

**IN THE MATTER OF:
AND IN THE MATTER OF:**

the Resource Management Act 1991
Proposed Plan Change 49 - Open
Spaces (PC49) to the Operative Upper Hutt
District Plan; and Variation 1 to PC49

MINUTE (9) OF THE INDEPENDENT HEARING PANEL APPOINTED BY UPPER HUTT CITY COUNCIL

Notice of reconvened hearing – ecological issues

Introduction

1. You have received this Minute because you have either made a submission, have been involved in the preparation of, or are an expert witness in the matter of Plan Change 49 and Variation 1 to the Operative Upper Hut District Plan (PC49 and Variation 1).

Ecological issues need to be clarified

2. As signalled in Minute 4 the Panel has been turning its mind to the nature and extent of ecological information it needs to ensure the Council fulfils its statutory functions with regard to Variation 1 and PC49.
3. Through the exchange of evidence and through the Panel's questioning at the hearing it is the Panel's current view that there is likely to be an area or areas on the Variation 1 land which would fall to be a probable Significant Natural Area as per policies 23, 24 and 47 of the operative Greater Wellington Regional Policy Statement (RPS).
4. However, there is uncertainty as to the nature and extent of the area or areas.
5. The Panel has been considering the most appropriate and practicable way to be able to satisfy its mind on this issue.
6. The Panel is mindful of ensuring that any process followed must be both fair to all parties, and proportionate with the scale of the issue it is reflecting on.

Minute 4

7. Through its Minute 4 the Panel had signalled that it anticipated that Dr Keesing (for GTC), the ecological expert for Forest & Bird and the Council's ecology expert witness would participate in an expert conference. The expected outcome was to be a joint witness statement to be provided to the Panel. A direction was to be issued by the Panel in late January 2024.
8. However, Mr Williams for Forest and Bird raised a concern about the attendance of an ecology expert for Council given that the ecology expert for the Council did not attend the hearing and no brief of evidence had been presented at the Hearing as follows:

"Forest & Bird is concerned that it would not be appropriate for the proposed experts to conference in the absence of a brief of evidence from Mr Goldwater (Wildlands).

So far as we are aware, Mr Goldwater did not give evidence at the hearing, and we have not seen a written brief of evidence. As a result, our expert Dr Maseyk would not be able to be sufficiently informed in advance of the conference to make the process efficient and worthwhile.

We also note that it is most unusual for an expert to be included in expert conferencing where that expert has not prepared a brief of evidence or given evidence at the hearing. Please can these concerns be addressed before any further steps are taken in relation to expert conferencing.”

9. The Panel issued Minute 7 on January 30 2024, with the Panel inviting all submitters to provide feedback and directing the Council to provide feedback on the matters raised by Forest & Bird. Feedback was to be provided by 4pm Friday 9 February 2024.

Minute 7 Responses

10. The following responses were received to Minute 7:

- a) Guildford Timber Company (PD Tancock) February 1, 2024
- b) Pat van Berkel February 2, 2024
- c) Silver Stream Railway (Jason Durry) February 9, 2024
- d) John O’Malley February 9, 2024
- e) Upper Hutt City Council February 9, 2024, with supplementary responses provided on February 15 and 16, 2024.

10.1 Guildford Timber Company Response

- (1) *This memorandum is filed on behalf of Guildford Timber Company (GTC), a submitter on Plan Change 29 – Variation 1 in response to Minute 7 which sought the parties’ views on the request by counsel for Forest and Bird for Mr Goldwater to file expert evidence on behalf of Council setting out his views in advance of the expert witness conferencing.*
- (2) *GTC consider that it would be helpful for the parties to understand Mr Goldwater’s view in advance of conferencing, noting some assessment notes were attached to Council officer’s report but that these did not provide much information as to the basis of his views. Dr Keesing has filed detailed evidence including his assessment of the values of the spur, delineation, and GIS plots. GTC do not consider that a full brief of evidence is required at this point, but suggest that the Panel consider directing Mr Goldwater to file a “will say” statement in advance of expert conferencing to enable those experts conferencing with Mr Goldwater to better understand his views.*
- (3) *A “will say” statement would serve that purpose and would be consistent with the approach to expert conferencing in the Environment Court Practice Note 2024 (Duty to Confer Part 9.4 (f) page 28). The relevant extract states:*

Where an expert conference occurs before the exchange of evidence-in-chief in a particular case the Managing Judge may direct that it proceeds based on “will say” briefs being exchanged beforehand. Except as otherwise directed by the Court, that is expected to be by way of an expert witness:

i. confirming any evidence given at an earlier hearing in relation to the same matter; or

ii. as a minimum:

- 1) setting out the key facts and assumptions relied upon;*
- 2) identifying the methodology and standards used in arriving at their opinion; and*
- 3) clearly explaining the opinion arrived at.*

(4) Counsel considers that would be sufficient to allow the experts to prepare for and participate in conferencing without resulting in further delays that may arise from the need to prepare a statement of evidence.

10.2 Pat Van Berkel Response

Dear Commissioners

Regarding PC49 and Variation 1, your Minute 4 indicates that you intend to hold an expert conference on ecological matters and your Minute 7 is a follow-up.

I submitted to you, both in writing and orally (as submitter S42 and FS4 on Variation 1, FS5 on PC49). Attached is my oral submission of 27 Nov 2023.

Further to your intention to hold an expert conference on ecological matters, I am now concerned that the time span over which the Silverstream Spur ecology is being considered by the experts is too short. The experts have focussed on the definition of Significant Natural Areas, but the Hearing Panel is actually making a decision about the long-term future of the whole Spur. This future spans 100+ years, and in that time the whole Spur (including the non-SNA areas) will naturally restore itself (hastened perhaps by helpful citizens).

Please ask the ecological experts to include an assessment of what the Spur ecosystems will become if the Spur is allowed to restore itself over a 100+-year period.

Kind regards

Pat van Berkel

10.3 John O'Malley Response

I support the submission of Royal Forest and Bird Protection Society and Silverstream Railways submissions on this matter.

If new evidence is to be submitted to the current hearing on the spur then it needs to be done in a formal structured document.

It must contain arguments in reasoned detail that the submitters wish to present.

This should then be available to all previous submitters for comment on; approval, counter argument or rejection with the opportunity to give reasoned argument on their point of view.

This should be done before any conferencing tasks place.

This as I understand is the process done to date. Why the need to change the rules?

A “Will Say” statement is **not** sufficient. It does not permit consideration to detailed counter argument with supporting evidence nor the opportunity to submit questions for the Commissioners Panel to consider.

Stampedes in this process are inappropriate and will not produce a satisfactory outcome. I am in no hurry.

10.4 Silver Stream Railway Response

- a. We support the comments made by Tim Williams representing the Royal Forest and Bird Protection Society on the inappropriateness of bringing new evidence to the hearing for PC 49 & PC49 Variation 1, without allowing the opportunity for all submitters to review and respond to such new evidence.
- b. Any new brief of evidence from Mr Goldwater (Wildland Consultants) would be a **minimum** requirement for Mr Goldwater to be able to participate in expert conferencing. A “Will Say” statement is **not** sufficient especially when the principal reason this type of statement is being sought by a submitter is preventing further delays.
- c. If a new brief of evidence was requested by council from Wildlands, then this evidence should be circulated to all submitters who would not be involved in the proposed expert conferencing, as it is new evidence to the hearing. The opportunity should be provided for submitters to comment on such evidence and indicate whether they support or do not support the evidence.
- d. The Wildlands Consultant reports on their site investigations and professional opinions on the Spur environmental condition, which were commissioned by council, and provided as part of the supporting evidence for the council proposals for PC49 Variation 1, have been relied on by submitters as being the inputs to the content of PC49 Variation 1 as proposed by council. It is entirely plausible that any new brief of evidence prepared by Wildlands Consultants may make different recommendations from what was contained in the original Wildlands Consultants report. This would comprise new information to the hearing, that submitters must be given the opportunity able to comment on.
- e. It was a deliberate council decision not to request Wildlands Consultants to provide expert evidence to the conference. This has become an issue due to submitters raising issues with the content of the Wildlands Consultant report. Therefore, while we support a right of reply to all participants in the hearing within the rules of the hearing process, this opportunity has now been lost for Wildland Consultants.
- f. We suggest that a re-convening of the hearing after any new evidence has been prepared and subsequently circulated and commented on by the submitters would be the only fair and equitable way to proceed.
- g. Other submitters may also wish to be given the opportunity to present new evidence on the Spur environmental conditions which could be relevant. On the basis of allowing additional evidence to be provided as shown above, then other new or additional evidence must also be allowed.
- h. Silver Stream Railway’s primary interest is the protection of the Silverstream Spur from inappropriate use, and we are prepared to wait as long as is necessary to ensure this interest is satisfied, and are unconcerned if there is extra time required to ensure all steps are taken to ensure the interests of the land and its current and future ecological values are recognised and protected for the future.

10.5 Council responses and panel queries

10.5.1 On February 9 Council emailed its response as follows:

The section 42A report for the variation notes that the Upper Hutt City Council worked with ecological specialists Wildland Consultants Ltd, to complete a report and mapping of Upper Hutt's threatened indigenous flora and fauna in October 2018, which identified areas on the Silverstream Spur as Significant Natural Areas. It further noted that, following the initial 2018 report, Wildlands conducted two site visits in November 2020 and June 2022 to assess any potential additional Significant Natural Areas on the Silverstream Spur. Adjustments were made to incorporate these newly identified areas and the Wildlands field notes from those two site visits were attached to the Section 32 report for Variation 1 to Plan Change 49.

Whilst Mr Goldwater did not present evidence at the hearing, he peer reviewed the information that was included in the section 32 report for Variation 1 to Plan Change 49, and this peer reviewed information was relied upon in the Council's evidence report (section 42A assessment).

Mr Goldwater has recently visited the site and is able to provide a statement related to his peer review and what has happened on the site since the peer review was undertaken. Mr Goldwater has confirmed that he is happy to attend the expert conferencing should the panel consider this to be appropriate and is able to provide a statement prior to the expert conferencing if this would be helpful.

10.5.2 The Panel replied to the Council on February 14 as follows:

- (1) The Panel cannot find the Field Notes referred to in paragraph 1 of the above - they do not seem to be attached to the S32 Report for Variation 1. Please assist the Panel to find the Field Notes.*
- (2) In the second paragraph, there is a statement that Mr Goldwater peer reviewed the information referred to above. Again, the Panel cannot find the written information relating to this. Please assist.*
- (3) The Panel is unclear from the third paragraph whether Mr Goldwater's statement would be a Statement of Expert Evidence which conforms with the Environment Court Code of Practice Note. Can you please clarify.*

10.5.3 An email from Council on February 15 advised that should Mr Goldwater be asked to provide a statement, Council could ensure that his Statement of Evidence complies with the Environment Court's Code of Practice Note.

10.5.4 After a further email exchange on February 15 regarding the whereabouts of the Field Notes, a timeline for expert conferencing and whether more information could be provided on the aforementioned peer review by Mr Goldwater, Council replied on February 16 and attached two documents, "Pinehaven Spur Report" and "Astrid Field Notes".

10.5.5 This Council email also referred to an additional visit on 8/6/22 to UH070 (the Variation 1 area) at 1 Reynolds Bach Drive, carried out by Florence Kelly and Joe Dillon (Wildlands Consultants Ltd.) as follows:

“Proposed extension of SNA UHO70 contains small areas of black beech-hard beech forest with very little understorey. Edges are mostly weedy vineland and shrubland including honeysuckle (Japanese and Himalayan), gorse, and broom.”

The email notes that *“Mr Goldwater is locating more information on the above as well as site notes from his visit, however a locational issue means that these may not be available until early next week.”*

Review of responses and information received

11. The Panel has read and discussed all the responses to Minute 7.
12. The Panel accepts the position of Forest & Bird, that it has yet to hear from Council’s ecological expert.
13. Guildford Timber Company seeks a “will say” approach. As the Panel has yet to hear from Council’s expert it does not believe that a “will say” approach is appropriate.
14. The Panel has also considered all the material received from Council as identified above. The Panel considers there may be new material in the information provided by the Council which is pertinent to defining the mapped area of the Silverstream Natural Area. Should there be new material in there, it is essential that all parties have the chance to review and respond.
15. The Panel has therefore decided that the most straightforward way to address the issue of the extent and values of any probable Significant Natural Area/s and to traverse the arguments about any necessary assessments under the RPS, is to reconvene the hearing.
16. The Panel also believes that it is essential to hear firsthand from Council’s ecological expert as it is clear that there has been relevant ongoing assessment of this area. The Panel notes that the Pinehaven Spur Report has been peer reviewed by Mr Goldwater, and contains a map which is different again to others that have been presented at the hearing.
17. The reconvened hearing will provide an opportunity for all parties to consider any new ecology information or evidence prepared by the Council’s ecology expert and any relevant updates to the Council’s s.42A report in advance of the hearing, and to present to the Panel on the new information or evidence should they wish.

Next steps

18. Council is **directed** to provide to all submitters and upload to the PC49/Variation 1 webpage the document *Pinehaven Spur Report*, and page 37 of the document entitled *“Astrid – Field Notes 2018 – Guildford Swap Forest”*. This is to be done without delay.
19. Council officers are **directed** to instruct expert ecological evidence to be provided to the hearing.
20. Council officers are also **directed** to review as necessary their s42A assessment in response to that evidence. This is to focus on the relevant sections of the RPS, the extent of any probable area that meets the criteria of Policy 23 of the RPS including a clear and definitive map capable of being incorporated into the District Plan.

Notice of Reconvened Hearing

21. This Minute advises that the hearing of PC49/Variation 1 is to be reconvened on **April 3 2024, with April 4 and 5 set aside as reserve days** with a venue and specific timetable to be confirmed.
22. The exchange of evidence is to take place as per Table 1 below.
23. The purpose of the reconvened hearing will be to receive and hear (as appropriate):
 - (a) The Council's ecological evidence.
 - (b) Updates, if any, to the s42A report from Council on this matter.
 - (c) Updates, if any, to expert evidence on the matters referred to in (a) or (b) above from any party who has previously made a submission on PC49/V1.
 - (d) Updates, if any, to submissions on the matters referred to in (a) or (b) above on this matter from any party who has previously made a submission on PC49/V1.

Council officers are directed to provide expert evidence and a revised s42A report which is to be circulated to all submitters and uploaded to the PC49/V1 webpage by:	4pm March 8 2024
Submitters' expert evidence is directed to be provided in writing by:	4pm March 15 2024.
Submissions of counsel are requested to be provided in writing by:	4pm March 22 2024
Lay submitters are invited to provide any written submissions or presentations by	4pm March 22 2024.
Lay submitters who wish to present to the Panel on the above matters are to advise the Council that they wish to be heard by:	4pm March 22 2024

Timetable for reconvened hearing 1



Sue Wells

Chairperson, on behalf of the Independent Hearings Panel

20/02/2024

Advice Note:

1. This note is about the procedure for the reconvened hearing. It is intended to be of assistance particularly for lay submitters.
2. The purpose of this reconvened hearing is very focussed. It is not a rebuttal hearing, nor is it intended to be a second bite at the cherry. It is to help the Panel in its deliberations and to ensure that there are no gaps in the Panel's knowledge on the specified issue. The point of focus for this hearing is to ensure the Panel has the information it considers necessary with respect to the relevant RPS provisions.
3. In both the submissions phase to this and at the hearing, the Panel will be adopting an "add knowledge" approach. In short, if you have already made a submission there is no requirement to re-submit what you have done so far.
4. Any queries on this matter should be directed to the Hearings Manager, Hayley.Boyd@UHCC.govt.nz