should not prevail over the objectives and policies for the NOSZ, which are the more relevant provisions.
67. I therefore accept the conclusions of Mr Moran, that the proposal is contrary to the most relevant NOSZ objectives and policies which are central to this application. It therefore does not pass the second s104D ‘gateway test’.

#### ***s104D Conclusion***

68. On the basis of the above, I find that the proposal does not satisfy either of the s104D ‘gateway tests’.

## **CONCLUSIONS**

---

69. Having considered the plans and application material, the s42A reports, submissions, and all evidence before me, I find that the proposal does not satisfy the requirements of either s104D(1)(a) or s104D(1)(b). On this basis I cannot grant consent for this non-complying activity. As such it is not necessary for me to carry out an assessment under s104(1) or to further consider the requirements of Part 2 of the Act.

## **DECISION**

---

70. That pursuant to sections 104B, 104D, and 108 of the Resource Management Act 1991, the Hamilton City Council refuses consent for the application by David and

---

<sup>47</sup> Evidence of Mr Billimoria, paragraph 9.9

Barbara Yzendoorn to establish a duplex dwelling in the Natural Open Space Zone and Waikato Riverbank and Gully Hazard Area overlays and Significant Natural Area at 29 Petersburg Drive, Flagstaff, Hamilton.



**Richard Knott**  
**Commissioner (Chair)**

**Date: 18 January 2024**