

**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).**

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

**Dated: 2 April 2024**

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**MAY IT PLEASE THE PANEL:**

**1.0 Introduction**

1.1 These additional legal submissions are filed in response to submitter evidence and submissions filed for the revised hearing – seeks to capture “key themes,” rather than every submission point.

**2.0 Legal submissions of Forest & Bird**

2.1 Many of Forest & Bird's comments are not focused on the narrow purpose of the resumed hearing and the issues raised have been addressed thoroughly in opening submissions. However, responses have been provided (to the extent these may assist the Panel):

2.2 Forest & Birds additional legal submissions (para 4 – 8) say that in determining whether or not a transport corridor is appropriate, that the Panel should assess the consistency with the purpose of the Open Space Zone. This is self-serving, as it ignores that the Panel must also consider the suitability of the Open Space Zoning, (the land is not currently zoning Natural Open Space). As noted in the s32 Report, the Council introduced the plan change to provide for both the Natural Open Space Zoning, while retaining a policy and rule framework for future roading and infrastructure access. Plan Change 49-v1 introduces a bespoke framework with a dual purpose in order to manage the inherent tension created by the proposed new zoning.

2.3 Counsel for Forest & Bird says at para 8 that the evidential basis for including provision for future servicing of the SGA is ‘speculative.’ This is incorrect and ignores:

- (a) The detailed history of cooperation between GTC and UHCC in planning for future development of the site set out in para 4.0-4.20 of Mr Hall's Evidence dated 17 November 2023.

- (b) The expert evidence of Mr Read in terms of the infrastructure requirements of the SGA;
- (c) The expert economic evidence of Dr Foy as to the continued demand for housing; and
- (d) GTC's request to rezone the SGA as part of Plan Change 50.
- (e) This is a Council lead plan change – not a private plan change, Council have advanced the plan change on the basis there is a need for an infrastructure and roading corridor.
- (f) The Panel have had the benefit of hearing from GTC's expert witnesses and assessing the strength of their evidence. Importantly GTC is the only party who has called expert evidence on economics, land development and planning. Forest & Bird have not put up any experts challenging the basis of this evidence in the usual way.

2.4 At paragraph 12 and 16 Forest & Bird refers to Dr Mayesk's evidence. The Panel are reminded of Dr Maysk's acknowledgement of the limitations of her evidence being a "review and adopt" of the Wildlands assessment (which Mr Goldwater departs from to some degree) (Refer to additional legal submissions on behalf of GTC dated 29 November 2023 para 1.3). Notably, Dr Mayesk has not filed further evidence in response to Mr Goldwater's evidence, Dr Mayseks assumed "support" or "otherwise" for Mr Goldwater's position (which was not available to her at the time of her evidence) should be treated with caution.

#### **Dr Keesing's evidence**

2.5 At paragraph 16, Forest & Bird make the following submission:

'In this subjective context, the fact that Dr Keesing is providing evidence on behalf of the company that wants to build a road through the disputed area is relevant. It is submitted that the evidence of Mr Goldwater should be preferred, on the basis that (a)

he is better placed as an expert to make an impartial subjective judgement; and (b) he is broadly supported in his conclusions by Dr Maseyk.'

- 2.6 This is inappropriate and unsubstantiated and also an unhelpful way to approach a difference in professional opinion between two experts. Most experts that you will hear from are paid. That does not form a basis to discredit their evidence. The Court of Appeal confirmed this in *Lisiate v R* [2013] NZCA 129 at [55].

'Expert evidence will not be inadmissible simply because the expert is associated with one of the parties, without any other indication that professional impartiality will not be maintained.'

- 2.7 Dr Keesing is a respected and experienced ecologist. He is a well-qualified and independent expert who understands the professional duty he has to the decisionmakers he appears before. He has provided both his oral and written evidence in accordance with the Environment Court Practice Note 2023.<sup>1</sup>

- 2.8 The Panel has had the opportunity to hear from Dr Keesing and he has undertaken his assessment's, presented his evidence in an open and very helpful way, notably he has made concessions where in his judgement it is important to do so. You are entitled to rely upon his evidence.

### **Spatial Extent and Route of Proposed Transport Corridor.**

- 2.9 In paragraphs 17- 18 Forest & Bird complain about the lack of detailed proposal in order to assess actual effects, as do other submitters. GTC consider that the Panel has adequate information upon which to make a decision about a plan change.

- 2.10 Detailed evidence was filed by GTC in November 2023 and elaborated over the course of the earlier hearing, which remains relevant. The focus of the March 2024 evidence – is purposely narrow and is on the new material (as per the Chair's direction).

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<sup>1</sup> Dr Keesing's qualifications and experience and commitment to comply with the Environment Court Practice Note 2023 is set out in his evidence in chief.

- 2.11 The correct approach was set out in opening legal submissions<sup>2</sup>. Notably, the Panel need to be satisfied that the PC 49-v1 provides provisions put a planning framework in place to allow the effects of future activities on the Spur to be properly assessed at resource consent stage.
- 2.12 A number of submitters are concerned about Mr Hall's reliance on Mr Read's evidence as to likely extent of a future road being a "minimum length" of 880m. Mr Hall was entitled to rely upon Mr Read's evidence. He is the only infrastructure and engineering expert witness to have appeared before the Panel. The Council has not (to date) contested Mr Read's evidence.
- 2.13 The thrust of Mr Read's evidence is that a smaller footprint would be designed for infrastructure and roading to service the SGA, than what was put forward for the joint GTC/UHCC Infrastructure Accelerator Fund application – because housing development is no longer intended on the Spur.<sup>3</sup>
- 2.14 Mr Halls evidence (dated 15 March 2024), draws attention and seeks to correct an inaccuracy. Mr Goldwater's effects assessment included reference that infrastructure (including roading corridor) would take up approximately 3.5ha or 10% of the total Silverstream Spur area, (which in turn influences the Officers recommendation).
- 2.15 Mr Hall (based on the evidence of Mr Read) seeks to correct that mistake, says this would form closer to 1.7ha (or 4.85%) of the total Spur area. Dr Keesings evidence is that the effects of this are not material and are capable of being managed at a consent stage.

**Was is required to "protect" and "avoid?"**

- 2.16 In paragraph 20 Forest & Bird submit that a road that transects the Spur is "entirely inappropriate" and should not be provided for. This overplays both s6(c) RMA and the NPS-IB, neither can be read as

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<sup>2</sup> Opening legal submissions for GTC dated 17 November 2023 (para 12.1 and Appendix 1 which sets out the legal framework and paras 13.1 - 13.6 which discusses the difference between assessing the effects of a plan change compared to assessing a resource consent application).

<sup>3</sup> (para 5.4-5.5, 5.7-5.9, and 11.1 (ii) refers to an 880m length road from Reynold's Batch Drive at 1.8 gradient)

categorically precluding development in all circumstances (for example NPS-IB contains exceptions for cl.3.11 (a) - in terms of a pathway for specified infrastructure).<sup>4</sup> Similar pathways exist in cl.3.22 of the NPS-FM.

- 2.17 The recent Supreme Court decision in *Port Otago Ltd v Environmental Defence Society* [2023] NZSC 112 SC 6/2022 has confirmed that avoidance policies in the NZCPS do not require absolute protection, only protection from “material harm.” Material harm can be mitigated to “immaterial harm” via the imposition of conditions at a consent stage, and taking into account the temporary nature of which the harm subsists, meaning overall it is not material.
- 2.18 In my submission the Courts comments have broad application and are equally applicable to interpreting other “avoid” policies in the NPS-IB and Regional and District Plans and the direction to “protect” in s6(c) and NPS-IB as not being absolute –underscore the importance of allowing applications to proceed to consent stage before reaching conclusions about effects.

#### **Access to the SGA.**

- 2.19 GTC has previously granted access to its land recreationally, but in November last year closed the forest to the public due to an anticipated high risk fire season and the fact that it is a working forest - logging is underway. Over the course of plan change 49-v1, it appears that a number of parties (based on the coordinates they have provided) have ventured onto GTC’s private land without approval which is of concern to GTC, both from a health and safety perspective and particularly given the focus of and scope of Plan Change 49-v1 is on Council land only.
- 2.20 It is important that the potential for future roading infrastructure to service the SGA is not foreclosed. GTC is dependent on the Spur for access to the SGA, (which is currently possible under the existing zoning). The future use of its land will be severely compromised by

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<sup>4</sup>For example, the NPS-IB definition of Specified Infrastructure (c), as being ‘infrastructure that is necessary to support housing development, that is included in a proposed or operative plan or identified in any relevant strategy document including any Future Development Strategy.’

the rezoning of the land to Natural Open Space if the Panel does not make provision for a roading and infrastructure corridor as part of the Natural Open Space rezoning.

### **3.0 Timeframes**

- 3.1 Submitters have requested that the Panel delete the provisions to service the SGA on the basis that the FDS confirms “it is not needed,” as Mr Hall will explain this is a misinterpretation of the FDS. Regardless of that it is important not to prematurely rule out the future development of the SGA. It is one of the largest and unconstrained greenfield sites in the region –set aside for housing for several decades. Planning decisions made today are not felt in the short term, they inevitably impact housing supply in the medium-term.
- 3.2 The relevant timeframe the Panel need to consider is at least 10-15 years (the minimum expected life expectancy of a district plan before review). The environment is not static, zoning, the housing crisis, FDS, housing, supply and national direction as to how to respond to that crisis will inevitably change over the Plan Change 49-v1’s lifetime. The SGA should not be hastily dismissed on the basis that is “not needed today,” without recognition that it may be needed in the future.
- 3.3 Equally, the effects of a roading or infrastructure proposal will be assessed based on the future environment that exists (including the regulatory and policy environment at the time that that resource consent is lodged). The Panel should not seek to pre-empt the outcome of that, or deprive GTC of the opportunity to seek consent based on the merits.

**Concluding comments**

- 3.4 As set out in opening, and revised submissions filed for this hearing, the relief sought by GTC, (on the Officers initial s42A Report) and delineation of the SNA proposed by Dr Keesing strikes the right balance.



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**P D Tancock**

**Counsel for Guildford Timber Company Ltd**

Dated 2nd April 2024.