

BEFORE THE PROPOSED PORIRUA DISTRICT PLAN HEARINGS PANEL
IN PORIRUA

IN THE MATTER OF

The Resource Management Act 1991

AND

IN THE MATTER OF

The Proposed Porirua District Plan – Hearing Stream 5

BETWEEN

PORIRUA CITY COUNCIL

Local Authority

AND

SILVERWOOD CORPORATION LIMITED
(Submitter #172)

Submitter

Opening Legal Submissions of Counsel for Silverwood Corporation Limited

DATED 1 July 2022

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MAY IT PLEASE THE COMMISSIONERS**Introduction**

1. These are the opening legal submissions on behalf of Silverwood Corporation Limited (“**Silverwood**”) regarding its submission to the Proposed District Plan.
2. Silverwood’s submission requests the rezoning of two adjoining properties; being some 52 hectares held in three parcels and owned by Silverwood together with the adjoining Landcorp site of some 62 hectares. Collectively, these are referred to as the site.
3. The Landcorp property is a “Deferred Settlement Property” in the Ngati Toa Deed of Settlement and is subject to negotiations currently occurring with the Crown. Ngati Toa will speak to you separately about this.
4. The site is located between Waitangirua to the west, the Waitangirua Link Road to the north, Transmission Gully to the east and Belmont Regional Park to the south. It will have legal road frontage to the Waitangirua Link Road once it is completed.
5. The site is proposed to be zoned Rural under the Proposed District Plan with the exception of a significant portion of Silverwood’s Lot 6 north and two small portions of Lot 1 south and Lot 6 south that are zoned General Residential. The submission seeks that only those areas of the site proposed to be zoned Rural should now be zoned Future Urban Zone.
6. Silverwood’s submission is thorough and comprehensive. It was supported by expert assessments in the fields of urban design, infrastructure, ecology, landscape and urban design, transport, geotechnical engineering and planning. The submission went as far as producing a Draft Structure Plan for the site. In preparation for this hearing, Silverwood has commissioned further expert evidence with which you are familiar in the fields of landscape, planning and now, economics.
7. The Future Urban Zone is a transitional zone. A thorough structure planning process and plan change is required before a live zoning can be secured. The matters that the Structure Planning exercise is required to assess are set out in Appendix 11 of the PDP. I would observe that the submission now before you, in all material respects, addresses the elements required of that future structure planning process. That should give you confidence that the key issues have been addressed; well so.

Legal Framework

8. The legal framework under which you are required to assess the submission has been canvassed thoroughly in the expert evidence and assessments undertaken by Silverwood and the Council. The requirements of the s32 evaluation and the like have been thoroughly canvassed by numerous decisions of the Environment Court and above, and are well understood. However, I make the following specific observations.
9. The starting point for considering a submission requesting a rezoning is to determine whether the resulting land use pattern, and zoning, will assist Council to carry out its functions in achieving the purpose of the Act, and whether the zone is in accordance with Part 2 of the Act. From there, the proposed rezoning must be examined as to whether it is the most appropriate method for achieving the objectives of the District Plan¹ by:
- Identifying other reasonably practicable options for achieving the objectives; and
 - Assessing the efficiency and effectiveness of the provisions in achieving those objectives by:
 - identifying and assessing the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposed provisions, including opportunities for:
 - (i) Economic growth that are anticipated to be provided or reduced²; and
 - (ii) employment that is anticipated to be provided or reduced³.
 - If practicable, quantify the benefits and costs referred to above⁴.

¹ s30(1)(b) Resource Management Act 1991

² s32(2)(a)(i) Resource Management Act 1991

³ s32(2)(a)(ii) Resource Management Act 1991

⁴ s32(2)(b) Resource Management Act 1991

- Assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods⁵.
10. The "most appropriate" test does not mean the most "superior" method. The High Court has held that section 32 requires a value judgment as to what, on balance, is the most appropriate when measured against the relevant objectives. "Appropriate" means suitable⁶.
 11. Efficiency and Effectiveness are key themes in this assessment. Efficiency means⁷:

Efficiency measures whether the provisions will be likely to achieve the objectives at the lowest total costs to all members of society, or achieves the highest net benefit to all of society. The assessment of efficiency under the RMA involves the inclusion of a broad range of costs and benefits, many intangible and non-monetary.
 12. Effectiveness assesses the contribution new provisions make towards achieving the objective, and how successful they are likely to be in solving the problem they were designed to address⁸.
 13. There is no presumption in favor of any particular zoning, or of the status quo remaining. You are required to determine the most appropriate zoning for the land judging between the status quo and the proposed provisions⁹.
 14. Economic assessment of the residential supply and demand has become a key, if not the, reason why the Council officer's recommendation to you is that the Silverwood submission and requested rezoning should be refused. In essence, that part of the economic assessment compares the projected residential capacity for housing generated under the Proposed District Plan rezoning against the projected population growth in Porirua over the next 30 years.
 15. There are several aspects of this analysis that you will need to come to your own views on and upon which I will offer some comment shortly. However, the fundamental proposition is that the Council officer's conclusion has been based almost entirely on this economic growth

⁵ s32(2)(c) Resource Management Act 1991

⁶ *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 HC at [45]

⁷ Ministry for the Environment. 2017.; A guide to section of the Resource Management Act 1991 at 18

⁸ Supra note 7 at 19

⁹ *Infinity Group v Queenstown Lakes DC* (EnvC C010/05) 28 January 2005, at paragraph 53

rationale. The difficulty with that, is that the correct approach required at law, is that economic considerations are but one of several considerations, required under the Act.

16. In *Carter Holt Harvey Limited v Waikato Regional Council*¹⁰ the Environment Court confirmed that whilst the Act requires consideration of economic issues these are but one element contributing to sustainable management. For economic evidence to be useful it must be clear dealing with an agreed identification of the issues to be addressed and the methodologies employed.

17. The Court stated:

*[181] Thus, there can be no doubt that the Act includes economic considerations. But the manner in which such considerations are to be taken into account is sometimes complex and depends on the nature of each individual case. **Economics is just one of the various threads discernible in the Act which contributes to the attainment of sustainable management.***

*[182] In the present case, we were confronted with a large amount of economic evidence. Its complexity was compounded by the fact that different methodologies were employed and there was no consensus as to the appropriate base data. **While the witnesses caucused as directed, the caucus statement identified relatively few points on which the witnesses agreed, nor did it set out succinctly the areas of disagreement and the reasons why.***

(my emphasis added)

18. In *Contact Energy Limited v Waikato Regional Council*¹¹ the High Court confirmed that it is appropriate to adopt, and undertake, the s32 analysis based on a wider exercise of judgement of which the economic evidence is one aspect. The High Court accepted the Environment Court position stating:

*“While acknowledging the usefulness of a marginal cost benefit analysis, **we also consider that a s32 analysis requires a wider exercise of judgement in determining whether or not a rule is the most appropriate method of achieving the objectives of the***

¹⁰ *Carter Holt Harvey Limited v Waikato Regional Council* [2011] NZEnvC 380

¹¹ *Contact Energy Limited v Waikato Regional Council* (2007) 14ELRNZ 128 (HC)

*plan and the purpose of the Act. We have regard to the economic evidence in this context.*¹²

(my emphasis added)

19. However, this is not the approach that has been taken in the Council’s assessment. Ms Sweetman states in her report that:

“306. There are two elements to my assessment; the appropriateness of the site to be rezoned to Future Urban, taking into account the directions set in the proposed FUZ-P1 as well as higher level direction in the objectives of the PDP and the NPS-UD, and the reasons for GWRC’s opposition to the rezoning.”

20. Then she goes on to determine, or agree that:

- (a) The Silverwood site is identified in the Porirua Urban Growth Strategy 2019 (“Growth Strategy”) as a “potential residential area – medium term”. The Growth Strategy does not address why this has been identified as potential¹³;
- (b) In terms of infrastructure funding for additional water storage, booster pump stations, rising mains and contributions to waste water connections and storage that an infrastructure funding agreement is possible;¹⁴
- (c) The site is of a size, scale and location which could accommodate comprehensive and integrated future development that is connected to or planned to be connected to the transport network;¹⁵
- (d) The approaches offered by Silverwood’s ecological assessment are adequate to avoid, minimise and mitigate potential adverse ecological impacts on identified SNA’s;¹⁶
- (e) Wider ecological effects can be appropriately addressed through a future structure plan and plan change process as well as future subdivision consents;¹⁷
- (f) A detailed landscape assessment can be done;

¹² Supra note 11 at paragraph 51

¹³ s42A Report at 310

¹⁴ s42A Report at 315

¹⁵ s42A Report at 315

¹⁶ s42A Report at 320

¹⁷ s42A Report at 321

- (g) In respect of the criteria contained in FUZ-P1 for inclusion of additional sites as Future Urban Zone, that generally the Silverwood site could be considered for inclusion;¹⁸
- (h) The site is able to provide for residential development that would provide for a well functioning urban environment for a number of reasons summarised as:
- Its proximity to local centres
 - Being adjacent to established residential areas and a marae
 - Access to recreation and the natural environment
 - Access to State Highway 1 and the existing roading network
 - Good multi modal connectivity including to a planned public transport route
 - Opportunities for access to southern views
 - Ability to maintain the value of the special amenity landscape to Eastern Porirua
 - Ability to retain existing vegetation and provide for development
 - Possibility to provide a range of housing typologies; and
 - Ability to locate a neighbourhood centre within the site¹⁹

21. Ms Sweetman accepts Mr Osbourne's economics assessment that identifies that the Silverwood site has a number of positive economic attributes meaning that its location makes economic sense as a natural expansion area for Porirua City²⁰. She cites that the following aspects with approval from Mr Osborne's report:

- The site will have good transport routes north and south once Transmission Gully's wider connector road network is completed and will be around 10-12-minutes' drive from Porirua's CBD. There are also existing public transport routes that could be extended to include the area without much disruption.
- The sites are on the city's fringe and would allow for a diverse range of housing typologies across a number masterplanned super lots or mega lots.

¹⁸ s42A Report at 328

¹⁹ s42A Report at 331

²⁰ s42A Report at 332

- The sites are similar to the surrounding suburbs, and much of Porirua City, marked by rolling hills and valleys. The residential environment would likely blend in with the city seamlessly.
- The site is not used for productive use and does not feature highly productive soils so the opportunity cost of live-zoning for residential would be slight.
- The site would form an extension to the Waitangirua suburb filling the area along link road between the “old” suburb and Transmission Gully interchange.

22. Ms Sweetman says her concerns lie with achieving UFD-O1 and UFD-O2 and Objectives 2, 3 and 6 of the NPS-UD, and whether its rezoning would result in an over-supply of Future Urban zoned land. This in turn may impact on housing affordability and competitive land and development markets, impacting on intensification, and being strategic.

23. Although she says she addresses all of these provisions comprehensively²¹, I cannot find her assessment against each of these provisions. They are, all of course, different. For example, UFD-O1 says:

URBAN GROWTH

Porirua grows in a planned, compact and structured way.

24. Ms Sweetman accepts though that the site has a number of attributes meaning that its location makes economic sense as a natural expansion for Porirua City and that it may be a logical extension²². How then, does she conclude that the proposed rezoning does not achieve UFD-O1?

25. As another example, Objective 3 of the NPS-UD says:

*Objective 3: Regional policy statements and district plans enable more people to live in, and more businesses and community services to be located in, areas of an urban environment in which **one or more of the following apply:***

- (a) the area is in or near a centre zone or other area with many employment opportunities*
- (b) the area is well-serviced by existing or planned public transport*

²¹ S42A Report at 329

²² S42A Report at 333

(c) *there is high demand for housing or for business land in the area, relative to other areas within the urban environment.*

26. Mr Stratham's evidence concludes that the site was well serviced by transport links, and it is accepted too that it is on the city's fringe. Why then has Ms Sweetman not referenced criteria (a) or (b) has having been met?
27. Neither do I see reference in Ms Sweetman's assessment to other of the objectives and policies considered by Ms Blick to be relevant. These are all set out in Table One of Silverwood's original submission²³.
28. Ms Sweetman's concern, in a nutshell then is whether rezoning of the site would result in an over-supply of Future Urban zoned land²⁴. Silverwood deals with this issue comprehensively in the evidence of Mr Thompson.
29. However, Ms Sweetman's recommendation, with respect, rests on this one issue only; that of supply and demand. She has not actually provided an assessment of all the relevant objectives and policies, and provisions of the NPS-UD and seems to have discarded the several benefits and positive attributes of the site, that actually demonstrate numerous of these provisions are satisfied. Indeed, the assessment of supply and demand seems to be the only issue, that is not met by the proposed rezoning. Wrongly, she focuses also on FUZ-P1.
30. For the reasons I have given above, Ms Sweetman's assessment fails to adopt the approach required by law. Her assessment elevates the assessment of supply and demand, to the critical criteria and it seems to taint her consideration of several relevant matters. That, unfortunately, results in an unbalanced, and improper assessment.
31. In contrast, Silverwood's submission and its expert assessment properly considers all relevant provisions.

s42A Report

32. Whilst the overall recommendation in the Council officer's report is that Silverwood's submission should be refused there are numerous aspects of the Council's reporting that

²³ Page 34

²⁴ S42A Report at 333; Supplementary Evidence

support the proposed rezoning. The particular areas of the s42A Report I wish to address are as follows.

33. First, it is acknowledged that the site is identified in the Growth Strategy as a “potential residential area – medium term”. Ms Sweetman takes issue with whether or not this means that the site is “in” the Growth Strategy. Ms Sweetman and Ms Blick both recognise that the site is part of the Whitby/Waitangirua Transmission Gully motorway area that “can be considered for residential zoning through the Proposed District Plan Review”.
34. The Growth Strategy does not give any explanation as to what, if there is one, the difference is between a “potential residential area” and “new residential area”. In one sense, there is no distinction because live zonings over either are yet to happen. However, I do not think anything turns on the different nomenclature because the simple point is that the general locality of the site is considered in the Growth Strategy and the possibility of it and the surrounding land being zoned Residential is definitely flagged.
35. For completeness, I note that Ms Sweetman’s Supplementary evidence dismisses this issue by reference to two dictionary definitions of the word “potential”. Unfortunately, this is the incorrect approach, as a matter of law, to interpretation. The correct approach is that where ambiguity exists the plain meaning of words should be sought, but that exercise should not be undertaken in a vacuum²⁵. In other words, the context of provisions must be considered. Here, as Ms Blick says, the site is specifically discussed in the Growth Strategy and the possibility, or appropriateness, of it being considered for residential zoning is clearly raised²⁶. Considering the provisions as whole, the site is consistent with, and envisaged by the Growth Strategy. Unfortunately, Ms Sweetman, fails to consider the broader context of the Growth Strategy.
36. Secondly, there tends to be an emphasis on Policy FUZ-P1 (identifying future urban areas) because apparently this gives criteria by which the FUZ zone should be determined. That policy provides:

Identify areas for future urban development as the Future Urban Zone where these:

1. Are consistent with the Porirua Urban Growth Strategy 2048 (2019); and

²⁵ *Powell v Dunedin CC* [2004] 3 NZLR 721; (2004) 11 ELRNZ 144; [2005] NZRMA 174(CA); *Official Bay Heritage Protection Soc Inc v Auckland CC* [2008] NZRMA 245(CA)

²⁶ Stephanie Blick, Evidence in Chief at para 40-46.

- a. Avoid significant adverse effects and avoid, remedy or mitigate any other adverse effects on the identified characteristics and values of any areas identified in SCHED9 - Outstanding Natural Features and Landscapes, SCHED7 - Significant Natural Areas, SCHED11 - Coastal High Natural Character Areas and SCHED10 - Special Amenity Landscapes; and
 - b. Will not result in an increase in risk to people's lives and properties within any area located in a Natural Hazard Overlay or a Coastal Hazard Overlay; or
2. Are of a size, scale and location which could accommodate comprehensive and integrated future development that:
1. Is serviced by infrastructure or planned to be serviced by infrastructure in the Council's Long Term Plan;
 2. Is connected to or planned to be connected to the transport network;
 3. Avoids significant adverse effects and avoids, remedies or mitigates any other adverse effects on the identified characteristics and values of any areas identified in SCHED9 - Outstanding Natural Features and Landscapes, SCHED7 - Significant Natural Areas, SCHED11 - Coastal High Natural Character Areas and SCHED10 - Special Amenity Landscapes; and
 4. Will not result in an increase in risk to people's lives and properties within any area located in a Natural Hazard Overlay or a Coastal Hazard Overlay.
37. Council²⁷ and Silverwood both agree, that one way or the other the site meets these criteria and could be included as FUZ. I simply note that in line with what I have said above, this criteria, is one of several considerations, and matters for your evaluate. However, given its specific nature, it is one of the more relevant considerations.
38. Third, Ms Armstrong (Landscape) and Ms Sweetman express concern that an overall FUZ may indicate that all of the site is appropriate for future urban development²⁸. Ms Armstrong elaborates and says²⁹

20 I am of the opinion that, while it may eventuate that risks to values are effectively managed this way, the interim FUZ zoning would open up potential risks to SAL values in the development of the later Structure Plan (for reasons set out in my Statement of Evidence, and further

²⁷ s42A Report at 328

²⁸ s42A Report at 330

²⁹ Armstrong Supplementary Evidence at para 20-21

explained above), and that inclusion of a Structure Plan as part of the FUZ re-zoning process would provide certainty to the Council that risks to SAL values will be effectively managed.

21 An alternative approach could be to make application for a single re-zone (to the final zone) through a plan change, with inclusion of a Structure Plan as part of that process. This would remove the interim FUZ zoning, and any related risks to SAL values.

39. Along similar lines, Ms Sweetman concludes that her preference would be for a more nuanced approach where it is only those areas that are appropriate for urban development are zoned Future Urban³⁰.
40. Both these expert assessments ignore the rigour of the Structure Plan and plan change processes required to secure a live zoning. They amount to a vote of no confidence in these future processes. The difficulty with that though, is that the requirements of the Structure Plan process set out in Appendix 11 of the PDP are thorough and comprehensive. They require a careful and deliberate consideration of the site attributes, including constraints, such as SNA's, natural features and landscape values as well as the identification of potential development areas and landscape protection areas. Restrictions on development and outcomes are all required. In my view, the Structure Plan assessment required under Appendix 11 is not far from what you would expect of a resource consent application.
41. With respect, the suggestion that somehow a more nuanced approach to the extent of FUZ zoning, within "pockets" or that the site would somehow be exposed to landscape risk by a FUZ zoning, simply ignores the thorough assessment provided to date (which far exceeds what would typically be required), and the future assessment process required.

Conclusion

42. Having carefully reviewed the Council's reporting and expert assessments, there are two issues in contention. These are:
- (a) The relevance, and assessment of residential "supply and demand"; and

³⁰ Sweetman Supplementary evidence at para 20

(b) The treatment of landscape sensitivities on the site in a FUZ zoning.

43. It is important to remember what the FUZ zoning is. It is a transitional zone, that says, effectively, at some point in the future, a residential zoning is possible. But, a very detailed, thorough and rigorous process must first be completed. The time must be right.
44. Your assessment must be carried applying the legal framework I have set out above. In short, you are obliged to consider a variety of matters to determine the most appropriate zone for the site. In so doing, you must weigh the probative value of the expert evidence presented.
45. When you do that, the evidence of the Council, and Silverwood is not that far apart. Both agree that the site is a logical extension. Ms Sweetman's conclusion is this:

"At this point, the evidence from Mr Osborne is that there is no requirement to provide any additional greenfield land for urban development within the short, medium or long term. Therefore, I see no point at this time to rezone the subject site to Future Urban."

46. This comment, in my view, portrays the fundamental fallacy in Ms Sweetman's approach. Her assessment, has, with respect, fixated on a single aspect of the economics assessment, and in turn, elevated that consideration to a trump card. That, is not the assessment required of her, at law.
47. Furthermore, Mr Osborne cannot conclude that *"there is no requirement to provide any additional greenfield land"*. He can offer his opinion, but that is all.
48. It is disappointing that Ms Sweetman has chosen to ignore the economic benefits, the positive attributes, the expert assessments of other disciplines, and the reasons why, were it not for this single element, the site must be considered as appropriately zoned FUZ. Indeed, looked at through the proper lens, all of the expert evidence agrees that the required evaluation is otherwise satisfied.

49. Thus, the expert evidence before you, from both the Council and Silverwood, is such, that when put into the proper legal framework, Silverwood's submission should be accepted.

A handwritten signature in blue ink, appearing to read "J.C. Dawson". The signature is stylized and cursive, with the first name "J.C." written in a large, flowing script and the last name "Dawson" written in a smaller, more legible script below it.

J.C Dawson – Counsel for Silverwood Corporation Limited