

BEFORE THE PROPOSED PORIRUA DISTRICT PLAN HEARINGS PANEL
IN PORIRUA

IN THE MATTER OF

The Resource Management Act 1991

AND

IN THE MATTER OF

Variation 1 – to the Proposed Porirua District Plan

BETWEEN

PORIRUA CITY COUNCIL

Local Authority

AND

SILVERWOOD CORPORATION LIMITED

Submitter

Opening Legal Submissions of Counsel
for Silverwood Corporation Limited

DATED 16th March 2023

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MAY IT PLEASE THE COMMISSIONERS:

Introduction

1. These submissions are made on behalf Silverwood Corporation Limited (“Silverwood”) regarding its submission on Plan Variation 1.
2. Silverwood is requesting, in summary, that its property and the adjacent “Landcorp” site be given a Future Urban Zone or a “live” zone recognising the Structure Plan that was included with, and presented as part of its submission, on the PDP.
3. The basis upon which Silverwood is requesting a rezoning of the property has been comprehensively canvassed in its submission and evidence on the PDP. I do not seek to repeat it.

Council Officer’s Report

4. The Council Officer recommends rejecting Silverwood’s submission. Mr Smeaton rejects the possibility of a FUZ, citing similar grounds to those of Ms Sweetman (addressing Silverwood’s submission on the PDP) , and in respect of a live zone, he concludes that¹:

*In relation to the submission from Silverwood [OS71.3] seeking a Development Area with ‘live’ MRZ zoning, I consider that as **this request is essentially ‘leap-frogging’ the request above in terms of the process for zoning new urban areas under the PDP.** That is, while [OS71.1] seeks a FUZ be applied to the land, [OS71.3] seeks MRZ or other ‘appropriate zones’ along with an associated Development Area chapter. Under the framework set out in the PDP, this step would occur after an area is identified as FUZ. As such, I consider that the same response applies. Further to this, the submitter has not provided a proposed Development Area chapter or fully developed structure plan. I am therefore unable to adequately assess whether such a chapter, or the more detailed provisions that would be included in such a chapter, would be appropriate.*

(my emphasis added)

5. The difficulty with the Council officer’s recommendation is that, with respect, rather than considering the merits of Silverwood’s submission, and the possibility of a live zoning, it is

¹ S42A Report at paragraph 68

simply dismissed for what Mr Smeaton considers to be the absence of process. In other words, “process over substance.”

6. However, the evidence of Mr Hook (planning consultant) is that there is very little, if any, difference between the assessment required in the proposed Structure Planning process and that which has been presented in the expert evidence and assessment from Silverwood supporting its submission to the PDP. He concludes that all of the information required in a Structure Plan (Appendix 11 of the PDP) is contained in Silverwood’s material.
7. So far as I can see, the only question mark is perhaps around “Feedback from stakeholders”. Here the key stakeholder is Ngāti Toa, who of course, is supportive of the draft Structure Plan prepared by Silverwood; their land is part of it. Mr Hook notes also that an Infrastructure Report has been provided. Therefore, it is difficult to see how there is any material deficiency there.
8. Furthermore, the submission process of both the PDP and PV1 itself has given ample opportunity for any public engagement. As far as I can tell, none has been received.
9. Whilst the Council points to a potential “leap frogging” process by Silverwood, it fails to provide any rationale, or material deficiency in support of that view. The Council does not tell us, what, if any additional benefit, or improved planning outcome would be achieved by following a further, proposed Structure Planning process.

Scope of Silverwood’s Submission

10. The central issue seems to be that of scope. That is, whether Silverwood’s submission, is “on” the variation.
11. I have reviewed the Council’s opening legal submissions and I am grateful for the legal analysis set out in section 6 of their opening submissions. I do not disagree with the legal analysis presented.
12. Given the ISPP, there are two possibilities in considering Silverwood’s submission. They are:
 - (i) That Silverwood’s submission is within scope in which case the Panel needs to make a recommendation on it; or

(ii) Even if Silverwood’s submission is determined to be out of scope, or arguably so, the Panel has a broad mandate to make recommendations on matters raised in the hearing process which it considers to be of merit.

13. For the reasons set out below, it is my view that Silverwood’s submission fits within scope but even if that is not convincingly so, then the mandate of this Panel is such that you can nevertheless make a recommendation on it.

(a) Silverwood’s Submission is Within Scope

14. PV1 substantially amends the Residential, Commercial and Mixed Use Zones, which were originally notified as part of the PDP and it also introduces additional land (including Future Urban Zoned Land) for live residential zonings.

15. For a submission on PV1 to be within scope, the so called *Clearwater* tests apply. These are:

(a) A submission can only fairly be regarded as “on” a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.

(b) But if the effect of regarding a submission as “on” a variation would be to permit a planning instrument to be appreciably amended without a real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submissions is truly “on” the variation.

16. Looking at the first of these possibilities it is not necessary that Silverwood’s submission seeks to address a matter that was contained in the s32A report. However, it does need to address the content of PV1.

17. That question is all the more complex because decisions have not yet been made on the PDP.

18. The primary focus of PV1 is to provide for urban development and intensification across the District. The MDRS standards are introduced to relevant residential zones, subject to any qualifying matters. Rezoning of land, including new residential zones² and non-residential zones is also provided for. Council considers that its evaluation under the Act and the NPS – UD includes both the identification of areas for intensification (zoning) as well as the management of land uses across the urban environment.³ As a result, PV1 proposes the

² s77G(4) Resource Management Act 1991

³ Overall s32 Evaluation at page 11

rezoning of several areas, as well as the introduction of new zones and precincts. Numerous amendments are proposed to the zone provisions themselves and related provisions of the PDP.

19. The Northern Growth Area is one example of land which Council is now proposing to rezone from FUZ to MDRZ along with a Local Centre Zone and areas of Open Space.
20. In my submission, PV1 proposes, and is required to, facilitate residential intensification in the District. It does this with a variety of tools, including the rezoning of land, both greenfields and FUZ, and by introducing a variety of provisions intensifying residential development and removing obstacles.
21. Here, had the Panel made its decisions on the PDP (as in usual circumstances it would have done) there is every possibility that the site could have received a FUZ. Had that happened, it would all the more anticipated that the site would have been included by the Council in PV1 on notification.
22. However, even without that FUZ in place, PV1 directly contemplates rezoning of land throughout the District, in appropriate locations, for residential development. That is what Silverwood's submission seeks.
23. Insofar as the second limb of the *Clearwater* test is concerned, the possibility of rezoning the site has been comprehensively earmarked in Silverwood's submission and further submission on the PDP and now PV1. This, in my view, has given ample opportunity for public engagement and no issue arises there.

(b) Hearing's Panel's Discretion to Make Recommendations

24. The Act confers a broad discretion on the Hearing's Panel to make recommendations on the IPI and is not limited to matters that are within the scope of submissions⁴.
25. However, the Council seems to contend that this broader discretion remains subject to, the requirement that these recommendations must still be "on" the IPI⁵. However, that argument is circular, because a submission is not within scope because it is not "on" the plan change, then neither could the panel make a recommendation on it, in its broader discretion, because

⁴ s99(2)(b) Resource Management Act 1991

⁵ Opening Submissions of Council at paragraph 4.21

that too would not be “on” the plan change. Thus, the distinction between these two powers, would be nugatory and deny the panel the opportunity to make recommendations on matters it considered to be relevant.

26. Council does not offer any principled analysis of this contention. However, the *Albany*⁶ decision provides a useful context.
27. In the *Albany* decision the High Court specifically acknowledged and agreed that the Independent Hearing Panel hearing the Auckland Unitary Plan submissions had broad powers of recommendation that were not limited by the relief sought in submissions⁷. Those recommendations had included the rezoning of land even where that land was not subject to a submission and even where that land had not previously been proposed for rezoning⁸.
28. However, the High Court did not specifically consider the issue now arising, and the proper ambit of your discretion to address matters outside the scope of submissions.
29. In my view, the real contest here is that the Council does not support the rezoning of the site to either a future urban zone or a live residential zone. That is because, and with respect, it did not identify this land itself as being rezoned when it drafted the Proposed District Plan and because it already preferred other properties. Furthermore, the Council’s intransigent view arises because it considers that absolute adherence to the proposed Structure Planning process is required. The difficulty there though, is that the merits of the proposal are ignored.

Conclusion

30. PV1 envisages and provides for the rezoning of land in the District to achieve an urban intensification. That includes greenfields land and land currently zoned as FUZ. That confers sufficient ambit to consider, through the submission and hearing process, the rezoning of other land, such as the Silverwood property.
31. Council’s response to that, seems to be that the proposed structure planning process must first be followed. That though, introduces further cost and delay, without any actual benefit in the context of a comprehensive and thorough assessment already presented by Silverwood.

⁶ *Albany North Landowners v Auckland Council* [2016] NZHC 138 (HC)

⁷ Supra note 6 at paragraph 104

⁸ Supra note 6 at paragraph 96

32. Silverwood requests then, that its submission be accepted and recommended accordingly.
33. In my view, Silverwood's submission on Variation 1 is within scope. I have set out the reasons for that above. I do acknowledge thought that there is some debate about that and for that reason, the possibility of the Panel relying on its broader discretion emerges.
34. The situation is confused and difficult because of the very unusual process that has now emerged with the decisions on the proposed District Plan not yet made.
35. In my view, Silverwood's submission should be allowed.

A handwritten signature in blue ink, appearing to read 'J.C. Dawson'.

J.C Dawson – Counsel for Silverwood Corporation Limited