

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2025] NZEnvC 309

IN THE MATTER of the Resource Management Act 1991

AND an appeal under Clause 14 of the First Schedule to the Act

BETWEEN FBG DEVELOPMENTS LIMITED

(ENV-2023-CHC-18)

Appellant

AND DUNEDIN CITY COUNCIL

Respondent

Court: Environment Judge P A Steven
Environment Commissioner M C G Mabin

Hearing: In Dunedin 8-10 July 2025

Appearances: P Page and H Perkin for the appellant
M Garbett and R Kindiak for the respondent

Date of Decision: 15 September 2025

Date of Issue: 15 September 2025

DECISION OF THE ENVIRONMENT COURT

A: The rezoning of Area D is approved subject to an RTZ Overlay, pending completion of the Council's planned wastewater upgrades.

B: The appeal is resolved in part.



- C: The parties are directed to file:
- (a) consent orders for the areas of the appeal site that were settled through mediation, on terms that address the court's decision including on the wastewater issue; and
 - (b) a final structure plan (and associated provisions giving effect to this decision) for the whole of the appeal site.

REASONS

The appeal

[1] The appeal relates to the zoning of a property at 35, 37 and 43 Watts Road and 309 North Road, North East Valley, Dunedin, being the former Palmer's quarry (the site). The U-shaped site covers the faces of the quarry and surrounding areas, although the flat quarry floor area is outside of the area subject to this appeal. The site is generally vacant of buildings and contains areas of native vegetation, gardens and access tracks.

[2] The site is presently zoned a mixture of General Residential 1 (GR1), Rural Hill Slopes (RHS) and Rural Residential 2 (RR2). Collectively, the site comprises a total area of 9.4ha. The quarry floor has a General Residential 2 (GR2) zoning, which is beyond challenge.

[3] The Lindsay Creek runs along the southern boundary of the site from southeast to southwest. That area contains a Hazard 2 (flood) Overlay Zone and an Esplanade Reserves and Strips Mapped area. An Otago Regional Council (ORC) designation covers part of the site for the purpose of Lindsay Creek River Works.

[4] Along the eastern boundary is a Critical Electricity Distribution Lines Mapped Area, and Critical Electricity Distribution Infrastructure Corridor Mapped Area. The appellant proposes to reinstall the lines underground. Part of the site

is a Verified Hazardous Activities and Industries List (HAIL) site,¹ due to its former use as a quarry, parts of which were in-filled. That pertains (primarily) to the quarry floor area, but also extends into the appeal site area.

[5] The surrounding environment contains a mix of zoning with the RHS to the northwest, GR2 to the west and south and GR1 to the east.

[6] The rezoning sought for the site is for a mix of residential zoning. The appellant had lodged original submissions seeking a rezoning upon notification of the Dunedin City Council's (the Council) Second Generation District Plan (2GP) in 2018, and then (in 2021) on Variation 2 to the 2GP. Through the Variation 2 process, the land was broken up into five areas; Areas A, B, C, D and E. This treatment has been adopted for the purposes of this appeal, including in the appellant's drafting of proposed Structure Plan provisions.

[7] When the 2GP was notified (in 2015), the quarry floor (referred to in the Structure Plan as Area B) was proposed to be zoned GR2, subject to a Wastewater Constraint Mapped Area overlay. The effect of that overlay is to reduce the number of dwellings provided for to a GR1 rather than a GR2 density, meaning that the minimum site size is 400m² rather than 300m². The maximum development potential is one habitable room per 100m² rather than one per 45m². That zoning was not challenged and is now operative.

[8] The Council's decision was to decline to rezone the remainder of the site, as sought in the appellant's original submission, although the area of land (now referred to as Area D) was rezoned from Rural to RR2. The RR2 zone enables a single residential activity on that land.

[9] The Council's decision was that the appellant's proposed rezoning would not meet the plan's strategic policy for a residential rezoning, being Policy 2.6.2.1.

¹ It is listed on ORC's Listed Land Use Register (HAIL.02182.01, Category 1, G5: Waste Disposal to land).

Key considerations related to the location of part of the site within the Significant Natural Landscape (SNL) overlay, and lack of servicing infrastructure.

[10] That decision was appealed. However, Variation 2 was notified not long afterwards, at which point, the appeal was placed on hold. The appellant lodged a further original submission to Variation 2 although that submission was also declined. Although reasons for that decision repeated those that had formed the basis for the Council's first decision, the second decision raised further issues with slope instability, lack of a biodiversity assessment and transportation concerns.

[11] Through mediation, the parties reached agreement on the zoning of areas within the appeal site except for Area D.

[12] ORC is a party to the appeal, although it took no active part in the hearing as ORC's issues were resolved at mediation.

[13] Accordingly, the court was asked to determine remaining issues, with respect to Area D.

Overview of appellant's Structure Plan

[14] The Structure Plan is to be inserted into Chapter 15 and referred to as the North/Watts Road Structure Plan Mapped Area. This provides for:

- (a) Area A1 to remain as part of the GR1 zone;
- (b) Area A2 to be rezoned to GR1;
- (c) Area B which comprises the worked quarry faces, to remain as RHS;
- (d) Area C to be rezoned to GR1;
- (e) Area D to be rezoned to LLR1;
- (f) Area E to be rezoned to LLR1.

[15] Although the GR2 quarry floor land is not subject to the appeal, it is depicted on the Structure Plan. Through mediation, the parties agreed that this

land is important to the appellant in making decisions as to the future development of the surrounding site. Accordingly, infrastructure-related provisions affecting this land are included within the Structure Plan. We address the court's jurisdiction to agree to that part of the proposal further on.

[16] The rationale for the different treatment of Areas A1 and A2 is related to a resource consent obtained by the appellant for residential development (for 14 lots). That resource consent provides for a density generally in accordance with the expectations for the GR1 zone. However, that resource consent enabled development extending into an area of RHS land (the Area A2 land). The appellant's proposal for a GR1 zoning for the A2 land would provide for the kind of development enabled under the existing resource consent.

[17] Area C is located on a ridge to the northeast of the GR2 quarry floor land. It extends to an existing area of GR1 zoned land to its north. The rezoning would allow for a more intensive level of residential development compatible with the surrounding zoning format.

[18] Area D is the upper plateau of the former quarry and is generally flat land. It is defined at the edge of Area A2 and Area B. The southwestern extent of Area D has been defined by adoption of the boundary of the Flagstaff-Mount Cargill SNL Overlay Zone.

[19] Area E is a bush gully on the southwest side of the site. The only outstanding issue pertains to the geotechnical slope stability considerations for future building platforms. However, the parties propose to address those matters at subdivision stage.

[20] The appellant's rationale for the Area D/E boundaries is related to the location of the boundary of the SNL.

Mediation agreement

[21] The mediation agreement was attached to the evidence given to the court. Part of the agreement was to provide a further geotechnical assessment of building platforms proposed for areas C and E to determine whether the potential risk from natural hazards is no more than low.² This assessment was undertaken by RDA Consulting. The author of that report was not called to give evidence before the court, although the assessment was sought by the court and was duly provided.

[22] The agreement provided that the appellant was to draft proposed provisions for stormwater and wastewater management and for the supply of drinking water through a private development agreement (PDA). These were to be circulated to the Council and ORC. The PDA is to include provision of low flow devices on all sites.³

[23] For transport reasons, the parties agreed that a maximum of 12 lots on the combined appeal site, together with the GR2 quarry floor land would be acceptable pending upgrade to the existing single land bridge. No transport issues relate to Area D as access is anticipated to occur from Watts Road.⁴

[24] As to landscape measures, the appellant agreed to formulate provisions for managing adverse landscape effects.⁵ The appellant also agreed to provide a further assessment of biodiversity values present on Areas C, D and E, accounting for the input from the experts for each of the Councils.⁶

[25] Following mediation further matters were agreed in principle:

- (a) a PDA was agreed as the appropriate mechanism to manage

² Mediation Agreement dated 1 November 2023, at [3](a).

³ Mediation Agreement dated 1 November 2023, at [3](b).

⁴ Mediation Agreement dated 1 November 2023, at [3](c).

⁵ Mediation Agreement dated 1 November 2023, at [3](d).

⁶ Mediation Agreement dated 1 November 2023, at [3](g).

- stormwater discharge from the land (excluding from Area D), including as to the range of provisions to be included within the PDA;
- (b) a PDA was also agreed as the appropriate measures to manage wastewater discharge from the land, including as to the range of appropriate provisions to be included within the PDA;
 - (c) agreement was reached that the site could be suitably serviced with water from the Council's existing water supply infrastructure.

[26] We should note that the parties' position was that the mediated agreement for Areas A, C and E would be presented to the court by way of consent order after a decision is given on the issues (primarily) relating to Area D.

[27] However, early on in the hearing, the court indicated our problems with the parties' proposal for wastewater detention for Areas C and E from a jurisdiction perspective. This is because the consent order would necessarily impose further restrictions on development of the GR2 quarry floor land, in order to provide for development on Areas C and E. The GR2 quarry floor land is not the subject of this appeal as it has an operative zoning. We will return to that issue later.

[28] In the lead up to the hearing, further issues were agreed between the experts through the caucusing process, on biodiversity values present on Areas C, D and E. We were told that the parties agreed that the area of kānuka that straddles areas D and E that is significant, will be protected in any rezoning.

[29] We note that the PDA for Areas A, C and E was not formally introduced into evidence before the court. We were told that it would be produced by Mr Bowen, who would speak to it, although that did not occur.

[30] A copy of a draft PDA had been provided to the court prior to the hearing as the terms of that agreement resolved matters of interest to ORC. It was on that basis that ORC sought leave to withdraw from the hearing. However, the draft PDA was primarily related to management of stormwater. Recital C does refer to a communal wastewater facility. Recital C states that:

DCC have entered into this Deed to record the requirements for communal wastewater detention infrastructure to be built by the Developer in accordance with Schedule 3 when/if the Land is subdivided. The reason for entering into this Deed is to allow the Land to be developed in a manner that would not have the potential to cause adverse effects on DCC's wastewater infrastructure. This Deed also records that all other development contributions remain payable by the Developer in relation to the Land.

[31] Further details are included in Schedule 3 of the PDA, although it is not entirely consistent with the evidence given to the court about the wastewater issue, as will soon become apparent.

Matters in dispute

[32] Matters not resolved through mediation and subsequent discussions relate to:

- (a) **Wastewater** – the appellant seeks to provide for the discharge of wastewater associated with Area D development to the existing Council network in Watts Road, without any intervening detention. The Council is opposed to that as the public reticulation network is currently beyond capacity during wet weather flows;
- (b) **Geotechnical** – Areas C and E;
- (c) **Biodiversity** – there is no agreement as to how best to manage biodiversity values within Area C. The Council considers that the same structure plan rules that have been agreed to for the significant kānuka straddling areas D and E, should be applied to the indigenous vegetation in Area C although this is opposed by the appellant. There is a further area of indigenous vegetation identified by the Council's ecologist on each of Areas C and E that is recommended for enhancement and restoration; although that is also opposed by the appellant;
- (d) **Landscape** – Area D. The parties are not agreed on the zoning of

this land, on landscape grounds; and

- (e) **Area B** – the parties are not agreed on whether there is a need for a legal mechanism to ensure clarity regarding who is responsible for maintaining the quarry face over time. The Council supports the inclusion of such a provision in the Structure Plan rules to be addressed at the subdivision stage so that the quarry face does not become an isolated and unmaintained area of rural land. The appellant has not closed its mind to any such option, although considers that this is a matter best addressed at the time of subdivision and not through the structure plan provisions.

Rezoning Area D – the main issue

[33] Area D comprises an area of 2.17 ha. This part of the site sits at the upper edge of the former quarry face. It is partially within the Flagstaff-Mt Cargill SSNL. While the SNL is geographically widespread (covering hills to the north and urban Dunedin including Flagstaff, Swampy Summit and the lower slopes of Mount Cargill to Signal Hill), Area D forms a very small part of the lower Mount Cargill slopes.

[34] Area D sits with an enclave of built form within established vegetation immediately adjacent to and within the HRS zone and higher on the slope above Area D.

[35] With a 2,000m² minimum site area limit, the LLR1 zoning provides for a maximum of 10 residential sites. Access is proposed to be provided from Watts Road by means of a private right-of-way. Due to the topography of the existing Watts Road access, it is unable to be constructed to a full-width legal road, and under the 2GP, there is a limit on the number of no more than 12 sites able to be accessed by private right-of-way.

[36] The appellant proposes to provide for access for an additional two sites to be located at the northern boundary of Area E utilising the same private right-of-

way. Additionally, the appellant proposes that wastewater drainage would be provided for along that private accessway corridor, connecting to the existing public infrastructure in Watts Road. The appellant's position is that this volume of additional wastewater discharge into the Council's network infrastructure is relatively minimal.

[37] The appellant called landscape evidence from Mr Tony Milne, who assessed the effects of the proposal to locate 10 dwellings in the SNA. His assessment is relevant in the context of Policies 2.4.4.3, and 2.6.1.5.c.iii.3 which we discuss later. Mr Milne's evidence explains the mitigation measures provided for in the proposed structure plan rules relating to built-form, building appearance and landscape. Development is to be in accordance with the Quarry Gardens Structure Plan (the structure plan). The structure plan includes the following provisions:

- (i) Area D to be developed in line with 15.7 Subdivision and performance standards.
- (ii) A building height limit of 6.0 m above for all Lots within the SNA of Area D⁷.
- (iii) Within Area D all buildings and hard surfaces are to be restricted to a curtilage area not exceeding 800m² on each Lot.
- (iv) Within Area D the final colour of any building's external roof and gutters, and any building's external walls uses a natural range of greys, browns or greens with a LRV of less than 20% and 32% respectively.
- (v) There shall be one shared accessway into Area D from Watts Road.
- (vi) The primary structural/mitigation planting as shown on the Structure Plan is to be undertaken as part of future Subdivision. A detailed landscape and management plan shall be prepared for this area as shown on the Structure Plan. These landscape areas shall be maintained by the landowners and cannot be altered or removed.
- (vii) Within Area D all future lots shall have at least 20% of the Lot revegetated with native planting.

[38] In addition, his evidence contemplated that existing ecologically significant

⁷ Above fixed datum levels.

native vegetation straddling Areas D and E is to be protected.

[39] The appellant contends that the RR2 zoning is inefficient as it is specifically designed to ensure that subdivision does not occur and that there is only one residential activity permitted per existing site. If the site is able to accommodate more than one residential activity, as the appellant contends, then RR2 is not the most appropriate zone because that zoning does not contemplate any other outcome.

The wastewater solution

[40] The wastewater infrastructure issue for the majority of the appeal site is to be resolved by a PDA, terms of which would require wastewater detention to be provided on the GR2 quarry floor land, pending completion of the Council's planned upgrades. This is the solution agreed to by the Council at mediation.

The Council's position on the wastewater issue

[41] The Council is opposed to the rezoning of Area D. It considers that development beyond the single residential activity provided for under the RR2 zoning would be inappropriate due to impact on the values of the SNL.

[42] The Council is also opposed to the disposal of wastewater by way of gravity discharge into its existing Watts Road infrastructure. This would exacerbate the existing pressures on the wastewater network. In order to manage wastewater discharges from any new dwellings (if the court approves the Area D rezoning) the Council's position is that wastewater should be gravity discharged into a communal detention facility that has been agreed to at mediation to service Area C.

[43] Either that, or a Residential Transition Zone (RTZ) overlay should be placed over Area D. The Council's position is that this overlay would provide for development within this area under existing Chapter 12 "release" provisions once the wastewater network upgrades have been completed.

[44] For the Council, Mr Oliver gave evidence in his capacity as Planning Manager, 3 Waters, at the Council. Mr Oliver gave evidence that the North East Valley wastewater catchment, located north of Dunedin, includes a wastewater overflow discharging to Lindsay Creek, under resource consent RM 16-355-05. The overflow is monitored to detect the frequency and volume of wastewater overflows.

[45] This catchment experiences frequent overflows during wet weather indicating poor network performance. Mr Oliver gave evidence that from monitoring records from November 2011 to September 2023, the overflow discharged over 96,000m³ of wastewater in total, with overflows occurring on average 8.8 times per year, with an average volume discharge per overflow of 915m³.

[46] Monitoring shows that the overflows are having adverse effects on water quality for the Lindsay Creek due to elevated levels of E.coli, Dissolved Reactive Phosphorus (DRP) and Nitrite-Nitrate contaminants, these being typically derived from wastewater.

[47] The system would be further strained with the development of plan-enabled growth unless interventions are implemented. His evidence explained the existing and predicted⁸ level of service for this catchment, noting that there is generally no issue with capacity during dry weather.

[48] Whereas the Council has commenced pipe renewals and upgrades to the system in this catchment, it will take time to resolve the existing issues. Moreover, renewals will not completely resolve the issues, as 50% of the inflow and infiltration comes from private laterals. Operational funding is proposed in the 2025/2026 and 2026/2027 financial years for the establishment of a programme to check for cross-connection on private properties, although resolving these

⁸ Out to 2050. See Mr Oliver, EIC, dated 16 May 2025.

issues would also take time.

[49] Mr Oliver does not support the addition of uncontrolled discharges from an additional 12 sites in Areas D and E (via the private right of way) which would exacerbate already poor wet weather performance of this sub-catchment. He described the alternatives considered for servicing Area D, including provision of the detention facility on the GR2 quarry floor land, which he supported.

[50] He explained that this is a relatively new approach to enabling growth in areas where wastewater infrastructure is constrained during wet weather. His evidence is that the Council intends to be the operator and maintainer of such communal wastewater detention facilities, which require higher levels of maintenance and monitoring than normal gravity sewers.

[51] Because these facilities are a less efficient form of infrastructure, the Council's preference is to have as few of these systems as possible, and that they are of a sufficient scale to service at least 50 properties.⁹ Mr Oliver explained that if the development enabled in the GR2 quarry floor land is included, this would mean that this minimum number would be realised.

[52] Mr Oliver gave evidence that although no such facility is in use in the district, the potential for such a solution was provided for in the provision for further growth in capacity constrained areas under Variation 2. Mr Oliver explained that the only reason that these facilities were agreed to by the Council was to enable the Council to meet housing capacity requirements in the National Policy Statement on Urban Development 2020 (NPS-UD). A facility for this proposal would be an additional system to that contemplated by Variation 2.

[53] Mr Oliver explained that the detention facility would be designed to detain water for a 12-hour storm event, being "typically like a 1 in 10-year rainfall event", that being the rainfall event used for a lot of the wastewater design in Dunedin.

⁹ Mr Oliver, EIC, at [42].

The Council would monitor the network at the relevant location to determine when the level of flow in the network is full, such that diversion to the wastewater detention system would be activated until such time as capacity is available for release back into the network.

Incorporation of the quarry floor land

[54] The court has no knowledge of discussions at mediation beyond that recorded in the mediation agreement presented in evidence to the court and referred to in memoranda.¹⁰ In closing submissions, the appellant explained the rationale for PDA arrangement incorporating the GR2 quarry floor land for wastewater detention as follows:

72. The benefit of the PDA approach is that it enables the Council to exert control over the existing GR2 zoned area. The appellant and the council are agreed that the management of wastewater needs to treat the site as a single integrated entity. The Council may not be able to achieve that for the GR2 land without a PDA.

73. The existing agreement between the parties recognises that the appellant could complete the development of 12 residential units (including the GR2 land) without first requiring wastewater retention. That is reflected in the wastewater PDA. The simple point for the appellant is that if 12 units are acceptable from a capacity perspective, then it doesn't matter where those units are. The appellant has not yet decided the most logical development sequence, and it could well be that Area D goes first.

[55] Rule 15.8.32.4.c. of the appellant's Structure Plan provisions is a performance standard for wastewater servicing and provides that:

¹⁰ Including the memorandum of counsel for the appellant dated 11 April 2025 when evidence-in-chief was filed. Paragraph 19 of that memorandum states that the parties agreed to manage Areas C, E and the quarry floor through a PDA, this being a clause of the Mediation Agreement.

- c. *Wastewater servicing*
- i. In any part of the Structure Plan Mapped Area a total of no more than 12 residential activities may drain wastewater to the Council's wastewater infrastructure without the use of a wastewater detention facility described in rule 12.3.5.2 prior to discharge. The maximum shall be calculated including any residential activity within the General Residential 2 Zoned Land within the former quarry floor located on Record of Title 782299.
 - ii. Once the maximum of 12 wastewater connections for residential activities has been exhausted, any subsequent wastewater connection for a residential activity within the Structure Plan Mapped Area must comply with one of the options in Rule 12.3.5.2. where a communal wastewater detention facility option is used, the initial 12 residential lots must also then connect to the detention tanks.

Inclusion of Area D – the appellant's amended solution

[56] The appellant's position on the wastewater solution was somewhat fluid. In response to the Council's position, the appellant had stated that it may need to retain wastewater in the detention facility agreed to under the PDA, although it does not want the Environment Court to determine that issue. The appellant contends that it "simply isn't necessary to determine that issue to resolve the zoning of Area D".

[57] However, during the hearing the appellant had presented an amended set of Structure Plan provisions including newly drafted bespoke provisions applying only to Area D on the wastewater issue.

[58] Although the appellant was initially opposed to a RTZ being applied to Area D, in closing submissions the appellant confirmed that if that updated version was adopted, the appellant would have no objection.

[59] Rule 15.8.32.2 of this amended Structure Plan addresses application of structure plan mapped area rules to Area D excluding this land from the operation of rule 15.8.32. 5. This new rule states:

- a. Rules 15. 8. 32.4 to 15. 8.32.5 do not apply to land within the area D on the structure plan mapped area until such time as the RTZ applying to Area D has been released in accordance with the structure plan rules and Rule 12.3.5.

[60] An additional new provision (cl 12.3.5) is proposed for insertion into Chapter 12 RTZ. This provision would apply to Area D instead of 15.8.32.5, “until such time as the RTZ applying to Area D has been released in accordance with these structure plan rules and rule 12.3.5”.

[61] Proposed rule 12.3.5 relates to the release of the RTZ in North/Watts Road Structure Plan Mapped Area and states:

Rule 12.3.5 Release of RTZ in North/Watts Road Structure Plan Mapped Area

1. In the RTZ area of the North/Watts Road Structure Plan Mapped Area, the Large Lot Residential 1 Zone rules will apply in addition to the Structure Plan Mapped Area rules that apply to Area D, when the RTZ is “released” by the Chief Executive Officer or their delegate certifying that the requirement in 12.3.5.2 is met.
2. The Chief Executive Officer or their delegate must certify to release land in the Residential Transition Zone applying to Area D following receipt of an application demonstrating that one of the following applies:
 1. Modelling using accepted industry practice demonstrates that upgrades to the Council’s wastewater infrastructure serving Area D has been achieved so that surcharge of pipes and flooding out of manholes will not occur as a result of wastewater being discharged from Area D to the Council’s infrastructure during a design rainfall event (10% AEP); or
 2. The application will not result in more than 12 wastewater connections for residential activities within the whole Structure Plan Mapped Area and the General Residential 2 zoned land within Record of Title 782299, to the Council’s wastewater infrastructure without the detention referred to in 12.3.5.3 below; or
 3. That the application proposes that the wastewater from Area D will be drained to a communal wastewater detention facility located within Record of Title 782299 designed in accordance with the

following criteria:

1. The communal wastewater detention infrastructure must meet the DCC's wastewater detention specification requirement current at the time of the applications. Key (but not all) requirements from these documents are listed below:
2. Include wastewater detention tank(s) with capacity to detain 12 hour storage of the Average Dry Weather Flow (ADWF) of wastewater from the development, prior to releasing the wastewater to the public infrastructure network. The volume of wastewater to be detained will be based on the maximum residential development density permitted under the 2GP for the parts of the Land that are zoned for residential use, and will be calculated with reference to Part 5 of the Dunedin Code of Subdivision and Development 2010 ('Code of Subdivision');
3. Be designed to integrate with DCC reticulated wastewater system;
4. Be designed to allow for easy removal of the detention tank(s) and direct connection to the reticulated wastewater network in the future once capacity is available;
5. Be designed to integrate with DCC's Remote Telemetry and SCADA (Supervisory Control and Data Acquisition) systems to allow remote monitoring and control;
6. Be installed at one location that is approved by DCC and that:
7. ensures the efficient and effective functioning of the communal wastewater detention system and DCC reticulated system;
8. allows wastewater to gravity feed to the wastewater detention tank; or, if wastewater pumping is required from the development to the wastewater network, then a bespoke design is needed, for approval by DCC;
9. is easily accessible for maintenance or tank removal;
10. Components and materials used must comply with the DCC's 3 Waters Approved Product and Manufacturers List and Dunedin Code of Subdivision 2010 Part 5. Where no approved product exists for any component it must be specifically approved by DCC;

11. Be designed and developed to DCC standards at Developer cost'; and
12. Design, construction and commissioning are all subject to DCC approval.

Or;

4. An agreement between the DCC and the developer on the method, timing and funding of any necessary wastewater infrastructure is in place.

Landscape issues

[62] The landscape witnesses (and counsel) agreed that the policy test for the court to consider the application of new residential zoning is at Policy 2.6.2.1.d.iv which states:

Dunedin's outstanding and significant natural landscapes and natural features are protected (Objective 2.4.4). Achieving this includes generally avoiding the application of new residential zoning in ONF, ONL and SNL overlay zones;

[63] Mr Page emphasised that Policy 2.6.2.1.d.iv applies to all forms of residential zoning in the 2GP. This, he submits, is an acknowledgement within the 2GP that within that spectrum of zoning, LLR zones can be used when there are particular landscape issues to be managed. He submits that the presence of the SNL overlay does not preclude LLR1 zoning; moreover, the appellant's proposed zoning, and associated structure plan rules, is consistent with the 2GP objectives and policies and is the most appropriate zoning for Area D.

[64] Mr Page further submits that the introduction statement of the RR2 Zone is very confined and specific to limited circumstances insofar as it states that:

17.1.1.2 Rural Residential 2 Zone

The Rural Residential 2 Zone typically occurs in coastal locations, or on hill slopes in proximity to urban areas. The Rural Residential 2 Zone recognises existing semi-developed clusters of small rural sites where there is already some rural residential activity, and provides for one residential activity per existing site

[65] The appellant considers that an RR2 zoning within Area D contradicts that statement.

[66] The appellant's position is that the 2GP does not require the listed SNL values to be protected, let alone maintained and enhanced, at both a "site and landscape context scale", rather, it requires that the listed SNL values be protected.

[67] Only the landscape scale context is relevant to Objective 2.4.4, and thus Policy 2.6.2.1. Mr Page considers that the "generally avoid" wording in Policy 2.6.2.1.d.iv enables sites within the SNL to be rezoned for residential development even though that development would not itself maintain the existing site values.

[68] Mr Page agreed with Mr Garbett's submission that Policy 2.6.2.1.d.iv leaves "the door ajar" for applications for new residential zoning within an SNL. However, he submitted that the Council's approach does not in fact leave the door ajar, due to its focus on adverse effects of dwellings on the values within the site in preference to the wider landscape context.

[69] The landscape witnesses prepared a joint witness statement (JWS) dated 9 May 2024, attached to Mr Milne's evidence at Appendix A.

[70] The JWS states that the site forms part of the larger SNL (forming the toe end of the SNL and the spur it contains).¹¹ However, it does not express all identified values which relate to the wider biophysical, sensory, and associative landscape values, as identified in Appendix A3.3.2.2.¹²

[71] However, they were *not* agreed as to the specific landscape values listed in Appendix A3.3.2.2 that apply to the site.

¹¹ JWS, Flagstaff-Mount Cargill SNL Landscape Values, 9 May 2024, at [5.c].

¹² JWS, Flagstaff-Mount Cargill SNL Landscape Values, 9 May 2024, at [5.d].

The values of the SNL and the site

[72] Mr Milne considers that the values of the SNL are associated with elements, qualities, patterns and processes in the landscape when understood in the spatial context of the SNL as a whole, particularly the upper slopes. Having considered the listed values, he opined that that while the SNL is mapped as a whole, the SNL description makes it clear that the SNL is not a whole but a selection of different areas and elements that have been attributed value.

[73] His opinion is that Area D, while mapped as within the SNL, bears very little physical and/or visual connection to the listed values of the SNL. At a stretch, Mr Milne considers that Area D contributes to the following values:¹³

(a) *Biophysical values:*

...

- iii. ... the sequence of legible and largely intact eroded volcanic spurs which extend below the summit.

(b) *Sensory values:*

- i. Volcanic landscape which remains expressive of its formative processes.
- ii. Low impact of built elements, earthworks, and exotic tree plantings, and the significant relative dominance of natural landscape elements.

...

- vi. The extent and quality of views across the landscape from public roads and tracks.

(c) *Associative values*

...

- iii. The ring of encircling hills has been referred to as the outer town belt.

[74] Reasons for Mr Milne's opinion as to the effect on identified values resulting from future development within Area D include that:

¹³ Mr Milne, EIC, at [33].

- (a) the underlying volcanic landform has been significantly altered to the point that the underlying biophysical values are of low degree;
- (b) the sensory values linked to Area D relate more to the overall site and its quarry and basin-like appearance, which is highly modified and is not consistent with the natural landform and visual coherence of the surrounding hillside;
- (c) Area D is relatively devoid of vegetation, and forms a small and modified part of the backdrop to the northeast side of North East Valley;
- (d) a grove of medium size kānuka has been identified on the Site, some of which is growing on Area D. This will remain (as shown on the Structure Plan); and
- (e) the associative values of Area D stem from it being part of a site that was previously quarried along with its current informal recreation use by the public, even though it is in private ownership.

[75] Visibility of the site is contained within areas of North East Valley from where some increased visibility is apparent given the site's location on an elevated spur. The predominant view is achieved from the well frequented Baldwin Street to the south of the site. Visibility from this, and other viewpoints, were assessed.

[76] As Area D is at the lower point of the SNL, Mr Milne considers that LLR1 development on Area D will read as being physically and visually contained along with the existing urban form of the valley floor in this area. In this location, it will not result in a more prominent and fragmented urban edge and will not be contrary to the softened rural edge recognised by the SNL classification.

[77] At most, he considers that LLR1 development may result in a slight loss to the overall rural character and amenity when viewed from roads and streets at a similar (or higher) elevation on the southeastern side of North East Valley.

[78] Mr Girvan disagreed with Mr Milne's view that "the site is not connected

to the wider SNL values”.¹⁴ Mr Girvan gave evidence that:

[46] ... Area D is a coherent part of the recognised extent of the Mount Cargill Flagstaff SNL within which the LRR1 zone would not maintain and enhance identified landscape values.

[79] Mr Girvan considered that Area D contributes to the following values:¹⁵

a. Biophysical values:

- i. The extent and integrity of the natural landscape elements including wildlife.
- iii. Volcanic Peaks and associated landforms including the summits of Flagstaff and Swampy Summit and the sequence of legible and largely intact eroded volcanic spurs which extend below the summit.

b. Sensory values:

- i. Volcanic landscape which remains expressive of its formative processes.
- ii. Legibility of the natural landform and associated visual coherence of the landscape i.e. patterns of land use reflecting the topography.
- iii. Low impact of built elements, earthworks, and exotic tree plantings, and the significant relative dominance of natural landscape elements.
- iv. Naturalness of elevated landforms.
- v. Landform and vegetative altitudinal connectivity present.
- vi. The extent and quality of views across the landscape from public roads and tracks.
- vii. Naturalness attributes of the rural landscape which provides backdrop and containment to the discrete harbourside settlements.
- viii. Naturalness of the foreground to the Mt Cargill ONL above.
- ix. Forms much of the backdrop to urban Dunedin.
- xi. Native vegetation cover and vegetation patterns that reflect the natural topography and natural skylines.
- xii. Has very high levels of visibility from significant population centres and major roads.
- xiii. High rural amenity value.

¹⁴ Mr Milne EIC, at [37].

¹⁵ Mr Girvan EIC, at [47].

c. Associative values:

- iii. The ring of encircling hills has been referred to as the outer town belt.

[80] Mr Milne gave evidence that “overall, the changes to the landscape attributes that will result from future development within Area D will have negligible impact on the landscape values...”.

[81] Mr Girvan’s assessment is that zoning Area D to LLR1 would have moderate adverse effects on landscape values. Extending residential zoning to within Area D will not protect identified landscape values, including maintaining and enhancing the SNL.

[82] His assessment is summarised in the JWS as follows:

Mr Girvan considers that the inclusion of residential development within Area D will have material impacts on the landscape values of the Flagstaff – Mt Cargill SNL to the extent that avoiding the inclusion of the residential development would better reflect the objectives and integrity of this SNL.

...

- 17) The underlying landform within Area D is located above a rehabilitated quarry and more clearly associated with the unmodified rural land above. This is reflected in the SNL following a logical boundary based on more apparent landform modification which remains evident.
- 18) Area D remains associated with the toe of a legible volcanic spur and broader natural and rural backdrop which has been differentiated from a more modified and contained basin form associated with former quarrying activity.
- 19) The inclusion of development at residential densities will have a material impact on natural and rural landscape characteristics and qualities typically seen above the pattern of residential development within North East Valley located below and currently separated from more elevated development contained within Pine Hill.
- 20) From the floor of the North East Valley along North Road, existing vegetation within and adjoining Area D often remains visible along the skyline and elevated above surrounding residential development.

- 21) Where visible from elevated residential areas along the southern side of North East Valley, Area D appears elevated above the modified quarry face and would extend visual effects of residential development into the defined SNL.
- 22) The inclusion of residential development within the SNL would impact on the integrity of this broader recognised natural and rural backdrop.

[83] The Council accepts that the mitigation proposed by Mr Milne will help but considers that the dominance of dwellings over open space will change that area of the site and the SNL fundamentally, and permanently. In reliance on Mr Girvan's evidence, Mr Garbett submitted that 10 new dwellings on Area D in a LLR1 Zone, with all the accompanying residential aspects of domestication this brings, will be inappropriate and not maintain or enhance the SNL values.

[84] The Council therefore maintains that the current RR2 Zone is appropriate in Area D and providing for one new residential dwelling on the existing site outside the SNL overlay (or in the SNL overlay with resource consent) to be more appropriate to maintain the values of the SNL in light of the 2GP framework.

[85] Mr Page submitted that Mr Milne's approach is more intuitively aligned with the RMA's approach to s7 landscapes, and that a strict requirement to "maintain" every value on every site is inconsistent with the directive to "have particular regard to" amenity values in s7. Mr Page submitted that the court's approach in setting the SNL boundary in *Norrish v Dunedin City Council*¹⁶ points to a more context-driven approach to the values of an SNL.

[86] The viewing location where the site is most prominent within its context, is Baldwin Street, which we accept, (having undertaken a site visit). Mr Page submitted that Mr Girvan's photographs 3 and 4 (from McGregor Street) offer a representative viewpoint from which the relevant SNL values, and the threats to

¹⁶ [2023] NZEnvC 116.

those values, should be identified in order to be consistent with *Norrisb*.

[87] At the hearing, we asked Mr Milne about his focus on Area D's connections with urban areas outside the SNL instead of its connection with values within the SNL. We questioned whether this approach could set a precedent for "chipping away" at other locations on the boundary of an SNL close to existing urban areas.

[88] However, Mr Milne considered Area D could be distinguished from "other locations" due to its small size and location at the edge of the SNL. Further, the characteristics of Area D's immediate setting are considered to be unique due to it being part of a former quarry landscape.

[89] Mr Milne also noted that from most viewpoints of the SNL, and particularly opposite the site where some of the wider SNL is viewable, there is notable urban development "charging up" Pinehill Road. His opinion is that development on Area D could be viewed as a continuous extension to the urban form, providing a softer transition into the houses to the northwest of the site.

Area B – the former quarry face

[90] The management of Area B was a consideration we asked counsel to address due to the potential slope stability issues associated with the rock face identified in the RDA Report.

[91] The Council's preference is for Area B to be tied to a residential site/s, the owner/s being responsible for maintenance. The appellant does not wish to determine the ownership structure of Area B now, as it wishes to retain flexibility to respond to the market. The appellant also considered the possibility of establishing an incorporated society of lot owners that wishes to maintain it – as the site is already informally used by the community as a walking area.

[92] Mr Page submitted that it is not the practice of the Council to engage with every owner of rural zoned land to enquire into their willingness to manage natural

hazard risks on the property of their neighbours. The appellant's position is that the common law manages *inter partes* damage issues.

[93] Ms Spalding gave evidence that Area B would be left as an island of rural land in the middle of the surrounding development.¹⁷ We also raised this issue with Mr Girvan and sought his expert opinion as to what he thought should happen to the quarry face. If rural zoning is retained on Area D, Mr Girvan stated that the vegetation within Area B would assist with the transition from urban below on the quarry floor to rural above on Area D.¹⁸

[94] The appellant's response is that rural land in the middle of surrounding development is not an uncommon occurrence within the city.

Area C – biodiversity issue

[95] The parties are agreed that Area C is to be zoned GR1, although they are not agreed as to how best to deal with a stand of kānuka and whether this vegetation ought to be protected.

[96] The appellant had engaged Ahika Consulting Limited to prepare a biodiversity assessment of the site, which was provided to the Council in 2023 (Ahika Report). The Council then commissioned Wildlands Consultants to undertake a review of Ahika's assessment, which was initially undertaken as a desktop exercise. The appellant had declined to allow Wildlands to undertake a site inspection, although that access was granted by the court.¹⁹

[97] A site visit was undertaken by Wildlands on 12 May 2025. Wildlands agreed with the boundary and description of the kānuka stand identified by Ahika as being present within Area C, including that it contains planted exotic species, with

¹⁷ NOE, p 144 line 2-7.

¹⁸ NOE, pp 116-119.

¹⁹ By decision on an opposed application, given on 8 May 2025. See *Glass v Dunedin City Council* [2025] NZEnvC 148.

occasional indigenous species, some of which are planted garden varieties. However, indigenous biodiversity values were present in the indigenous species including in the understorey, sub-canopy and occasionally canopy, and in areas where over 30% of the species coverage is indigenous.²⁰

[98] For the Council, Ms Metcalfe gave evidence that this area of kānuka on Area C meets the criteria for ecological significance, supporting the recommendations in the Ahika Report for enhancement and mitigation of this vegetation, while further recommending that the vegetation also be retained and protected.

[99] In her opinion, this measure would be consistent with Policy 2.6.2.1 which sets out to ensure that rezoning will result in the protection, enhancement and restoration of ecologically significant indigenous biodiversity values, and that other indigenous biodiversity values are maintained or enhanced and restored. We address this policy later in this decision.

[100] Her evidence described further areas of kānuka on the boundary between Area D and E (on the upper parts), and an area of mixed indigenous and exotic vegetation on the mid and lower slopes of Area E. While there are areas of vegetation that would meet the 2GP definition of indigenous vegetation, mapping of these areas was not considered practical. Her evidence noted that much of the indigenous vegetation identified in the Ahika Report in this location had been cleared between their site visit in July 2023 and the later visit in November 2023.²¹

[101] Her evidence acknowledges that the vegetation most vulnerable to clearance within the upper areas of Area E is where native cover and diversity is lower. However, as mitigation for removal of this area of vegetation, she suggested creation of restricted development areas and development of an ecological

²⁰ Indigenous vegetation is defined in the 2GP as including indigenous species comprising at least 30% coverage by area or 30% of the total number of specimens present.

²¹ Ms Metcalfe, EIC, dated 20 May 2025, at [19].

enhancement area, through amendments to the structure plan rules. She also sought rules to restrict removal of indigenous vegetation in the areas.

[102] Overall, Ms Metcalfe supported Ahika's recommended actions for three areas. This included land areas recommended for esplanade reserves along the length of Lindsay Creek, and land adjacent to that, some of which met the criteria for Areas of Significant Biodiversity Vegetation (ASBV). However, we were told that ORC would likely take some or all of this land for flood protection works and accordingly, these areas ought not be considered any further.

[103] The remaining areas for protection (in addition to the restricted development areas on Areas D and E), include the kānuka spanning Areas E and D, and on Area C. These measures were supported by Ms Spalding, who recommended that these areas are mapped and protected through the operation of restricted development areas and associated structure plan rules, together with special information requirements where subdivision is proposed requiring a biodiversity enhancement plan for these areas.

[104] Ms Spalding's evidence cited provisions in the National Policy Statement on Indigenous Biodiversity (NPS-IB)²² and 2GP provisions giving effect to the NPS-IB, notably, Objective 2.2.3, Policy 2.6.2.8 and Policy 2.6.2.1 d) iii of the 2GP, which is addressed later in this decision.

[105] The appellant notes that under the indigenous vegetation clearance rules that apply in the RHS zone, 1000m² is able to be cleared over a 3-year period as a permitted activity, contending that no protection should be afforded to the kānuka existing on Area C. The appellant relies on *Hawthorn*²³ in submitting that vegetation removal is already part of the existing environment, stating that the appellant is entitled to remove this vegetation if it wants to.

²² Policies 6 and 8 and cl 3.16.

²³ *Queenstown Lakes District Council v Hawthorn Developments Limited* [2006] 12 ELRNZ 299.

[106] The appellant's Structure Plan provisions continue the application of the RHS vegetation clearance rules pending the grant of a subdivision consent across the site, with the exception of Area C, where indigenous vegetation clearance is limited to clearance to establish a building platform for residential activity. However, once a subdivision consent has commenced, the rule ceases to have any effect such that any remaining indigenous vegetation on the site (including on Area C) is not given any form of protection and could be cleared completely.

[107] Referring to the wording of Policy 2.6.2.1.d.iii, the appellant further contends that there is no mechanism in the 2GP for protecting this vegetation unless it is mapped as an urban biodiversity mapped area (UBMA) or as an ASBV, neither of which applies to this area of kānuka. We discuss Policy 2.6.2.1.d.iii later.

[108] No biodiversity evidence was brought by the appellant. However, in his landscape evidence, Mr Milne agreed that the kānuka stand on Areas D and E should be protected. While his evidence identified the kānuka stand on Area C, this vegetation was not recommended for protection.

[109] In his planning evidence, Mr Anderson considered that presence or removal of the kānuka on Area C is a neutral factor.

Areas C and E – geotechnical issues

[110] The parties have agreed that there are no further geotechnical issues to be resolved on the basis that the recommendations in the RDA Consulting Geotechnical Report dated 3 February 2025 (RDA Report) in relation to proposed building platforms in Areas C and E, are recorded as structure plan rules in a structure plan.

[111] ORC had withdrawn from the hearing on the basis that the recommendations in the RDA Report are recorded as structure plan rules.²⁴ The

²⁴ Memorandum of counsel for ORC, dated 13 June 2025, at [11].

Council took the same position.

[112] The recommendations in the RDA Report include:

- (a) a Geotechnical Investigation Report be completed prior to subdivision to confirm any instability and any offsets that might be required;
- (b) vegetation clearance is kept to a minimum;
- (c) that any modification and design of stormwater flows is designed by a suitably qualified person; and
- (d) any development of the site is subject to design, supervision and certification by suitably qualified engineers that confirm that the site is suitably stable, and any proposed work will not introduce or exacerbate slope instability.

[113] The RDA Report recommendations are based on an “indicative” lot layout contained in a subdivision concept plan produced by Patterson Pitts Group on behalf of the appellant.

[114] The opening paragraph in the Summary of the RDA Report states:

This report is intended to assist and support rezoning applications and is not a detailed design report.

[115] The RDA Report merely tests and demonstrates the ability for residential development to occur on the site. It further addresses Policy 2.6.2.1 of the 2GP which stated that the risk of slope instability of the Areas C and E proposed building platforms is low.

[116] The introduction of the RDA Report further defines the scope of the assessment as:

The purpose of this assessment is to investigate and evaluate the general geotechnical conditions of the proposed building platforms, as they pertain to the

Natural Hazards encountered on site, and to determine (if they are present) the risk they pose to any future development, and to provide recommendations and any constraints for development.

The work was commissioned by Fletcher Glass of FBG Developments, dated 14 March 2024. The proposed site consists of two areas Area C and Area D, both require a more detailed natural hazards assessment to ascertain if they are suitable for further residential development. Our assessment has been based on the proposed subdivision concept plans produced by Patterson Pitts Group, dated 30 October 2023.

[117] The RDA Report goes on further in the limitations section to state that:

Findings presented as part of this report shall be used in accordance with the specific scope and the purposes outlined above.

[118] In the context of Policy 2.6.2.1, low risk is given the following meaning:²⁵

- (a) minor consequences that are likely, possible, or rare; and
- (b) moderate consequences that are possible or rare; and
- (c) major consequences that are rare.

[119] Mr Page noted that the RDA Report did not recommend any density thresholds, nor did it state that the development could only occur in the locations tested. He advised it is likely that the building platforms proposed will be at or near the areas identified as indicative building platforms on the Modified Rezoning Plans.

[120] The appellant does not wish to limit development on Areas C and E if more residential development can be achieved in accordance with the recommendations of the RDA Report, the objectives, policies and rules of the 2GP and the RMA. It considers that the further information requirements in the proposed structure plan rules provide the Council with the necessary control to ensure any

²⁵ In section 7.1 RDA Report.

geotechnical risk from future residential development is no more than low. It considers a density threshold is not required.

Statutory framework

[121] The statutory tests for a plan appeal are well understood, having been set out in numerous decisions, notably, in *Colonial Vineyard Ltd v Marlborough District Council*.²⁶ In summary, the 2GP must:

- (a) accord with and assist the Council to carry out its functions under s31 RMA, so as to achieve the purpose of the RMA (see s74(1)(a) RMA);
- (b) give effect to any relevant national policy statement or operative regional policy statement (s75(3)(a) and (c) RMA); and
- (c) establish the most appropriate method (here being the appropriate zones and any structure plan provisions) for achieving the objectives and policies of the 2GP as required by s32 RMA, taking into account:
 - (i) the benefits and costs of the alternative zones proposed; and
 - (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the zones proposed.

[122] The proposed methods (notably, the proposed rules) must also be evaluated with regard to the actual and potential effects on the environment of the activities they enable, including potential future effects.

[123] We agree that relevant PDP objectives and policies flesh out and give local effect to Part 2 such that it is not necessary to consider those provisions. We also agree that they assist the Council to carry out its functions and give effect to the relevant higher order policy instruments.

[124] In the context of a s32 evaluation, we are required to make a value judgement as to what is the most appropriate, i.e. the most suitable, suite of

²⁶ [2014] NZEnvC 55 at [17].

provisions when measured against relevant 2GP objectives.

[125] We must also have regard to the decision of the territorial authority under s290A RMA.

The 2GP framework

[126] Chapter 2 contains six overall strategic directions. These provisions focus on key issues for the city and establish the overall management approach for the 2GP including zoning and other methods. We were referred to provisions of relevance to the issues in dispute, being:

- (a) strategic direction 2.6 – “Dunedin has quality housing choices and adequate land supply”; and
- (b) strategic direction 2.4 – “Dunedin is a memorable City with a distinctive built and natural character”.

[127] Each strategic direction is supported by objectives, which (in summary):

- (a) for strategic direction 2.1 relates to the provision of adequate urban land supply and housing choices (Objectives 2.6.1 and 2.6.2); and
- (b) for strategic direction 2.4 relates to Dunedin’s outstanding and significant natural landscapes and natural features. Objective 2.4.4 is that these are to be “protected”.

[128] Objective 2.6.2 is implemented by a policy suite including Policy 2.6.2.1 which provides for the identification of “areas for new residential zoning” based upon 11 stated criteria. For completeness, and given its length, we have attached a copy of this policy as an annexure to this decision.

[129] Policy 2.6.2.1.b is the key criterion in the context of the wastewater issue:

Rezoning is unlikely to lead to pressure for unfunded public infrastructure upgrades, unless either an agreement between the infrastructure provider and the

developer on the method, timing, and funding of any necessary public infrastructure provision is in place, or a Residential Transition overlay zone is applied and a future agreement is considered feasible;

[130] Policy 2.6.2.1.d also addresses biodiversity and landscape values, and infrastructure issues and states:

- ...
- iii. Dunedin’s significant indigenous biodiversity is protected or enhanced, and restored; and other indigenous biodiversity is maintained or enhanced, and restored; with all indigenous biodiversity having improved connections and improved resilience (Objective 2.2.3). Achieving this includes generally avoiding the application of new residential zoning in ASBV and UBMA”;
 - iv. Dunedin’s outstanding and significant natural landscapes and natural features are protected (Objective 2.4.4). Achieving this includes generally avoiding the application of new residential zoning in ONF, ONL and SNL overlay zones (...);
 - ix. public infrastructure networks operate efficiently and effectively and have the least possible long term cost burden on the public (Objective 2.7.1)”.

[131] Objective 2.4.4 is implemented by a number of policies, relevantly, for the purposes of this appeal, Policy 2.6.1.5 which contains the criteria to assess the appropriateness of a rural residential zoning. This includes sub-cl (c) which is:

- c. Considering the rules and potential level of development provided for the proposed rural residential zoning is the most appropriate to achieve the objectives of the Plan, in particular:
 - ...
 - iii. Objective 2.4.4. Achieving this includes:
 - ...
 - 3. avoiding the application of new rural residential zoning in the SNL Overlay Zone, unless such rules (such as rules that restrict the scale and location of development activities can ensure that Objective 2.4.4 will be achieved.

[132] The Rural Residential 2 Zone is described in Chapter 12:

The Rural Residential 2 Zone typically occurs in coastal locations, or on hill slopes

in proximity to urban areas. The Rural Residential 2 Zone recognises existing semi-developed clusters of small rural sites where there is already some rural residential activity, and provides for one residential activity per existing site.

Our consideration

Landscape issues

[133] We preface our evaluation by noting that in closing submissions, Mr Page attached a series of documents emanating from the Council's first instance hearing process. The attachments numbered 228 pages. His closing submissions referred to facts and assumptions applicable to the s42A assessment, particularly on landscape issues. Passages in these documents were relied upon to support counsel's submission that was critical of the Council's approach to only evaluate a 1-house outcome.

[134] Mr Page submitted that the Council's failure to identify the tipping point between a 1-house outcome and the 10-house outcome sought by the appellant, is problematic as it represents a change in the Council's position. Mr Page contended that his attachments illustrated that at the Council hearing, an assumption had been made that the status quo RR2 zoning allowed 3 (or possibly 4) dwellings.

[135] Although Mr Girvan was cross-examined on whether some other number of dwellings (between 1 and 10) could be accommodated,²⁷ the documents attached to the closing submissions were not referred to in opening submissions, in evidence lead by the appellant, or in cross-examination of the Council's experts including Mr Girvan. Accordingly, submissions that were critical of the Council's position are not accepted and will not be considered any further.

[136] As to our evaluation, we note that both Mr Milne and Mr Girvan provided the court with their opinions on Area D's values, which we have summarised

²⁷ NOE, pp 104 and 105.

above. They also adopted similar methodology in assessing Area D. Both considered the site within its immediate landscape context, including areas outside of the SNL.²⁸

[137] Mr Girvan’s methodology approach was to enquire into the “contribution” that Area D makes to the SNL values, and then consider what change to the contribution would occur with 10 houses.

[138] Mr Milne’s approach was to see the site in its visual catchment and ask whether development of the site under LLR1 zoning would make any difference to the visible SNL’s scheduled sensory values.

[139] We agree with Mr Page that the difference between the witnesses seems to be one of emphasis rather than principle.

[140] However, as Mr Page submitted, we find that Mr Milne’s evidence is a more accurate representation of the scale at which the landscape assessment is required and should be preferred. We further agree with his further submission that Mr Girvan’s evidence might be viewed as a defence of the integrity of the SNL line, rather than an appraisal of the effects of development on the scheduled values when assessed at a landscape scale alone.

[141] Having considered the competing assessments, we accept Mr Milne’s assessment approach and resulting opinions, in preference to that of Mr Girvan.

[142] Accordingly, our decision is that a LLR1 zoning providing for a maximum of 10 houses is more appropriate than retention of the RR2. However, that is subject to our decision on the wastewater issues which we now address.

²⁸ NOE, pp 87-89.

Wastewater management

[143] As we have decided that dwellings are able to be accommodated on Area D, the wastewater management issues come into consideration. That said, there are many problems with the appellant's wastewater proposal for other areas of the site, (which the Council has agreed to) in this policy context.

[144] The first is that the PDA has not yet been executed for any of the areas, although terms are generally agreed to. We were told that once the zoning of the Area D land is confirmed by the court in an interim decision, a consent memorandum would be filed seeking orders to have all areas rezoned, at which point, the PDA would have to be executed. However, an "agreement to agree" is not what Policy 2.6.1.b calls for.

[145] More relevantly, the detention facility is proposed to be located on Area B which is outside of the appeal site. Also, amended Structure Plan rule 15.8.32.4.c restricts residential activity on Area B beyond that applying under the existing operative GR2 zone provisions.

[146] The appellant justifies the inclusion of the restriction on the basis that the appellant is the owner of all the land and wishes to treat the site as a single integrated entity when it comes to management of wastewater.

[147] The appellant further submits that the benefit of the PDA approach is that it enables the Council to exert control over the existing GR2 zoned area which it would not be able to achieve without the PDA. However, none of that overcomes the court's lack of jurisdiction to regulate activity on Area B under the 2GP, and jurisdiction cannot be conferred on the court by the parties' agreement.

[148] Another issue relates to the sequencing of development across the site, as in closing submissions, the appellant states it has not yet decided the most logical

development sequence, noting that “it could well be that Area D goes first”.²⁹ However, this gives rise to a further issue with this interim solution, which may have been overlooked by the parties.

[149] Area D could be developed (with the 10 dwellings as proposed) before other land is developed, although the detention facility would not need to be constructed until other areas are opened up for development. The detention facility is only required when development of 12 residential units is completed.

[150] If the GR2 land is next to be developed, as soon as more than two dwellings are constructed on that land, the detention facility will have to be constructed. However, development on Area B is not required to use the detention facility. This is not a requirement of the operative GR2 provisions.³⁰ Discharges from Area B development on Area B are able to be directed into the Council’s network.

[151] Accordingly, there can be no certainty that the detention facility would ever serve the number of dwellings (in excess of 50) required by the Council to justify this as an efficient interim solution.

[152] This problem may be alleviated to some extent if Area D development is followed by development on Areas C and E, although that has to be said with some caution. This is because there was no evidence before the court as to whether full development of these areas will be capable of achieving in excess of 50 dwellings.

[153] We further note that the appellant’s amended Structure Plan rule for Area D is proposed to be inserted into the Chapter 12 section, in a location³¹ that contains matters of discretion for a discretionary activity (which is rule 12.3.5) rather than operating as “release” rules which apply as a prerequisite to the LLR1

²⁹ The draft PDA contemplates development of the site in stages, yet to be determined.

³⁰ Although during the hearing, the court, and possibly Mr Oliver, may have thought otherwise.

³¹ On the court’s understanding of the 2GP.

zoning. This is a departure to the existing RTZ regime (in rule 12.3).

[154] It is not clear to the court whether this is intentional or whether the new provisions are in fact intended to operate as new “release” rules for Area D only. However, the drafting of these provisions is consistent with their application as discretionary activity matters of discretion, this being consistent with its stated position that the Area D infrastructure issue is best addressed when a subdivision consent is applied for rather than when the rezoning is being considered.

[155] However, this approach is also inconsistent with Policy 2.6.1.b which is to be applied at the stage of a rezoning; that is, by this court in resolving the appeal. The appellant’s provisions defer a consideration of the Policy 2.6.1.b.c criterion to the subdivision consent process, which we are not willing to approve of.

[156] Moreover, (seemingly) the appellant’s provisions are not solely reliant on provision of a detention facility pending the planned upgrades to the North East Valley infrastructure, as agreed to at mediation. Under the appellant’s proposed new provisions, a variant of the detention facility solution is provided for but only in relation to development on Area D. This is under proposed assessment matter 12.3.5.3, and particularly in 12.3.5.3.2, which provides for the design of a detention facility to take:

the volume of wastewater to be detained... based on the maximum residential development density permitted under the 2GP for the parts of the Land that are zoned for residential use... .

[157] Reference to “the Land” in the context of this bespoke provision can only be a reference to Area D. The rule has no wider application. However, the appellant’s proposal for Area D (for a maximum of 10 dwellings) is significantly less than the preferred minimum number of 50 dwellings preferred by the Council for this type of interim solution. This is problematic, particularly if Area D is developed ahead of other areas.

[158] As to the circumstances in which Area D could be developed, the appellant's amended provisions provide various avenues for the release of the (notional) RTZ overlay. If these provisions are satisfied, then development could proceed under the LLR1 rules. Notably, Mr Oliver was not given the opportunity to comment on this amended proposal.

[159] C12.3.5.3.4 provides an alternative prerequisite for the release of the RTZ over Area D in the following assessment matter:

An agreement between the DCC and the developer on the method, timing and funding of any necessary wastewater infrastructure is in place.

[160] This alternative "release" provision for Area D is unsatisfactory for reasons explained in our discussion in the context of Policy 2.6.1.b. Elements of this could already be said to have been satisfied on the basis of the evidence heard by the court from Mr Oliver, as to the nature and timing of the upgrades despite the fact that the upgrades are many years from being fully implemented.

[161] It is relevant to further note that during the hearing, somewhat casually, we were informed by the Council that a change to the RTZ "release" provisions was on foot. This introduces a new alternative criterion into rule 12.3.1 based upon the execution of a PDA, which would operate as a release to the RTZ Overlay facilitating development of the specified residential zoning. The rule incorporating this provision, which we are told is not challenged, reads:³²

Rule 12.3.1 Release of Land in the Residential Transition Overlay Zone (RTZ)

1. In a Residential Transition Overlay Zone (RTZ), other than the RTZ listed in rule 12.3.4, the provisions of the specified future residential zone will

³² We were puzzled why this was not brought to our attention earlier in the hearing, given that the Council had preferred imposition of a RTZ Overlay for Area D in preference to the appellant's proposal for a PDA associated with the detention facility. However, and although no submissions were presented on the effect of this proposed amendment, the wording of the Rule 12.3.1 amendment arguably rules out an interim solution such as that agreed to under the existing PDA proposal.

apply to any part of that zone that is “released” by the Chief Executive Officer or their delegate certifying that the requirements in rule 12.3.1.2.a and 12.3.1.2.b are met.

2. The Chief Executive Officer or their delegate must certify to release land in a Residential Transition Overlay Zone (RTZ) following receipt of an application demonstrating that:
 - a. ~~the DCC has published a statement on its website that for 3 waters public infrastructure, any of the following criteria are met:~~
 - i. ~~the DCC has published a statement on its website that~~ further development within the Residential Transition Overlay Zone will meet the following criteria, demonstrated by modelling using accepted industry practice:
 1. fire flows within the piped treated water network servicing the Residential Transition Overlay Zone meet the New Zealand Fire Service Firefighting Water Supplies Code of Practice (SNZ 4509:2008);
 2. water pressure within the piped treated water network servicing the Residential Transition Overlay Zone is maintained between 300-900 kPa; and
 3. surcharge of pipes and flooding out of manholes will not occur during a design rainfall event (10% AEP) within the wastewater network necessary for the servicing of potential development that is being released; or
 - ii. ~~the DCC has published a statement on its website that~~ a contract has been awarded that will ensure any necessary infrastructure upgrades required to meet the tests in rule 12.3.1.2.a.i are completed within three years; ~~and/or~~
 - iii. ~~a private development agreement between the DCC and developer on the method, timing and funding of any necessary 3 waters public infrastructure is in place; and~~ *{Change Res20}*
 - b. an agreement between the DCC and the developer on the method, timing and funding of any necessary transportation infrastructure is in place.
3. Areas that have a Residential Transition Overlay Zone may be released in whole or in part, and where more areas are requested to be released than can meet the criteria above, they will be released on a first come first served basis following an application to the Chief Executive Officer or their

delegate that meets the criteria outlined in Rule 12.3.1.

4. The statement on water supply and wastewater infrastructure capacity may specify the number of additional dwellings for which there is infrastructure capacity.

[162] For these reasons, we prefer, and agree to the Council's preferred solution for wastewater for Area D if it is to be rezoned and developed with dwellings. We accept the evidence of Mr Oliver that drainage to Watts Road would exacerbate the existing pressures on the wastewater network.

[163] We conclude that a RTZ should be placed over Area D permitting development within this area once wastewater network upgrades have been completed. Release provisions that apply to the land should be those that are contained within the 2GP, subject to the inchoate changes currently going through the Sch 1 process.

[164] Although we have not yet received the consent orders for other areas to be rezoned, we can indicate that we would be requiring the same outcome, in place of the PDA proposal, for Areas C and E, for reasons set out in this decision.

Biodiversity

[165] The Council acknowledges that removal of 628m² of kānuka on Area C could be removed under existing RHS rules, assuming the 1,000m² threshold for clearance across the whole site has not been used by other vegetation clearance.

[166] Accordingly, and because rezoning is proposed, the Council supports protection of the areas of significant kānuka on Area C and Areas E/D as recommended by Ms Metcalfe.³³

[167] We agree with the Council that the current RHS vegetation clearance rules

³³ Mr Milne also supported protection of the existing kānuka on Areas E and D.

do not form a legal entitlement when a new urban zone is being promoted.

[168] We find that this protection will result in consistency being achieved with relevant 2GP provisions, and (necessarily) the NPS-IB, particularly Policy 2.6.2.8 and Policy 2.6.2.1.d.iii.

[169] We find that it is irrelevant that these areas are not already identified within the 2GP as ASBV. Strategic Objective 2.2.3, which is referred to within Policy 2.6.2.1.d.iii, is of relevance on this matter, as noted in *Gray v Dunedin City Council*.³⁴ This objective refers to “... all indigenous biodiversity having improved connections and improved resilience”.

[170] *Gray* observed that:³⁵

... the 2GP adopts various methods to identify, protect and enhance all biodiversity values within the district, not being limited to those that meet the significance criteria in Policy 2.2.3.2.

[171] Accordingly, we consider that measures must be included within the Structure Plan rules ensuring retention, protection and enhancement of the existing areas of significant kānuka.

[172] We further accept the Council’s submission that: “The cost of not including this in the structure plan or adopting Mr Anderson’s proposed “restriction” is the potential clearance of the indigenous vegetation, with the loss of its values”.

[173] We note that the structure plan map identifies the area of existing kānuka on Areas E/D. However, the Council must be given the opportunity to consider

³⁴ [2023] NZEnvC 045, at [36].

³⁵ [2023] NZEnvC 045, at [145].

whether the area is sufficiently identified, in light of the evidence from Ms Metcalfe.³⁶

[174] Rule 15.8.23.3.ii states that “No indigenous vegetation clearance may be undertaken on the SPMA [Structure Plan Mapped Area] marked as the Extent of Existing Kanuka”. This provision must be extended to the area of kānuka on Area C, which is also to be depicted on the structure plan in accordance with Figure 1 of the evidence of Ms Metcalfe.

[175] Although Ms Metcalfe had recommended other areas for enhancement and protection, supporting the recommendations of Ahika, our decision is to limit protection to these two areas. However, we emphasise the importance of protecting the existing kānuka stands, including for the further reasons identified by Mr Milne in his evidence and JWS. In his opinion, this protection will provide some mitigation of the adverse landscape and visual effects resulting from development under the LLR1 zone.³⁷

Geotechnical issues

[176] We accept that the RDA Report was predicated on an indicative lot layout and an identified number of lots that was provided to RDA by or on behalf of the appellant after mediation. Accordingly, we conclude that the structure plan should limit density of dwelling numbers on Areas C and E to that assessed in that report.

[177] We further conclude that the recommendations contained within the RDA Report should be provided for in the Structure Plan, namely, that:

- (a) a Geotechnical Investigation Report be completed prior to subdivision to confirm any instability and any offsets that might be

³⁶ Ms Metcalfe, EIC, at [24].

³⁷ He notes that development across the site, and on the GR2 land will reduce existing vegetation cover.

- required;
- (b) vegetation clearance is kept to a minimum;
 - (c) any modification and design of stormwater flows is designed by a suitably qualified person; and
 - (d) any development of this site is subject to design, supervision and certification by suitably qualified engineers who confirm that the site is suitably stable, and any proposed work will not introduce or exacerbate slope instability.

Area B

[178] Little more needs to be said about this. Although we had considered the Council's proposal for tied ownership, we have decided (on this single issue) that ownership is more appropriately left to be determined at the subdivision stage.

Outcome

[179] Our decision is to approve of the rezoning of Area D subject to an RTZ Overlay, pending completion of the Council's planned wastewater upgrades. The existing Chapter 12 RTZ Overlay release provisions should apply to this land without modification.

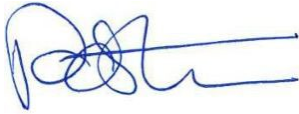
[180] This decision resolves the appeal in part only, although aspects of this decision affect areas within the appeal site that were settled as between the parties at mediation, or where there were unresolved issues requiring resolution from the court.

[181] The parties are now directed to prepare and file for the court's final consideration:

- (a) consent orders for the areas of the appeal site that were settled through mediation, on terms that address the court's decision on the wastewater issue;

- (b) a final structure plan (and associated provisions giving effect to this decision) for the whole of the appeal site.

For the court



P A Steven
Environment Judge



Annexure – Policy 2.6.2.1

Policy 2.6.2.1

Identify areas for new residential zoning based on the following criteria:

- a. rezoning is necessary to ensure provision of at least sufficient housing capacity to meet expected demand over the short and medium term; and
- b. rezoning is unlikely to lead to pressure for unfunded public infrastructure upgrades, unless either an agreement between the infrastructure provider and the developer on the method, timing, and funding of any necessary public infrastructure provision is in place, or a Residential Transition overlay zone is applied and a future agreement is considered feasible; and
- c. the area is suitable for residential development by having all or a majority of the following characteristics:
 - i. a topography that is not too steep;
 - ii. being close to the main urban area or townships that have a shortage of capacity;
 - iii. currently serviced, or likely to be easily serviced, by frequent public transport services;
 - iv. close to centres; and
 - v. close to other existing community facilities such as schools, public green space and recreational facilities, health services, and libraries or other community centres;
- d. considering the zoning, rules, and potential level of development provided for, the zoning is the most appropriate in terms of the objectives of the Plan, in particular:
 - i. the character and visual amenity of Dunedin’s rural environment is maintained or enhanced (Objective 2.4.6);
 - ii. land, facilities and infrastructure that are important for economic productivity and social well-being, which include industrial areas, major facilities, key transportation routes, network utilities and productive rural land:
 1. are protected from less productive competing uses or incompatible uses, including activities that may give rise to reverse sensitivity; and
 2. in the case of facilities and infrastructure, are able to be operated, maintained, upgraded and, where appropriate, developed efficiently and effectively (Objective 2.3.1).

Achieving this includes generally avoiding areas that are highly productive land or may create conflict with rural water resource requirements;

- iii. Dunedin's significant indigenous biodiversity is protected or enhanced, and restored; and other indigenous biodiversity is maintained or enhanced, and restored; with all indigenous biodiversity having improved connections and improved resilience (Objective 2.2.3). Achieving this includes generally avoiding the application of new residential zoning in ASBV and UBMA;
- iv. Dunedin's outstanding and significant natural landscapes and natural features are protected (Objective 2.4.4). Achieving this includes generally avoiding the application of new residential zoning in ONF, ONL and SNL overlay zones;
- v. the natural character of the coastal environment is, preserved or enhanced (Objective 2.4.5). Achieving this includes generally avoiding the application of new residential zoning in ONCC, HNCC and NCC overlay zones;
- vi. subdivision and development activities maintain and enhance access to coastlines, water bodies and other parts of the natural environment, including for the purposes of gathering of food and mahika kai (Objective 10.2.4);
- vii. the elements of the environment that contribute to residents' and visitors' aesthetic appreciation for and enjoyment of the city are protected or enhanced. These include:
 - 1. important green and other open spaces, including green breaks between coastal settlements;
 - 2. trees that make a significant contribution to the visual landscape and history of neighbourhoods;
 - 3. built heritage, including nationally recognised built heritage;
 - 4. important visual landscapes and vistas;
 - 5. the amenity and aesthetic coherence of different environments; and
 - 6. the compact and accessible form of Dunedin (Objective 2.4.1);
- viii. the potential risk from natural hazards, and from the potential effects of climate change on natural hazards, is no more than low, in the short to long term (Objective 11.2.1);

- ix. public infrastructure networks operate efficiently and effectively and have the least possible long term cost burden on the public (Objective 2.7.1);
- x. the multi-modal land transport network, including connections between land air and sea transport networks, operates safely and efficiently (Objective 2.7.2); and
- xi. Dunedin stays a compact and accessible city with resilient townships based on sustainably managed urban expansion. Urban expansion only occurs if required and in the most appropriate form and locations (Objective 2.2.4).

