

**BEFORE AN INDEPENDENT HEARINGS PANEL  
OF THE UPPER HUTT CITY COUNCIL**

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

**IN THE MATTER OF** Upper Hutt City  
Council's Proposed  
Intensification Planning  
Instrument

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**OPENING LEGAL SUBMISSIONS  
ON BEHALF OF SILVERSTREAM LAND HOLDINGS LTD  
(Submitter 62)**

**19 April 2023**

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## MAY IT PLEASE THE PANEL

### 1. INTRODUCTION

- 1.1 These submissions are made on behalf of Silverstream Land Holdings Limited (**SLHL**) in support of its submission on the Upper Hutt City Council (**Council**)'s Intensification Planning Instrument (**IPI**).
- 1.2 SLHL seeks to have the Mixed Use Zone (**MUZ**) applied to the St Patrick's College Silverstream Site (**Site**), rather than the High Density Residential Zone (**HRZ**) proposed by the Council. It also seeks a number of secondary and consequential amendments to the IPI(R1), as outlined in Mr Lewandowski's evidence.
- 1.3 SLHL considers that the proposed application of the HRZ will inappropriately narrow the breadth of land uses available under the Operative District Plan (**ODP**), inconsistently with the National Policy Statement on Urban Development (**NPS-UD**). It further considers that there is an insufficient basis in terms of section 32 of the Resource Management Act 1991 (**Act**) to justify narrowing the flexibility of the site using the HRZ.
- 1.4 SLHL's view is that the MUZ is the more appropriate zone, both in achieving the purpose of the Act and the objectives of the IPI. In particular, the MUZ would achieve the benefits of the HRZ zone in providing for residential use, while preserving the current flexibility of development opportunity at the Site in a manner consistent with the landowner's previous investment and future aspirations, which are based on market demand for a range of land uses on the Site.
- 1.5 By way of summary, SLHL makes the following key points:
- (a) The existing Special Activity Zone (**SAZ**) under the ODP recognises the benefit of enabling flexibility of development at the Site, and thereby provides for a range of different (including non-residential) land uses;
  - (b) The NPS supports a focus on both business and residential land use, and is enabling rather than providing support for limiting the range of land uses available at the Site using the IPI process. The Council is required to give effect to policy 3 of the NPS in urban non-residential

zones, and policy 3 – which seeks to increase building heights and density of urban form – is not specific as to land use. In particular, it does not prioritise residential land use over other land uses; and

- (c) It is inappropriate to depart from the operative planning framework by applying a narrow focus on residential subdivision and development without a robust section 32 justification for doing so. No such justification appears to exist, and section 32 instead supports SLHL's relief, given that:
- (i) the MUZ zone – which was not considered as part of the section 32 report – best reflects the current zoning, while also achieving the benefits of the HRZ zone in providing for residential use;
  - (ii) the flexibility of land uses provided for under the existing ODP has formed the basis of SLHL's investment in the Site and consideration of development options;
  - (iii) rezoning the Site for residential use is not necessary to meet Upper Hutt's anticipated demand for residential housing in the short-term or long-term;
  - (iv) there is strong market demand for the non-residential uses at the Site, and provision for such uses would provide significant economic and community benefits; and
  - (v) provisions under the proposed IPI(N) and further provisions proposed by SLHL provide mechanisms for the Council to control and manage potential adverse effects arising from a mixed use development of the Site.

## **2. OVERVIEW OF SITE AND ZONES**

### **The Site**

- 2.1** The Site comprises 17.4 ha of flat land, located at the Southern Gateway to Upper Hutt. SLHL considers the Site to be of regional significance, offering

unique opportunities to generate benefits for the Upper Hutt community.<sup>1</sup> This is, in particular, due to the size, topography and proximity to the commuter rail network and State Highway transport links. These latter transport linkages allow it to service catchments from Wellington Central through to Upper Hutt.<sup>2</sup>

**2.2** As discussed in Mr Lewandowski’s evidence, the ODP provides for a wide range of development opportunities for the Managed Development Area of the Site, including opportunities for a mixture of activities to occur, such as residential development and commercial development (as controlled activities).<sup>3</sup> This allows flexibility for future development to respond to market demand and adapt to community needs. This intent is emphasised in the objective and policy framework, and in particular, in SAZ-O3 and SAZ-P4.<sup>4</sup>

**2.3** The provision for a variety of land uses as controlled activities - including residential units, business and professional offices, community facilities, and commercial development (excluding retail) - highlights these activities as being appropriate for the Site.<sup>5</sup> This provision for flexibility is unsurprising given the conclusions reached in Mr Heath’s evidence relating to the economic opportunities associated with a mixed-use development of the Site.<sup>6</sup>

### **High Density Residential zone**

**2.4** The principal change brought about by the IPI(N) would be a rezoning of the Site to HRZ. The effect is a “significant curtailing” of the possible development options for the Site from those that are available under the ODP framework.<sup>7</sup>

**2.5** The HRZ framework is set out in detail in Mr Lewandowski’s evidence. However, we briefly note here that:

(a) The HRZ is predominantly used for residential activities with a high density and bulk.<sup>8</sup> There are no policy provisions in the IPI(N) that would support any other activity aside from residential activity in the HRZ;<sup>9</sup> and

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1 Statement of Evidence of Brian McGuinness (**McGuinness**) at [4.1] – [4.2].

2 Ibid.

3 Statement of Evidence of Mitch Lewandowski (**Lewandowski**) at [4.1] – [4.12].

4 At [4.6] and [4.8].

5 We refer here to the Managed Development Area of the Site, rather than the College Area. See Lewandowski at [4.3].

6 Statement of Evidence of Tim Heath (**Heath**).

7 Lewandowski at [5.26].

8 Lewandowski at [5.8].

9 While the HRZ cross-references to the General Residential Zone on a number of matters, it does not do so in respect of objectives and policies. Lewandowski at [5.12] and [5.17].

- (b) Where currently the ODP provides for a wide range of activities as a controlled activity, the HRZ would limit the range of activities to residential, rest homes and community care housing, ancillary home businesses, and passive recreation as a permitted activity. All other activities (outside of Marae and early childhood centres), would be a discretionary activity.<sup>10</sup>

### **Mixed Use zone**

**2.6** The MUZ is a new zone introduced through the IPI(N). Its purpose, as noted in the introduction to the zone, is to “provid[e] for a wide range of activities.”<sup>11</sup> These activities include residential, commercial, retail, large format retail and light industrial. The National Planning Standards provide for mixed use zones to be “Areas used predominantly for a compatible mixture of residential, commercial, light industrial, recreational and/or community activities.”<sup>12</sup>

**2.7** ‘Table 1’ in Mr Lewandowski’s evidence compares the rule framework between the SAZ (ODP), the HRZ (IPI(N)) and the MUZ (sought).<sup>13</sup> Mr Lewandowski’s evidence is that the comparison demonstrates that the MUZ is the most closely aligned to the operative zoning.<sup>14</sup> The comparison also highlights the extent of the departure that the proposed HRZ would represent from the current SAZ zoning.<sup>15</sup>

## **3. MUZ BETTER GIVES EFFECT TO NPS-UD POLICY 3**

**3.1** As the Site is in the Upper Hutt urban environment and in a non-residential zone under the ODP, section 77N is the operative provision. Section 77N(2) requires tier 1 territorial authorities to give effect to policy 3 of the NPS-UD in their urban non-residential zones. In turn, subsection (3)(a) allows territorial authorities – at their discretion, but consistent with their duty to give effect to policy 3 – to create new urban non-residential zones or amend existing urban non-residential zones.

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10 Lewandowski at [5.18] and [5.23].

11 Section 32 Evaluation Report (**Section 32 Report**), volume 3, at page 43.

12 National Planning Standards, November 2019 at page 36.

13 Lewandowski at page 19.

14 At [6.13].

15 At [6.14].

- 3.2** Policy 3 seeks to increase building heights and density of urban form. Significantly, where it does mention land use, it expressly includes both housing and business use, as well as commercial activities and community services.
- 3.3** Policy 3 therefore does not prioritise residential land use over other land uses, and instead signals the potential for a mix of land uses in urban environments. It would be inconsistent with the policy to apply a narrow focus on residential subdivision and development at a site without considering the potential demand for commercial use (or other non-residential uses) at that site.
- 3.4** While this application of policy 3 is plain on its wording, it is also evident when interpreted consistently with the other provisions of the NPS-UD. In particular, objectives 1, 3 and 4 and policies 1 and 2 highlight that well functioning urban environments are achieved when there is appropriate provision for housing alongside business and community services.
- 3.5** While the operative requirement (for this IPI process and in relation to the Site) is for the Council to give effect to policy 3, policy 3 forms a part of a suite of other objectives and policies that, in conjunction, seek to achieve well functioning urban environments. The District Plan is required to give effect to the NPS-UD as a whole, including those other objectives and policies.
- 3.6** The other provisions of the NPS-UD also assume particular relevance in assessing “whether the objectives of the particular proposal are the most appropriate way to achieve the purpose of the Act”, under section 32(1)(a). The NPS-UD provides comprehensive direction for how the purpose of the Act is to be given effect in urban environments.
- 3.7** Given the existing policy objectives specifically seek to maintain flexibility of land use in relation to the Site, and policy 3 is not specific as to land use, in our submission it is inappropriate to narrow these land uses in the context of the IPI process. This is particularly where there is a clear demand for commercial and retail uses at the Site. As is clear from Mr Heath’s and Mr McGuinness’s evidence:
- (a) there is a demand for commercial and retail services in the economic catchment applying to the Site;<sup>16</sup>

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16 Heath at [8.1] - [8.14]; McGuinness at [5.2].

- (b) there is a growing demand for supermarkets within the economic catchment area, with the catchment being currently under-served in this respect;<sup>17</sup> and
- (c) there is a growing demand for (general) large format retail within the economic catchment area.<sup>18</sup>

#### **4. MUZ IS MORE APPROPRIATE IN TERMS OF SECTION 32**

**4.1** The orthodox evaluative requirements under sections 32 and 32AA of the Act remain applicable under the IPI process, requiring an assessment of:

- (a) whether the objectives of the particular proposal are the most appropriate way to achieve the purpose of the Act; and
- (b) whether the provisions of the proposal are the most appropriate for achieving the objectives of the proposal, including identifying other reasonably practicable options and assessing the efficiency and effectiveness of the provisions of the proposal.

**4.2** The section 32 report noted that the rezoning of the Site was not compulsory under the NPS-UD,<sup>19</sup> but applied the HRZ zoning consistent with the Council's use of HRZ in respect of walkable catchments throughout Upper Hutt. It considered that the following benefits would arise from the HRZ zoning:<sup>20</sup>

The rezoning of the St Patrick's Estate area will generate a significant opportunity for increased residential subdivision and development. Development of the site following the proposed rezoning will result in opportunities for economic growth and employment associated with residential subdivision and development.

**4.3** The section 32 report did not consider the use of the MUZ zone at the Site. Such a step would have been helpful, given that the MUZ would retain the current breadth of development opportunities for the Site, while, significantly, also providing for the residential outcomes enabled by the HRZ. The report did

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17 Heath at [8.11] - [8.14]; McGuinness at [5.2(a)].

18 Heath at [8.5] - [8.10]; McGuinness at [5.2(b)].

19 Section 32 Report, volume 2, at page 70.

20 Ibid.

identify the following risks in rezoning the Site, which in our submission support the logic of considering and applying MUZ:<sup>21</sup>

With regard to the proposed rezoning of part of the St Patrick's Estate site to High Density Residential Zone, it is acknowledged that the resulting subdivision and development will result in a significant change from the existing undeveloped character of the site. However, as the Council has previously consulted the community on the proposed rezoning of part of the site to enable residential subdivision and development, the resulting effects and change in existing character is not unanticipated by the community. This fact reduces the levels of risks and uncertainty significantly.

It is unknown what the impact of implementing the MDRS and giving effect to the NPS-UD is on district plan-enabled housing capacity and how this addresses the City's anticipated housing needs. It could be that the implementation of the MDRS and the NPS-UD results in there being no shortfall in plan enabled housing capacity. This situation would reduce the policy support and justification for rezoning part of the St Patrick's Estate area in particular.

On this basis, and notwithstanding the unknown impact of incorporating the MDRS and giving effect to Policy 3 of the NPS-UD on plan-enabled housing capacity with respect to anticipated housing needs, it is considered there is sufficient information and low levels of risk associated with this option.

**4.4** With regard to these identified risks, SLHL notes that:

- (a) As identified in Mr Heath's evidence, the use of the Site solely for residential land use is not needed to meet the anticipated demands for housing in the district in either the short or long-term.<sup>22</sup> This undermines the principal impetus for the proposed zoning;
- (b) While the Council may have consulted with the community as to enabling residential uses for the Site, SLHL is unaware of it having consulted on *limiting* the site to residential use. Therefore, this consultation provides limited justification for the reduction in "risks" cited by the Council;
- (c) As also identified in Mr Heath's evidence, there is a significant opportunity cost in solely providing for residential use at the Site, given

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<sup>21</sup> Section 32 Report, volume 2, at page 70.

<sup>22</sup> Heath at [7.8] and [7.9].



the demands for retail (and particularly large format retail) in the surrounding economic catchment.<sup>23</sup> This risk (or converse benefit of the MUZ) is not identified in the section 32 report; and

- (d) The ODP planning framework has informed SLHL's consideration of multiple options for the Site. In particular, Mr McGuinness states in his evidence that, "[t]he flexibility of the operative District Plan provisions has been an important factor in SLHL's planning for and investment in future development over several years."<sup>24</sup> This investment has included the commencement of bulk earthworks to elevate the land to above the 440yr flood plain level, which will enable development on the Site to occur.<sup>25</sup>

**4.5** In that context, there does not appear to be a robust section 32 foundation for the departure from the enabling framework provided under the ODP. Instead, the MUZ is the "most appropriate" way to achieve the purpose of the Act and the objectives of the proposal. In particular the evidence highlights that:

- (a) The potential benefits in applying the proposed HRZ are similarly achieved through the application of the MUZ, while also providing, as a further benefit, flexibility for future development to respond to market demand and adapt to community needs;<sup>26</sup> and
- (b) A number of risks associated with the change would be avoided under the MUZ. Perhaps the most significant of these risks is the opportunity cost in not providing for the Site to meet the district's anticipated demands for non-residential uses.<sup>27</sup>

## **5. SECTION 42A REPORT**

**5.1** In the Council's section 42A report, Mr Muspratt accepts that MUZ is the "closest comparable zone that reflects many, but not all, of the activities provided for and encouraged within the St Patrick's Estate site."<sup>28</sup> However, the report supports the proposed HRZ zoning on the basis of potential adverse effects (and

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<sup>23</sup> Heath at [10.2] and [10.3]. Also see McGuinness at [5.2(c)]

<sup>24</sup> McGuinness at [4.3].

<sup>25</sup> At 3.3 and 4.4.

<sup>26</sup> Lewandowski at [9.1] and [9.2]; Heath at [10.2] and [10.3].

<sup>27</sup> Ibid.

<sup>28</sup> Council's Evidence Report (**Section 42A Report**) at 1129.

particularly transport effects) of the MUZ zoning, rather than the comparative benefits of the HRZ zoning.

**5.2** The report requests SLHL propose “a potential alternative technical solution that addresses the key potential issues” as part of the hearings process.<sup>29</sup> SLHL welcomes this opportunity and has proposed mechanisms for mitigating these potential effects.

**5.3** SLHL understands Mr Muspratt’s concerns hinge on two principal bases:

(a) First, that in light of the size of the Site and its undeveloped state, a structure plan is necessary to deliver a rational pattern of development and mix of uses that would not result in potential adverse effects. He identifies such effects as those arising from high density residential land use being located in proximity to non-residential activities enabled under the MUZ.<sup>30</sup>

(b) Second, the MUZ enables activities (particularly large format retail) that are non-complying activities under the existing SAZ provisions. He considers that these are of sufficient scale to warrant an integrated transport assessment prior to being deemed appropriate activities within the Precinct, as identified in the Council’s transport evidence, prepared by Mr Wignall.<sup>31</sup>

**5.4** In SLHL’s submission, it is both unreasonable and unnecessary to require a structure plan as a precondition to retain the existing flexibility for development provided under the OPD. Instead, there are appropriate planning mechanisms that can be adopted through this IPI process that can mitigate the potential adverse effects identified by Mr Muspratt. SLHL has proposed two such mechanisms.

**5.5** First, SLHL proposes a restricted discretionary activity status for retail activities. Appropriately framed matters of discretion can thereby cover the potential effects (including transport effects) and provide the Council with a means of exercising control over these potential effects to ensure they are appropriately mitigated.

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29 Section 42A Report at 1140.

30 At 1135.

31 At 1134.

**5.6** Second, SLHL has proposed the inclusion of a 100 vehicle per hour threshold, by which any activity or activities (excluding residential) that generates vehicle movements over this threshold, is assessed as a restricted discretionary activity. Such a mechanism has been proposed for the MUZ zone applying to the Trentham Racecourse Precinct as a means of mitigating transport concerns there.

**5.7** Mr Georgeson, who has prepared transport evidence on behalf of SLHL, has reviewed these mechanisms and concluded that, in his expert opinion:<sup>32</sup>

the relief sought in SLHL's submission to establish a MUZ classification for the Site, along with the recommended provisions around the inclusion of a traffic generation threshold trigger, can be supported from a transportation perspective. This would allow associated Site traffic impacts to be appropriately assessed through the resource consent process.

**5.8** SLHL considers that the mechanism proposed provide an appropriate technical solution to the matters raised by Mr Muspratt, allowing for potential effects of development to be appropriately managed through a resource consent process once the development opportunities for the Site have become clear.

**5.9** Regarding the first concern in particular (paragraph 5.3(a) above), SLHL also briefly notes that:

(a) The MUZ anticipates exactly such a mixture of uses by providing for residential activities and a range of other development options.<sup>33</sup> The Hearing Panel should take comfort that the provisions of the MUZ can appropriately provide for a mixture of activities.<sup>34</sup>

(b) As identified in Mr McGuinness's evidence, SLHL has no intention for retail activities to fill the site; instead it is contemplating a high quality and genuinely mixed use development with significant provision of mixed residential uses.<sup>35</sup> While the ultimate development of the Site has not been confirmed, the indicative scheme in Appendix A to Mr McGuinness's evidence provides a high level indication of what a realistic, mixed-use development of the Site may look like.

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32 Statement of Evidence of Mark Georgeson at [6.1].

33 Lewandowski at 8.21.

34 Lewandowski at 8.28.

35 McGuinness at 6.6.

**6. CONCLUSION**

- 6.1** In summary, the proposed application of the HRZ will inappropriately narrow the breadth of land uses available under the ODP, inconsistently with the NPS-UD and without a robust section 32 justification. The MUZ is a more appropriate zone in achieving the purpose of the Act and the objectives of the IPI, preserving the current flexibility of development opportunity at the site while also achieving the benefits of the HRZ in providing for residential use.
- 6.2** SLHL respectfully requests the Panel adopt the changes sought to the IPI(R1) provisions, as outlined in Appendix 4 of Mr Lewandowski's evidence.

**Dated** 19 April 2023



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**Matt Conway / Olliver Maassen**

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