

**BEFORE INDEPENDENT HEARING COMMISSIONER APPOINTED BY THE  
WESTLAND DISTRICT COUNCIL**

**IN THE MATTER OF** the Resource Management Act 1991

**AND**

**IN THE MATTER OF** resource consent applications  
220120 & 230030  
at 117 Arthurstown Road, Hokitika

**BY** Forest Habitats Limited

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**MEMORANDUM FOR THE COMMISSIONER**

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Level 2, 241 Hardy Street  
Nelson  
P O Box: 656  
DX: WC 70016  
Phone: +64 3 548 2154  
Solicitor: Nigel McFadden  
(nm@mmp.co.nz)

## May it please the Commissioner

1. Counsel refers to the reconvened hearing of this application held on 25 September 2024.
2. The way in which the reconvened hearing was managed has raised a number of concerns on the part of the Applicant, and thus raised a number of questions. The concerns were further exacerbated by receipt of a video recording of the hearing. The concerns are set out below: -
  - (a) In a situation where two planning witnesses (on opposing sides) are giving evidence, why is one (Mr MacDonell) asked technical questions but the other (Ms Johnson) questioned only as to the NZCPS and RPS policies? Why were the same questions not put to each of the witnesses for consistency of understanding?
  - (b) Why were leading questions put to Ms Johnson by the Commissioner, as occurred on a number of occasions i.e.: -
    - (i) at 0:53:48 (when talking about policies as to sealing of the road) - Commissioner: -

*“Is there any policies that support that or not?”*

This is a leading question as the question suggest that there might not be a policy in place, which tends to guide the witness towards confirming or denying something without them first volunteering the information.

- (ii) at 0:54:48 - Commissioner: -

*“So none of the rules in the proposed district plan have legal effect, do they? At this stage. None of the ones permitting, you know, residential development or houses or anything like that, do they?”*

This is a leading question as it suggests a specific answer, namely that none of the rules in the proposed plan have legal effect and encourages the witness to agree with that conclusion. The structure of the question implies that the witness should confirm that the rules do not have legal effect.

(iii) at 0:55:17 – Commissioner: -

*“So none of them have legal effect at the moment, unless in relation to the matters that have immediate legal effect under Section 86”.*

Again, a leading question for the reasons outlined above.

(iv) at 0:55:47 – Commissioner: -

*“So what it seems to me is that the RPS has a criteria about SNAs, including any indigenous or any habitat of indigenous fauna that supports indigenous species that are threatened or at risk, and so that would include the spoon bill and the white heron. So it seems to me like it meets that criteria and is therefore an SNA. Is that, is that your reading, or is that your understanding of how the RPS works?”*

This is initially an open question and then turns to a leading question as it suggests a specific answer and encourages the witness to agree with the Commissioner’s assessment.

(v) at 0:56:51 – Commissioner: -

*“Well, I think what it says and you’ve referred to it in your report is that whether it’s an SNA or not is normally determined by someone who’s a qualified ecologist. But in this case, on the face of it, it seems reasonably obvious that if there is habitat for at-risk indigenous fauna, it clearly meets those criteria, and we could probably safely conclude that without an ecologist”.*

This is a leading question because it suggests a specific answer and encourages the witness to agree with the Commissioner proposition. Indeed, the witness then does so agree in her answer.

(vi) at 0:57:42 – Commissioner: -

*“So I’ve got some questions regarding the Coastal Policy Statement, and so my first question is regarding Policy 25. And you may I’ll just give you a little bit of time to turn to that, if you can. So that policy talks about considering the potential effects of tsunamis and how to avoid*

*or mitigate them. So it provides an avoid or mitigate scenario. Therefore, the question is, what would your expectation be as to what's an acceptable mitigation when it comes to managing the risk of tsunamis?"*

The witness having responded. At 0:59:09 - Commissioner: -

*"So you're talking about the entire property, not just the, you know, the, I suppose, more valuable parts of the property, like the houses."*

This is a leading question because it prompts the witness to adopt that distinction or agree with it, even if they did not intend to make such a differentiation.

(vii) at 1:01:18 – Commissioner: -

*"So what you're saying is it's trying to avoid investment in areas that are increasing, which will increase the risk from coastal hazards."*

This is a leading question because it prompts the witness to agree with the Commissioner's proposition.

(viii) at 1:04:26 – Commissioner: -

*"And so what you're saying is they'll advocate because they've invested their money and their time in this. They'll advocate, naturally, to protect what they've invested."*

This is a leading question because it prompts the witness to agree with the Commissioner's summary of what the witness has just said, that summary being different and more expansive than what the witness said.

(ix) at 1:05:10 – Commissioner: -

*"However, is it fair to say that the suitability of an area for residential development is not just addressed through those rules but also through the consideration of natural hazard effects in the subdivision process, and that requires a broader consideration? Is that your understanding, or I don't want to put words in your mouth or is it only*

*the only way or the best way to deal with is just through minimum floor levels?”*

This is a leading question because it prompts the witness to agree with the Commissioner's proposition, and even the Commissioner recognised that perhaps words were being put in the witness's mouth.

(x) At 1:06:45 – Commissioner: -

*“Is it reasonably common or uncommon for roads in the Westland to be compromised during a significant flood? Are you still there?”*

This is a leading question because the Commissioner proposes that roads in the Westland tend to be compromised during a significant flood, and then ask the witness to agree or disagree.

(xi) At 1:07:30 – Commissioner: -

*“So the question is is it pretty common for roads to be shut off in a big flood event on the west coast and for people not to be able to get out of the road to other places?”*

This is a leading question. The Commissioner has put the same proposition to the witness namely that roads in Westland tend to be compromised during significant flood and that people can't escape, and then asks the witness to agree or disagree. This is even more leading than the first attempt at the question.

(xii) At 1:10:12 – Commissioner: -

*“So I understand you have been around the council, have worked there before and probably involved in emergency management. Does allowing development in flood prone areas? Does it have a cumulative effect on emergency services during a flood?”*

This is a leading question because the Commissioner is proposing that allowing development in flood prone areas has a cumulative effect on emergency services during a flood and asking the witness to agree with that proposition.

(xiii) At 1:10:49 – Commissioner: -

*“Okay, and if this decision was granted, does it sort of set a precedent for other similar subdivisions that are in flood prone areas?”*

This is a leading question because what Commissioner is proposing that this case sets a precedent and is asking the witness to agree with that proposition.

(c) Were there any communications, verbal or written, between the Commissioner and Council staff (other than Kate Fleming) including (but without limitation) Edith Bretherton or any other Council officer or consultant?

(d) If the answer to the last question is yes, then: -

(i) who were the Council staff or consultants communicated with (by name)?

(ii) what was the nature of the communication?

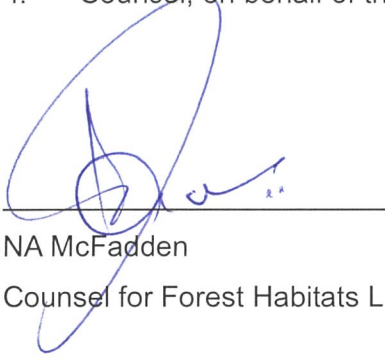
(iii) can the Applicant be provided copies of any notes, emails, and other records of any such communications between Commissioner and staff and consultants?

(iv) why was the Applicant and all other parties, including submitters, not made aware of such communications and given copies of any documentation?

(e) Were the questions by the Commissioner to witnesses based on any report or documentation not supplied to the Applicant?

3. We have a copy of the video record which has now been transcribed. That will be available in the event of any appeal.

4. Counsel, on behalf of the Applicant, seeks provision of the above information.

A handwritten signature in blue ink is written over a horizontal line. The signature is stylized and appears to be 'NA McFadden'.

NA McFadden  
Counsel for Forest Habitats Limited

30 October 2024