IN THE ENVIRONMENT COURT **ENV-**

I MUA I TE KOOTI TAIAO
I ŌTAUTAHI ROHE

IN THE MATTER	of the Resource Management Act 1991 ("**RMA**")
AND	
IN THE MATTER	of Clause 14(1) of Schedule 1 of the RMA
BETWEEN	**WOOLWORTHS NEW ZEALAND LIMITED**
	Applicant
AND	**HAMILTON CITY COUNCIL**
	Respondent

NOTICE OF APPEAL AGAINST DECISION ON PLAN CHANGE 5 TO THE HAMILTON CITY COUNCIL OPERATIVE DISTRICT PLAN

12 APRIL 2023

Russell McVeagh

A A Arthur-Young | J H Fraser
P +64 9 367 8000
F +64 9 367 8163
PO Box 8
DX CX10085
Auckland

To: The Registrar
The Environment Court
AUCKLAND

WOOLWORTHS NEW ZEALAND LIMITED ("**Woolworths**") appeals against parts of the decision of Hamilton City Council ("**Council**") in respect of changes to Hamilton City Operative District Plan ("**District Plan**") under Plan Change 5 ("**PC5**").

DECISIONS APPEALED

1. Woolworths made a submission on PC5 on 5 November 2021. Woolworths presented evidence and legal submissions in support of its submission at the hearing on PC5 on 29 September 2022. Woolworths own a site at 410 Peacockes Road, within the area subject to PC5 ("**Woolworths' Site**").

2. Woolworths received notice of the Council's decision on PC5 on 1 March 2022 ("**Decision**").

3. The parts of the Decision being appealed are the decisions to reject or to accept only in part the matters raised in Woolworths' submission or to amend PC5 in a way that is inconsistent with the matters raised in Woolworths' submission.

4. The parts of the Decision that Woolworths appeals relate to the location and extent of the Local Centre, including the Decision to retain Medium Density Residential Zone over Woolworths' Site, and to decline to make consequential amendments to:

    (a) Appendix 1.4 – Design Guides (specifically, the Peacocke Local Centre Design Guideline);

    (b) Appendix 2 – Structure Plans (amendments to the Peacocke Structure Plan maps and the inclusion of a Peacocke Local Centre concept plan); and

    (c) Appendix 17A – Planning Maps (those zoning and feature maps that relate to the Local Centre).

5. Woolworths is not a trade competitor for the purposes of section 308D of the RMA.

REASONS FOR APPEAL

6. PC5, in its present form:

   (a) will not promote the sustainable management of the natural and physical resources in Peacocke, and is contrary to or inconsistent with Part 2 and other provisions of the RMA;

   (b) is inconsistent with other relevant planning documents;

   (c) will not meet the reasonably foreseeable needs of future generations;

   (d) will not enable the social, economic and cultural wellbeing of the community;

   (e) does not avoid, remedy or mitigate actual and potential adverse effects on the environment; and

   (f) is not the most appropriate way to achieve the objectives of the Peacocke Structure Plan in terms of section 32 of the RMA.

7. In addition to the general reasons outlined above, Woolworths appeals the Decision for the specific reasons set out below.

SPECIFIC REASONS FOR APPEAL AND RELIEF SOUGHT

8. Woolworths sought the rezoning of its Site from Medium Density Residential to Local Centre Zone.

9. Woolworths' Site covers approximately 1.7 hectares located on the south-western corner of the proposed intersection of Peacockes Road and Whatukooruru Drive. Woolworths purchased the Site in 2021 after identifying it as a potential location for a future supermarket. The Site is well located to form part of the proposed Local Centre.

10. Woolworths seeks the Woolworths' Site be rezoned to Local Centre Zone. This will result in an efficient and high-quality outcome for Peacocke, and will also enable a supermarket to locate on Woolworths' Site.

11. PC5 contains a number of objectives and policies that recognise the need for an effective and efficient centre which promotes accessible pedestrian movement and services. The relief sought by Woolworths will give effect to these objectives and policies.

12. The outcome sought by Woolworths is also consistent with the vision for the local centre proposed by the Peacocke Local Centre Design Guideline.

Relief sought

13. Woolworths seeks:

(a) Woolworths' Site is rezoned to Local Centre Zone; and

(b) such other consequential amendments to the provisions of the District Plan and appendices (including Appendix 1.4 – Design Guides; Appendix 2 – Structure Plans and Appendix 17A – Planning Maps) as may be necessary to give effect to the relief sought in (a).

ATTACHMENTS

14. The following documents are attached to this notice:

(a) A copy of the relevant parts of the Decision.

(b) A copy of Woolworths' submission.

(c) A list of the relevant names and addresses of persons who lodged submissions who are to be served with a copy of this notice.

WOOLWORTHS NEW ZEALAND LIMITED by its solicitors and authorised agents Russell McVeagh:

Signature: A A Arthur-Young | J H Fraser

Date: 12 April 2023

Address for Service: C/- Julia Fraser
Russell McVeagh
Barristers and Solicitors
48 Shortland Street
Vero Centre
PO Box 8/DX CX10085
AUCKLAND

Telephone: (09) 367 8428

Email: julia.fraser@russellmcveagh.com

TO: The Registrar of the Environment Court at Auckland.

AND TO: Hamilton City Council.

AND TO: The submitters to Plan Change 5.

Advice to recipients of copy of notice of appeal

How to become a party to proceedings

1. You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal.

2. To become a party to the appeal, you must:

   (a) within 15 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and

   (b) within 20 working days after the period for lodging a notice of appeal ends, serve copies of your notice on all other parties.

3. Your right to be a party to the proceedings in the Court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

4. You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (see form 38).

Advice

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch.

APPENDIX A – DECISION ON APPEAL

Decision following the hearing of Submissions on Plan Change 5 – Peacocke Structure Plan (PC 5) to the Operative Hamilton City Plan under the Resource Management Act 1991

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1 Proposal

1. Plan Change 5 to the Hamilton City Operative District Plan seeks to replace the Peacocke Structure Plan with its General Residential and Special Character Zoning with a new Peacocke Structure Plan providing a new Medium Density Residential Zone, a Local Centre Zone, 8 Neighbourhood Centre Zones, Peacocke Sports and Active Recreation Zone, Natural Open Space Zone with Significant Bat Habitat Area and Significant Natural Area overlays, and amendments to the Waikato River and Gulley Hazard Area and Seismic Setback overlays, over approximately 690 hectares of land in the growth cell area known as Peacocke to the south of Hamilton, with a supporting Development Area Plan and Precinct.

Pursuant to clause 10(5) of Schedule 1 to the RMA, on and from the date this decision is publicly notified, Proposed Plan Change 5 – Peacocke Structure Plan to the operative Hamilton City District Plan 2017 is amended in accordance with this decision.

The Hearing Panel's decision is:

a. To accept and reject submissions on PC 5 as set out in s.42A hearing report Appendix A: Summary of Decisions Requested and Recommendations; and

b. To approve the PC 5 provisions as generally set out in s.42A hearing report Appendix B: Recommended Revisions to the notified Plan Change 5 – Peacocke Structure Plan provisions, with modification in accordance with this decision. The final approved PC5 provisions are set out in **Appendix 1** to this decision.

The reasons for its decision are set out below.

Plan Change No:	PC 5
Hearing Panel:	David Hill (Chair) Cr Ewan Wilson Vicki Morrison-Shaw Nigel Mark-Brown
Public notification:	24 September 2021
Submissions closed:	5 November 2021
Summary of submissions:	16 February 2022
Further submissions closed:	16 March 2022
Hearing commenced:	Tuesday 27 September 2022 - Monday 3 October 2022
Appearances / Attending:	Hamilton City Council: Muna Wharawhara (Karakia tīmatanga) Lachlan Muldowney (Counsel) Shaye Thomas (Counsel) Jamie Sirl (Planning) Michael Graham (Landscape) Ian Munro (Urban design – local centres) Warren Gumbley (Archaeology) Nathanael Savage (Wastewater/Potable water) Ari Craven (Stormwater) Alastair Black (Transportation) Sam Foster (MDRS density provisions)

	Gregory Akehurst (Retail economics) Dr Hannah Mueller (Ecology) Gerry Kessels (Ecology) Dr Matthew Baber (Ecology) John Mckensey (Lighting) <u>Submitters</u>: *Director-General of Conservation* Michelle Hooper (Counsel) Moira Pryde (Bat and bat habitat) Dr Kerry Borkin (Lighting - bats) Susan Mander (Lighting engineer) Dr Ilse Corkery (Biodiversity) Jesse Gooding (Planning) *Kāinga Ora* Susannah Tait (Planning) Brendon Liggett (Corporate) *Waikato Regional Council* Hannah Craven (Planning) *Shortbread Ltd* Stephanus Meyer (Engineering) Lynne Sun (Planning) *The Adare Company Ltd* Dr Robert Makgill (Counsel) Mike Doesburg (Counsel) David Peacocke (Corporate) Dr Stuart Parsons (Bat ecology) Hamish Anderson (Corporate and commercial considerations) Wayne Bredemeijer (Urban design) Richard Bowker (Retail) Tony Penny (Transport) Ray O'Callaghan (Engineering) Andrew Blayney (Ecology) Dr Sarah Flynn (Ecology) Andrew Collins (Planning) *Northview Capital and Jones Land and Peacocke South* Renee Fraser (Planning) Don McKenzie (Traffic and transportation) *Woolworths New Zealand Ltd* Allison Arthur-Young (Counsel) Daniel Shao (Corporate) Tim Heath (Economics) Richard Knott (Urban design) John Sofo (Architecture) Don McKenzie (Traffic and transportation) Philip Brown (Planning) *M and M Shaw* Julian Dawson (Counsel) James Hook (Planning)

	Mangakootukutuku Stream Care Group Dr Kevin Collier *Bike Waikato* Richard Porter *Living Streets Kirikiriroa (Hamilton)* Peter Bos *Kevin and Kathy Sanders* Kathy Sanders Geoff Smith (Interpreter) *Waikato Environment Centre Trust (Go Eco)* Harvey Aughton *ID and EM Williams Ltd* Ian Williams *Fire and Emergency New Zealand* Blair Kiely *Cordyline Holdings Ltd* Rachel Dimery (Planning) *Individual submitters* Ben and Rachel Inger Andrea Graves Dan and Sarah Franicevic Hamish Anderson on behalf of AJ and HC Koppens Victoria Collins and Troy Radovancich Gregory Knight *Tabled* Ministry of Education (Daniel Thorne) Transpower (Trudi Burney) WEL (Sara Brown) Ron Lockwood (Bevan Houlbrooke) Waikato Regional Council (Andrew Carnell - Transport) Metlifecare (Bianca Tree) <u>S.42A Authors</u>: Craig Sharman Mark Roberts <u>Hearing support</u>: Steve Rice - Hearings Co-ordinator
Commissioners' site visit	Thursday 29 September 2022
Hearing adjourned	3 October 2022
Hearing Closed:	17 November 2022

2. Before turning to outline our substantive decision on PC 5 the Panel wishes to acknowledge the recent death of counsel for The Adare Company Limited ("**Adare**"), Dr Robert Makgill. Dr Makgill was a well-known and respected practitioner in the resource management field, and his passing will have been felt by many:

E kī ana te kōrero, he ai atu tā te tangata he huna mai tā Hinenuitepō.

Ki a Robert, haere atu rā, moe mai, okioki mai rā.[1]

3. We also send our condolences to his family, friends and colleagues.

PART 1 PROPOSAL AND PROCESS

2 Introduction and Procedural Matters

4. This decision is made on behalf of the Hamilton City Council ("**Council**") by Independent Hearings Commissioners **David Hill (Chair), Councillor Ewan Wilson, Vicki Morrison-Shaw** and **Nigel Mark-Brown**, appointed and acting under delegated authority pursuant to ss.34 and 34A of the Resource Management Act 1991 ("**the RMA**").

5. The Commissioners have been given delegated authority by the Council to hear and make decisions on all submissions and matters relating to Plan Change 5 – Peacocke Structure Plan ("**PC 5**") to the Operative Hamilton City Plan ("**Operative District Plan**") after considering all the submissions, the s.32 evaluation, the reports prepared by the officers for the hearing, and evidence presented and representations made, during and after the hearing of submissions.

6. PC 5 is a plan change that has been prepared following the standard RMA Schedule 1 process. That is, the plan change is not the result of an alternative, 'streamlined' or 'collaborative' process as enabled under the RMA.

7. The plan change was publicly notified on 24 September 2021, with the initial submission period closing on 5 November 2021 and further submissions closing on 16 March 2022.

8. A total of 58 submissions and 18 further submissions were made on the plan change. No late submissions were received.

9. The s.42A RMA hearing report was prepared by Craig Sharman and Mark Roberts with technical support from:

    a. Samuel Foster on Medium Density Residential Standards ("**MDRS**") and the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 ("**the Amendment Act**");

    b. Ian Munro (urban design);

    c. Greg Akehurst (retail economics);

    d. John McKensey (lighting);

    e. Gerry Kessels, Matthew Baber and Hannah Mueller (ecology);

    f. Warren Gumbley (archaeology);

    g. Michael Graham (landscape);

    h. Ari Craven (stormwater); and

    i. Alastair Black (transport).

[1] This is a well-known saying which speaks of how while the human race procreates the goddess of death lies in wait. To Robert we say farewell, sleep well, and rest in peace.

10. That report included, as Appendix A, a comprehensive summary of decisions requested by submissions with recommendations as to whether to accept or reject those submission points, and the reasons for those. The Panel has reviewed those recommendations and reasons and, with the exceptions discussed later in this decision, accepts them. Appendix A is, therefore, to be considered an integral part of this decision *except* as noted below.

11. Other s.42A appendices were:

    a. Appendix B – Changes proposed by the s.42A authors to the notified PC 5 provisions;

    b. Appendix C – Changes proposed in response to the MDRS in the Amendment Act; and

    c. Appendix D – Amendments proposed in response to the Long-tailed Bat Protection topic.

2.1 Hearing Process

12. During the hearing, the Panel visited the general area of Peacocke. We record our gratitude to Mr Sirl and Mr Roberts for their assistance with the site visit.

13. The hearing proceeded by way of a mix of in-person and virtual appearances and was adjourned on the final day for the purpose of receiving supplementary evidence, the written reply and final draft provisions.

14. The hearing was closed on 17 November 2022 following receipt of that material.

2.2 Procedural Matters

15. The Panel issued eight Directions on report, evidence and legal submissions exchange, appearances, the order of presentations and post-hearing, additional evidence and responses.

16. No other procedural matters were raised at the hearing.

3 Summary of Plan Change

3.1 Context

17. The PC 5 land pertains to a suburb of Hamilton City known as Peacocke, located to the south of the city between State Highway 3 (Ohaupo Road) and the Waikato River. Peacocke comprises approximately 740 hectares ("**ha**") of land of mostly rural land. The area is mostly undeveloped except for a portion known as Stage 1 that integrates with development in Glenview around Dixon Road. Resource consents for the subdivisions known as *Amberfield* in the east and *Northview* in the west of the area have recently been granted. The Peacocke area is one of four significant growth cells in Hamilton and is the only area located in the south of Hamilton. The growth cell is located in an area of strategic importance to Hamilton City and the wider Waikato Region, due to its proximity to the city centre (3.5 km along a direct route of Cobham Drive from the northern end of Peacocke), as well as Hamilton Airport, Cambridge and Te Awamutu in the south.

18. The Peacocke growth cell is currently zoned Peacocke Special Character Area, with some Council reserve land and land along the river frontage being zoned as Natural Open Space. Peacocke contains around four hectares of Significant Natural Area ("**SNA**"),

predominantly along the banks of the Waikato River and in the Mangakootukutuku Gully. The Peacocke Special Character Area has gully, hill and terrace overlays.

19. While there is a structure plan for Peacocke in the Operative District Plan, this is proposed to be replaced by a new structure plan in PC 5. As illustrated by that plan, the development area will be closely connected to existing urban development with key transport corridors on the northern and western boundaries. There is also a key transport connection into Waipā District on the southern boundary.

20. The proposed plan change is described as follows:[2]

- The rezoning of approximately 690 ha from General Residential Zone and Peacocke Special Character Zone to Peacocke Medium Residential Zone. This will enable up to 7,800 residential units comprising a mixture of single dwellings, duplex dwellings, terraced houses and apartments.
- The rezoning of approximately 7.8 ha from Peacocke Special Character Zone to Local Centre Zone to establish the main commercial centre within Peacocke.
- The rezoning of approximately 3 ha from Peacocke Special Character Zone to Neighbourhood Centre Zone to establish neighbourhood centres across Peacocke.
- Increase the Natural Open Space Zone from 16 ha to 143 ha which include the Significant Bat Habitat Areas ("**SBHAs**").
- Rezoning of approximately 14 ha of Peacocke Special Character Zone to Peacocke Sports and Active Recreation Zone for the purpose of establishing a sports park.
- Increase the area of SNA to 58.2 ha.
- Several additional archaeological sites have been identified and included on the Features Maps.
- The Waikato River and Gully Hazard Area overlay has been amended and a new Seismic Setback area has been introduced to reflect the work undertaken to identify natural hazards.
- New provisions are proposed to protect areas of significant bat habitat from future urban development, including controls over fixed lighting associated with urban development as well as a building setback from the boundary of SBHAs.
- A high density overlay area is introduced.
- Identification of the indicative transport corridors, including proposed public transport routes.
- Identification of the indicative location of stormwater wetlands and areas of future open space.
- Introduction of a new infrastructure and staging plan for the Peacocke Structure Plan Area.

21. In terms of amendments to the Operative District Plan, the following sections were proposed to be amended:

[2] Summary adapted from Section 42A Hearing Report, 2 September 2022, at [2.4].

a. Chapter 3 – Structure Plans and Chapter 3A Peacocke Structure Plan 9;

b. Chapter 4A – Medium Density Residential Zone: Peacocke Precinct and Chapter 5 Special Character Zones;

c. Chapter 6A: Peacocke Neighbourhood Centre Zone;

d. Chapter 6B: Peacocke Local Centre Zone;

e. Chapter 15A: Natural Open Space Zone: Peacocke Precinct;

f. Chapter 15B: Sport and Active Recreation Zone: Peacocke Precinct;

g. Chapter 23: Subdivision and Chapter 23A Subdivision: Peacocke Precinct;

h. Chapter 25: City-wide;

i. Appendix 1: District Plan Administration;

j. Appendix 2: Structure Plans;

k. Appendix 8: Historic Heritage;

l. Appendix 9: Natural Environments;

m. Appendix 15: Transportation; and

n. Appendix 17: Planning Maps and Appendix 17A Peacocke Zoning and Features Maps.

22. The anticipated yield from the PC 5 area was noted as 7,500 dwelling units over the next ten years. Mr Sirl explained that Future Proof[3] seeks a net target density of 30 to 45 residential units per hectare to be achieved over time in defined locations. He considered that PC 5 is consistent with Future Proof as the provisions seek to establish net densities between 20-50 dwellings per hectare throughout the remainder of the structure plan.[4]

23. PC 5 noted that a Medium Density Residential zone (referred to as the MRZ, adopting the abbreviated nomenclature of the National Planning Standards) does not presently exist in the Operative District Plan. The proposed provisions have therefore been crafted to import the Amendment Act MDRS. They also include two bespoke MDRS objectives and associated policies derived from the Amendment Act for the zone.

24. The proposed Peacocke Precinct encourages further residential density intensification though a modified Increased Height Overlay permitting a maximum height of 16m in areas subject to the Overlay.

25. Residential performance standard changes reflecting the greater residential density proposed include height in relation to boundary, front yard setback, building height, building coverage, and reduced outdoor living areas amongst others. Up to three dwellings on each site is a permitted activity (provided they meet all the bulk and location standards), and subdivision of those dwellings is a controlled activity.

26. Finally, PC 5 includes the following figures:

a. Land Use Plan;

b. Transport Network Plan;

c. Natural Environment and Heritage Plan;

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3 'Future Proof' is a joint project set up to consider how the Hamilton, Waipā and Waikato sub-region should develop into the future.

4 Statement of Evidence of Jamie Sirl for Hamilton City Council, 2 September 2022, at [189]-[190].

d. Staging Plan;

e. Peacocke Local Centre Concept; and

f. Peacocke Precinct - Features Map.

27. In his evidence, Mr Sirl helpfully summarised the outcome that PC 5 seeks as follows:[5]

a. Enable housing delivery and choice while creating accessible new communities.

b. The enhancement of the environment, specifically in relation to water quality, biodiversity and cultural outcomes.

c. Encourage public transport, cycling and walking modal shift.

d. Encourage landscape and urban design excellence.

28. Mr Sirl considered that structure plans remain an appropriate and effective method for establishing the pattern of land use and the transport and 3-waters infrastructure network within a defined area. He summarised PC 5 as refreshing both the structure plan and the associated land use planning provisions to optimise the Housing Infrastructure Fund investment and give effect to the wider Peacocke Programme objectives. Mr Sirl also noted that the Peacocke Structure Plan:[6]

a. Identifies the best location for public parks and open space, strategic 3 waters, walking/cycling network, stormwater wetlands, suburban centres, schools, community facilities, mixed use development and community nodes;

b. Identifies and protect matters of national importance including areas of ecological, historic and cultural significance;

c. Removes the Peacocke Master Plan requirements;

d. Introduces a staging plan and transport connections; and

e. Promotes best practice in terms of urban development.

29. The s.42A hearing report authors agreed with Mr Sirl's description.

3.2 Section 42A Report Amendments

30. As a consequence of further discussions following formal notification and the receipt of submissions, the s.42A report also recommended a number of proposed changes to PC 5:[7]

<u>General</u>

- *Amendments to import the Medium Density Residential Standards as set out in Schedule 3A Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021.*
- *Amendments to the residential densities to be consistent with the updated Future Proof Strategy which sets a net target density of 30-45 dwellings per hectare to be achieved over time in Peacocke.*
- *Various changes to a number of objectives, policies and rule provision to further clarify the indicative nature of the features maps, adding the word 'generally' when seeking plans and development to be consistent with the Peacocke Structure Plan, and using 'indicative' rather than 'proposed' within the legend for Figures 2-1 and 2-3.*

5 Statement of Evidence of Jamie Sirl for Hamilton City Council, 2 September 2022, at [66].
6 Statement of Evidence of Jamie Sirl for Hamilton City Council, 2 September 2022, at [68].
7 Section 42A report, 2 September 2022, Section 8.

Local Centre Zone

- *Amendments to restrict retail and commercial development within the local centre, including supermarkets being undertaken in a manner that would elevate the centre above the role that it has been designed to play within the existing Hamilton centre structure.*
- *A less restrictive activity status for residential activities on the ground floor of the Peacocke Local Centre Zone where they are located outside of the primary and secondary road frontages.*
- *Additional height of 24m within the Local Centre Zone but with the height limit of 16m retained within 30m of the Local Centre Zone boundary adjoining the Natural Open Space Zone on the eastern side of the Local Centre and the Peacocke Medium Density Residential Zone on both the Northern and Southern interfaces with the Local Centre.*

Neighbourhood Centre Zone

- *Introduction of a new rule into Chapter 6A to restrict the commercial function to 800m^2 gross floor area while still allowing other activities that do not undermine the core commercial activities to be developed.*
- *A more lenient activity status for residential activities as a discretionary activity to occur on the ground floor.*
- *Increased maximum building height to 16m.*

Long-tailed Bat Habitat Protection Responses

- *Deletion of the Significant Bat Habitat Areas (SBHAs) and other notations outside of the city boundary.*
- *Amendments to Chapter 3A Peacocke Structure Plan - DEV01-PSP: Components of the Peacocke Structure Plan - Natural Environment and Open Space Network has been revised to better reflect the intended approach to management of long-tailed bat habitat areas.*
- *The addition of a new permitted activity vegetation clearance Rule 25.2.5.2 Vegetation Clearance in the Peacocke Structure Plan Area, and an amendment to Rule 25.2.3 Activity Status Table for any activity not complying with Rule 25.2.5.2 being a restricted discretionary activity.*
- *Amendments to the lighting provisions within 25.6.2.2 policies (a) and (b), and the related rule provision Rule 25.6.4.4 Peacocke Medium Density Zone: Peacocke Precinct.*
- *Amendments to objectives and policies for clarity within Chapter 15A Peacocke Natural Open Space Zone, and Chapter 23A Peacocke Subdivision, primarily to remove use of the phrases 'ecological corridors' and 'bat corridors' with instead consistent use of the phrase 'Significant Bat Habitat Areas' being the notation label within the mapping contained within Appendix 2 and Appendix 17A.*
- *Amendments to 1.2.2.25 Ecological Rehabilitation and Management Plan information requirements to support subdivision resource consent applications.*
- *Amendments to 1.2.2.27 Bat Management Plan information requirements to support subdivision and land use resource consent applications.*
- *Amendments to 1.3.3 Restricted Discretionary, Discretionary and Non-Complying Assessment Criteria P3 Development in the Peacocke Precinct and P5 Subdivision in the Peacocke Structure Plan.*

Significant Natural Areas

- *Amendments to recognise the values present within the Mangakootukutuku Stream and gully network and the margins of the Waikato River beyond the long-tailed bat habitat values.*

Cultural and heritage

- *Inclusion of reference to a future pedestrian bridge linking the Hamilton Gardens to the Korikori Paa reserve.*

Landscape

- *Several minor amendments to the purpose and contents of the Appendix 1 – 1.2.2.24 Landscape Concept Plan mechanism.*

Subdivision processes and vesting of reserves

- *deletion of the R22 rule requiring maximum 500m between residential dwellings and neighbourhood parks, and replacement with a new assessment matter.*
- *The notation 'proposed esplanade reserves' have been removed from Figure 2-3 within Appendix 2 Structure Plans.*

Transport, staging and infrastructure

- *Amendments to insert a consenting regime for 'out of sequence' development, including a new assessment matter.*
- *Amendments to the rear lane access provisions.*
- *For public transport infrastructure, deletion of a subdivision standard (Chapter 23A - R25), addition of wording within assessment matters (Appendix 1, 1.3.3), amendments to Figure 2-2 Transport Network to show amended locations for public transport facilities shown and changes to notations within the legend.*
- *Minor wording changes to policies or objectives related to stormwater wetlands.*
- *Revision of the stormwater catchment requirements in accordance with the objectives of the Integrated Catchment Management Plan.*

Earthworks

- *Amendments to the provisions.*

Land use activities

- *Amended provisions for retirements villages and childcare facilities.*

Mapping changes

- *Amendments to the structure plan maps to correct errors in the exact locations of features shown, and to exclude land outside the Hamilton City Council jurisdiction.*
- *Change to the exact location of a neighbourhood centre and its underlying zoning.*
- *Removal of 5 Significant Trees.*
- *The notation on the maps has changed from "Seismic Setback Line" to "Seismic Investigation Area".*
- *Inclusion of a permitted activity rule to apply specifically to the Transpower NZ national communications centre site.*
- *Amendments to the Natural Open Space Zone and Significant Bat Habitat Area to better align with the master plan.*
- *Amendments to the Significant Natural Area to better align with the vegetation that exists.*
- *Deletion of the "future reserve" notation.*

4 Statutory Provisions and Hierarchy of Instruments

4.1 Resource Management Act 1991

31. The RMA sets out an extensive set of requirements for the formulation of plans and changes to them (ss.31, 32, 74, 75 and 76) that decision-makers must consider when determining whether to approve, modify or decline a plan change.

32. These matters are well settled and were comprehensively summarised by the Environment Court in *Colonial Vineyard Ltd v Marlborough*[8] following the 2009 RMA

[8] *Colonial Vineyard Ltd v Marlborough* [2014] NZEnvC 55, at [17]. This case updated the list of requirements first specified in the *Long-Bay Okura Great Park Society Incorporated v North Shore City Council* A 78/2008, 16 July 2008, following the amendments made to the RMA in 2009.

amendments. As further amendments have been made to the requirements since 2014, we have used the *Colonial Vineyards* list as a base and updated it as follows:

A. General requirements

1. *A district plan (change) should be designed to accord with (s.74) - and assist the territorial authority to carry out its functions (s.31) so as to achieve the purpose of the Act (s.72 and s.74(1)).*
2. *The district plan (change) must also be prepared in accordance with any regulation and any direction given by the Minister for the Environment (s.74(1)).*
3. *When preparing its district plan (change) the territorial authority must give effect to Te Ture Whaimana, any national policy statement, any New Zealand Coastal Policy Statement and a national planning standard (s.75(3)), with Te Ture Whaimana prevailing over any inconsistent provisions in these documents (s.12 of Waikato-Tainui Raupatu Claims (Waikato River Settlement Act 2010).*
4. *When preparing its district plan (change) the territorial authority shall:*
   (a) *give effect to any operative regional policy statement (s.75(3)).*
   (b) *have regard to any proposed regional policy statement (s.74(2)(a));*
5. *In relation to regional plans:*
   (a) *the district plan (change) must not be inconsistent with an operative regional plan for any matter specified in section 30(1) or a water conservation order (s.75(4)); and*
   (b) *must have regard to any proposed regional plan on any matter of regional significance etc (s.74(2)(a)).*
6. *When preparing its district plan (change) the territorial authority must also:*
   (a) *have regard to any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations to the extent that their content has a bearing on resource management issues of the district (s.74(2)(b)); and to consistency with plans and proposed plans of adjacent territorial authorities (s.74(2)(c));*
   (b) *take into account any relevant planning document recognised by an iwi authority (s.74(2A)); and*
   (c) *not have regard to trade competition or the effects of trade competition (s.74(3)).*
7. *The formal requirement that a district plan (change) must also state its objectives, policies and the rules (if any) and may state other matters (ss.75(1) and (2)).*

B. Objectives [the section 32 test for objectives]

8. *Each proposed objective in a district plan (change) is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act (s.74(1) and s.32(3)).*

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. *The policies are to implement the objectives, and the rules (if any) are to implement the policies (s.75(1)(b) and s.76(1));*
10. *Each proposed policy or method (including each rule) is to be examined, having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objectives of the district plan (s.32(1)) taking into account:*
    (i) *the benefits and costs of the proposed policies and methods (including rules) (s.32(2)(a)); and*
    (ii) *the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods (s.32(2(c); and*

(iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances (s.32(4));

(iv) the advice from iwi authorities and any response to that advice (s.32(4A)).

D. Rules

11. In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment (s.76(3)).

12. Rules have the force of regulations (s.76(2)).

13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive" than those under the Building Act 2004 (s.76(2A)).

14. There are special provisions for rules about contaminated land (s.76(5)).

15. There must be no blanket rules about felling of trees in any urban environment (S.76(4B)).

E. Other statutes:

16. Finally territorial authorities may be required to comply with other statutes.

F. On Appeal

17. On appeal the Environment Court must have regard to the decision of the territorial authority (s.290A).

33. Mr Muldowney (among other counsel) addressed these matters in his opening legal submissions and confirmed the Panel's scope to integrate the MDRS into PC 5.[9]

34. Those matters were also summarised in Mr Sirl's evidence[10] and section 4 of the s.42A report (among other planning witnesses).

35. We accept those summaries as being an accurate description of the relevant statutory and planning context.

4.1.1 Emissions Reduction Plan and National Adaptation Plan

36. While no party addressed us on these matters, we note that the first Emissions Reduction Plan and National Adaptation Plan ("**Climate Change Plans**") came into effect on 30 November 2022 and are relevant considerations for any district (and regional) plan change notified *after* that date.

37. As PC 5 was notified prior to 30 November 2022, we are not able to consider the Climate Change Plans in making our decision. This is because cl.26 of Sch.12 to the RMA directs that where a plan change has been publicly notified but not proceeded to the stage where no further appeal is possible at the time the climate change amendments (and Climate Change Plans) came into force, the plan change must be determined as if the climate change amendments had not been enacted. Accordingly, we confirm we have not considered those plans in reaching our decision.

4.1.2 Other RMA Requirements for Decision

38. We also note that cl.10 of Sch.1 requires us to include in our decision:

    a. our reasons for accepting or rejecting submissions; and

[9] Opening legal submissions for Hamilton City Council, 23 September 2022, at [6]-[23].
[10] Statement of Evidence of Jamie Sirl for Hamilton City Council, 2 September 2022, at [134]-[178].

b. a further evaluation of any proposed changes to the plan change arising from submissions, with that evaluation to be undertaken in accordance with s.32AA.

39. We note that where specific amendments were proposed by the Council that required a further evaluation, these were accompanied by a s.32AA evaluation. Some submitters[11] also provided such evaluations to support the amendments they sought.

4.2 RMA Hierarchy and Relative Weightings of Instruments

40. The RMA establishes a hierarchy both within its sections and between the planning documents prepared under it.

41. Whilst there was no dispute between the parties as to the relevant RMA provisions, policies and plans, and to the primacy of Te Ture Whaimana,[12] there remained disagreement as to the approach and weight to be given to some provisions/documents. In particular:

a. how the "recognise and provide for" imperative in s.6(c) ought to be achieved;

b. the extent to which the hierarchy approach to effects management in the National Policy Statement for Freshwater Management ("**NPSFW**") can be used to 'gap-fill' the Waikato Regional Policy Statement ("**WRPS**"); and

c. the weight that can be given to the exposure draft (and imminence) of the proposed National Policy Statement for Indigenous Biodiversity ("**NPSIB**").

4.2.1 Section 6(c) of the RMA

42. Section 6(c) of the RMA requires the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna. There was no dispute that this was an important consideration in the context of PC 5 given the presence of the nationally critical long-tailed bat within the Peacocke structure plan area and its surrounds. The key area of dispute related to how that protection ought best be achieved.

43. We consider that the starting point in this analysis is the direction given by the Supreme Court in *King Salmon,* namely that:[13]

a. where the RMA policies and plans give substance to the requirements in Part 2, unless there is a challenge to the validity of a particular policy/plan, a particular policy/plan does not "cover the field" or there is some uncertainty as to the meaning of a provision within that policy or plan, it is not necessary to refer back to Part 2; and

b. where a regional policy or plan has given effect to higher order national documents, there is no need to specifically consider those higher order documents, absent a challenge, gap or ambiguity in meaning.

44. The opening legal submissions for the Director-General of Conservation (**DOC**) recognised that the policy directive in s.6(c) is reflected in the WRPS.[14] However, DOC pointed to comments made by the Environment Court in the *Amberfield* development decision that the existence of a "gap" in the Operative District Plan (being the absence of

[11] Submitters providing such evaluations were generally those who called expert witnesses in support of their submissions or who provided statements qualifying themselves as expert witnesses.
[12] As addressed in the opening legal submissions of Mr Muldowney for Hamilton City Council at [47] to [56].
[13] *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38, at [85] and [88].
[14] Opening legal submissions for the Director-General of Conservation, 27 September 2022, at [28].

a commonly identified and generally agreed bat protection area) meant it was appropriate for steps to be taken "based on s.6(c) of the Act and relevant plans".[15]

45. DOC then extrapolated this argument as the basis for referring to and adopting the provisions and approaches of the NPSFW and exposure draft of the NPSIB.[16] DOC argued, based on these documents, that the *effects management hierarchy* must be sequentially applied – certainly in the context of a s.6(c) consideration - so that each of the potential responses – avoidance, remediation, mitigation, offset and compensation - must be worked through and satisfied in turn before use can be made of a subsequent response. In particular, DOC was critical of PC 5 as skipping "offsets" and employing a compensation approach to residual effects.[17]

46. We discuss this area of disagreement further (in Section 5 below) but suffice to say at this point that we are not persuaded that either the NPSFM approach or the draft NPSIB are pertinent or necessary considerations for the exercise of the Panel's s.6(c) duty.

4.3 Relevant Statutory Plan Provisions Considered

47. In addition to the legal submissions of Mr Muldowney (and other counsel), Mr Sirl's evidence[18] and section 4 of the s.42A report comprehensively identified and addressed the hierarchical suite of statute, policy, plan and regulation provisions. There was no dispute about those matters.

48. As those respective provisions and their application were not contested, we adopt those narratives for our purpose and simply refer the reader to those referenced sections. We do however note that the weight to be accorded to respective provisions was not necessarily agreed.

49. In summary, the relevant provisions are to be found under the following:

    a. Te Ture Whaimana o Te Awa o Waikato – Vision and Strategy ("**Te Ture Whaimana**");
    b. National Policy Statement on Urban Development 2020 ("**NPSUD**");
    c. National Policy Statement for Freshwater Management 2020 ("**NPSFM**");
    d. National Policy Statement on Energy Transmission 2008 ("**NPSET**");
    e. National Environmental Standards for Freshwater 2020 ("**NESF**");
    f. Waikato Regional Policy Statement 2016 ("**WRPS**");
    g. Waikato Regional Plan 2007 ("**WRP**");
    h. Hamilton City District Plan 2017 ("**Operative District Plan**"); and
    i. National Planning Standards 2019.

50. Other relevant documents that have been considered in accordance with s. 74(2) and s. 74(2A) include:

    - Tai Tumu, Tai Pari, Tai Ao - Waikato-Tainui Environmental Plan 2013;
    - Waikato Regional Land Transport Strategy 2011-2041 ("**RLTS**"); and
    - Future Proof Strategy 2022.

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[15] *Weston Lea Ltd & Director-General of Conservation v Hamilton City Council* [2020] NZEnvC 189 (interim decision), at [42]; and Opening legal submissions for the Director-General of Conservation, 27 September 2022, at [30]-[31].
[16] Opening legal submissions for the Director-General of Conservation, 27 September 2022, at [48].
[17] Opening legal submissions for the Director-General of Conservation, 27 September 2022, at [74].
[18] Statement of evidence of Jamie Sirl for Hamilton City Council, 2 September 2022, at [134]-[178].

5 Preliminary Matters

51. In this section we address the following preliminary matters:

    a. Matters out of scope;
    b. Effects management hierarchy;
    c. Adaptive management; and
    d. Trade competition.

5.1 Matters Out of Scope

52. As Mr Muldowney submitted, only submissions that are "on" a plan change have relevance and can be considered.[19] There are two key reasons for this:

    a. if submissions are not "on" the plan change then they probably have not undergone an appropriate s.32 evaluation; and

    b. even if they have undergone a s.32 evaluation, the submissions are likely to involve other affected persons who have not submitted "on" the plan change and therefore have no ability to enter the process and comment on those proposals. This breaches the principles of natural justice.

53. Three out of scope matters were raised:

    a. submissions seeking the cancellation or relocation of Designation A106 (the east-west corridor);

    b. requests for the use of alternative processes and compensation provisions for land effectively sterilised from development by the Natural Open Space Zone ("**NOSZ**"); and

    c. requests for further consultation.

5.1.1 Designation A106 Relocation

54. Both Ngāti Ngāmurikaitaua and the Shaw family sought changes to Designation A106 the Southern Links Motorway.

55. Ngāti Ngāmurikaitaua have areas of cultural heritage that are affected by the Southern Links Motorway and sought changes to the Designation to reduce those effects.

56. Mr and Mrs Shaw own land along the alignment of the Designation A106. The Shaws were concerned that this Designation also extends into areas identified under this plan change and proposed Plan Change 9 as proposed SNAs.[20] The planning evidence of Mr Hook for the Shaws contended Designation 106 was "incongruous and in direct conflict" with the proposed SNA areas and Part 2 of the RMA. His view was that the Council should give notice pursuant to s.182 to surrender Designation A106 and undertake a comprehensive review of all roads in the Southern Links area, and then renotify a new notice of requirement.[21]

57. Counsel for the Shaws, Mr Dawson, submitted that this situation had arisen because "the Council had not assessed and identified the significance of this habitat at the time the designation was progressed in 2014."[22] Mr Dawson, while acknowledging that the Panel

[19] Opening legal submissions for Hamilton City Council, 23 September 2022, at [10].
[20] Statement of Evidence of James Hook for M&M Shaw, 16 September 2022, Figures 1 and 4.
[21] Statement of Evidence of James Hook for M&M Shaw, 16 September 2022, at [16] and [26].
[22] Legal submissions for M&M Shaw, 28 September 2022, at [8].

"did not have the statutory power to revisit and amend the Designation" as part of this process, submitted that we were able to (and should):[23]

a. recommend that the Council reviews Designation A106; and/or

b. issue an interim decision highlighting this as an issue that needs to be addressed; and

c. record our evaluation of this issue in our decision.

58. Mr Dawson submitted that it was open to us to consider this issue as part of PC 5 because:[24]

a. the WRPS gives a clear and explicit policy direction that activities should avoid the loss or degradation of SNAs;

b. the WRPS creates an environmental bottom line; and

c. *King Salmon* states these policy directives/bottom lines must be given effect to.

59. These issues were addressed by Mr Muldowney in his closing submissions for the Council. He submitted that:[25]

a. the relevant WRPS policy (11.2.2)[26] is not unqualified as it was in *King Salmon*, and does not set an absolute bottom line – instead the directive being to avoid "in preference to remediation or mitigation";

b. our delegation from the Council does not extend to amending, rescinding or making recommendations for the amendment or rescindment of Designation A106;

c. we have no ability to issue an interim decision requesting that Designation A106 be addressed given there is no power to make the recommendation proposed; and

d. the only available option is to record our evaluation of the Shaw's concerns in our decision.

60. Mr Muldowney also pointed out that the alignment of Designation A106 had already been the subject of recent judicial examination in *Shaw v Hamilton City Council*.[27]

5.1.2 Findings

61. We agree with counsel for the Council that we are constrained in our decision-making by the terms of our delegation.

62. As we advised in our Minute #1, we have been appointed and delegated powers by the Council to hear submissions and make decisions on PC 5. The appropriateness (or otherwise) of Designation A106 is not a matter which is before us for determination. To the extent that parts of the Ngāti Ngāmurikaitaua and Shaw submissions seek to challenge Designation A106 through this process we find that those parts of their submissions are not "on" the plan change and therefore go beyond the matters that we can properly determine, make recommendations on, or make the subject of an interim decision.

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[23] Legal submissions for M&M Shaw, 28 September 2022, at [15].
[24] Legal submissions for M&M Shaw, 28 September 2022, at [11]-[12].
[25] Closing legal submissions for Hamilton City Council, 4 November 2022, at [86]-[95].
[26] We note this now appears to be numbered ECO-M13(4) under the current online version of the WRPS. However, as all parties referred to 11.2.2 we adopt that reference in this decision.
[27] *Shaw v Hamilton City Council* [2021] NZEnvC 175.

63. As a secondary point, and in response to the submission made by counsel for the Shaws about *King Salmon*, we agree with counsel for the Council that there are significant differences between the relevant policies which bear on their interpretation. In *King Salmon*, the relevant policy contained an unqualified directive to avoid certain effects, whereas here the relevant policy – ECO-P2 – includes the qualifier as follows:

> *Significant indigenous vegetation and the significant habitats of indigenous fauna shall be protected by ensuring the characteristics that contribute to its significance are not adversely affected to the extent that the significance of the vegetation or habitat is reduced.* [Our emphasis]

64. The relevant Method ECO-M13.2 further clarifies that the directive is not unqualified where it states:

> *Regional and district plans shall (excluding activities pursuant to ECO-M4)*
>
> *…*
>
> *2. require that activities avoid the loss or degradation of areas of significant indigenous vegetation and significant habitats of indigenous fauna in preference to remediation or mitigation;* [our emphasis]

65. As a final point, we note that the recent Environment Court decision to which Mr Muldowney directed us (*Shaw v Hamilton City Council*), sets out in some detail the assessment of alternatives that was undertaken as part of the Designation A106 process. After reviewing all of the relevant evidence and materials before it the Environment Court stated:

> *[122] …we are satisfied that:*
>
> *(a) the options evaluation process was wide-ranging, comprehensive and robust and, in our view, was in accordance with recognised good practice;*
>
> *(b) adequate consideration was given to ecological effects during the evaluation process;*
>
> *…*
>
> *[123] We are satisfied that the Council gave adequate and genuine consideration to alternatives…*

66. We have no basis on which to disagree.

67. For the above reasons, we reject the relief sought by these submitters in relation to Designation A106.

5.1.3 Natural Open Space Zone - Compensation for land

68. A number of submitters raised concerns about the NOSZ – which includes areas identified as SBHAs and SNAs - applying to their land and sought certainty about whether their land would be acquired, when that would happen, and whether fair compensation would be paid.[28]

69. This issue arises as the PC 5 NOSZ covers both public and privately owned land, with the majority of the SBHAs being located on privately owned land.

70. While many submitters urged the Council to take a proactive approach to the acquisition of such areas through the use of its Public Works Act 1981 ("**PWA**") powers (presumably for

[28] For example: Tilehurst Living Trust submission point 15.7, Shortbread Ltd submission point 41.1, Ben and Rachel Inger submission point 46.9, Gregory Knight submission point 48.1, and Jacky Li and Alex Zheng submission point 52.2, as recorded at pp.12, 42, 50, 51, and 58 of the Summary of Submissions.

the greater certainty that process provides for timing and compensation), the s.42A Report instead confirmed that:

> *7.80 … Following discussions with Council's Parks and Open Spaces Unit Council intends to acquire land identified as SBHAs and Natural Open Space Zone through the subdivision process, with funding set aside to acquire the land from landowners. Funding has been set aside within Council's Long Term Plan 2021-2031 for this reserve acquisition process and landowners will get fair market value based on the value of the land if it was within the Medium Density Residential Zone, to avoid landowners being 'penalised' for land being zoned as Natural Open Space Zone given the uneven distribution of this land across the Peacocke Structure Plan area and equity issues that would arise otherwise.*
>
> *7.82 A key element of the above is that this is reactive to land use and subdivision applications as they arise and is not a proactive process as sought by some submitters.…*
>
> *7.84 Some submitters have urged Council to undertake designation processes for SBHAs as a means of proactively acquiring these areas, given that Council is a requiring authority pursuant to the RMA. The designation of the SBHAs would enable the Public Works Act 1981 processes to be employed as necessary to acquire the complete Peacockes network of SBHAs. This would avoid a potential piecemeal acquisition process given that property owners may choose not to subdivide their properties, and the sequence of subdivision and development may not follow the staging sequence set out within Chapter 3A and as shown on Figure 2-3A within Appendix 2. Utilising the designation powers available to Council as a requiring authority is not the intention however.*

5.1.4 Findings

71. While the desire by affected landowners for a more proactive approach from the Council is understandable, it is not something we can mandate as part of this PC 5 process. Our role is to determine whether the provisions of this plan change will assist the Council to carry out its functions[29] in order to achieve the purpose of the RMA.[30] We have no jurisdiction to require the use of alternative processes, such as the PWA.

72. We do however note that the Council has proposed provisions in Chapter 23A, the Peacocke Precinct Subdivision chapter (SUB- PREC1-PSP: P19 and R25), which ensures the inclusion of NOSZ areas and for these to be vested at the time of subdivision. This is an available RMA method, and one which, for the reasons that follow in subsequent sections of this decision, we are satisfied is necessary to enable the Council to carry out its functions in controlling the effects of development and use on indigenous biological diversity (and particularly long-tailed bats).

73. We also note that, in response to the concerns raised in submissions, the Council has proposed that further wording be included in Chapter 15A Peacocke Precinct Natural Open Space Zone (NOSZ-PREC1-P: ISSUES), confirming Council's intention to acquire land at the time of subdivision at fair market value – taking into account both the development potential of the new urban land as well as recognising the restrictions placed over the NOSZ. We consider this wording gives a clear signal that the Council intends to ensure fair compensation is paid. We are not able to direct that the Council goes further than this.

[29] As set out in s.31 of the RMA.
[30] Section 72 of the RMA.

5.1.5 Consultation

74. In their submission, Ngāti Ngāmurikaitaua requested that further consultation be undertaken with them about certain parts of the Operative District Plan,[31] and any changes or decision-making on those parts.

75. In their response to submissions, the s.42A Report authors indicated their view that:[32]

> *Further consultation of changes and further discissions [sic] on the District Plan is outside the scope of Plan Change 5. The submitter is encouraged to continue to engage with Hamilton City Council through future plan change consultation processes as well as engage with THaWK, Te marae toopu o Kirikiriroa and Waikato-Tainui separately.*

5.1.6 Findings

76. We agree with the view expressed by the s.42A Report authors. Consultation on the Operative District Plan and any future plan change processes are outside the scope of matters we can consider for PC 5.

77. To the extent the concern also extends to PC 5:

    a. we were informed that extensive consultation was undertaken prior to the plan change being notified, including with mana whenua representative entities, and via public open days and other engagement;[33] and

    b. we consider this material is sufficient to demonstrate that the consultation requirements set out in Sch.1 of the RMA have been complied with.

78. We also note that there were further opportunities for Ngāti Ngāmurikaitaua to engage through the PC 5 process, such as by filing a further submission, appearing at the hearing, and/or seeking to engage with the Council prior to and during the hearing. These opportunities were not taken up.

5.2 Effects Management Hierarchy

79. As noted above, DOC submitted that in order to properly give effect to Part 2 of the RMA (and s.6(c) in particular) we should adopt an effects management hierarchy approach as outlined in the NPSFM and the exposure draft of the NPSIB. Such a hierarchy, it maintained, requires the completion of each step of the hierarchy before being permitted to step down the cascade of avoid, remedy, mitigate, offset, and compensate. DOC was particularly critical of PC 5 for, in its opinion, skipping "offsets" and employing a compensation approach to residual effects.[34]

80. In response, counsel for the Council in his closing submissions stated that:[35]

> *[9] Next, in preparing district plan provisions which recognise and provide for the protection of this habitat, there is no legal basis to justify the Panel departing from the policy framework established under the WRPS. Indeed, the Panel has an obligation to give effect to this policy framework, which has been directly endorsed by the Environment Court as akin to an "instruction manual to the preservation and enhancement of the long-tailed bat".*

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[31] Appendix 1.1 – Definitions and Terms, Appendix 1.2 – Information Requirements, Appendix 1.3 – Assessment Criteria, Appendix 1.4 – Design Guides, Appendix 2 – Structure Plans, Appendix 8 – Historic Heritage, Appendix 9 – Natural Environments, Appendix 15 – Transportation and Appendix 17 – Planning Maps.

[32] Section 42A Report, 2 September 2022, Appendix A recommendations to submission 32.14.

[33] Section 42A Report, 2 September 2022, at [7.70] and Appendix E to the notified version of PC 5.

[34] Opening legal submissions for the Director-General of Conservation, 27 September 2022, at [74].

[35] Closing legal submissions for Hamilton City Council, 4 November 2022, at [9].

…

[13] To be clear, the WRPS Policy 11.2.2 effects management hierarchy, and the effects management hierarchy contained in the NPS-FW and draft National Policy Statement for Indigenous Biodiversity (NPS-IB), each prioritise avoidance of loss of habitat in preference to remediation or mitigation, but do not create an absolute requirement that avoidance options are fully exhausted before moving through the hierarchy. The effects management hierarchy in the NPS-FW and draft NPS-IB call for avoidance, where practicable, but without defining that term.

…

[15] … WRPS Policy 11.2.2 requires avoidance in preference to remediation or mitigation and requires that where any adverse effects are unable to be avoided, remedied or mitigated, more than minor adverse effects shall be offset to achieve no net loss. Accordingly, whether applying the effects management hierarchy from the NPS-FW, or Policy 11.2.2 of the WRPS, the Panel must determine whether PC 5 progressively manages effects in a reasonable and practicable manner, having regard to the context.

…

[24] In terms of compensation, it is acknowledged that Policy 11.2.2 only identifies offsetting. The effects management hierarchy recognises compensation in situations where direct offsetting is unachievable or cannot be measured, and this transition from offsetting to compensation in such circumstances has been endorsed by the Environment Court in Waka Kotahi NZ Transport Agency v Manawatu-Whanganui Regional Council. Notably, the Environment Court held that despite compensation not being provided for in the relevant policy in the Regional Policy Statement as a step in the offsetting hierarchy, "its absence there does not affect the validity of its inclusion in the overall mitigation package proposed for the project". As set out in Dr Baber's evidence, offsets have not been "skipped", but have been considered and ruled out on the basis that:

a) For bats the number of individual bats that are adversely affected cannot be determined and more notably the predicted number of extra bats that would result from the proposed compensation package cannot be predicted with a reasonable degree of certainty to 'demonstrate' or 'claim' an offset has been achieved at the plan change stage of this project;

b) A like for like (equivalent) habitat offset would require that pasture and the exotic vegetation within the pasture matrix is replaced which constitutes a poor ecological outcome relative to the trading-up approach proposed;

c) While the standard for offsetting based on quantitative loss and gain calculations is not applied, HCC's proposed compensation is like for like, e.g. in exchange for impacts on bats HCC is proposing compensation that is expected to generate equivalent benefits for bats.
[Footnotes omitted]

5.2.1 Findings

81. We record our agreement with counsel for the Council that the absence of an express reference to compensation in WRPS Policy 11.2.2 (now more explicitly identified as method ECO-M13) does not exclude compensation from being an available response. As the Environment Court in the *Waka Kotahi* case that counsel for the Council referred us to noted:[36]

[187] We find that even though 'compensation' is not provided for in Policy 13-4(d) of the One Plan as a step in the offsetting hierarchy, its absence there does not affect the

[36] *Waka Kotahi NZ Transport Agency v Manawatu-Whanganui Regional Council* [2020] NZEnvC 192.

validity of its inclusion in the overall mitigation package proposed for the Project. The proposed compensation will contribute to replacing biodiversity that cannot be offset (in terms of the definition of that word) and will be verified after the fact as required by the conditions of consent.

82. We also consider that the references to offsetting in methods ECO-M13.4 and .5, which refer to the achievement of "no net loss" through "on-site or offsite methods", are consistent with and are broad enough to include the concept of environmental "compensation".

83. Indeed, the WRPS defines neither *offset* nor *compensation* – and dictionary definitions often treat those terms as reasonably synonymous. The WRPS does, however define "no net loss" as follows (emphasis added):

Means no reasonably measurable overall reduction in the type, extent, long-term viability and functioning of indigenous biodiversity. When the term is applied in a policy context it has regard to the overall contribution of regulatory and non-regulatory methods as contained in local indigenous biodiversity strategies. It does not create a no adverse effects regime.[emphasis added]

84. The WRPS explanation for method ECO-M13 is instructive and states:

ECO-M13 reflects a more directive approach to achieving no net loss for areas of significant indigenous biodiversity than ECO-M3. This is consistent with s6(c) of the Resource Management Act which requires protection of such biodiversity. The Method seeks avoidance of adverse effects as the most effective means of protecting areas of significant indigenous vegetation and significant habitat of indigenous fauna. It recognises that some loss of or damage to those areas may be unavoidable and in those cases remediation and mitigation is required. Where adverse effects remain after avoidance, remediation and mitigation then more than minor adverse effects are required to be offset. Any loss can be documented and tracked to assist with monitoring the state of the resource.

When applying ECO-M13, the expectation is that proposals should reasonably demonstrate that no net loss has been achieved using methodology that is appropriate and commensurate to the scale and intensity of the adverse effects. The application of biodiversity offsetting will be determined on a case by case basis through the decision-making processes.

85. No party disagreed that compensation was an available response under the WRPS. Instead, the key area of disagreement was whether opportunities for offsetting had to be sequentially "exhausted" before moving to compensation, and if so, whether that had occurred in this case.

86. We do not consider such a formulaic requirement applies in this instance for the following reasons:

    a. While the WRPS does not expressly mention compensation, the methods it includes when referring to offsetting (ECO-M13.4 and .5 referring to achievement of no net loss through on- and off-site methods) are worded broadly enough to include the concept of compensation.

    b. The WRPS applies to all *areas* of significant indigenous vegetation and significant *habitats* of indigenous fauna. The effects management hierarchy in the NPSFW applies only to natural inland wetlands and rivers.

    c. While the exposure draft of the NPSIB signals that it will apply to all areas of indigenous biodiversity, it remains in draft form and has no legal effect at this stage.

d. Even if they were relevant, while both the NPSFW and exposure draft of the NPSIB distinguish and include a hierarchy between offsetting and compensation, those requirements are not absolute – there is recognition that compensation may be appropriate where offsetting is "not possible".

e. The Council evidence and legal submissions clearly demonstrate why offsetting is neither practicable nor possible in this case without significant compromise to the NPSUD and MRZ imperatives pursued,[37] and the contrary was not demonstrated by any other evidence.

87. We discuss the derivative issue of compensation and the model proposed by PC 5 for determining that quantum later in this decision.

5.3 Adaptive Management

88. It is trite that rules in a plan must be clear and certain in order to be enforceable. It is also trite that at the planning stage it is not possible to know precisely how an area will actually be developed, and therefore the extent to which the anticipated effects will arise. The task of the District Plan is therefore to include sufficient measures and triggers that ensure an activity's effects are able to be appropriately controlled – either through rules, permitted activity standards or through conditions imposed at the time of consent.

89. In situations where uncertainty remains regarding the outcome sought, the courts have accepted that an adaptive management approach is permissible subject to a series of prescriptions. These were articulated by the Supreme Court in *Sustain our Sounds Inc v The New Zealand King Salmon Co.*, in which the Court noted that whether such an approach is available will depend upon:[38]

(a) the extent of the environmental risk (including the gravity of the consequences if the risk is realised);

(b) the importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);

(c) the degree of uncertainty; and

(d) the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

90. Furthermore, the Court accepted in that case, that the following factors are relevant:[39]

(a) there will be good baseline information about the receiving environment;

(b) the conditions provide for effective monitoring of adverse effects using appropriate indicators;

(c) thresholds are set to trigger remedial action before the effects become overly damaging; and

(d) effects that might arise can be remedied before they become irreversible.

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[37] Statement of Evidence of Gerry Kessels for Hamilton City Council, 2 September 2022, Attachment 1; Statement of Evidence of Matthew Baber for Hamilton City Council, 2 September 2022; Rebuttal Statement of Evidence of Matthew Baber for Hamilton City Council, 22 September 2022; and Closing legal submissions for Hamilton City Council, 4 November 2022, at [9], [13], [15] and [24] (as quoted earlier in our decision).

[38] *Sustain our Sounds Inc v The New Zealand King Salmon* Co. [2014] NZSC 40, at [129].

[39] Ibid, at [133].

91. While that case involved both plan change provisions and coastal permits, those factors remain relevant to PC 5. As the Court concluded in that case (emphasis added):[40]

> *The Board was entitled to consider that the adaptive management regime, reflected in both the plan and the consent conditions, was consistent with a proper precautionary approach. The plan changes were not improperly predicated on the consent conditions and there was no need for the plan to contain more than it did on water quality, the plan containing in particular a reference to an adaptive management regime and to controls for water quality.*

92. No party challenged that an adaptive management approach to long-tailed bat management was an available approach for PC 5. The disagreement was about whether the preconditions for such were satisfied – and we discuss that aspect further below.

5.4 Trade Competition

93. Ms Arthur-Young, counsel for Woolworths New Zealand Ltd ("**Woolworths**"), submitted that Adare's concerns about Woolworths' proposal to extend the local centre onto Woolworths' land amounted to trade competition. She also submitted that Adare's position was inconsistent with the Commerce Commission's recommendations in its recent report on the retail grocery sector.[41]

94. Counsel for Adare, (the now late) Dr Makgill, dismissed these concerns largely on the basis that Adare is a land developer, is not in the business of operating supermarkets and has no current agreement with any supermarket provider.[42] Dr Makgill also submitted that the Commerce Commission's report had no status under the RMA, did not support "carte blanche supermarket development", and that Adare's position did not offend against that report as, unlike the Woolworths' land, its land "would be available for supermarket development by Woolworths, Foodstuffs or any new market entrant".[43]

95. Counsel for the Council agreed and submitted that:[44]

> *[72] In HCC's submission, there is no evidence to suggest that Adare stands to gain an advantage in trade competition in opposing Woolworths' relief, nor that Adare and Woolworths are commercial competitors. "Trade competition" is not defined in the RMA. However, the High Court has concluded that the words "refer succinctly to the rivalrous behaviour which can occur between those involved in commerce" and "planning law should not be used as a means of licensing or regulating competition". The mischief the prohibition seeks to address is competition between traders of the same kind - for example between the two supermarket chains. In HCC's view, Adare and Woolworths are not trade competitors in this sense. Rather, Adare and Woolworths are competing for the highest value use of their land. Such contests do not constitute trade competition.*
>
> *[73] Even if the Panel disagreed that Adare and Woolworths are not trade competitors, HCC has raised similar concerns to that of Adare and HCC is clearly not a trade competitor. HCC considers the relief sought by Woolworths raises real environmental concerns relating to urban design and the optimisation of the benefits associated with the Local Centre. The Panel is obliged to have regard to these matters in accordance with s 74(1) of the RMA.*
>
> [Footnotes omitted]

[40] Supra n.33 at [158].
[41] Legal submission for Woolworths New Zealand Ltd, 23 September 2022, at [5.4]-[5.5].
[42] Legal submissions for the Adare Company Limited, 27 September 2022, at [66]-[75].
[43] Legal submissions for the Adare Company Limited, 27 September 2022, at [76]-[81].
[44] Closing legal submissions for Hamilton City Council, 4 November 2022, at [72] and [73].

5.4.1 Findings

96. We have closely considered the evidence and submissions of all parties on this issue. We find that no trade competition issue arises in this case for the reasons given by the Council and Adare (as summarised above). As counsel for Adare noted, Adare's participation in PC 5 stemmed from "its genuine interest in establishing a high quality, functional and vibrant Local Centre". The concerns raised by Adare, relating as they did to urban design, transport, and planning, were consistent with that position – and are valid resource management issues. Woolworths, while raising the spectre of trade competition, did not provide us with any evidence in support of its submission.

97. However, even if we are wrong in finding that Adare is not a trade competitor, as counsel for the Council notes, the Council is clearly not a trade competitor, and it expresses similar concerns. Those matters are therefore squarely on our table to determine.

98. Accordingly, we are satisfied that there are no effects, issues or concerns raised by Adare that go beyond those that can properly be considered under the RMA, and there are no effects or evidence that should be dismissed on the basis of trade competition.

PART 2 ISSUES AND EFFECTS

6 Introduction

99. The legal submissions, evidence and representations received were extensive and, in the interest of brevity, we identify those, where relevant, under the particular issues in contention.

6.1 Principal Issues in Contention

100. Having considered the submissions and further submissions received, the hearing report, the evidence presented at the hearing and subsequently, and the Council officers' response to questions, we find that the following principal issues remain for determination:

- Long-tailed bat / habitat management;
- Local centre – location, extent and the centres hierarchy;
- Transportation standards and identification; and
- Density rules, setbacks and plan / map notations etc.

101. We turn to each of those matters in turn below.

7 Long-Tailed Bats

102. The long-tailed bat (*Chalinolobus tuberculatus*) ("**LTB**") is an endemic bat found only in New Zealand. Long considered extinct in urban habitats, its presence within Hamilton was only comparatively recently confirmed.[45] Dr Borkin noted[46] that at least 61 LTB were estimated in the southern Hamilton area (including the Peacocke Structure Plan Area ("**PSPA**")) in 2018 from the 28 roosts found.

103. We were told that other relevant characteristics of LTB include:

[45] Statement of Evidence of Dr Kerry Borkin for the Director-General of Conservation, 16 September 2022, at [6.2], citing a study by A S Dekrout in 2009.

[46] Ibid, at s.3.3.2.1.

a. LTB are “highly philopatric” – i.e., loyal to their home range (which can be large) and their social group, but regularly change favoured roost trees.

b. LTB use all habitat types present in Peacocke (indigenous, exotic and pasture).

c. LTB roost in tree hollows, knot holes and beneath loose bark – usually in limited numbers.

d. Roosting areas change over the season reflecting the changing needs / preferences of male and female LTB.

e. High quality maternity / communal roosts (in which larger numbers of females gather) are a limiting resource for LTB due to their specific thermal requirements.

f. Maternity roosts are typically close to an open water source to minimise the time lactating mothers are absent.

g. LTB may go into true hibernation over the June to August winter months.

h. LTB are insectivorous and foraging typically occurs along forest edges, over low density regenerating Kānuka and Mānuka, above wetlands; and over open water and vegetated road corridors.

i. LTB tend to use landscape features for navigating.

104. The above are all matters that must be taken into account in designing a management strategy. We did not perceive any disagreement about that among the bat experts.

7.1 Distribution

105. The LTB is found throughout both islands as well as on several offshore islands, but there is little information on their number and distribution across the Waikato region.[47]

106. As Dr Mueller noted succinctly in her evidence:[48]

> *A population of long-tailed bats regularly use the PSPA for foraging, commuting and roosting. Within the PSPA, the riparian margins of the Waikato River, the Mangakotukutuku Gully and treeland areas containing known roosts trees for bats, are considered to be key habitats for foraging, commuting and roosting. However, to varying degrees, bats are also using a variety of other exotic and indigenous habitats for foraging and/or commuting.*

107. Dr Borkin added that they:[49]

> *… appear to be generally restricted to the southern parts of Hamilton with habitats of particular importance being those around wooded areas and the southern Hamilton gully system and along the Waikato River.*

108. In apparent confirmation of that observation we heard from Mr Aughton from the Waikato Environment Centre Trust (Go Eco), who presented a 2021 graphic summarising the results of a 2-year acoustic bat monitoring survey he had coordinated for Project Echo over some 60+ sites in and around Hamilton City. While that survey only captured bats “on the wing”, it indicated that 88.2% of the 5,196 bat passes recorded in that survey occurred

[47] Statement of Evidence of Professor Stuart Parsons for the Adare Company Limited, 16 September 2022, at [8] to– [11].
[48] Statement of Evidence of Dr Hannah Mueller for Hamilton City Council, 2 September 2022, at [23].
[49] Statement of Evidence of Dr Kerry Borkin for the Director-General of Conservation, 16 September 2022, at [5.1].

at the 2 sites located in Peacocke and the adjacent (i.e., eastern side of the Waikato River) Hammond Bush.[50]

109. There was no material disagreement with that overview – albeit most statements by the experts were qualified due to the uncertainty of the extent of bat use. Similarly, there was agreement that the LTB population needed to be managed at a wider scale than Peacocke – although precisely what that meant and required was not agreed (as we discuss later in this decision).

7.2 Threat Status

110. Ms Pryde, a Technical Advisor in the Threatened Species Unit at DOC, told us that:

(a) LTB are "absolutely protected" under s.3 of the Wildlife Act 1953; and

(b) are classed as "Nationally Critical" under the New Zealand Threat Classification Series 21.

111. She explained that that classification:

> *… means that this population (irrespective of size or number of sub-populations) has a very high ongoing or predicted decline (> 70%).*

112. Furthermore, Ms Pryde told us that threat status had recently been reviewed and reconfirmed; that Hamilton is one of the last cities where LTB persist; and that the rate of decline in bat colonies where populations are not managed has been estimated at between 5% and 9% per annum.[51]

113. From a later discussion the Panel had with the expert bat witnesses, we understood that a stable population is one where c.80% of mature females survive.

7.3 Habitat and Flyways

114. Dr Mueller characterised the existing LTB habitat as follows:[52]

> *Within the PSPA, the riparian margins of the Waikato River, the Mangakootukutuku Gully and treeland areas containing known roosts trees for bats, are considered to be key habitats for foraging, commuting and roosting. However, to varying degrees, bats are also using a variety of other exotic and indigenous habitats for foraging and/or commuting.*
>
> *This habitat usage is consolidated by a network of exotic and indigenous stands of trees and mature shelterbelts scattered through this largely pastoral environment. These lines of shelterbelts and patchily distributed stands of mature trees enable bats to move around this landscape as they use these features as navigational features to guide them to and from key habitats.*

115. To those elements, Mr Blayney added the functional importance of shelter and buffering (from both wind and lighting), noting that all of these habitat elements are essentially structural,[53] not relying upon the diversity or health of the habitat (although he emphasised[54] the need for varied and complex habitats to provide the full suite of microhabitats within which the LTB's necessary resources could be found). This, in his opinion, suggested the importance of efficient and continuous connections, which

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50 Rebuttal Evidence of Dr Matthew Baber for Hamilton City Council, 22 September 2022, at [14]-[15].
50 Rebuttal Evidence of Gerry Kessels for Hamilton City Council, 22 September 2022, at [27].
51 Statement of Evidence of Moira Pryde on behalf of the Director-General of Conservation, 16 September 2022, section 5.
52 Statement of Evidence of Dr Hannah Mueller for Hamilton City Council, 2 September 2022, at [23] and [24].
53 Statement of Evidence of Andrew Blayney for the Adare Company Limited, 16 September 2022, at [17].
54 Ibid, at [18(b)(v)].

minimised obstacles such as gaps in vegetation or lit sections of corridors – a point echoed by Professor Parsons, among others, who agreed that bats do not discriminate between tree species or forest types and spoke about the need to avoid habitat fragmentation.

116. The core areas of high value bat habitat and key corridors have been mapped and are shown as SBHAs on PC 5 Figure 2-3: Natural Environment and Heritage, along with the SNAs and existing wetlands that comprise the NOSZ.

117. There appeared to be general agreement among the bat experts that buffers of 50m and 25m respectively around communal and non-communal roosts[55] were adequate, and that an additional 20m buffer on the margins of all identified high value bat habitat areas was also appropriate.

118. There remained disagreement among the bat experts regarding the width of the connecting flight and foraging corridors required for bat management purposes.

119. Dr Borkin presented a summary table in her hearing presentation, concluding that 100m was the minimum corridor width required *with* bespoke design. Dr Mueller and Mr Kessels, while accepting 100m as a good starting proxy, argued that good bespoke corridor and planting design could reduce that to a minimum of 50m (comparable to that for communal bat roosts in Sandford Park).[56]

120. We discuss this issue further below under the proposed bat management sub-heading.

121. Dr Baber recorded that the Council's ecologists had calculated that in order to achieve a *net gain* target of 20% after 25 years, habitat restoration in the order of the following would be required:[57]

    (a) 66 ha (elsewhere noted as 65 ha) of *restored* habitat within the PSPA;

    (b) 62 ha of *enhanced* habitat within the PSPA;

    (c) 190 ha of high value bat habitat *restoration* outside the PSPA; and

    (d) 700 ha of habitat *enhancement* through mammalian pest control *in perpetuity*.

122. The 20% target buffer was not disputed. However, we note that it is not a requirement within either the Indigenous Biodiversity chapter (11) of the WRPS, which requires only the arguably lesser threshold of *no net loss*, or the Operative District Plan, which sets a 10% habitat sustainability threshold (SNA Policy 20.2.1o). Regardless, we accept that a more aggressive target is appropriate given the given the importance of ensuring a cautious approach to LTB management.

123. As part of that calculation Dr Baber noted that only 3 ha of high value bat habitat would be lost under PC 5 – and therefore would not be "avoided" - but that was primarily already authorised for removal under Adare's *Amberfield* resource consent.[58]

124. Furthermore, he noted that the calculation of residual adverse effects for which an off-site compensation package was deemed to be required, was associated with the loss of 488 ha of pasture habitat and 34 ha of mostly low stature exotic habitat.[59] Importantly,

[55] Statement of Evidence of Dr Hannah Mueller for Hamilton City Council, 2 September 2022, at [27].
[56] Statement of Evidence of Gerry Kessels for Hamilton City Council, 2 September 2022, at [30].
[57] Statement of Evidence of Dr Matthew Baber for Hamilton City Council, 2 September 2022, at [36].
[58] Rebuttal Statement of Evidence of Dr Matthew Baber for Hamilton City Council, 22 September 2022, at [7].
[59] Statement of Evidence of Dr Matthew Baber for Hamilton City Council, 2 September 2022, at [11].

however, we note that precisely (or even generally) where that restoration, enhancement or predator control is to occur outside the PSPA remains speculative.

125. DOC's bat experts were not persuaded that sufficient habitat would remain within the PSPA.

126. Ms Pryde, for example, noted that PC 5 reduces the identified existing open space bat habitat within PSPA from 128 ha to 112 ha with reduced connectivity because of the Southern Links designation, of which 47 ha is classed as being of "medium value".[60] She also noted that the average range of all the bats studied was 704 ha[61] – in other words the proposed remaining habitat is only 16% of that range, well below the 20% range extinction threshold cited.[62]

127. In passing we note that, while the PSPA is some 740 ha, there was no evidence suggesting or confirming that the "resident" LTB are constrained to range only within that area either by preference or anything else. The co-relation between the 704 ha average bat range and the 740 ha area of the PSPA remains undetermined.

7.4 Adverse Effects of Concern

128. Dr Borkin and Ms Pryde summarised the adverse effects of concern as:

    a. Habitat (foraging and roosting) and connectivity loss;
    b. Home range reduction;
    c. Roost tree loss, felling and associated death / injury;
    d. Roads, traffic, lighting and noise;
    e. Predation; and
    f. Male-skewed population.

129. They summarised the necessary requirements arising as:

    a. Functional habitat;
    b. Protection from blue wavelength light;
    c. Protection from noise;
    d. Sufficient roost trees;
    e. Space – particularly the width of habitat; and
    f. Predator control.

130. We did not understand Mr Blayney, Dr Flynn, Professor Parsons, Dr Mueller or Mr Kessels to disagree with that characterisation or summation. The difference related more around the extent to which those matters can or should be managed and provided for – it is a question of appetite for risk in the face of managing uncertainty.

7.5 Bats and Adaptive Management

131. As we noted earlier, adaptive management is a resource management tool that has been developed for circumstances where a level of uncertainty is evident but sufficient management cautions can be identified and expressed such that relevant adverse effects of concern can be appropriately addressed in a timely fashion. There is now sufficient case authority for the implementation of such an approach in defined circumstances.

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60 Statement of Evidence of Moira Pryde for the Director-General of Conservation, 16 September 2022, at [9.7].
61 Ibid, at [9.11].
62 Statement of Evidence of Moira Pryde for the Director-General of Conservation, 16 September 2022, at [9.12].

132. The measures proposed through PC 5 purport to enable an adaptive management approach - with the key outcome parameters defined as summarised in paragraph 121 above, including offset compensation beyond the PSPA.

133. A number of submitters, including DOC, considered that not enough work had been done and not enough was known with regard to the displacement of LTBs in the PSPA:

    a. for an adaptive "learn as we go approach" to be employed;[63]

    b. for the Panel to be "in a position to make a decision about what the Peacocke compensation programme will achieve" when we do not "actually know what will occur";[64] and

    c. for the Panel to be confident that financial compensation was appropriate to address the significant residual effects on LTBs or that the Biodiversity Compensation Model ("**BCM**") could accurately calculate the appropriate quantum – matters that we address in subsequent sections below.

134. As a result, DOC advocated (as a position secondary to its opposition) for a precautionary approach with more stringent plan provisions in order to ensure effects on the LTB were appropriately managed. In the main these comprised wider corridors (minimum of 100m), amendments to lighting controls in the vicinity of SBHAs, predator controls (particularly cats), and firming up of management plan purpose and policy provisions (in addition to anchoring the effects hierarchy as discussed above).

135. In response, counsel for the Council submitted that DOC had misunderstood the function of a district plan, the law relating to such plans, and therefore the degree of certainty required.[65] In particular, counsel stated that:

    [33] …The hearing panel is not required to make a decision on what the compensation programme will achieve in order to approve PC 5… Rather the Panel is required to determine the extent of residual adverse ecological effects likely to arise from the enabled land use changes under PC 5, and be satisfied that a compensation programme, which addressed the effects to a no net loss/net gain outcome, is able to be implemented…

    [34] The correct approach is to evaluate the performance of the compensation programme as a mitigation strategy over time, and through adaptive management make changes to the programme, or consent conditions, if compensation is not being delivered at a rate, and in a manner, that delivers effective mitigation of residual adverse effects arising.

    [35] … Not all the modelled residual adverse effects arise on day one, nor must all of the compensation outcomes be delivered on day one. The practical reality is that Peacocke will be urbanised in stages, incrementally over time. Adverse effects and the concomitant compensation will similarly accrue over time.

    …

    [38] … a district plan sets the framework for enabling development, but it cannot predict or control with certainty all of the consequential environmental outcomes. These outcomes manifest through the occurrence of permitted activities, and the implementation of resource consents which authorise land uses that are not expressly permitted. The potential outcomes are many and varied, and on occasion, may not be anticipated (such as non-complying activities). So just as the

63 DOC Summary of Issues, 30 September 2022, p.3

64 Final Memorandum of Counsel for the Director-General of Conservation, 28 October 2022, at [19] and [4] respectively.

65 Closing legal submissions for Hamilton City Council, 4, November 2022, at [30].

plan provisions cannot determine with certainty what on site mitigation outcomes will look like for a particular development, nor can they determine with certainty what off site compensation will occur, and exactly where it will occur. All the district plan can do is set the requirements.

[39] What matters is that … [the] district plan enables the urbanisation of Peacocke in a matter that accords with the section 5 sustainable management directive. This requires plan provisions which enable an adaptive management of the ecological issues as urbanisation progresses, recognising also that plan provisions must be reviewed within 10 years. The 10 year review of the PC 5 provisions represents the necessary break point where the effectiveness of the compensation programme can be measured against the rate of residual adverse effects generated. If there is a misalignment, the plan provisions can be amended, to limit further urbanisation unless and until the compensation deficit is resolved. Across a likely development timeframe of 20-30 years, this represents a suitable breakpoint.

[Footnotes omitted]

136. The Council did however suggest including two additional assessment criteria as a way of achieving greater certainty and measurability in terms of compensation.[66] In response to the Panel's request for suggested wording for those provisions the Council proposed the following:[67]

x) The extent to which the proposal contributes to the ecological compensation outcomes identified within the report 'Preliminary Assessment of Ecological Effects - Peacocke Structure Plan Area', Tonkin & Taylor Ltd, dated July 2021, required to achieve the No Net Loss outcome for the long-tailed bat population within the Peacocke Precinct. This evaluation shall ensure the ecological compensation required for the proposal is proportional to the extent of effects identified arising from the proposal.

In broad terms to achieve the No Net Loss outcome, the following habitat restoration and enhancement activities will need to be implemented:

a) Habitat restoration within PSPA public open space areas (native revegetation, weed management and mammalian pest control within riparian pasture) of some 66 hectares;

b) Habitat enhancement within PSPA public open space areas (native enrichment planting, weed management and mammalian pest control within existing forested habitats – exotic and indigenous) equating to about 62 hectares; and

c) Habitat restoration outside of the PSPA within high value bat habitat known to support bat roosts. This comprises:

i. native revegetation, weed management and mammalian pest control within riparian pasture (equating to some 190 hectares of habitat restoration) and/or

ii. mammalian pest control in perpetuity (equating to 700 hectares of habitat enhancement), or

iii. a lesser combination of both.

y) The extent to which the proposal has taken steps, either onsite, or offsite, to compensate for the effects of development on Significant Bat Habitat Areas by

[66] Closing legal submissions for Hamilton City Council, 4 November 2022, at [29] and [100].
[67] Council Response to Commissioners Queries, 15 November 2022. Noting in that response two options were suggested for the first criterion, however only the Council's preferred criterion has been reproduced here.

implementing a planting programme enabling new bat habitat, including consideration of the age and development of that planting.

7.5.1 Findings

137. As a preliminary point we note that s.6(c) is directed at the protection of "areas of significant indigenous *vegetation* and significant *habitats* of indigenous fauna" rather than the indigenous fauna themselves. Other legislation, namely the Wildlife Act 1953 administered by DOC, provides for the direct protection of all wildlife, including the LTB.[68] However, this is not to say that effects on LTBs themselves are not important under the RMA – they clearly are – and the District Plan is required (under s.31) to control any actual or potential effects of the use, development or protection of land including for the purpose of *maintaining* biological diversity (s.31(1)(b)(iii)).

138. In terms of DOC's view that it is inappropriate to adopt an "adaptive learn as we go approach", we note that this view appears to be based on a perceived failure of the PC 5 provisions to satisfy the Supreme Court's tests for when an adaptive management approach is appropriate. As already noted, these tests (which require good baseline information, effective monitoring conditions, threshold triggers for remedial action, and an ability to remedy effects before they become irreversible), arose in the context of a case where the Supreme Court was considering both resource consent applications and a private plan change, and involved a clear avoidance directive. We do not consider a similar level of certainty is required for PC 5 given the different policy context and that no resource consents are being sought contemporaneously.

139. In any event, we consider that we have sufficient information to be able to determine plan provisions which are appropriate to manage effects on the LTB and their habitats. As counsel for the Council noted, we are not required at this juncture to know exactly how LTBs will be affected or the precise compensation package that will (or will need to) be adopted. Instead, all we need to be satisfied about is that there are mechanisms in the plan which are appropriate, realistic and within the jurisdiction and ability of parties to manage those matters. As a codicil, Mr Muldowney and Mr Sirl drew attention to the funding and policy mechanisms available to the Council as well as other strategies to which it was either a signatory or obligated.[69]

140. Furthermore, we agree with counsel for the Council that in the context of Peacocke, where the development is to be progressed in stages over the next 20 – 30 years, the 10-year plan review requirement provides appropriate "break-points" where the effectiveness of the compensation package and overall management programme can be reviewed. We also note that it would be open to the Council to review the plan requirements earlier, and the terms of any subsequent consent granted in reliance on that plan, were it to become concerned about the effectiveness or progress of the compensation package and/or consent conditions in managing effects. Once brought into the Operative District Plan, PC 5 will influence the consideration of resource consents beyond the PSPA with respect to LTBs.

141. Accordingly, we are satisfied that, with the addition of the two further assessment criteria (noted at paragraph 136 above and identified in the Plan as 1.3.3 P2 (r) and (s) and P4 (ar) and (as)) and the provisions we have detailed in other parts of our decision, that the provisions of PC 5 are suitably precautionary, accord with the fundamentals of an adaptive management approach, and will manage the effects on LTBs and their habitats

[68] Refer in particular to s.3 of the Wildlife Act 1953.
[69] Supplementary Statement of Evidence of Jamie Sirl for Hamilton City Council, 11 October 2022.

appropriately. The critical issue of the PC 5 proposed method by which any compensation is determined was also challenged by DOC - and we discuss that next.

8 Compensation and the Biodiversity Compensation Model

8.1 Overview of Potential Effects Associated with Land Use Change

142. It is trite that rules in a plan must be clear and certain in order to be enforceable. It is also trite that at the planning stage it is not possible to know precisely how an area will be developed, and therefore the extent to which anticipated effects will arise. The task of the District Plan is therefore to include sufficient measures and triggers that ensure an activity's effects are able to be appropriately controlled – either through rules, permitted activity standards or through conditions imposed at the time of consent.

143. PC 5 proposes to manage residual adverse effects on LTB habitat occasioned within the PSPA by compensation measures applied both inside and outside the PSPA. The implication of that was contentious.

144. It was common ground that the proposed change in land use associated with PC 5 has the potential to result in a range of adverse effects on ecological values. These include construction-related effects such as:[70]

    a. vegetation and habitat loss through vegetation clearance and earthworks;

    b. direct mortality or injury to species - for example, roosting bats could potentially be harmed during vegetation clearance activities;

    c. during breeding season, vegetation removal has the potential to result in the destruction of nests, eggs and fledglings (outside of bird breeding season bird mortality would be low);

    d. the creation of habitat edge effects, altering the composition and health of adjacent vegetation (i.e. habitat degradation), which may affect habitat suitability for flora and fauna;

    e. habitat fragmentation and isolation due to the loss and reduction of available habitat types and by reducing the ability for plants and animals to disperse across the landscape for food, shelter, and breeding purposes, i.e., severing or partially severing access to habitats that would otherwise be suitable; and

    f. construction and operation-related noise, vibration, dust, or lighting effects.

145. Potential long-term, on-going adverse effects associated with the change in land use may include:[71]

    a. on-going habitat degradation associated with habitat loss, edge effects and fragmentation, which permanently affect movement of some species, with possible effects on meta-population dynamics and increased vulnerability to local extinction;

    b. on-going disturbance effects, particularly on habitat margins/edges, through noise, dust and lighting associated with infrastructure and housing;

[70] Statement of Evidence of Gerry Kessels for Hamilton City Council, 2 September 2022, Attachment 1 – Technical Ecology Report, s.3.3.1.

[71] Ibid.

c. mortality or injury on roads through strike or roadkill for some species;

d. the increased presence of people and introduced species in previously less accessible areas; and

e. lost opportunities for creating wildlife corridors.

8.2 Effects Avoidance Measures

146. There was no dispute that every practicable effort should be undertaken to avoid adverse effects on ecological values. To this end the most significant adverse effects will be avoided through:[72]

a. Protection of the most ecologically significant habitat which includes riparian margins of the Waikato River, major gullies and known bat roost sites through the mapping of these areas as NOSZ (127.86 ha).

b. Protection of significant bat habitat in the form of ecological corridors to avoid or minimise severance or partial severance in the landscape.

c. Protection of significant bat habitat in the form of ecological buffers around important ecological habitat to avoid or minimise potential effects associated with lighting and general disturbance resulting from land use change activities.

8.3 Effects Minimisation Measures

147. Potential adverse effects on terrestrial and wetland values associated with construction and operation are intended to be avoided, remedied or mitigated to the extent possible through:[73]

a. seasonal constraints on vegetation clearance;

b. vegetation clearance controls;

c. sediment control measures;

d. vegetation/habitat clearance, salvage and relocation operations for nationally 'Threatened', 'At Risk', Regionally uncommon or legally protected species present or potentially present onsite including:

i. best practice bat tree felling protocols to reduce the risk of harming roosting bats;

ii. lizard salvage and relocation; and

iii. redeployment of dead standing wood or fallen logs into native revegetation sites, to mitigate for potential effects on regionally uncommon invertebrates that may be present, e.g. tree wētā and peripatus;

e. mitigation plantings to buffer against light, noise, dust or general disturbance of ecologically significant habitats. These plantings are ideally undertaken before construction starts, to reduce the time lag needed for planted habitat to become ecologically functional.

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[72] Statement of Evidence of Gerry Kessels for Hamilton City Council, 2 September 2022, Attachment 1 – Technical Ecology Report, s3.3.2.1.

[73] Statement of Evidence of Gerry Kessels for Hamilton City Council, 2 September 2022, Attachment 1 – Technical Ecology Report, s3.3.2.2.

148. These measures were recommended by Mr Kessels in his supporting technical ecology report, for inclusion in PC 5 in order to appropriately avoid or minimise effects – and were generally supported as minimum requirements by the relevant ecology experts. We have accepted those recommendations.

8.4 Biodiversity Compensation Model

149. Council's evidence (primarily Mr Kessels and Dr Baber) was that biodiversity offsetting was considered in the first instance but was ruled out on the grounds that neither the biodiversity values within the PSPA, the nature of residual adverse effects on those values, nor the proposed residual effects management measures lent themselves to quantitative accounting for gains and losses with the necessary degree of confidence to constitute an offset as that term is currently used in the NPSFM and exposure draft of the NPSIB.

150. Attention therefore focussed on compensation mechanisms. We were told that all available and commonly used options for assisting with the determination of compensation requirements were considered.[74] Those options included:

    a. a sole reliance on professional opinion;

    b. the use of arbitrarily assigned multipliers / compensation ratios;

    c. negotiated exchanges; and

    d. application of BCMs coupled with professional opinion.

151. Of these options, the BCM approach was favoured because it was considered the most transparent and likely to generate the best ecological outcomes based on the team's collective experience.

152. In summary, BCMs are used to 'sense check' and test the likelihood that net gain outcomes (a more ambitious target outcome than the WRPS' *no net loss* policy objective) will be achieved through the type and quantum of compensation that is proposed to address residual adverse effects. It was emphasised that the BCM is not used to claim or demonstrate that an offset has occurred or that a particular outcome (e.g., no net loss or net gain) is guaranteed - which is why it is termed a compensation model rather than an offset model. In summary, BCMs:[75]

    a. include quantitative and qualitative metrics, with the qualitative metrics being directly aligned with the preliminary assessment of ecological effects which, in turn, is based on professional opinion underpinned by desktop and field investigations;

    b. are based on measurements of biodiversity loss at the impact site(s) and gains at the proposed compensation site, i.e.:

        i. assessment of the quantum and value/quality of habitat within the impact footprint before and after project activities (biodiversity loss);

        ii. assessment of the quantum and value/quality of habitat before and after proposed compensation measures (biodiversity gain);

    c. account for any time lag between adverse effects occurring at the impact site and gains realised at the compensation site;

[74] Statement of Evidence of Gerry Kessels for Hamilton City Council, 2 September 2022, Attachment 1 – Technical Ecology Report, s.4.2.3.

[75] Ibid.

d. include multiple contingencies to minimise the risk of false positives - i.e., predicting likely net gain when the converse is true. Specifically the BCMs include:

i. contingency to account for biodiversity risk, which is based on the ecological value / threat status per se;

ii. contingency to account for impact uncertainties;

iii. contingency to account for the degree of confidence that the stated net gain outcomes proposed through restoration or habitat enhancement measures will be achieved in the stated time frame;

iv. a predicted net gain target of 20%.

153. Council's team chose to use a single LTB BCM to assist with determining compensation requirements for all adversely affected biodiversity values because it considered that:[76]

a. LTBs are an 'umbrella species' and efforts to address effects on bats also serve to benefit the full suite of biodiversity values that are potentially affected by the PSPA; and

b. residual adverse effects on bats were considered the most significant potential effect.

154. It was noted that ecological outcomes are improved where biodiversity compensation principles are applied as a guideline. Accordingly, we understood that the Council team carried out an assessment of its proposed biodiversity compensation package against the 13 Principles for Biodiversity Compensation set out in Appendix 4 of the exposure draft NPSIB.[77] That assessment concluded that, with the exception of the Science and Mātauranga Māori principle (under which experts in Mātauranga Māori had not yet been included in design and implementation), those principles were met.

155. To address residual effects on bats and other values, the Council proposed a focus on native revegetation or native enrichment plantings, weed control and the control of introduced mammalian pests (browsers and predators) within suitable protected areas - and that these measures should follow best practice guidelines to optimise ecological outcomes.

156. Habitat restoration, or enhancement activities within all available open public space zones that are present within the PSPA but outside of the development footprint, are concluded to go a considerable way towards addressing adverse effects. However, the BCM indicated that it was unlikely to achieve a net gain outcome for LTBs and for those residual adverse effects it is proposed that further bat habitat restoration and enhancement measures in areas outside of the PSPA is required to generate a net gain outcome overall for LTBs.

157. The BCM indicated that in order to achieve a net gain target of 20% after 25 years, the following habitat restoration and enhancement activities would likely be required:[78]

a. habitat restoration within PSPA open space areas (native revegetation, weed management and mammalian pest control within riparian pasture) of some 66 ha;

[76] Statement of Evidence of Gerry Kessels for Hamilton City Council, 2 September 2022, Attachment 1 – Technical Ecology Report, s.4.2.3.

[77] Statement of Evidence of Gerry Kessels for Hamilton City Council, 2 September 2022, Attachment 1 – Technical Ecology Report, Table 71

[78] Rebuttal Evidence of Dr Matthew Baber for Hamilton City Council, 22 September 2022, at [11] and [14(e)].

b. habitat enhancement within PSPA open space areas (native enrichment planting, weed management and mammalian pest control within existing forested habitats – exotic and indigenous) equating to about 62 ha; and

c. habitat restoration outside of the PSPA within high value bat habitat known to support bat roosts comprising:

   i. native revegetation, weed management and mammalian pest control within riparian pasture (equating to some 190 ha of habitat restoration); and/or

   ii. mammalian pest control in perpetuity (equating to 700 ha of habitat enhancement), or

   iii. a lesser combination of both.

158. It is further proposed to use the BCM to provide an automated and integrated approach for compensating adverse effects given the potential for many small developments having an unquantifiable cumulative effect on ecosystems.[79]

159. The Council has put forward assessment criteria (under P3 and P5 in 1.3.3) to enable consideration of habitat restoration and enhancement activities when development proposals are considered.

160. Council's closing legal submissions noted that any consent assessment would examine the extent to which the development would contribute to the ecological compensation outcomes identified.[80] We understand that this is intended to be achieved by using the BCM model to determine the quantum of each of the above habitat restoration and enhancement activities (summarised at para 157 (a), (b) and (c) above) that are required for a proposed development. Activities (a) and (b) would be required either to be provided prior to or be functioning adequately at the completion of the development. Activity (c) would be provided by way of a financial instrument (such as a development contribution or local government rate charge) dedicated for habitat restoration outside of the PSPA, to be delivered through policy and a management strategy which are yet to be formulated (Mr Sirl's and Mr Carstens' supplementary evidence provided some indicative policy and funding mechanism options in that regard).

161. The evidence of Dr Corkery considered that the proposed biodiversity management model did not:[81]

- ensure each of the first three steps in the effects management hierarchy would be exhausted sequentially;
- adequately provide for losses to be offset; and
- potentially provide adequate compensation to address residual effects.

162. Dr Corkery considered that the BCM outputs lack transparency and are difficult for other ecologists or decision makers to interpret. She was also concerned that the model's calculated gains could be highly sensitive to minor fluctuations in inputs. Dr Corkery concluded that the model assumptions need to be made more transparent and criticised some of the input quanta used in the BCM. She expressed the view that models that facilitate compensation over offsetting in the first instance, when limits to offsets have not

[79] Statement of Evidence of Dr Matthew Baber for Hamilton City Council, 2 September 2022, at [42].
[80] Closing legal submissions for Hamilton City Council, 4 September 2022, at [28].
[81] Statement of Evidence of Dr Isle Corkery for the Director-General of Conservation, 16 September 2022, at [4.4].

been reached, go against best practice effects management. Her concluding opinion was that it is possible and even likely that the BCM would facilitate biodiversity loss in the PSPA.[82]

8.4.1 Findings

163. We accept Dr Baber's evidence that all reasonably practicable measures to avoid adverse effects have been considered, and where avoidance is not practicable, will be appropriately mitigated.[83] We also accept Dr Baber's evidence that he considered offsetting, but had ruled it out for good reason based primarily on the lack of like for like measurability.[84]

164. We also accept the Council evidence regarding the appropriateness of using the BCM to address effects and which we discuss further in section 8.7 below.

8.5 Monitoring

165. Guidelines for pre-development bat monitoring, developed by the Council in 2020, constitute a starting point for a wider monitoring framework. However, it was agreed among the bat experts that monitoring for the area should also involve baseline studies at a landscape scale, and more detailed monitoring such as radio telemetry to ensure bat habitat enhancement and mitigation measures are effective in the long-term, and at that wider landscape scale. Monitoring should also be coordinated with on-going existing infrastructure projects, such as monitoring for Southern Links, subdivisions such as *Amberfield*, and the Hamilton city-wide annual monitoring programme.[85]

166. We acknowledge that wider monitoring is not something that can be provided entirely through the provisions of PC 5. However, site-specific monitoring and the provision of a Bat Management Plan will be required, for certain individual applications such as those requiring the removal of trees/vegetation of a specified size.

167. So that the issue is not lost sight of we have included a note in the implementation chapter - section 1.5.4(r) Other Methods / Collaboration and Partnerships – regarding the establishment of a co-ordinated city-wide Bat and Habitat Enhancement Panel to oversee related issues in the wider area.

8.6 Policy and Management Strategy Options

168. This matter was addressed in the supplementary evidence of Mr Sirl for the Council,[86] which is summarised in the following paragraphs.

169. To implement the wider habitat restoration and enhancement activities and monitoring required through the BCM, the Council will need to take steps in collaboration with other agencies to co-ordinate centralised monitoring and data collection, pest and predator control, habitat restoration and land acquisition, both within and outside of the PSPA.

170. These steps will require integration and co-ordination so that all of the actions are aligned with the overarching ecological compensation objective. Mr Sirl set out a 'blueprint' of what is possible, noting that the Council will be motivated to lead the implementation and

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82 Statement of Evidence of Dr Isle Corkery for the Director-General of Conservation, 16 September 2022, at [12.8] to [12.14].
83 Rebuttal Evidence of Dr Matthew Baber for Hamilton City Council, 22 September 2022, at [7].
84 Ibid, at [9].
85 Section 4.3 Long-tailed bat report June 2021.
86 Supplementary Statement of Evidence of Jamie Sirl for Hamilton City Council, 11 October 2022.

management of the proposed biodiversity compensation given its statutory duties (discussed further below).

171. To guide the approach and ensure clarity of purpose, Mr Sirl suggested that the Council could first establish a policy on how to address the ecological compensation issues arising from the urbanisation of Peacocke. That policy would identify the intended outcomes, as summarised in the ecological compensation evidence for the Council in the PC 5 hearing. By establishing a policy of this nature, all actions could then be directed towards achieving the identified outcomes.

172. With the policy in place, Council staff could then establish a management plan or strategy setting out all of the actions needed to achieve the policy objectives. There would be obvious benefits in the Council seeking inputs from other agencies such as DOC, tangata whenua, Waikato Regional Council ("**WRC**") and neighbouring territorial authorities on the management strategy. This consultation and feedback would inform the strategy.

173. The types of actions that Mr Sirl suggested the strategy might pursue included:

- identifying potential sources of funding;
- identifying actions to be taken in order to pursue land acquisition and ecological enhancement opportunities;
- setting a framework for a pest and predator control programme;
- identifying how the broader 'landscape wide' compensation integrates with pest and predator control, mitigation, offsetting and compensation sites;
- establishing a Bat Ecology Panel or similar, comprising representatives from a range of agencies and ecologists to assist in the development of a habitat and corridor enhancement plan and to inform land use and subdivision consent processes; and
- integrating the compensation outcomes delivered via resource and subdivision consents, with those achieved at a wider landscape scale.

174. In conclusion Mr Sirl reiterated that ultimately how the Council responds to the requirement for ecological compensation will be a matter for elected members, based on expert and staff advice. Nevertheless, he expressed confidence that his evidence presented a practical framework that could be implemented to good effect.

175. DOC was critical of the Council's approach stating that it was too uncertain, the Council had failed to undertake a s.32 evaluation of funding sources and had not properly considered the limits on the use of development contributions.[87]

8.6.1 Findings

176. We note that under s.31 of the RMA, the Council must control the effects of land use for the purpose of the maintenance of indigenous biological diversity. That function is not confined to being performed via the District Plan.

177. Under s.10 of the Local Government Act 2002, the Council's purpose is to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future. Its role is to give effect to this purpose in relation to its district. We accept Council's closing legal submission that these statutory requirements hold the Council to account, ensuring that any remaining residual adverse effects arising from land use are addressed.

[87] Memorandum of counsel for the Director-General of Conservation, 28 October 2022.

178. With respect to DOC's concerns about a failure to evaluate funding sources under s.32 and the limits on development contributions, we accept the submission made in the Council's closing legal submissions that:[88]

    a. The compensation programme referred to in the evidence of Mr Carstens sits outside the District Plan. It is therefore not directly subject to s.32.

    b. Development Contributions address the effects of growth, where a territorial authority is required to create new or additional assets or assets of increased capacity as a consequence of that growth. Those assets include reserves and community infrastructure (including land acquired) and development assets on land for the purpose of providing public amenities. We see no reason why land purchased by the Council and developed as natural open space to provide bat habitat and ecological compensation would not satisfy that requirement.

    c. For any other aspect of the compensation programme which cannot be considered capital expenditure, such as ongoing pest control, rating revenue will be an available source of funding.

8.7 Reliability of the BCM

179. In this section we address the significant disagreement between the relevant experts on whether the BCM can accurately calculate the appropriate quantum of compensation.

180. We note Mr Kessels' explanation as to how the BCM allows for an approach where professional judgment on key matters such as existing habitat quality, potential degradation of habitat quality, and likely gains through restoration and habitation enhancement for fauna, over space and time are inputted into a model.

181. We accept Dr Baber's evidence that when biodiversity offsets cannot be established, the BCM is currently the most transparent and robust approach available, and his explanation as to why the BCM is preferred as the most reliable model available for PC 5.[89]

182. We also accept Mr Kessels' evidence that when dealing with complex spatial and temporal matters in terms of habitat loss and habitat gain, or uncertainty of successful outcomes, the BCM is preferable to other more subjective approaches, which, in his view, often resulted in ecologists applying multipliers through a 'horse-trading' approach, with no robust ecological process to account for the multiplier.[90] We were persuaded by Mr Kessels' explanation as to why, in his opinion, the BCM was superior to this 'horse trading' or multiplier approach. This was, in summary, because the BCM is:[91]

    a. transparent and repeatable regarding input and output metrics;

    b. conservative to allow for uncertainty associated with the lack of quantitative data; and

    c. capable of being applied instantly, which is critical to PC 5 and the consenting regime enabled thereunder.

183. We also accept Mr Kessels evidence in rebuttal to Dr Corkery's criticisms of his assumptions related to the model, which explained the basis for his conclusion that habitat

88 Closing legal submissions for Hamilton City Council, 4 November 2022, at [48] to [51].
89 Rebuttal Evidence of Dr Matthew Baber for Hamilton City Council, 22 September 2022, at [14] and [15].
90 Rebuttal Evidence of Gerry Kessels for Hamilton City Council, 22 September 2022, at [24].
91 Ibid, at [25].

creation will achieve a BCM value of 3 within 25 years.[92] We note these assumptions are based on Mr Kessels' considerable experience surveying bats throughout the Waikato.

184. We record that we prefer the evidence of Dr Baber and Mr Kessels to that of Dr Corkery with respect to the appropriateness and reliability of the BCM. The overall reasons for this are that we find that Dr Baber and Mr Kessels have adopted a practical and realistic approach to biodiversity management based on their considerable experience in designing, reviewing and implementing biodiversity effects management, including using models, for RMA consenting for a large range of projects. While we accept that, necessarily, all models have their limitations, and there will always be technical arguments around the margins, we find that the criticisms of the BCM model by Dr Corkery were satisfactorily addressed in the evidence of Dr Baber and Mr Kessels.

185. Dr Flynn, on behalf of Adare suggested an alternative approach to the BCM, which was that the contribution of each landowner should be calculated on a 'per area' basis as a proportion of the total cost of programme implementation, indexed to inflation, and allowing a contingency to cover cost variances over time.[93] Dr Flynn opined that while some residual risk is likely to remain, it may be appropriately dealt with through off-site compensatory measures, and that these values should be calculated and dealt with separately from the SBHAs.[94]

186. While initially attractive as a simpler option that potentially gives greater certainty to landowners, ultimately, we accept that this approach is not appropriate for the reasons set out in Mr Kessels' rebuttal evidence:[95]

> *Her evidence provides no solution to how the quantum of residual adverse effects on bats and their habitats will be addressed with any sense of scientific robustness, repeatability or transparency across PC 5, nor does it address varying habitat bat usage of habitats or habitat attributes across the PSPA, and does not allow bespoke solutions or innovation by developers in terms of designing avoidance, remediation, or mitigation measures to reduce the extent of residual adverse effects on bat habitat before applying any type of 'horse- trading' agreement, multipliers or biodiversity accounting model.*

9 Local Centre

187. PC 5 proposes a 7.8 ha Peacocke Local Centre Zone ("**LCZ**"), with a commercial activity cap of 20,000m^2 Gross Floor Area ("**GFA**") and a supermarket cap of 4,500m^2 GFA (among other things), to the east of Peacockes Road. It was generally accepted that this amount of GFA would enable two supermarkets to establish should that prove viable.

188. Both the size of the centre and the respective development caps were justified in terms of the District Plan's retail centres hierarchy, which places the PC 5 development yield within that Plan's suburban centre spectrum (local centre being the equivalent nomenclature required under the National Planning Standards).

189. Those matters were not materially in dispute between the main protagonists in this matter – being Council, Adare and Woolworths. In passing, we note that Kāinga Ora had withdrawn its submission challenging the status of the LCZ.[96]

190. At issue was whether the land owned by Woolworths on the western side of the Peacockes / Whatukooruru Road intersection, directly opposite the proposed LCZ to the

[92] Rebuttal Evidence of Gerry Kessels for Hamilton City Council, 22 September 2022, at [27].
[93] Statement of Evidence of Dr Sarah Flynn for the Adare Company Limited, 16 September 2022, at [29].
[94] Ibid, at [31].
[95] Rebuttal Evidence of Gerry Kessels for Hamilton City Council, 22 September 2022, at [24].
[96] Statement of evidence of Susannah Tait for Kāinga Ora, 16 September 2022, at [47] to [49].

east and the Ministry of Education's proposed school site to the north, should be included in the LCZ (as it is in the operative Peacocke Structure Plan that PC 5 seeks to replace).

191. That latter point, i.e., the fact that the Woolworths site is currently zoned as "suburban centre", the zone equivalent to the proposed LCZ, in the operative Peacocke Structure Plan, was strongly emphasised by Woolworths and, we were told, was a prime factor in its decision to purchase the site.[97]

192. Council and Adare's basic position was that the area identified as LCZ in PC 5 can accommodate 2 supermarkets within the GFA capped size, in addition to other retail, commercial and community offers, all of which should be sited to the east of Peacockes Road in order to anchor and support the conceptual main street development and concentrate carparking accordingly. The expert evidence of messrs Akehurst, Anderson and Bowker (retail and development economics), Munro and Bredemeijer (urban design), Sirl and Collins (planning), and Graham (landscape and visual) supported that position.

193. The transportation experts for Council, Adare and Woolworths (messrs Black, Penny and McKenzie) seemed less concerned with that issue. They agreed that pedestrian-friendly solutions needed to be available across the Peacockes / Whatukooruru intersection in any event to service the eventual school and any development on the Woolworths site – whether that be the medium density dwellings currently proposed by PC 5 or the supermarket alternative. They noted that this would, of necessity, be a low-speed environment. Indeed Mr Black noted:[98]

> *Based on discussions with HCC staff directly involved in the project I understand that the Whatukooruru Drive/Peacockes Road intersection was designed to facilitate safe pedestrian and cycle movements based on land uses including a Local Centre on the eastern side of Peacockes Road and a school and high density residential on the western side. They understood there was the potential for the residential activity to be replaced by a supermarket.*
>
> *In my opinion the planned works will provide a slow speed environment that provides multiple opportunities for pedestrians and cyclists to safely cross Peacockes Road.*

194. Mr Black also noted that providing access to and egress from a supermarket adjoining Peacockes Road would pose its own traffic issues in relation to pedestrian and cycling activities.

195. However, and as noted by the Council's witnesses, even Mr Bredemeijer's helpful urban concept plans which demonstrated a number of options for supermarket locations within the PC 5 proposed LCZ location, were nothing more than concepts. The precise arrangement of uses, activities and access, remains for future determination through resource consent processes if and once PC 5 is approved. The structure plan is the framework, not the detail.

196. We discuss the four substantive issues raised by this disagreement next.

9.1 Supermarket Operating Requirements

197. For Woolworths, Mr Shao, its development manager, gave evidence on the key factors underlying its decision to purchase the present site - finalised in November 2021.[99] Those factors included accessibility and visibility, appropriate zoning, freedom from physical

[97] Legal submissions for Woolworths New Zealand Ltd, 23 September 2022, at [3.1].
[98] Rebuttal statement of evidence of Alastair Black for Hamilton City Council, 22 September 2022, at [32] to [33].
[99] Statement of evidence of Daniel Shao for Woolworths New Zealand Ltd, 16 September 2022, sections 2 to 5.

development constraints, and land acquisition timing relative to commercial feasibility. It was Mr Shao's evidence that not only did the existing site satisfy those requirements fully, the options to the east of Peacockes Road patently did not and would present undesirable issues in terms of site establishment, development and layout. He noted that Woolworths had completed nine new or replacement supermarkets across New Zealand in the previous 18 months. This experience meant that, unlike witnesses who opposed the Woolworths' site location proposal, Woolworths better understands what makes an appropriate supermarket site for operational purposes. Mr Shao foresaw significant operational difficulties with the concept layouts provided through the expert conferencing – but did not elaborate on how Woolworths might be accommodated should the decision not favour the outcome it sought.

198. Mr Shao did not agree that the intersection constituted a barrier to movement across to the main street core and proposed surrounding commercial retail. He also noted the benefit of having car parking spread to reduce congestion in the core and to provide waiting areas for caregivers dropping off or collecting students from the proposed adjacent school.

199. Neither Council nor Adare provided operational supermarket evidence. As noted, their evidence tended to rely upon planning / urban design arguments.

9.2 Contextual Relationships and Urban Design

200. In essence the urban design disagreement reduces to the question as to whether an anchor supermarket was more likely than not to facilitate development of the main street if located on the east of Peacockes Road (Munro and Bredemeijer) than it would if located to the west (Knott and Sofo) – all else being equal (i.e., overall size of LCZ and the various retail / supermarket caps proposed). The respective planning witness tended to support their respective client's urban design witnesses.

201. Critical to that argument is the role played by the Whatukooruru Drive / Peacockes Road (both minor arterials) intersection.

202. The proposed context for the PC 5 LCZ is that it would be surrounded on the eastern side of Peacockes Road by medium density residential dwellings and a public transport terminus north of the main street on Peacockes Road; a primary school on the northwestern corner of Whatukooruru Drive and Peacockes Road; and medium density residential dwellings on the southwestern corner of Whatukooruru Drive and Peacockes Road.

203. In the Woolworths' alternative, its supermarket with strip retail along Peacockes Road would occupy the southwestern corner in place of the residential dwellings. A walking distance (if leaving the car parked) from a point in the approximate centre of an imagined car park on the Woolworths' site to the main street would be in the order of 150 - 175m.

204. The public transport "terminus" is proposed to be on the eastern side of Peacockes Road north of the intersection. School students arriving by public transport will need to cross at the intersection in either alternative.

9.3 Intersection Pedestrian Safety

205. While the urban design and planning witnesses opposing Woolworths' position expressed concerns about pedestrian safety and the psychological barrier of Peacockes Road and the intersection, we find that to be over-stated. We agree with the transport experts that, as a minor arterial, safety and pedestrian-friendliness ought to be able to be designed into

the intersection. As already noted, with a school, the current proposal for medium density dwellings around the intersection, and the bus terminus on the eastern side of Peacockes Road, pedestrian--friendly and safe measures must be implemented in any event.

206. The “barrier” issue is therefore more likely to be a distance rather than a safety or inconvenience matter – if at all.

9.4 Options for Sizing

207. By the end of the hearing there seemed to be a developing acceptance (but by no means agreement) that a LCZ of the size proposed (7.8ha) was more than sufficient for the foreseeable scale of development that would be enabled by PC 5 and in keeping with the retail hierarchy.

208. We agree that adding the Woolworths site of 1.7 ha to the proposed 7.8 ha certainly challenges both the hierarchy and the short to medium term prospect of achieving an overall coherent urban local centre form – not impossible, certainly, but more difficult. As such we would need a much finer grained sub-structure LCZ plan to be confident that it would not have that effect.

209. In our view, simply adding that area by extension to the notified LCZ is not therefore an option at this point.

210. The question, then, for the Woolworths’ alternative, is whether the Panel has sufficient evidence to justify moving the entire 7.8 ha locus of the LCZ westward – and what to zone the erstwhile “vacated” far eastern edge of the notified LCZ.

211. Put simply, we do not have either the analysis or evidence to justify (in a s.32 RMA sense) that option.

9.4.1 Findings

212. We find that the 7.8 ha size is appropriate for the LCZ and that extending the size by 1.7 ha to include the Woolworths’ site is not justified in terms of the overall architecture of the Operative District Plan and its retail centres hierarchy.

213. We agree with Woolworths that the locational counter-argument has been over-emphasised. While it is obvious that locating all relevant activities in the same general “uninterrupted” area makes spatial sense, we find that having a minor arterial road with a sympathetically designed intersection is not the obstacle that would necessarily prevent the development of a successful and vibrant local centre.

214. In that regard we again note that this is a plan change, the downstream implementation of which will involve multiple resource consents and development plans – including, undoubtedly, further plan changes until Peacocke is completely realised. The components of the local centre similarly will ebb and flow as occupancy of the Peacocke Structure Plan Area fills up. It will not be built in a day.

215. Therefore, while the Panel is sympathetic to Woolworths case, it is unable to reach a favourable decision on that point based on the evidence before it. For the moment, at least, the position and extent of the LCZ is to remain unchanged from that notified.

10 Transportation

216. In this section we outline the key transportation and design principles for PC 5, the current and proposed roading network, and public transport matters before turning to discuss the principal transportation issues in contention.

10.1 Key Principles

217. The Integrated Transport Assessment prepared by Gray Matter[100] identifies the Peacocke area as being developed in line with Hamilton's vision for a 20-minute city, which seeks to provide residents' access to everything they need within 20 minutes without relying on private motor vehicles. With respect to transport this means providing a multi-modal transport network that provides access to frequent public transport on key routes and a direct and accessible walking and cycling network, that is safe and enjoyable to use. The network is intended to be constructed to meet best practice principles related to safety, coherence, directness, attractiveness and amenity, which will assist in encouraging mode shift, in particular for shorter trips of less than 3km.

218. Key transport features that distinguish PC 5 from the current Operative District Plan provisions are:

    a. wider footpaths on local corridors;

    b. separated cycle lanes on the collector network;

    c. identification of public transport routes so that infrastructure can be provided at the time of subdivision;

    d. bus stops to be provided in-lane to minimise delays to the public transport services; and

    e. increased use of rear lanes for property access.

219. The Peacocke Structure Plan is proposed to enable a highly walkable and cyclable environment. This aligns with broader objectives found in Access Hamilton and Waka Kotahi's Regional Mode Shift Plan. These plans seek to increase the number of trips taken by walking, bike, other micro-modes (i.e., e-scooters) or public transport to 29% of all trips by 2028. Objectives relating to short trips, i.e., those less than 2 km, are more ambitious, seeking up to 50% of all trips to be undertaken by foot.

220. The Regional Mode Shift Plan in particular, identifies the need to invest in high quality and inclusive infrastructure that is suitable for use by all ages and builds a network of safe routes. This highlights one of the key barriers to increasing the number of active mode trips, particularly by bike - safety. This has been identified as a key barrier to cycling, particularly for children moving to and from school and for those with less experience or confidence on the road.

221. In order to meet the mode shift targets and overcome the barriers to walking and cycling, the active mode network should be designed to maximise the user's experience, providing a safe, pleasant journey for active mode users, prioritising the movements of active mode users throughout the structure plan area. This includes modifying the typical roading cross section to better cater for pedestrians and people on bikes, creating low-speed, safe

[100] PC 5 Assessment of Environmental Effects July 2022, Appendix P Integrated Transport Assessment, Gray Matter, 3 August 2021.

environments.

222. PC 5 identifies the high-level network of arterial and collector corridors that will function as the key movement routes for cyclists, providing separated cycleways - i.e., cycleways that are physically separated from the vehicle carriageway. These will be supported by a range of walking and cycling paths that use the edges of the gully network. Due to restrictions on lighting within these areas and related safety issues, these paths are complementary to, but not a replacement for, the separated cycleways, particularly during winter months with reduced daylight.

223. Local roads are to be low-speed environments, with a design speed of 30km/hour. This enables the use of techniques such as narrower lanes and street trees to create the perception of a narrower carriageway by creating vertical friction. This low speed allows cyclists to share the lane with vehicles and allows pedestrians to move across the road corridor safely. Parking bays are to be recessed and alternated with street trees, planting and stormwater treatment devices.

224. Appropriate speeds, limiting conflict points, and use of appropriate geometry in developing streets are all proven to provide safe urban streets. By adopting international best practice and taking an integrated and holistic approach to safety, risk of injury and death will be minimised, and vibrancy of the streets will be supported.

225. All transport networks shown on the Peacocke Structure Plan are considered to be key linkages and future developments must show how these connections are to be provided and how future integration is to be ensured with surrounding land parcels. The layout of the transport network is however indicative and not intended to show exact alignments. Collector roads and key local roads in particular are shown conceptually to demonstrate the need for linkages within and between different residential neighbourhoods. Their precise alignment will be largely determined as individual subdivisions are progressed. The transport network will be staged as development progresses within the PSPA.

10.2 Roading Network

226. The following is a summary of the proposed roading network based on the description and comments on implementation of the road network provided in the Assessment of Effects prepared to support PC 5.

227. The local road network is anticipated to have low traffic volumes, as well as travel speeds of 10 to 30 km/h. They are largely residential streets with occasional commercial uses. These streets will have friction (trees, green infrastructure, parking, etc.) on either side of the street to slow speeds and allow for a mix of traffic and cycling. Local streets are some of the most important street types, as this is where people live and play. Walking and cycling will be prioritised as the fundamental units of movement within the local road network by designing low traffic streets. The needs of a wide variety of people throughout their lifetime should be considered during the design of these streets (Universal Access provisions).

228. The collector network serves to connect local neighbourhoods together as well as linking neighbourhoods to key destinations and to the wider arterial roading network. Some flexibility is anticipated in the alignment of the collector streets network shown on the structure plan, however as the collector roads play a key role in providing for public transport services as well as being part of a wider walking and cycling network, the ability to provide a direct and efficient connection between nodes will be an important design element when considering the collector road alignment. Cycling and walking facilities

within the collector corridor will be separated to ensure a safe and efficient pedestrian and cycling network that promotes active modes of transport.

229. The minor arterial network is characterised by high traffic volumes, with some limited destination types such as offices, shops and residences. Large volumes of mixed traffic are anticipated on these routes, including frequent public transport services. Public transport should be given priority. Safety of vulnerable users moving along and across the road should be ensured. Due to the high volumes of traffic on this network a separated cycling network will be provided along with pedestrian facilities.

230. The minor arterial transport joins the neighbourhoods within Peacocke to the local centre as well as key areas outside of Peacocke.

231. The arterial transport network (Southern Links) was established through a designation process confirmed in 2016. While it connects Peacocke to key destinations outside of Peacocke such as the central city, hospital, university and employment area, it is also part of a wider regional transport network that connects Hamilton to areas in the south such as the airport and Te Awamutu. The north-south major arterial route, which traverses through the central portion of Peacocke and links with Cobham Drive at the Cobham Bridge, will provide a direct route to the central city and hospital. This route is identified as a possible mass transit route in the future.

232. The Eastern Link major arterial route which branches from the north-south route and crosses the Waikato River near Echo Bank Place linking with Cobham Drive and Wairere Drive, provides a direct route to the eastern side of the city.

233. These are shown on the Appendix 2: Structure Plans - Transport Network plan contained within the provisions.

234. The current transport provisions of the Operative District Plan support the strategic framework, but PC 5 seeks to go further through adding objectives and policies that seek closer integration of land use and transport with a focus on higher density development near key transport corridors and activity nodes along with prioritising pedestrians and cyclists over vehicles. The policy framework provides supporting detail including requirements for the transport network to provide for public transport services and infrastructure, separation of cyclists from vehicles on the collector network, and providing a continuous and safe walking and cycling network.

235. In summary, PC 5 is well aligned with the national, regional and local strategic transport frameworks. These frameworks seek improvement access for all users, provide safe transport networks, provide for economic growth and environmental sustainability / climate change.

10.2.1 Ohaupo Road / Hall Road intersection

236. Hall Road is currently a local no-exit road that forms a T-intersection with Ohaupo Road (SH3). SH3 is a Limited Access Road, meaning that any vehicle crossings or intersections to SH3 need to be authorised by Waka Kotahi.

237. The Operative District Plan shows Hall Road as a local corridor. The operative Peacocke Structure Plan identifies Hall Road as a collector with no direct connection to SH3, but connections to Whatukooruru Drive through Stage 1B, and to and across the north-south arterial.

238. With an increase in traffic from development on Hall Road, there is a significant risk of an increase in crashes and delays at the intersection. Due to the topography, there are no practicable options to safely provide for more intensive use of the intersection. Therefore, development on Hall Road will need to either be delayed until other internal connections are provided, or alternative access is provided.[101]

239. The notified Structure Plan sought that the existing Ohaupo Road/Hall Road intersection be closed due to existing safety concerns and this connection be relocated to a more suitable location south of the existing intersection and indicated as a collector. At caucusing the transport experts agreed that Hall Road should be closed for traffic reasons.[102]

10.2.2 Public Transport

240. The development of a conceptual public transport network by WRC based on the operative Peacocke Structure Plan's indicative land use and transport network as well as the following design principles:[103]

    a. Ensure the local road network supports fast and direct public transport routes that connect to activity centres including retail, employment and school activities. Deviations or indirect routes should be avoided where possible.

    b. Ensure a connected local road network that maximises the number of people within 400m of a potential bus stop.

    c. Minimise road connections across the green network.

    d. Ensure road connections for a major school assumed to be located at northern end of Peacockes Road (north of Peacockes Lane intersection).

    e. Assume that the Ring Road Extension planned for 2023 and the North/South Arterial planned for 2035+ will be limited access and therefore not suitable for bus stops or for passengers to access public transport services.

    f. Assume that the East-West Arterial planned for 2025/26 will support significant development along its length and will be well integrated into the local road network.

241. Delivering a public transport network involves providing the most appropriate transport solution for the future Peacocke community while ensuring that all services are connected to create an integrated network for the region. The following service layers are identified in the Peacocke public transport network:

    a. Mass transit: High capacity, high quality mass transit services on core corridors with high quality infrastructure, limited stops and dedicated right-of-way.

    b. Frequent: High capacity, high quality and direct services on core corridors with high quality infrastructure and extensive priority measures.

    c. Connector: Regular, high quality and direct services connecting key destinations and residential areas with high quality infrastructure and targeted priority measures.

    d. Coverage: Basic level of service that maximises coverage and

[101] PC5 Assessment of Environmental Effects July 2022, Appendix P Integrated Transport Assessment, at [5.3].
[102] Joint Witness Statement, Planning and Transport (1), 19 August 2022, at [3.1].
[103] PC 5 Assessment of Environmental Effects July 2022, Appendices U & V.

accessibility with high quality stops and shelters.

e. Targeted: Range of targeted services including school transport, public ride-share, community transport, special events and total mobility services.

242. The proposed network structure provides a "blueprint" for public transport based on Peacocke being fully developed. The proposed network structure includes the following key features:

a. Core network of frequent services connecting major population and activity centres with high capacity, high quality and direct services.

b. Supporting network of Connector services connecting key destinations and residential areas with high quality and direct services.

10.3 Principal Transportation Issues

243. As an initial comment we note that there were a large number of submitters on this topic, with all submissions and Council staff responses listed in Appendix A of the s.42A report. A number of submitters' concerns and requests were addressed following expert conferencing and the provision of the following joint witness statements ("**JWS**"):

a. JWS Planning and Transport (1) 19 August 2022.

b. JWS Planning and Transport (2) 23 August 2022.

c. JWS Transport (3) 3 October 2022.

244. Other concerns and requests in submissions have been responded to by the Council through proposed revisions, additions to and/or clarification of the PC 5 provisions.

245. We discuss the submissions together with the Council recommendations and our findings under a number of topic headings in the following sections. This discussion includes only the submissions in which the specific relief sought by the submitter has not been included in the PC 5 provisions approved by us, or where it is considered useful or necessary to include responses in addition to those in Appendix A of the s.42A report.

10.3.1 Closure of Hall Road and the Indicative Location of a Future Collector Network Connection with Ohaupo Road (State Highway 3)

246. Figures within Appendix 2 Structure Plans indicate the intention to:

a. close the Hall Road / State Highway 3 intersection to address existing safety and visibility issues;

b. partially close portions of Hall Road;

c. provide a replacement collector and local road network (indicatively shown); and

d. provide a future collector corridor intersection further to the south.

247. The above are subject to future statutory and funding processes and are indicative only. As described within expert conferencing on this topic, the closure of the Hall Road / State Highway 3 intersection can only occur following a replacement collector road alignment being constructed, as otherwise no property access to a public road is available for existing Hall Road properties. Once a replacement collector corridor and property access arrangement is in place, then Council can proceed through the road stopping and closing process pursuant to the Local Government Act 1974.

248. Waka Kotahi sought that reference to upgrade the Hall Road / SH3 intersection is removed from Stages D and E within the tables titled 'Strategic Infrastructure Required'. Other submitters sought that the connection showing the relocated Hall Road intersecting with Ohaupo Road be removed from the Transport Network Plan, supported closure of the current Hall Road intersection but sought that the new intersection be located south of the reservoir.

249. Eventually, state highway status for Ohaupo Road will be revoked and it will revert to local road. Until then we were advised that, depending on the level and nature of traffic on Ohaupo Road, it may not be desirable to create a new intersection.

250. In response to the issues raised by Waka Kotahi, Mr Black proposed the following changes to the PC5 provisions:[104]

    a. the Peacocke Infrastructure and Staging Table (Chapter 3A) be amended so that Stages D and E refer to closure of the Hall Road / SH3 intersection, not upgrading;

    b. an additional footnote be added to the Peacocke Infrastructure and Staging Table (Chapter 3A) stating that '*New or altered intersections on the state highway network require the approval of Waka Kotahi*';

    c. the Transport Network text (Chapter 3A) be amended to include the following text:

    Collector and key local networks are shown conceptually to provide key linkages and ensure integration between land parcels and different residential developments. New or altered intersections on the state highway network require the approval of Waka Kotahi.

251. In response to the other (non-Waka Kotahi) submissions on this matter Mr Black advised as follows:[105]

    a. The proposed relocation of the existing intersection is considered necessary. The District Plan and structure plan provide sufficient flexibility so that the intersection form and transport corridor alignment can be determined at the time of subdivision.

    b. Relocating the Hall Road intersection further south is not favoured as it does not allow for integration with the Houchens Structure Plan and results in poor sight distance for the Peacocke connection.

10.3.1.1 Findings

252. We accept the Council's evidence and find that submitter concerns have been adequately addressed by way of changes to the provisions (where appropriate) or explanation of the reason for retaining the relevant provisions.

10.3.2 Extent and Alignment of Collector and Local Roads

253. In respect of the transport networks shown in PC 5 Appendix 2, the expert transport conferencing discussed the wording 'proposed' versus 'indicative', the ability to graphically

[104] Statement of Evidence of Alastair Black for Hamilton City Council, 2 September 2022, Attachment 1 Review of Transport Submissions Report, at [5.8.3].
[105] Statement of Evidence of Alistair Black for Hamilton City Council, 2 September 2022, Attachment 1 Review of Transport Submissions, Gray Matter 31 August 2022, at [5.8.2].

display the level of flexibility of transport corridors required, and the merits of some specific corridor changes sought by the parties.

254. The substitution to "indicative" was agreed.[106] The Council's 's position remained that the structure plan figures are appropriate and that the Chapter 3A commentary is sufficient (with some recommended amendments) to accompany the transport corridors shown on the structure plan figures and to convey the level of flexibility required while clearly indicating their general location.

10.3.2.1 Findings

255. We agree and adopt the indicative notation and find that the submitter concerns and requests are adequately addressed by the Council by way of changes to the provisions or explanation of the reason for the relevant provisions.

10.3.3 Cross Sections of Collector and Local Roads

256. There was considerable discussion of this issue through expert conferencing and changes to provisions were agreed as a result. There remained only two apparently unresolved concerns of submitters:

    a. A request by one submitter for the reduction of collector local road carriageway widths - which were of a minor quantum. Mr Black recommended no change to those shown in Table 15.6b noting that new transport corridors are a restricted discretionary activity and assessment criteria provide guidance that allows a range of cross sections to be considered.[107]

    b. A request by two submitters that the service berm width be reduced to 1.5 m to be consistent with the provisions for minor arterial and local roads, and to minimise the total road corridor width. Mr Black recommended retaining the Operative District Plan's standard 2 m wide service berm.[108]

10.3.3.1 Findings

257. We are mindful that having different standards for essentially the same matters in district plans can cause unnecessary confusion. We agree with Mr Black that, in light of the flexibility of the restricted discretionary activity status and the indicative cross section dimensions provided, there is no good reason for departing from the District Plan's standard for PC 5.

10.3.4 On-street Car Parking Requirements Along Minor Arterial Roads and Collector Roads

258. At the Planning and Transport expert conferencing session of 23 August 2022 Sarah Loynes of Waka Kotahi considered that the presumption of on-street parking conflicts with the aim of PC 5 for active mode shift. She sought deletion of specific car parking from Table 15.6b and cross section drawings and that the provision of on-street car parking be left as a matter to be addressed at the time of subdivision.

259. Adare's submission 53.98(5) noted that provision of on-street car parking along Minor Arterial Roads, such as Peacockes Road, is very important to ensure that medium and high density residential uses, as well as other planned uses such as the Local Centre,

[106] JWS Planning and Transport (1), 19 August 2022, at [3.1].
[107] Statement of Evidence of Alastair Black for Hamilton City Council, 2 September 2022, at [53].
[108] JWS Transport (3), 3 October 2022, at [3.6].

Neighbourhood Centres and schools, are accessible to residents and visitors and that the centres are commercially viable.

260. We note that Waka Kotahi did not provide any expert evidence or appear at the hearing so we could not question them on this matter.

261. The Council has proposed amending NCZ-PREC1-PSP: P5 to read: "4) Minimise off street parking along the street frontage." It also advised that provision of on-street parking should be subject to specific design considering the adjacent land use.[109]

10.3.4.1 Findings

262. We find that the Council response addresses this matter and agree that the provision for on-street parking should be determined through the resource consent process in light of the directions provided through PC 5.

10.3.5 Bicycle Paths and Parking

263. Bike Waikato made a number of submissions seeking more specific provisions supporting bicycle paths and parking. Council's response was to the effect that many such matters would either be the subject of resource consent considerations or will be addressed city-wide in plan changes (e.g. PC12) currently notified.

10.3.5.1 Findings

264. While we agree that Bike Waikato's submissions accord with the active mode orientation of PC 5, we find that the Council response to the submitter's requests are appropriate – and best left to other plan changes which are currently being progressed and which address the issue on a city-wide basis.

10.3.6 Location of Public Transport Hub and Stops

265. The WRC submission 36.75 sought that additional bus stops at several locations be shown on the Transport Network plan.

266. The experts participating in the expert conferencing, including Mr Carnell for WRC agreed that assessment criteria are the appropriate approach to address the provision of public infrastructure.[110] This has been included in assessment criteria P4 (b) which includes the criterion "*The extent to which the streetscape and road corridors have been designed to integrate with public transport*."

10.3.6.1 Findings

267. We accept the outcome of the JWS Transport and Planning,[111] that the location of public transport facilities is best addressed, at this point, through an assessment criterion.

11 Three Waters Infrastructure

268. The proposed three waters (wastewater, water supply and stormwater) strategic infrastructure and proposed staging requirements are set out in the Assessment of Environmental Effects.[112]

[109] Section 42A Report Appendix A, Response to submission 5.38.
[110] Joint Witness Statement for Planning & Transport, 19 August 2022, at [3.2].
[111] Ibid.
[112] Plan Change 5 Assessment of Environmental Effects, at [2.3].

269. Wastewater servicing for PC 5 will require the construction of a number of mains extensions, a transfer main to the far eastern interceptor, and a number of new pump stations and connecting and distribution mains.

270. A staging programme has been developed to ensure urbanisation does not occur out of sequence with water and wastewater infrastructure - shown in Table 3A of the provisions.

271. Stormwater management for PC 5 will principally be through a number of sub-catchment stormwater management devices to be designed in accordance with the requirements and guidance of an Integrated Catchment Management Plan.

272. The draft Managakootukutuku Integrated Catchment Management Plan ("**ICMP**") was developed in parallel with this plan change and is part of the wider Peacocke development programme. This ICMP addresses wastewater, water supply and stormwater and was, at the end of the hearing, still with Waikato Regional Council for approval.[113]

273. A network of stormwater treatment devices is identified in the ICMP with indicative locations of centralised stormwater treatment wetlands shown on the Appendix 2 Structure Plan figures. The increased density proposed by the plan change has been allowed for in the ICMP by ensuring stormwater device footprints are sized to manage the flows that would result from 80% imperviousness.[114]

274. The draft ICMP provides clear direction on how three waters infrastructure should be developed and managed. The outcomes of the ICMP are strongly aligned with PC 5 as both seek to ensure improved environmental outcomes through future development.[115]

275. As PC 5 relies on the ICMP (once approved) to inform developers and Council about the future requirements for three waters infrastructure in the PSPA, no further amendments are proposed to the provisions in the Operative District Plan chapter 25.13 - which require development to be carried out in accordance with an ICMP. Using this approach, any actual or potential effects of development on the three waters network can be managed through the resource consent process.[116]

276. It was anticipated that the ICMP will be certified during the latter part of 2022 / early 2023 and operate as the key response to the NPSFW.[117]

11.1 Principal Stormwater Issues

277. Submissions on water supply and wastewater were addressed in Appendix A of the s.42A Report.

278. The submissions on stormwater wetlands can be divided into two categories:

    a. minor wording changes to polices or objectives; and

    b. requests to move or remove entirely indicated proposed wetland locations.

279. The intent of the first category has generally been supported by the Council staff as submissions have generally sought to strengthen biodiversity and stream restoration outcomes, which aligns with the objectives being sought in the Mangakootukutuku ICMP.

[113] Ibid at [4.7.1].
[114] Ibid at [4.7.1].
[115] Ibid at [4.7.1].
[116] Ibid, at [4.7.1].
[117] Section 42A Report at [4.14].

280. The bulk of the second category of submissions were in opposition to the location and size of proposed stormwater wetlands identified on submitter properties. In some cases, submitters disputed the locational need for a stormwater wetland, while other submitters agreed one was needed, but opposed the exact location and size.

281. The s.42A report addressed both the need for and location of stormwater wetlands.

282. It noted that the locations, position and size of proposed stormwater wetlands identified on the structure plan maps are indicative only. The purpose behind including these was to clearly signal to the plan user that a stormwater wetland would be required in the area to manage stormwater within an ICMP sub-catchment. This was to manage expectations on the developability of land and avoid ambiguity at the time of development on the need for stormwater management in the area, including the likely extent of land required (although the extent of land will be subject to a future detailed design process). We were told that the intended process is that, at the time of resource consent, the applicant can, if desired, propose an alternative location within their property that would be better suited for the stormwater wetland as a result of proposed earthworks and changing topography from development, or from their design aspirations for their site. The size of the proposed wetland is also negotiable as long as the applicant can provide stormwater treatment and attenuation requirements in accordance with the ICMP.

283. It was questioned whether these stormwater wetlands should be deleted from the maps, and simply raised at the time of resource consent. We were informed that the Council did not support this option because it considered their inclusion as more usefully informative to set expectations for the plan user and landowner (including any future landowner).

284. Following expert conferencing on this topic and completion of analysis in response to the various stormwater-related submission points, various changes were recommended by the Council to a number of objectives, policies and rule provisions to further clarify the indicative nature of the features maps - adding the word ‘generally’ when seeking plans and development to be consistent with the Peacocke Structure Plan, and using ‘indicative’ rather than ‘proposed’ within the legend for the Land Use map of Appendix 2.

285. We were also told that the PC 5 stormwater catchment requirements had been substantially revised in accordance with the outcome objectives of the Mangakootukutuku ICMP.

286. These changes provide the landowners with some flexibility in exact positioning and sizing of the stormwater wetlands identified on their sites, while still communicating the general locational need for these devices.

11.2 Findings

287. Whilst submitters may consider that these stormwater wetlands represent and potentially sterilise a large portion of valuable developable land, the inclusion of these wetland areas represents critical infrastructure. Not including those matters now would likely lead to unnecessary disputes in the future. We consider the indicative nature of the notations appropriately signals the need for the infrastructure and provides an opportunity for review on a site-by-site basis.

288. Overall, we find that the proposed plan provisions for three waters, including the provision of an ICMP and indicative stormwater wetland locations and sizes, is appropriate – and note that required infrastructure such as this is also a key underpinning of the NPSUD.

12 Neighbourhood Parks

289. PC 5 notes that neighbourhood parks provide a range of informal recreation opportunities, including children's play areas. These parks are intended to complement the range of facilities provided by the sports park and provide a smaller scale focal point for the local neighbourhoods. Such parks are particularly important as dwelling densities increase with reduced capacity for on-site open space amenity. Neighbourhood parks are intended to serve a catchment area within a radius of approximately 500m. In order to provide appropriate levels of accessibility and an even distribution of recreational facilities, PC 5 requires that each neighbourhood should be provided with a park between 5,000m² and 8,000m² in size.

290. PC 5 identifies indicative locations for neighbourhood parks to service the surrounding communities. Where possible, identified neighbourhood parks incorporate existing natural features and are sited in prominent locations where there is potential for passive surveillance, outlook, and a high degree of accessibility. They may also act as a transition area between different land use activities. The precise location and dimensions of neighbourhood parks will be determined in consultation with landowners at the time of subdivision, taking into account the specified criteria and the local road layout.

291. A number of submitters raised concerns with, or opposed, having a neighbourhood park indicated / located on their property. The common reason given for opposing a neighbourhood park was that there were other existing or proposed neighbourhood parks or open spaces in close vicinity and more parks were not needed.

292. The s.42A Report advised that each of these submitter concerns was discussed with Council's Parks and Open Space Planner and were individually considered in terms of the following radius rule:

> *SUB-PREC1-PSP: R22 Neighbourhood Parks;*
> *(1) …*
> *(2) Neighbourhood parks shall be located so that no residential dwelling is more than 500m from a neighbourhood park.*
> *…*

293. In each of the locations of concern identified in the submissions, the Council confirmed that a neighbourhood park was required in that approximate location to meet the 500m criterion set out both in the Operative District Plan and Council's Open Space Provision Policy (2018).

294. Submitters were advised by Council staff that the neighbourhood park notations on the structure plan figures are indicative and can be moved to provide for optimal design outcomes at the time of subdivision provided that does not compromise the functionality or availability of the neighbourhood park. For that reason all submissions opposing the location of Neighbourhood Parks were rejected or accepted in part in Appendix A of the s.42A report.

295. The neighbourhood park provisions were also discussed in expert conferencing. The JWS Planning (2)[118] recommended the deletion of the above R22 rule provision and its replacement with a new assessment matter (Appendix 1, 1.3.3 P5) that reflects its requirement (and is more consistent with the ODP) as follows:

[118] JWS Planning (2) 26 August 2022, Attachment A.

The extent to which the subdivision provides for the vesting of Neighbourhood Parks in locations which are generally consistent with the Peacocke Structure Plan – Figure 2-1. Neighbourhood Parks should generally be approximately 5000 m^2 in area; have at least 50% of the total neighbourhood park boundary to a transport corridor frontage (unless adjacent to land within the Significant Bat Habitat Area); on land that is generally flat and able to accommodate a 30m x 30m area.

12.1 Findings

296. We find that the Council's approach, as set out in the s.42A Report, is consistent with best practice and agree that the proposed revised assessment criterion is more appropriate than the notified rule – and adopt that accordingly.

13 Seismic Investigation Area

297. The slopes and soil types of the Waikato riverbank and gully systems potentially make these areas susceptible to land instability (erosion, land slips and subsidence). The Operative District Plan has controls within the Waikato Riverbank and Gully Hazard Area that establish setbacks for any new development. Land uses that have the effect of concentrating people into defined locations (e.g. residential activities at urban densities) that are subject to natural hazards, may create a greater risk than if the land was used only for lower population density uses.

298. Two setbacks were developed through the drafting of the ICMP for the Mangakootukutuku Catchment based on the Addendum Report Stage 2 Setback Assessment by AECOM.[119] We were told that the intention of these setbacks is to provide a guide to trigger additional investigation and analysis, and not as a strict no-build zone (although they can be applied as a default option). These setbacks relate to bank stability and land movement relating to seismic events. The setbacks will guide development to ensure it is undertaken in a manner that considers and, where necessary, addresses the potential risks surrounding slope stability. The setbacks proposed in PC 5 are:

    a. Bank Stability Setback Line: this setback is proposed as the minimum development setback distance necessary to prevent damage to the gully system from land development activities. This setback may also prevent property and assets being located within a potential (non-earthquake) slip hazard area without further geotechnical consideration.

    b. Seismic Setback Line: this setback line is proposed to indicate the area within which a development is required to be designed to accommodate potential lateral land movement because of an ultimate limit state seismic event.

299. We note that the bank stability setback line is no closer to the crest of gullies than the existing Council Gully Hazard Zone , which is 6 m from the crest of the gully slope. For a significant extent of the length of the gullies' crests the Bank Stability Setback line is at the same location as the 6 m line but, in a number of locations, is up to approximately 50 m further from the gully crest than the Gully Hazard Zone 6 m line.

300. The Seismic Setback Line is at a similar location to the Bank Stability Setback line for a limited extent of the length of gullies' crests but is typically between 50 and 100 metres further away from the gully crest than the Bank Stability Setback line.

[119] PC 5 Assessment of Effects, Appendix X Addendum Report Stage 2 Setback Assessment by AECOM, 2 October 2022.

301. Development inside the Seismic Setback Line would require analysis to be undertaken based on specific and up-to-date site investigation data. Development may proceed if that analysis is able to demonstrate that the site is not at risk of damaging lateral movements.

302. The main purpose of the Seismic Setback Line is to provide additional design information to ensure that dwellings can accommodate lateral land movements associated with large seismic events.

303. A number of submitters sought either a deletion or a change to how the Seismic Setback Line is mapped in the structure plan maps.

304. The submitter reasons for seeking deletion of the Seismic Setback Line included the assertion that they were arbitrary, misleading, superfluous and/or would unreasonably interfere with the ability to develop land to the degree anticipated by the NPSUD.

305. The s.42A Report accepted a submission point from Adare changing the notation on the maps from “Seismic Setback Line” to “Seismic Investigation Area” to better clarify the intent of the provision. This change triggers a need for a definition of ‘Seismic Investigation Area’, as this term is not currently used in the Operative District Plan. Such a definition is proposed to be included in the Appendix 1.1 Definitions Section of the ODP as a consequential amendment.

306. Additional assessment criteria 1.3.3 P2(g) and P4(al) are designed to implement the Seismic Investigation Area development control.

13.1 Findings

307. We find that the adoption of the setback lines through provisions in PC 5 are appropriate as they reflect areas of potential land instability adjacent to gullies based on geotechnical assessments.

308. Furthermore, their implementation is consistent with the requirement for the Council to recognise and provide for the management of significant risks from natural hazards, which is a matter of national importance under s.6(h) of the RMA. The changes made to the notation make it clear that further investigation is required, but that subject to the outcome of such investigation, land may be able to be developed.

14 Residual Planning Matters

309. The key remaining planning issues (i.e., those not otherwise addressed in this decision) identified in the various JWS Planning were:

    a. whether an overlay rather than a zone was more appropriate for open space;

    b. whether an alternative consenting route should be provided for out-of-sequence staging;

    c. whether the High Density Overlay (renamed Increased Height Overlay) should be extended in area;

    d. whether a higher target net density of 45 dwellings/ha should be applied across the PSPA; and

    e. whether multi-unit residential use/development should be provided for within the NCZ.

310. We deal with the above briefly next.

311. **Overlay versus zone**: Ms Tait expressed a preference for open space to be incorporated in PC 5 as an overlay rather than a zone, with residential being the underlying zone. In effect she considered that this would provide more flexibility to realise residential density targets over time while taking into consideration open space values.

312. Council noted that the Operative District Plan uses open space zones and PC 5 should be consistent with that usage. We agree.

313. **Alternative consenting route**: It was generally agreed that providing for out-of-sequence development was prudent – noting that such should not compromise the rollout of necessary infrastructure (as required by objective DEV01-PSP:O18 and policy DEV01-PSP:P49).

314. Amendments have therefore been recommended to the assessment criteria providing that proposals should *generally* be in accordance with the staging plan, adding specific criteria for any proposed variation (Appendix 1.3.3 – P5). We have accepted those proposed amendments.

315. **Density**: Ms Tait submitted[120] that the overall minimum density requirement of 35 dwellings per hectare sought by Kāinga Ora (outside the Increased Height Overlay) was not "overly aspirational". She considered that the PC 5 minimum of 30 dwellings per hectare would produce an outcome more akin to that realised in the General Residential zone rather than a MDR zone (which she indicated was more commonly toward the 50 dwellings per hectare end of the spectrum).

316. While she acknowledged the detailed master planning analysis undertaken by Mr Bredemeijer for Adare's "West Block" (which demonstrated[121] the practical difficulty of raising the minimum yield by even 2 dwellings per hectare given the convoluted landform), Ms Tait argued that PC 5 should anticipate the long-term 30-year development prospect as specified in the NPSUD.

317. Ms Tait was also critical of the notified PC 5 provision (MRZ-PREC1-PSP:R3) that permitted single dwellings. She noted that this could dilute and potentially compromise the achievement of the overall MRZ density target by inadvertently enabling low density development. Ms Craven for WRC made similar points. It was subsequently agreed that the rule should be amended to reference up to 3 dwellings on a site (as per the RMA Schedule 3A cl.10 density standard).

318. Whilst not unsympathetic to that argument we note, for example, that Adare already has the necessary resource consent(s) for its *Amberfield* development based on the operative (lower density) PSP provisions, and PC 5 could not alter that (although Mr Collins advised[122] Adare's intention to use the s.127 RMA process to vary the plans for the purpose of securing higher densities as things progress). Furthermore, we accept that in a greenfield development area of the size under consideration the market response needs to be initiated and matured. A mix of housing typologies is therefore pragmatic at this stage. Should the multi-unit market find favour then not only will that segment take off, but there is also no particular impediment in PC 5 that would prevent development at a higher

[120] Rebuttal Evidence of Susannah Tait for Kāinga Ora, 22 September 2022, at [5.5].
[121] Statement of Evidence of Bredemeijer for the Adare Company Limited, 16 September 2022, at [23].
[122] Statement of evidence of Andrew Collins for the Adare Company Limited, 16 September 2022, at [103] to [104].

density than the current target. As Mr Collins (building on Mr Anderson's commercial evidence)[123] observed:[124]

> *I consider it more important for PC 5 to "raise the bar" considerably from traditional densities (noting the current WRPS Policy 6.15 only requires 16 dwellings per hectare in Peacocke) but still express minimum densities in a manner that are practical and enable "reach" beyond the minimum figures expressed in policy and rules.*

319. We find that a density of 30 dwellings per hectare is sufficient at this stage – noting further that the density target can, of course, be reviewed either at the 10-year plan review or through a further plan change if that is required. Peacocke will not be developed in a single 10-year plan cycle.

320. **Increased Height Overlay:** A related density matter is Ms Tait's suggestion that the Increased Height Overlay (which sets a minimum 45 dwellings per hectare) be extended over the so-called "Island" part of *Amberfield* based, in part, on its proximity (walkable catchment) to the LCZ.

321. Mr Collins (and Mr Bredemeijer) acknowledged that while the Island is within 500-800m of the LCZ, it is physically separated by a substantial gully such that the actual walking distance (via a proposed bridge or bridges) is not a straight-line measure. Furthermore, Mr Bredemeijer noted[125] that some of the area proposed for extension is actually identified for open space, and the nature of the topography makes higher density problematic (particularly because of level differences and batter slope requirements). We also noted those elements on our site visit.

322. Mr Anderson's evidence[126] provides the commercial argument for the mix of housing typology and density proposed and the reasons why extending the Increased Height Overlay is not appropriate.

323. We are satisfied that sufficient ground-truthing has been conducted to justify not extending the Increased Height Overlay across the Island.

PART 3 STATUTORY TESTS AND DECISION

15 Conclusion on Requirements

324. The Panel is satisfied that PC 5 meets the required statutory tests and requirements.

325. PC 5 meets the s.5 purpose of the RMA by promoting the sustainable management of the land resource – which has been identified in the Operative District Plan for intensified future residential use for some considerable time.

326. With respect to the s.6 RMA matters of national importance, we have already discussed the biodiversity relevance of s.6(c) and have concluded that PC 5 does recognise and provide for that matter.

327. With respect to ss.6(e) and 8, Council explained in detail how PC 5 was developed following a significant consultative process and ensuring that areas of significant cultural heritage would be protected. The absence of substantive opposition from relevant

[123] Statement of evidence of Hamish Anderson for the Adare Company Limited, 16 September 2022, at [16] to [19].
[124] Reply evidence of Andrew Collins for the Adare Company Limited, 21 September 2022, at [21].
[125] Statement of evidence of Wayne Bredemeijer for the Adare Company Limited, 16 September 2022, at [26(d)].
[126] Statement of evidence of Hamish Anderson for the Adare Company Limited, 16 September 2022, at [24]-[28].

iwi/hapū also provided the Panel with sufficient confidence that those matters had been properly addressed.

328. With respect to s.7 other matters, to which particular regard is to be had, PC 5 has done so, inasmuch as a plan change can, in terms of 7(b) – the efficient use and development of land; s.7(c) - the maintenance and enhancement of amenity values; and s.7(f) - maintenance and enhancement of the quality of the environment.

329. We note that the land is already subject to a Future Residential Policy Area overlay, reinforced by the NPSUD, takes account of the NPSFM in the reserve and stormwater management network proposed, adopts contemporary stormwater and water conservation principles (including rainwater storage tanks), indicatively provides good connectivity to the adjacent urban area, and is subject to an infrastructure Development Agreement with Council.

330. PC 5 will assist Council in the discharge of its functions under s.31 RMA – particularly with respect to s.31(1)(aa) "…. *to ensure that there is sufficient development capacity in respect of housing … to meet the expected demands of the district*."

331. The further amendments recommended by Council were accompanied by an additional s32AA evaluation where that was approbate. Having considered those matters, we accept that further evaluation and, as we have made no further significant amendments, need make no further evaluation.

332. A final checkpoint, established through the courts, is the question as to whether a proposed plan change is a better fit with the overall architecture of the Operative District Plan than the provisions it seeks to supplant or amend. We find that to be the case, noting that minimal changes are required in the body of the Operative District Plan and bespoke provisions are included to ensure that development within Peacocke progresses in an appropriate manner. While the MRZ is a new zone not previously included in the Operative District Plan, it is consistent with the medium density residential provisions that Government introduced through the Amendment Act.

16 Decision

333. Pursuant to clause 10(1) of Schedule 1 to the RMA, under delegated authority from Council, the Hearing Panel is required to give a decision on provisions and matters raised in submissions.

334. Pursuant to clause 10(5), on and from the date this decision is publicly notified, Proposed Plan Change 5 – Peacocke Structure Plan to the operative Hamilton City District Plan 2017 is amended in accordance with this decision.

335. The Hearing Panel's decision is:

    a. To accept and reject submissions on PC 5 as set out in s.42A hearing report Appendix A: Summary of Decisions Requested and Recommendations; and

    b. To approve the PC 5 provisions as generally set out in s.42A hearing report Appendix B: Recommended Revisions to the notified Plan Change 5 – Peacocke Structure Plan provisions, with modification in accordance with this decision. The final approved PC5 provisions are set out in **Appendix 1** to this decision.

336. The summary reasons for the decision (as discussed throughout) are that Proposed Plan Change 5 – Peacocke Structure Plan:

(a) gives effect to Te Ture Whaimana;

(b) gives effect to the higher order National Policy Statements;

(c) gives effect to the National Planning Standards;

(d) gives effect to the Waikato Regional Policy Statement;

(e) will assist the Council in fulfilling its statutory functions under s.31 of the RMA;

(f) achieves the s.5 Purpose of the RMA by promoting the sustainable management of the land resource while protecting its natural resources~~;~~

(g) is worded in a way that is clear and concise; and

(h) will assist with the effective implementation of the Hamilton City District Plan.

David Hill
Chairperson
and for Commissioners Ewan Wilson, Vicki Morrison-Shaw and Nigel Mark-Brown.

Date: 17 February 2023

APPENDIX B – ORIGINAL SUBMISSION

FORM 5

SUBMISSION ON PROPOSED PLAN CHANGE 5 – PEACOCKE STRUCTURE PLAN

HAMILTON CITY OPERATIVE DISTRICT PLAN

To: Hamilton City Council
Private Bag 3010
Hamilton 3240

Name of Submitter: Woolworths New Zealand Limited

Woolworths New Zealand Limited provides this submission on Proposed Plan Change 5 ("**PC5**") to the Hamilton City Operative District Plan.

The purpose of PC5 is described in the public notice as being to:

- review and make amendments to the operative Peacocke Structure Plan and associated planning provisions;
- update the Peacocke Structure Plan and rezone the area from Peacocke Special Character Zone and General Residential Zone to Peacocke Medium Density Residential Zone, Peacocke Natural Open Space, Peacocke Sports and Active Recreation Zone, Local Centre Zone and Neighbourhood Centre Zone; and
- enable urban residential development within the Peacocke area.

The Submitter could not gain an advantage in trade competition through this submission and the submission does not raise matters that relate to trade competition or the effects of trade competition.

The submission relates to the proposed amendments to the text and provisions of the Hamilton City District Plan as set out in PC5. In particular, the Submitter **opposes** the proposed provisions relating to the Local Centre and seeks amendments to the form and extent of the Local Centre.

The provisions that are opposed include those contained in:

- proposed Chapter 6B: Peacocke Local Centre Zone;
- proposed Appendix 1.4 – Design Guides (specifically, the Peacocke Local Centre Design Guideline);

- proposed Appendix 2 – Structure Plans (the amendments to the Peacocke Structure Plan maps and the inclusion of a Peacocke Local Centre concept plan); and
- proposed Appendix 17A – Planning Maps (those zoning and features maps that relate to the Local Centre).

The Submitter seeks that the Local Centre maps and other provisions be amended to include the site at 410 Peacockes Road within the Local Centre (refer **Figure 1**), together with any consequential amendments that are required to appropriately give effect to that relief.

Reasons for submission

- The Submitter is concerned that the extent and placement of the Local Centre Zone will not result in an optimum outcome for the Local Centre in terms of amenity and efficiency;
- The current proposal, which positions the entire Local Centre to the east of Peacockes Road, does not take sufficient advantage of the prominent frontage that is available at the intersection of Peacockes Road and the proposed east-west minor arterial road. As a result, much of the land proposed to be zoned for the Local Centre will be set well back from any existing or proposed primary road. Future sites in those locations are likely to contribute little to the amenity and vibrancy of the Local Centre and would be too remote from the main retail street or arterial roads to attract significant foot-traffic. The lack of visibility of these sites will reduce their value and attract low amenity land uses that would undermine the outcomes sought for the Local Centre;
- The Waikato River and associated green space is not likely to provide a sufficiently strong anchor at the eastern end of the proposed Local Centre to draw customers down the main street. In the absence of an anchor at the western end, there is a significant prospect that the Local Centre will suffer from poor visibility, being effectively located down a cul-de-sac, away from more intensive housing, education facilities or other anchors that attract customers and contribute to the vibrancy of the Centre;
- Much of the walkable catchment of the proposed Local Centre under PC5 would be comprised of open space, stormwater wetland, the Waikato River corridor, and relatively lower-density housing. The high proportion of those uses within close proximity to the Local Centre is not consistent with a well-functioning urban environment. The Submitter considers that the focal point of the Local Centre should be shifted further to the west, so that the Centre can benefit from the visibility and frontage provided by the intersection of two arterial roads, the activity levels of the proposed school, and the convenience of the proposed public transport hub;
- The Submitter considers that the Local Centre should straddle the intersection of Peacockes Road and the proposed east-west minor arterial road, as proposed in the original structure planning undertaken by the Council. That will allow a separation of the retail uses so that the finer-grained retail, office, and entertainment activities are focused on the eastern side of Peacockes Road and the larger format supermarket can utilise the regular-shaped and flat land at 410 Peacockes Road. That outcome is consistent with the vision for the Local Centre main street that is articulated in the Peacocke Local Centre Design Guideline and in the objectives and policies of PC5;

- Supermarkets are inevitably more car-oriented than smaller-format retail activities because consumers need to transport often large quantities of grocery items back to their homes. The amendments to the geographical extent of the Local Centre that the Submitter seeks provide a logical separation of different retail categories and enables more efficient servicing of the supermarket from the existing and proposed arterial roads;
- PC5 specifically anticipates that the Local Centre will include a supermarket in order to provide for the needs and wellbeing of the community. For the Local Centre to be successful, the supermarket needs to be successful. The supermarket should be well-positioned so that it is easily accessible by heavy vehicles (for deliveries of goods) and private motor vehicles (for customers), and so that it does not compromise the focus on creating a pedestrian-friendly environment with active street frontages within the core area of the Local Centre;
- The limited length of the main street shopping environment means that the supermarket cannot realistically exist in that location without compromising the pedestrian environment and removing the potential for a greater variety of centre-based activities. A location to the rear of the main shopping street will provide poor accessibility for the supermarket and encourage cars and heavy vehicles into the pedestrian focused retail street. This will undermine the proposed PC5 policy seeking to facilitate a vibrant centre by establishing activities that encourage pedestrian activity on the ground floor. PC5 includes a proposed policy requiring activities with large floor areas, including supermarkets, to be located outside of areas identified as having active frontages;
- The Peacocke Local Centre Design Guideline makes it clear that the main street is to accommodate fine grain retail activity with active street frontages and small footprints. Larger commercial activities, such as a supermarket, are to be located outside of the main street. These principles are accepted as being sound from an urban design perspective. However, the Submitter considers that the best supermarket location for the supermarket operator, the general public, and the amenity and prosperity of the main street is on the site at 410 Peacockes Road. That corner site will enable the competing supermarket design outcomes of a pedestrian friendly entrance, convenient parking, and separated servicing areas to be achieved;
- Any concerns that might arise regarding the potential for Peacockes Road to form a barrier to the efficient movement of pedestrians between different parts of the Local Centre are unfounded. The intersection will be signalised, so priority can be afforded to pedestrian movement through the intersection design. Successful Local Centres are often located on intersections of main roads in traditional high-street environments;
- The Peacocke Local Centre Design Guideline states that the road corridor in the vicinity of the Local Centre should create a low-speed environment (30km/hr) that is safe for pedestrians and enables safe and easy crossing of Peacockes Road. That will facilitate pedestrian access between the main street on the eastern side of Peacockes Road and a school and supermarket on the western side of Peacockes Road;
- The school will also assist in anchoring the Local Centre at its eastern end so that all four corners of the intersection have an identifiable presence and an appropriate level of activity.

Relief sought

The Submitter seeks the following decision from Hamilton City Council in respect of PC5:

- That, subject to the amendments set out below, PC5 be confirmed;
- That the Peacocke Precinct Planning Maps be amended so that the site at 410 Peacockes Road is reidentified from proposed Medium Density Residential Zone to Local Centre Zone, as illustrated in **Figure 1**;
- That the Peacocke Precinct Planning Maps be amended so that land within the Local Centre Zone (generally as shown in **Figure 1**) is reidentified to Medium Density Residential Zone; and
- Such other consequential amendments to the provisions of the District Plan as may be necessary to give effect to the relief sought in this submission.

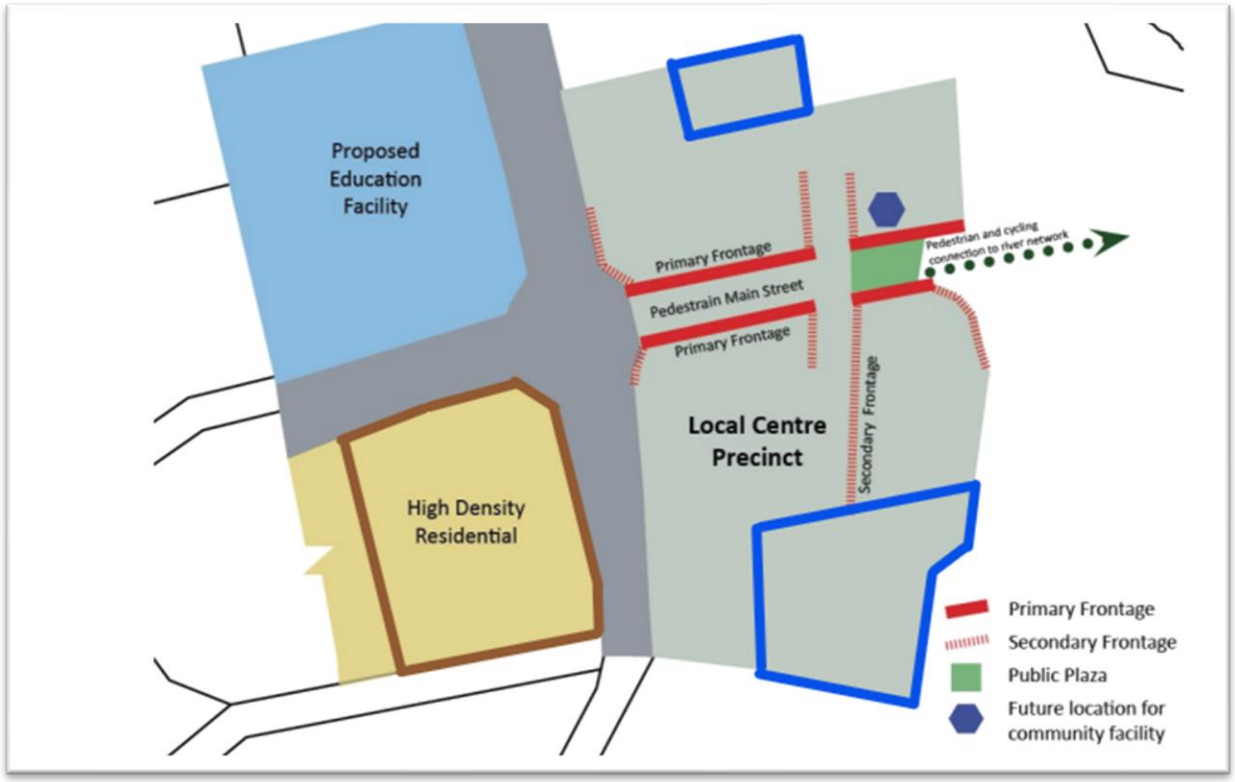

***Figure 1**: Area to be reidentified as Local Centre Zone (brown outline) and areas to be reidentified as Medium Density Residential Zone (blue outline)*

The Submitter wishes to be heard in support of this submission. If other parties make a similar submission, the Submitter would consider presenting a joint case with them at any hearing.

Philip Brown
Campbell Brown Planning Limited
For and on behalf of Woolworths New Zealand Limited as its duly authorised agent.

5 November 2021

Address for service of submitter:

C/- Campbell Brown Planning Limited
PO Box 147001
Ponsonby
AUCKLAND 1144

Attention: Philip Brown

Telephone: (09) 394 1694
Mobile: 021845327
Email: philip@campbellbrown.co.nz

APPENDIX C – RELEVANT NAMES AND ADDRESSES OF SUBMITTERS

Hamilton City Council

Address for service:

Hamilton City Council

Private Bag 3010

Hamilton, 3204

Submitters to be served:

SUBMITTER NAME	ADDRESS FOR SERVICE
Feathers Planning	louise@feathers.co.nz
Brendin Raymond and Mary Anne Ronke	brenmary@xtra.co.nz
Mangakotukutuku Stream Care Group	mangacare@gmail.com
Joshua Daniel Stannard	josh@stannard.org
Living Streets Kirikiriroa (Hamilton)	bospeterh@gmail.com
George Lane	georgelanesailing@gmail.com
Frankie Letford	phil.frankie.dene@gmail.com
Mithrandir Enterprises Ltd	dr.scott.c.robinson@gmail.com
Heritage New Zealand Pouhere Taonga	cmcalley@heritage.org.nz
Waka Kotahi NZ Transport Agency	emily.hunt@nzta.govt.nz
Hamilton City Council	jamie.sirl@hcc.govt.nz
Hodgson Trustee Management Co. Limited	tristan@jonesgroup.co.nz
Jones Lands Limited	tristan@jonesgroup.co.nz
Northview Capital Limited (Aurora development)	tristan@jonesgroup.co.nz
Tilehurst Living Trust	louise@feathers.co.nz
Graeme McMillan	graeme@momenta.nz
Findlay Family Trust	peter@findlay.net.nz
Fire and Emergency New Zealand	Blair.Keily@fireandemergency.nz
Nathan Cox , Stand Developments	josh.mckone@bcdgroup.nz
Waikato Environmental Centre (Go Eco)	manager@goeco.org.nz
Transpower New Zealand Ltd	environment.policy@transpower.co.nz
Broadwater Village Ltd	bevan.houlbrooke@ckl.co.nz
Ministry of Education	Emma.Howie@education.govt.nz

SUBMITTER NAME	ADDRESS FOR SERVICE
ID and EM Williams Ltd	iwilliams@genetic.co.nz
Alan Tsai	minghotsai8888@gmail.com
Johnny Tsai	johnnybrot@gmail.com
Richard and Elizabeth Ward	reward@bks.co.nz
Jacqueline Hazel Bates	jackie@bks.co.nz
Andrea Graves	andrea.graves@slingshot.co.nz
Tainui Waka Tourism Incorporated	craig@aeltd.nz
Ngaati Ngamurikaitaua	deontekopa@gmail.com
Shih-An Tseng	bencentt@gmail.com
Dan and Sarah Franicevic	sarah.dan.fran@xtra.co.nz
Kevin and Kathy Sanders	bevan.houlbrooke@ckl.co.nz
Waikato Regional Council	Matthew.Vare@waikatoregion.govt.nz
WEL Networks Limited	karleen.broughton@wel.co.nz
Department of Conservation - Te Papa Atawhai	jgooding@doc.govt.nz
Ron Lockwood	bevan.houlbrooke@ckl.co.nz
AJ and HC Koppens	hamish@cohere.co.nz
Shortbread Limited	Lynne@bluewallace.co.nz
Ohaupo Land LP	fraserm@barker.co.nz
Golden Valley Farms	fraserm@barker.co.nz
Cordyline Holdings Limited	christina.sheard@dentons.com
Richard & Ann Pirrit	robert.davies@nwm.co.nz
Ben Inger and Rachel Inger	i_ben@hotmail.com
Pragma Homes Limited	fraserm@barker.co.nz
Gregory Alan Knight	Lynne@bluewallace.co.nz
Metlifecare Limited	bianca.tree@minterellison.co.nz
Stuart & Maylene Ross	Lynne@bluewallace.co.nz
Ebenezer Property Limited Partnership	Lynne@bluewallace.co.nz
Jacky Li & Alex Zheng	Lynne@bluewallace.co.nz
The Adare Company Limited	mike.doesburg@wynnwilliams.co.nz
Bike Waikato	richard@bikewaikato.org.nz
Kāinga Ora – Homes and Communities	developmentplanning@kaingaora.govt.nz

SUBMITTER NAME	ADDRESS FOR SERVICE
Riverlea Environment Incorporated Society (RESI)	riverlea.soc@gmail.com
Victoria Collins & Troy Radovancich	colllinsvicky@hotmail.com troy@radsurveying.co.nz
Go Eco (Waikato Environmental Centre)	harvey@goeco.org.nz