

**BEFORE THE HEARING PANEL  
AT UPPER HUTT**

**IN THE MATTER OF** the Resource Management Act 1991  
**AND**  
**IN THE MATTER OF** Proposed Plan Change 49 – Open Spaces  
(PC49) to the Operative Upper Hutt District  
Plan; and Variation 1 to PC49.

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**LEGAL SUBMISSIONS  
ON BEHALF OF THE ROYAL FOREST AND BIRD  
PROTECTION SOCIETY INCORPORATED  
27 November 2023**

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## MAY IT PLEASE THE PANEL

### INTRODUCTION

1. These submissions are presented on behalf of the Royal Forest & Bird Protection Society Inc (**Forest & Bird**). Forest & Bird lodged submissions on Plan Change 49 (**PC49**) as originally notified, and on Variation 1 (**PC49-V1**) relating to the rezoning of the Silverstream Spur (**the Spur**) and is Submitter Nos. 74 & 79 and Further Submitter No. 16.
2. Forest & Bird supports the inclusion of the Spur as a Natural Open Space Zone (**NOSZ**) as proposed in PC49-V1. However, it opposes the provision for a transport corridor through the Spur to facilitate the development of the Southern Growth Area (**SGA**) by the Guildford Timber Company (**GTC**). As set out in its submissions, Forest & Bird believes that the Spur should remain exclusively NOSZ, with no transport corridor.
3. Provision for a transport corridor within the Spur NOS would be inconsistent with the relevant planning framework, including s 6(c) of the Act; policies 23, 24 and 27 of the Regional Policy Statement; and the NOSZ provisions in the District Plan itself.

### PLANNING FRAMEWORK

4. The purpose of the Resource Management Act 1991 (as amended) (**the Act**) is to promote the sustainable management of natural and physical resources.
5. Under s 74, the changes proposed in PC49 must be made “*in accordance with*”:
  - Council’s statutory functions under s 31
  - Council’s obligations under s 32
  - Part 2 of the Act

- National Policy Statement for Indigenous Biodiversity 2023 (**NPS-IB**)
  - National Policy Statement on Urban Development 2020 (**NPS-UD**)
  - National Planning Standards.<sup>1</sup>
6. Under s 75, the district plan (as modified) must also “*give effect to*” the NPS-IB, NPS-UD and the National Planning Standards, together with the Regional Policy Statement for the Wellington Region (**RPS**).
  7. The district plan (as modified) must not be inconsistent with the provisions of the Greater Wellington Natural Resources Plan (**NRP**) as it relates to indigenous biological diversity.<sup>2</sup>
  8. Finally,<sup>3</sup> under s 74(2) the Council must “*have regard to*” proposed plan changes to the RPS, together with urban development plans and policies developed under other legislation.

### **Council functions**

9. Under s 31 RMA, the Council’s relevant functions include:
  - (aa) the establishment, implementation, and review of objectives, policies and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district; ...
  - (b) ... (iii) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of ... the maintenance of indigenous biodiversity...
  - (d) the control of the emission of noise and the mitigation of the effects of noise.

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<sup>1</sup> National Planning Standards 2019, updated 2022; the PC49 proposal follows the Plan Structure in Table 5

<sup>2</sup> RMA s 75(4)(b) and s 30(1)(ga).

<sup>3</sup> The s 32 report states at [6.8] that there are currently no iwi Management Plans within the Upper Hutt District.

## **Part 2 RMA**

10. Section 6(c) RMA provides that “the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna” is a matter of national importance, which must be recognised and provided for by decision-makers.
11. In addition to the Part 2 matters referred to in the s 32 and s 42A reports, the Panel is asked to note that s 7(d) RMA includes the “intrinsic values of ecosystems” as a matter which decision-makers must “*have particular regard to*”.

## **National Planning Standards (2019)**

12. The PC49 proposal to divide the Open Space Zone into three distinct zones is consistent with the National Planning Standards, which describe the Natural Open Space Zone (**NOSZ**) as:<sup>4</sup>

Areas where the natural environment is retained and activities, buildings and other structures are compatible with the characteristics of the zone.

## **National Policy Statement on Indigenous Biodiversity (NPS-IB)**

13. The objective of the NPS-IB is to maintain indigenous biodiversity, so that there is at least no overall loss in indigenous biodiversity after the commencement date (4 August 2023).
14. According to Policy 6, significant habitats of indigenous vegetation and significant habitats of indigenous fauna must be identified as SNAs using a consistent approach.
15. Under Policy 7, SNAs must be protected by avoiding and managing adverse effects from new subdivision, use and development.
16. Forest & Bird understands that the incoming Government has indicated an intention to revoke the NPS-IB. Although national policy on SNAs

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<sup>4</sup> National Planning Standards, Table 13 at p 37

may soon be entering a hiatus, this does not alter the need to apply the relevant provisions in cascading policy instruments such as the RPS and NRP.

### **Regional Policy Statement (RPS)**

17. Objective 16 of the RPS requires the Council to maintain and restore indigenous ecosystems and habitats with significant biodiversity values to a healthy functioning state.

18. This objective is supported by:

- Policy 23, which requires the Council to identify indigenous ecosystems and habitats with significant indigenous biodiversity values.
- Policy 24, which requires the Council to protect these ecosystems and habitats, and
- Policy 47, which requires the Council to manage the effects on these ecosystems and habitats when varying plans.

19. The proposed PC1 to the RPS (currently at the hearings stage) would expand the criteria for significance, requiring the Council to protect and enhance indigenous ecosystems and habitats with significant ecosystem functions and services and/or biodiversity values.

### **Natural Resources Plan (NRP)**

20. The NRP became fully operative on 28 July 2023.

21. Objective 28 requires that ecosystems and habitats with significant indigenous biodiversity values are protected from the adverse effects of use and development, and where appropriate restored to a healthy functioning state.

### **Other Management Plans and Strategies**

22. It is submitted that in deciding whether the SGA is likely to be significant in relation to the Council's function of ensuring sufficient housing

capacity, the Panel can have regard to the most recent Housing and Business Development Capability Assessment (**HBA**), the draft Wellington Horowhenua Future Development Strategy (**FDS**), and to the Council's draft Intensification Planning Instrument (**IPI**).

### **Weight to be attached to RPS-PC1**

23. It is submitted that, of the relevant considerations recently summarised by the Environment Court in *Guthrie v Queenstown Lakes District Council*, the most relevant is “the extent to which the new measure, or absence of one might implement a coherent pattern of objectives and policies in a plan”.<sup>5</sup>
24. The general direction of policy in the Wellington region is towards increased concern for protecting and enhancing indigenous biodiversity. The Spur NOSZ is aligned with this policy direction, however the proposed transport corridor would run counter and is likely to be seen as causing a legacy issue assuming RPS-PC1 is adopted.

### **APPLICATION**

25. Forest & Bird's concerns relate to the proposed inclusion of a transport corridor in PC49-V1. It is submitted that the proposed transport corridor is incongruous in the context of PC49, runs contrary to national and regional policy on maintaining and enhancing indigenous biodiversity, and is not required or supported by current or proposed urban development plans for the district.

### **PC49 – Open Spaces**

26. It is submitted that the proposal for a transport corridor departs from the purpose of PC49-V1 which is to identify and zone sites which meet the criteria for NOSZ. The proposed road corridor would not mean that “the natural environment is retained” and would not be “compatible with the characteristics of the zone”, as such it would not give effect to National

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<sup>5</sup> *Guthrie v Queenstown Lakes District Council* [2021] NZEnvC 79, at [68]

Planning Standards. In these circumstances, it is submitted that a clear urban development policy (or a clear gap in those policies) would need to be identified to engage the Council's competing function of ensuring sufficient housing provision in the district.

27. In the context of PC49-V1, it is relevant to consider both the existing Open Space provisions and those proposed in PC49.<sup>6</sup>

28. The current Open Space provisions in the District Plan are "... focused on protecting open spaces for community use and allowing for recreational activities to occur".<sup>7</sup> These provisions, which refer to the importance of retaining greenspaces valued by communities and of maintaining and enhancing the natural environment, are accurately summarised in the s 32 report as follows:<sup>8</sup>

The Open Space Zone positively contributes to the mental and physical wellbeing of local communities. The zone comprises spaces which are accessed by members of the public to undertake a variety of recreational activities, both passive and active, but are also used for customary, conservation and educational activities. These spaces also provide amenity benefits for neighbourhoods, and the zones provisions emphasise retaining greenspaces which are valued by communities. Open spaces also provide natural benefits through the retention, maintenance and enhancement of the natural environment.

29. PC49 will introduce three separate categories of open space, following the National Planning Standards. Of these, it is the natural open space zone (**NOSZ**) which is relevant to PC49-V1. The NOSZ applies to those open spaces that are dominated by their natural character and focuses on the values of passive recreation and nature interaction. In the s 32 report, the NOSZ is characterised as being:<sup>9</sup>

... dominated by areas where people undertake predominantly passive recreational activities, or specialised active recreational activities which have a

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<sup>6</sup> RMA s 32(3)

<sup>7</sup> S 32 report at 5.1.1

<sup>8</sup> S 32 report at 5.1.2

<sup>9</sup> S 32 report at 7.9.14

high degree of nature interaction. These areas do not generally have an 'open' character, and do not have a wide range of buildings or specialised equipment to support recreation use. Although there are some specialist facilities within the Regional Parks, when seen in the wider scale of the parks, these parks are still dominated by their natural character. As such, using the Natural Open Space Zone allows for a rule framework which focuses on more passive recreation with a strong focus on nature interaction. Several River Corridors are also included within this zone, as they are largely accessible by the public and are regularly used for different recreational activities.

30. The Council's Open Space Strategy (2018) contains five strategic goals:

- Our open spaces are appropriately located.
- Our open spaces meet the needs of the community and more people benefit from regularly using them.
- Our open spaces are accessible and well connected, making it easier for people to exercise, play, socialise and relax outdoors.
- Our open spaces are enhanced to provide benefits for the environment and recreational experience.
- Our open spaces contribute to community identity, vibrancy and sense of place.

31. There is nothing in the above to suggest that PC49 should be concerned with enabling private development opportunities in other parts of the district. It is submitted that there would need to be a clear and compelling urban development policy to justify such a departure from the NOSZ objectives.

### **Indigenous Biodiversity**

32. In her report, Dr Maseyk has explained that the Spur includes part of an SNA and contributes to remaining indigenous vegetation cover in Upper Hutt District, which is now much reduced. She also observes the potential for ecological features and values to be enhanced over time.

33. In contrast, Dr Keesing has conducted a narrower assessment, providing his opinion as to the significance of specified pockets of indigenous



vegetation. The issues raised by Dr Keesing mainly concern the mapping of SNAs under the NPS-IB. It is unclear exactly how and when this mapping process will now be happening, but Dr Keesing's observations will be most relevant at that stage.

34. Although there is clearly room for debate about the precise boundaries of SNAs, it has been established that areas of significant indigenous biodiversity are present within the Spur NOSZ. These areas contribute to the natural and amenity values of the Spur NOSZ as a whole and help to provide the justification for its zoning as such.
35. The s 32 report states that "PC49 acknowledges that the purpose of the Natural Open Space Zone is not to protect indigenous vegetation, and that the rules associated with Significant Natural Areas will provide this protection".<sup>10</sup> It is submitted that the policy imperative to protect and enhance indigenous biodiversity is not something that can be ignored by the Council in the context of PC49-V1, particularly where NOSZs and SNAs overlap as in the case of the Spur. This has been recognised by the Council in its s 42A report on PC49-V1.
36. The Council's proposed provisions rely on NOSZ-P7 (identifying the Silverstream Spur Natural Area subzone) to protect biodiversity values. NOSZ-R22 manages the removal of indigenous vegetation within this subzone with the activity status of restricted discretionary. As currently drafted, NOSZ-R22 does not specify the matters over which discretion is restricted, and it is submitted that discretionary status would be more appropriate.
37. Forest & Bird supports the inclusion of the Natural Area in the District Plan but submits that this should not detract from the importance of maintaining and enhancing natural and amenity values more generally, including indigenous biodiversity, across the entire Spur NOSZ.

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<sup>10</sup> S 32 report at 7.9.13

## **Biodiversity offsetting and compensation**

38. Dr Maseyk has supported the inclusion of a definition of biodiversity offsetting and has also recommended that a definition for biodiversity compensation should also be included.<sup>11</sup> Forest & Bird supports these recommendations, the details of which can be addressed in evidence if necessary.

## **Urban Development**

39. Forest & Bird acknowledges the s 31 function of the Council to ensure there is sufficient development capacity in respect of housing to meet the expected demands of the district, and the objectives and policies set out in NPS-UD which aim to ensure that this development capacity is sustainable, well-functioning and integrated in the wider planning context.
40. The Southern Growth Area (SGA) is not currently “plan-enabled” or “infrastructure-ready” within the meaning of cl 3.4 NPS-UD, and it is submitted that it does not meet the criteria for “Unanticipated or out-of-sequence developments” under cl. 3.8.
41. At the local scale, ensuring that sufficient and suitable development capacity is available is to be achieved by means of Housing and Business Development Capability Assessments (**HBAs**) and Future Development Strategies (**FDS**). The most recent HBA states that, based on the current plan settings including Medium Density Residential Standards (**MDRS**), “Upper Hutt City has more than sufficient realisable capacity to meet its projected housing needs over the next 30 years”.<sup>12</sup> The proposed Upper Hutt Intensification Planning Instrument (**IPI**) will help to ensure that these outcomes can be achieved without the need to rely on greenfield development.

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<sup>11</sup> Expert evidence of Dr Maseyk at [7.1]

<sup>12</sup> Wairarapa-Wellington Horowhenua Region - Housing and Business Development Capacity Assessment – August 2023, at 6.2.5

42. The Wairarapa-Wellington-Horowhenua FDS is currently in draft form but expects that 60% of demand in the region will be met by an uplift in housing as a result of the MDRS.<sup>13</sup> Future Development Areas (greenfield) have been prioritised according to various criteria, and none have been identified in the Hutt Valley, where St Patricks is the only greenfield site mentioned. The draft FDS states that growth in the Hutt Valley will be prioritised in existing urban areas along the rail corridor.<sup>14</sup>
43. The above matters have been recognised in the Council's s 42A report.<sup>15</sup> As acknowledged in the s 42A report, it is not appropriate in the context of PC49 to include specific provisions to support residential development in the SGA.<sup>16</sup> Put simply, the SGA is not a significant policy consideration in the context of PC49-V1. It is submitted that the s 42A report is correct on this point, but that the same considerations also apply to the inclusion of provisions which refer in a vague manner to "future development opportunities".
44. In this context, no firm planning basis for including a transport corridor through the Spur NOSZ to service the SGA, or future development opportunities more generally, seems to exist. GTC's planning witness Mr Hall refers to Plan Change 42 – Mangaroa and Pinehaven Flood Hazard Extents. Although the SGA may have been referenced indirectly in this context, this does not provide any justification for engaging the Council's s 31 functions relating to housing provision in the context of PC49.
45. Similarly, although there is one reference to the SGA in a graphic included in the Long Term Plan 2021-2031,<sup>17</sup> this is only in the context of a "Possible New West-East Growth Corridor – Porirua to Heretaunga". It is notable that, in the absence of any clear planning basis for the SGA, GTC is forced to rely on the evidence of Mr Foy, which refers to the

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<sup>13</sup> Draft FDS at p 4, fn2

<sup>14</sup> Draft FDS at p 71

<sup>15</sup> Section 42A report, at [37]

<sup>16</sup> Section 42A report, at [243]

<sup>17</sup> Long Term Plan at p 118

presumed intentions of the incoming government,<sup>18</sup> and on “trends”<sup>19</sup> which are not reflected in the current policy framework.

46. Finally, it has not been established that a transport corridor through the Spur would be needed for the SGA even if it does eventuate. There are at least two alternative options for road access to the SGA, which it has not been possible to consider in the context of PC49. It is submitted that these alternatives would need to be properly evaluated before an evidence-based decision regarding a transport corridor through the Spur NOS could be made.<sup>20</sup>

**Transport corridor to support passive recreation and interaction with nature**

47. It is submitted that the argument that a road through the Spur NOSZ is needed to provide for passive recreational activities and amenity values is unconvincing. Although the Council’s Open Space Strategy does include the goal of making open spaces “accessible and well connected”, it is submitted that it would be non-sensical to do this at the expense of those values which have prompted recognition of the NOSZ in the first place.
48. In submissions (74.2) Forest & Bird has suggested, as an alternative to deleting policy NOSZ-P6, an amendment which does not refer to either the SGA or “future development opportunities”, and which would ensure that any transport corridor is at an appropriate scale, design, and location to provide for passive recreational opportunities.
49. It is not the case that the Spur NOSZ is currently inaccessible, and it is likely that a transport corridor would significantly diminish the ecological and amenity values which members of the local community find so attractive about it. To the extent that there is any tension between the Open Space Strategy goals referred to above, Goal 2 of the Council’s

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<sup>18</sup> Expert evidence of Mr Foy at [5.4.4] and [5.4.6]

<sup>19</sup> Expert evidence of Mr Foy at [5.4.5]

<sup>20</sup> RMA s 32(1)

Sustainability Strategy (2020) is relevant: “We will prioritise protecting and enhancing our natural environment”.

## **CONCLUSION**

50. The Spur meets all the planning criteria for an NOSZ, and therefore it should be zoned as such. This would be consistent with the Council’s function of controlling the actual or potential effects of the use of land on the maintenance of indigenous biodiversity. It has clearly been established that indigenous biodiversity values are present within the Spur NOSZ, and that this is one of the primary justifications for its zoning as such.
51. Departing from this position by including provision for a (poorly defined) transport corridor through the Spur NOSZ would need to be justified according to the Council’s competing function of ensuring sufficient development capacity in terms of housing to meet the demands of the district. However, there is very little support for this in terms of the local and regional planning framework, which prioritises intensification and proximity to existing transport infrastructure over greenfield development and expresses confidence that sufficient development capacity for housing already exists.
52. Driving a transport corridor through the Spur NOSZ is not necessary to support passive recreation and would undoubtedly have a negative impact on the natural and amenity values which provide the policy justification for its recognition in the first place.

Tim Williams for Forest & Bird

