

BEFORE THE HEARING PANEL

UNDER the Resource Management Act
1991

IN THE MATTER of submissions and further
submissions on Upper Hutt
District Council Plan Change
49- Variation 1 to the Operative
District Plan Silverstream Spur.

Submitter **GUILDFORD TIMBER
COMPANY LTD**
**(Submitter 82, Further
Submitter 12).**

**ADDITIONAL LEGAL SUBMISSIONS ON BEHALF OF GUILDFORD
TIMBER COMPANY LTD**

Dated: 29 November 2023

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MAY IT PLEASE THE PANEL**Introduction**

- 1.1 These additional legal submissions are made in addition to legal submissions filed on behalf of the Guildford Timber Company (GTC).
- 1.2 They respond to:
 - (a) Evidence filed by Forest & Bird;
 - (b) Reporting Officers comments at start of the hearing;
 - (c) Forest & Bird legal submissions; and
 - (d) Questions from the Panel.

Forest & Bird – Evidence of Dr Maseyk.

- 1.3 The Wildlands (s32 note) and Dr Maseyk rely extensively upon the findings of aptly titled –‘Draft Probable’ SNA’s UHO70 (Wildlands Report 2018). Dr Maseyk has acknowledged the limitations of her evidence as “a review and adoption” of the Wildlands assessment—she has not undertaken any assessment of her own.
- 1.4 There is a danger in relying upon these draft assessments. The Courts do not place weight on draft documents for good reason.¹UHCC has rightly chosen not to do so, noting that they will be reconsidered in light of the new NPS-IB criteria and that this work is not yet complete. Draft conclusions are subject to change.
- 1.5 Dr Keesing has undertaken detailed surveys of the Spur land in 2015 and again in 2023 has confirmed the values present on the Spur.

¹ *Lindis Catchment Group Inc v Otago Regional Council* [2019] EnvC 166 and *P & E Limited v Canterbury Regional Council* [2016] NZEnvC 252 at [195]. *Canterbury Regional Council* when asked to apply draft Guidelines developed for the Draft NPS-FW on maximum water location limits for low flow, the Court decided not to place ‘too much weight on a [draft] document that has no statutory significance,’ noting a lack of consensus in that other ecologist, ‘did not agree with it.’

- 1.6 Ms Thompson indicated at the opening of the hearing that she disagreed with Dr Keesing proposed reduction of the EPA, and confirmed that Wildlands did attend site, however neither Wildlands or Dr Maysk have responded to Dr Keesing's evidence or provided a differing view on this.
- 1.7 Council's rationale for its delineation of the EPA was that it met the significance criteria in Policy 23. GTC's position is simple, there needs to be an evidential basis for inclusion of the overlay in the plan. Land that that does not have those values should not be included in the EPA or be subject to the protection that the overlay provides it is not warranted.
- 1.8 Dr Maysk was critical of Dr Keesing's approach in applying the NPS-IB, but did not clarify why. It is also unclear what the factual or evidential basis is for the identification and protection of the wider EPA area, (if it is not its significance), particularly given the need to be consistent with the NPS-IB.
- 1.9 The Panel intends to hear from Wildlands on this issue. It is requested that they file evidence setting out their views in the usual way, to better understand the areas in dispute. Dr Keesing is available to attend joint witness conferencing. GTC would appreciate the ability to respond to any additional new ecological evidence filed by the Council.
- 2.0 What is required to give effect to the NPS-IB?**
- 2.1 In opening Ms Thompson indicated that UHCC did not propose to implement the NPS-IB at this time, due to a need to first consult with mana whenua and the community as part of clause 3.2 NPS-IB (and this has been supported by GTC in the evidence it has filed) and sympathises with that position.
- 2.2 However, counsel is obliged to bring to the attention of the Panel recent case law, that suggests a different approach is required and that more is needed to give effect to an NPS.

- 2.3 The Environment Court decision in *Balmoral Developments (Outram) Ltd v Dunedin City Council* [2023] NZEnvC and the High Court Decision in *Southern Cross Healthcare Ltd v Auckland Council* [2023] NZHC 948 (and the Panel) both confirm the extent of the Council, Court (and in this case the Panel's) obligation to consider the recently notified NPS and where there is scope 'to give effect to it' now as part of this current process, the decision maker is obliged to do so.
- 2.3.1 The High Court in *Southern Cross Healthcare Ltd v Auckland Council* noted it was *irrelevant* that the Council was engaged in separate and broader plan changes to give effect to an NPS – (in that case the NPS-UD), because those other planning processes, do not limit the obligation to give effect to the NPS as part of this process.
- 2.3.2 GTC say that the Panel is required to 'give effect to' – i.e. implementing the NPS-IB as part of Variation-1 (as best it can) by properly delineating the EPA in a manner that is consistent with an SNA in the NPS-IB as part of Variation-1.
- 2.3.3 The mandatory direction in Subpart 2 cl.3.8 (6) NPS-IB would apply here, as an interim measure before the district wide assessment occurs.
- 'If a territorial authority becomes aware (as a result of a resource consent application, notice of requirement or any other means) that an area may be an area of significant indigenous vegetation or significant habitat that qualifies as an SNA, a territorial authority must:**
- (a) Conduct an assessment of the area in accordance with subclause 2 as soon as practicable; and
- (b) If a new SNA is identified as a result, include it in the next appropriate plan change or plan notified by the territorial authority.'
- 2.4 Dr Keesing has undertaken that assessment, and this process provides the opportunity to ensure that the EPA identified in variation1, better aligns (and is consistent with) the NPS-IB.
- 2.5 It is accepted that the reference to subclause (2) includes partnership and consultation with tangata whenua but does not capture the breath of Policy 2 or cl. 3.3 in terms of tangata whenua as partners

in developing the decision-making principles for SNA identification at a local level.

- 2.6 For completeness, I note the Panels question to Dr Mayesk about the cl. 3.8(5):

'A territorial authority need not to comply with subclause (1) in respect of any SNA referred to in para b of the definition of SNA (i.e. an area already identified as an SNA at the commencement date) if within four years after the commencement date, a suitably qualified ecologist engaged by the territorial authority confirms that methodology originally used to identify the area as an SNA, and its application is consistent with the approach in Appendix 1.'

- 2.7 The Draft Assessment of Probable Significant Areas (Wildlands 2018) and subsequent assessments do not come within the definition of (b) of SNA in the NPS-IB:

'any area that, on commencement date, is **already identified in a policy statement or plan as an area of significant vegetation or significant habitat of indigenous fauna** (regardless how it is described); in which case it remains an SNA unless or until a suitably qualified ecologist engaged by the relevant local authority determines that it is not an area of significant indigenous vegetation or significant habitat of indigenous fauna.'

(emphasis added)

- 2.8 This is because the draft SNA's are not already reflected in the Operative District Plan. The approach in these cases and provisions, in my submission is relevant to inform the Panels next steps, it to consider the approach it takes to Dr Keesing's assessment.

A Draft – FDS

- 1.1 Forest and Bird and other submitters place undue reliance on omission of the SGA from the Draft FDS and supporting HBA. The FDS is still being developed, it is wrong to conclude that there is no need for the corridor to the SGA.

- 1.2 Councils must have regard to the relevant FDS when preparing or changing RMA planning documents,² there is no legal requirement or direction to consider a Draft FDS. Submissions are to be heard on that next week. Consultation under the LGA is undertaken applying the principles of including s82(e) LGA including the need to receive submission with an open mind and give due consideration – there is not yet a final decision and this Panel should not seek to pre-determine that outcome as part of Variation-1.
- 1.3 GTC has filed a detailed submission on the Draft FDS seeking inclusion of the site. A copy of that submission and supporting economic report by Mr Foy at Formative raises issues with the HBA **Copy available**. Recent announcements from the new Government will also impact the HBA calculations, use of MDRS and funding for Lets Get Wellington Moving. Mr Foy confirms the continuing need of the SGA to provide for the districts housing growth.
- 1.4 UHCC has also filed a submission seeking that the SGA be identified as a “site for further investigation” in the FDS. **Copy available**.
- 1.5 GTC are of the view that the site meets the criteria for inclusion in the FDS. Whether it does, or not, is a decision for the FDS Committee. It something that this Panel needs to second guess or make a finding on as part of Variation 1.
- 1.6 GTC is also seeking a rezone of the SGA via proposed plan change 50 which submissions have recently closed on. If successful the SGA would be ‘plan enabled.’
- 1.7 In addition the NPS-UD also requires local authority to have ‘particular regard to’ planning for unanticipated or out of sequence developments in respect of plan changes that provides ‘significant development capacity’ that is not otherwise enabled in a plan (or is not in sequence with planned land release).³RPS-PC1 Urban

² Cl3.17 of the NPS-UD(1)(a). The Wellington Growth Framework (2021) that does identify the SGA for future development Area is also relevant.

³ NPs-UD Subpart 2, cl3.8 responsive planning.

Development Chapter – (currently being considered) proposes a policy framework for that.

'specified infrastructure' under NPS-IB

- 1.8 If the outcomes of either of those processes are successful it is likely that a future road or infrastructure to the Spur would meet the definition of "specified infrastructure" in the IPS-IB in respect of (c):

'infrastructure that is necessary to support housing development, that is included in a propose or operative plan or identified for development in any strategy document (including a future development strategy or spatial strategy adopted by a local authority in an urban environment (as defined in the National Policy Statement on Urban Development 2020).

- 1.9 Cl.3.11(1)(i) provides a pathway for the construction of specified infrastructure with a regional public benefit, where there is a functional or operations need for the development to be in that particular location and no practicable alternatives exist. This allows adverse effects on an SNA to be managed in accordance with the effects management hierarchy.

- 1.10 Whether the infrastructure is specified infrastructure is not a static assessment – there is no requirement that it is met now. There is potential for SGA to be 'specified infrastructure' if it is recognised in the plan/FDS and meets the necessary tests, at the time when a particular proposal is considered. Plans are "forward looking," resource consents would only be sought for an infrastructure/roading corridor for the SGA – if the necessary mechanisms (i.e. change of zoning and/consents) had been obtained to allow the SGA to be developed.

A comment on timing

- 1.11 While the regulatory and planning climate currently being experienced, means much is in the air in terms of the draft FDS and Proposed Plan Change 50, RPS-PC1 and Proposed NRP-C1 and

potential legislative repeals, provide less clarity for PC49-Variation 1– it is premature to say with any confidence that the SGA is not needed or can't be developed, and that is not a decision before the Panel.

Concluding comment

- 1.12 Council's approach to variation 1 to preserve the opportunity for access for roading and infrastructure so to *not preclude* future development of the SGA is correct the mapped EPA and/or SNA is on the part of the site that is residential and can be developed at MDRS via the IPI.
- 1.13 If the Panel find that there is a compelling case for the Natural Open Space Zoning, it is important for the plan not to foreclose on the opportunity to service the SGA at a future date in the event it is needed.
- 1.14 The relief sought by GTC, to the Officers Response version of the wording, and delineation proposed by Dr Keesing achieves that.



P D Tancock

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Dated 28 November 2023.