

BEFORE THE DUNEDIN CITY COUNCIL

**IN THE MATTER
OF**

The Resource Management Act 1991 ('the
RMA')

AND

Proposed variation 2 (Additional Housing Capacity) to the 2GP and Section 357 objections by Submitters Justine Ragg, Meghan Mills, Simon Roberts, Grandview 2011 Ltd, Michael Byck and Nicola O'Brien, Tony McAuliffe, Murray Wilson and Paula Parker-Wilpark Trust, Brendan Murray, Richard Muir, Alec Cassie, Roger and Janine Southby, Wendy Campbell, Gladstone Family Trust, WillowCroft Ltd, Invermark Investments Limited, Custom Investments Limited, Paddy Bleach objecting to Council's determination that their submissions are out of scope.

**DECISION ON SECTION 357 OBJECTIONS TO AN OUT OF SCOPE
DECISION OF THE VARIATION 2 INDEPENDENT HEARINGS PANEL
26 NOVEMBER 2021**

INTRODUCTION

- 1 I have been appointed by the Dunedin City Council (DCC) to hear and decide section 357 objections to an earlier determination on 31 May 2021 of the Independent Hearings Panel (IHP) on "Out of Scope" submissions lodged in relation to Variation 2 (V2) to the 2GP.
- 2 Originally this hearing was due to take place from Wednesday, 18 August to Friday, 20 August 2021, but a change in alert levels responding to the COVID epidemic resulted in the hearing being postponed until Wednesday, 27 October 2021 on which day it occurred in the offices of DCC.
- 3 Prior to the hearing I issued directions in relation to pre-circulation of evidence and supporting materials. Those directions were duly complied with, which in part resulted in the hearing taking only one day instead of the scheduled two.
- 4 The s357 objectors are identified on the title page to this decision. I have applied all of the grounds and arguments for objections to all of the s357 objectors. I have included as Schedule A, following the same format utilised by the IHP, in which I record my decision alongside each objector.
- 5 I do agree with Mr Michael Garbett legal counsel for DCC that the evidence of Ms Peter's, Mr Anderson and Mr Bowen focuses on the merits of the various sites put forward. However because I have a discretion to exercise I have read and considered that evidence carefully so as to identify any matters that might influence the exercise of that discretion. As well I am mindful I can grant an objection in whole or part. So reading and considering that evidence was necessary.
- 6 I have read and considered the 31 May 2021 decision of the IHP determining those submissions that are outside the scope of V2 and were consequently struck out in accordance with section 41D RMA.
- 7 I have also read and considered the objectors s357 objection notices.
- 8 Mr Phil Page appeared as legal counsel for all of the s357 objectors. He presented legal submissions and was supported by consultant planners I have already referred to. They provided evidence for and on behalf of the s357 objectors they acted for. All 3 planners provided opinion

evidence assessing their client's sites and submission against the criteria set out in appendix 5 of the DCC section 32 report.

- 9 Emma Peters provided two briefs of evidence. The first related to objectors Richard Muir, Alec Cassie, Roger and Janine Southby, Invermark Investments Ltd, Willow Craft Ltd and Wendy Campbell.
- 10 The second brief of evidence from Emma Peters was presented on behalf of Ben and Raewyn Waller. This particular brief refers to the original legal opinion from the legal firm Gallaway Cook Allen that all objectors adopted and relied on. As well this brief of evidence traversed legal tests for a submission to be within scope.
- 11 That evidence contends that the Ben and Raewyn Waller submission is on point because it speaks directly to how in Purakaunui the location of the Waller land, DCC can discharge its obligations pursuant to objective 2.6.2. Also the evidence addresses how any prejudice arising from accepting the Waller submission can be overcome.
- 12 Some of the objectors were present at the hearing and provided some comments.
- 13 Mr Garbett presented legal submissions and a reply to Mr Page's opening legal submissions. Ms Emily Kate McEwan, a policy planner at DCC appeared and presented a statement of evidence. Her evidence ran to some 12 pages. She included a significant number of annexures including all of her Out of Scope Submission Reports she prepared and provided to the IHP which made the 31 May 2021 determination.
- 14 The annexures included as part of Ms McEwan's evidence provided me with background information relevant to V2, extracts from the V2 itself, a range of tables assessing submissions as to scope, a range of maps and plans identifying sites that were identified as V2 proposed changes, V2 rejected changes, those sites assessed as out of scope and others assessed as in scope. Usefully she also provided maps relevant to the objector's sites.
- 15 I considered provision of these maps to me met the needs of a site visit. As well I considered my task was essentially to ask and answer a legal question rather than address merits of particular sites. So I did not undertake a site visit of the objector's sites.

- 16 Mr Page at the end of the hearing presented verbal submissions in reply.
- 17 Jenny Lapham from DCC, a governance support officer organised the hearing and the pre-circulation of evidence and materials. She attended the hearing and took notes of which I have made use of in my deliberations.
- 18 I record I have read and carefully considered the above described evidence and information. I have also accessed the DCC website and read and considered publicly available information relevant to V2.
- 19 I formally closed the hearing on Friday 11 November 2021.

SECTION 357

- 20 S357 provides a right of objection to a person who has submission to a local authority is struck out under section 41D. The procedure for making and hearing objections under s357 is provided for by the RMA. Of relevance the notice of objection must set out the reasons for the objection. The RMA enables me to seek further information from the objector or the consent authority or commission report.
- 21 In terms of s357D I may;
- (a) dismiss the objection; or
 - (b) uphold the objection in whole or in part;
 - (c) if the objection relates to an additional charge remit that charge in whole or part.
- 22 Within 15 working days after making a decision on the objection I am required to give the objector and every person who I consider appropriate notice in writing of my decision on the objection and the reasons for it. The RMA provides a right of appeal to the Environment Court against this decision on the objection.

REASONS FOR THE OBJECTIONS

- 23 Mr Page helpfully set out the reasons for the objections commencing at paragraph 3 of his legal submissions. I have taken it that the reasons apply to all of the s357 objectors. In summary form the reasons, taken from both his submissions and the notices of objection are;

- (a) DCC have undertaken an inadequate s32 assessment. Mr Page set out a range of factors which he submitted were relevant to the consideration of the s32 assessment being;
 - (i) DCC has inaccurately described the purpose of V2;
 - (ii) the s32 assessment does not accurately report on the consultation undertaken prior to the notification of V2;
 - (iii) the spatial limitations within the notified version of V2 are not reflective of the consultation procedures undertaken prior to notification;
 - (iv) V2, as notified, is an incomplete mechanism to achieve compliance with NPS-UD 2020. This being the true purpose of V2;
 - (v) DCC have notified amendments to the residential strategic provisions of the plan. When assessing the appropriateness of amendment to strategic provisions, DCC should not predetermine the outcome (particularly specially) of any subsequent zoning or rules;
 - (vi) it is an appropriate to treat the proposed amendments of individual provisions as being confined to the specific *"purpose summary"*;
 - (vii) any prejudice to 3rd parties can be alleviated through the further submission process;
 - (viii) a supplementary process is mandatory because a submitter is entitled to seek alternative relief rather than that proposed by DCC; this includes reasonable alternative sites identified within the objectors submissions that should have been assessed through the s32 assessment.

24 While adopting Mr Page's objection points, objectors Ben and Raewyn Waller object on the basis that they consider the purpose of V2 was to give effect to the NPS-UD and to address Dunedin's housing capacity shortfall.

25 Consequently they consider their submission is within the ambit of V2 as the area sought for rezoning at 457 Purakanui Road is capable of providing additional housing capacity and housing choices in

accordance with the purpose of V2, Ben and Raewyn Waller also adopt the arguments in the joint submissions advanced by Mr Page.

26 Again while adopting Mr Page's objection points, the objectors represented by Mr Kurt Bowen raised the following issues within the notice notices of objection, namely;

- (a) that the site identification in s32 evaluation was flawed as it relied on informal discussions with selected persons of identified sites for rezoning, that others were not aware of the opportunity to make suggestions, and that the s32 evaluation should have looked more broadly than the suggested sites; that the zoning requests that were struck out, were of merit and/or higher relative merit than sites included in V2 and should be considered;
- (i) in relation to the submission by Grandview 2011 Limited seeking rezoning of 231 Signal Hill Road, while adopting Mr Pages objection points they also raised the proximity of this property to another property included in V2, at 233 signal Hill Road (and land subject to 2 GP rezoning appeals);
- (ii) in relation to the same submission, the high number of submissions received supporting rezoning of 231 Signal Hill Road; and
- (iii) in relation to the other four submissions the proximity of the suggested rezoning properties at John Street and Brighton Road to rezoning sites included in V2 at 16 Hare Road and 7 Kayforce Road (GF03) and 155 Scroggs Hill Road (GF01).

APPROACH

27 My first step is to ensure that I understand what V2 is about, essentially to understand what the stated purpose and intent of V2 is.

28 To do that I need to read and consider V2 including the s32 analysis that accompanied it as well relevant background materials, consultation undertaken prior to notification of V2, and the submissions made on V2 to assist me in answering the question, is the

submission 'on'V2? This is first essentially a fact gathering and finding exercise.

- 29 Second I need to understand the legal principles relating to determining the question as to whether or not a submission is 'on'V2. Thereafter I need to address the facts as I have found them, of this particular case in accordance with those legal principles.
- 30 My intention as I proceed is to make reference to the legal submissions and evidence received from both the objectors and DCC where relevant.
- 31 The final step in my approach will be to reach a decision drawing on the supporting reasons identified within this decision.

VARIATION 2

Background

- 32 Ms McEwan details the background to V2 within her Out-Of-Scope Submissions Reports¹ prepared for the IHP hearing on scope.
- 33 Essentially V2 was commenced following the results of a housing development capacity monitoring exercise completed in February 2019 found a shortfall in development capacity for Dunedin over the next 10 year or medium term. The National Policy Statement on Urban Development (NPS-UD) required DCC to address that shortfall.
- 34 The NPS-UD also required DCC, in conjunction with the Otago Regional Council, to develop a Future Development Strategy (FDS) to provide for and respond to growth in Dunedin for the longer term.
- 35 Within her 7 May Out Of Scope Submissions Report Ms McEwan included at Appendix B the Planning and Environment Committee's 12 February 2019 report. That report provided information on the background to V2 recording the need within V2 to address minor issues and errors to the 2 GP that were not capable of being adequately provided for under clause 16 of Schedule 1 of the RMA.
- 36 As well as that the Committee recognised that new population projections released in September 2017 resulted in Dunedin triggering additional requirements as a medium growth urban area including

¹ Dated 16 April, 4 May, 7 May, 13 May all 2021

assessing the demand capacity for new housing. The need to address this circumstance, speedily was recognised.

37 However as well the NPS-UD directive to respond to long-term demand for housing was also recognised by the Committee, including the development of a Future Development Strategy (FDS),

38 The Committee report at paragraph 16 noted that once initial options had been developed to identify development options, consultation with landowners would then be undertaken to ascertain the likelihood that areas and sites would actually be developed, if enabled and developed speedily.

39 The likelihood and timing of development was critical to ensuring that the short-term need for housing development was met. The Committee report continued at paragraph 17 noting that the plan change (V2) would further develop, involving formal submissions on the preferred areas. Ms McEwan drew attention to the words '*preferred areas*' as intimating a focused and restricted approach to meet housing development needs.

40 As well DCC had undertaken broader research into the provision of housing in Dunedin. That research was not spatially limited. The research included *The Housing we'd Choose Survey* and *The Planning for Housing Survey* both which were undertaken in 2019.

41 The results of these surveys were included in the V2 s32 supporting documents. Ms McEwan confirmed that results from this research were used for V2 but were also intended to inform wider projects regarding housing capacity such as the FDS.

42 In her 7 May 2021 Out of Scope Submissions Report she expressly noted that *The Planning for Housing Survey* report states its results will contribute to the approach DCC takes in responding to housing related issues including through V2 to the 2GP and future changes and policy developments.

43 Similarly *The Housing we'd Choose* report states that the work undertaken is expected to support responses to appeals on the 2GP and also to support a broader analysis of future housing demand that is being undertaken to meet the DCC monitoring capacity assessment obligations under the NPS-UD.

- 44 Mr Page submitted that the background documents included within the s32 report must form part of the scope of V2. He contended that was not open to DCC two pick and choose the aspect of the documents on which they wish to rely.
- 45 Essentially he submitted that the documents that inform V2 are broader than the specific sites identified within V2. He acknowledged that while these documents may also be used in processes such as the FDS these documents also apply to ensuring that DCC meets its short and medium capacity requirements through V2.
- 46 Essentially his point was reference to the background reports remain important when assessing whether DCC should have considered assessment of sites that were not originally notified. Further he contended that where the background reports identify areas that are appropriate or consistent with public feedback but are subsequently not included within V2 then a substantive decision has been made to exclude those areas.
- 47 Mr Garbett opposed that argument. Mr Garbett's point was when preparing a variation a variety of background materials, higher order documents as well as officer recommendations are all in play.
- 48 Mr Garbett submitted that all these background matters are put through the sieve of s32. He submitted as investigations develop, various issues, topics and also sites drop away and are not carried forward into the variation.
- 49 It was his submission that it is the notified variation with supporting s32 assessment that frames the scope of V2. Background reports, discussions or other higher order documents do not establish scope of this variation.
- 50 As well the background circumstance was that DCC was dealing with a number of appeals on the 2 GP been dealt with before the Environment Court.
- 51 I was told and read that DCC did not want those appeals to be delayed nor hold back implementation of the 2GP. Delaying the 2GP would cause planning uncertainty, would increase administrative costs to DCC and cause complications and confusion for applicants seeking resource consents under two plans rather than one.

- 52 This was another background circumstance that influenced the scope of V2 having the result that V2 would be focused, limited and restricted in its breadth and coverage.

Findings

- 53 I take from the Committees report and evidence of Ms McEwan that the background influences on V2 were the need to address with certainty and speed one of the NPS-UD directives, to meet short and medium term housing needs.
- 54 As well DCC needed to have means to correct some minor issues with existing residential plan provisions within 2GP that could not be corrected via Clause16 of Schedule 1. Also to ensure the outcomes of the 2GP process were respected, to avoid confusion and complication for applicants while the interim planning environment was undergoing change.
- 55 In the context of plan reviews and variations background reports of the nature detailed in the evidence, is I think entirely expected.
- 56 Again I find it not unusual those background reports may be broad in their approach and broad in their consideration of a range of issues to meet the objectives of that particular report.
- 57 I accept these reports will have a degree of influence on the content of a variation. However I do not consider that background reports will override and displace clear wording in the variation, particularly as to its coverage.
- 58 So while an influence, I do not accept background reports can be called in to aid in the manner suggested by Mr Page. I prefer the position advanced by Mr Garbett for the reasons he put forward.

Consultation Prior to Notification of Variation 2

- 59 In her 7 May 2021 out of scope report Ms McEwan details the consultation with stakeholders that was undertaken by DCC. The purpose of that consultation, commencing on 5 April 2019, was to enable people from across the development sector to provide to DCC suggestions for areas that might be appropriate to rezone as residential for "*up zoning*" for more intensive residential use. No deadline for when feedback was to be received was given. This information was utilised as background information for V2.

- 60 Within that same report Ms McEwan records this process was an ongoing process with site suggestions continuing to be added to the work programme for V2.
- 61 However inclusion of this feedback for consideration within the preparatory work for V2 ceased when a DCC consultant undertaking work on 3 waters infrastructure reached a point where that infrastructure work was too far advanced to include new sites for consideration under V2.
- 62 From approximately June 2020 onwards persons who had been so communicating with DCC were advised it was too late for the results of that communication to now be included within V2. But the information exchange would be kept on file for future purposes.
- 63 Interestingly those who were communicated with included most of the planning consultants who are party to these objections.
- 64 In addition in 2019 public consultation was undertaken via *The Planning for Housing Survey* which provided the general public with the opportunity to suggest areas that might be suitable for additional housing. Where submitters to that process made specific submissions for rezoning of their properties these were included within the V2 process.
- 65 Mr Page is critical of the DCC's site assessment process undertaken before public notification of V2. He submits that the s32 report does not accurately report on the consultation undertaken prior to the notification of V2.
- 66 Essentially he is critical that DCC did not include a deadline by which feedback was required from interested parties about sites that should be considered for inclusion in V2.
- 67 Mr Page criticises the IHP decision for seemingly faulting the interested parties for not finding out if the DCC would have a deadline. Mr Page's point was that a lack of a deadline can also indicate an open ended, rolling process which he submits is a more accurate description of what actually occurred.
- 68 Mr Pages alleges, based on planning consultants advice, DCC was on the one hand rejecting sites due to the passing of an internal deadline while accepting others that have been filed later. Essentially he

contended if DCC was accepting sites to be included within V2 then all sites requested prior to that date should also be included.

69 Mr Page contends that the spatial limitations within the notified version of V2 are not reflective of the consultation procedures undertaken prior to notification. So that effects scope of V2.

70 The site selection process is outlined at section 20.3 of the s32 reports and outlines the broad screening process undertaken using GIS to identify land that could potentially meet the criteria in 2GP policy 2.6.2.1 (for new residential zoning). The s32 report states²:

that this assessment was limited to identifying sites that were most likely to meet these criteria and so best place to provide capacity for the medium term.

71 The s32 report also outlined that in addition to the screening exercise a wide range of sites were identified through consultation with stakeholders, including local planners, surveyors and developers.

72 I have commented on the pre notification consultation above. A key benefit of this approach for DCC was gaining the knowledge that the sites were likely to get developed if rezoned. I understood likelihood and timing of development was important in terms of meeting the short term requirements of the NPS-UD.

73 Ms McEwan was of the view that the spatial limitations of the earlier and wider research that DCC undertook regarding housing are not relevant to determining the scope of V2 including because the research was undertaken to inform a wider range of projects.³

74 In her evidence she set out in some detail the different types of letters that were sent out to landowners of land that DCC had identified as potentially suitable for residential rezoning, those sites where DCC was likely to support the rezoning through V2 and finally those DCC would not include for rezoning in V2. She noted that all letters indicated if the sites were not finally included as a V2 proposal submission for reconsideration would be available. She noted this links to appendix 4 of the s32 report which lists the sites that were assessed as part of V2

² Paragraph 672 – S 32 report

³ Section 2.5 of the revised recommendations.

but not included for rezoning. Submissions seeking reconsideration of the sites are and were within scope.

- 75 Based in part upon these letters she considered the site selection process was robust and that communication and consultation throughout was adequate. As well she considered and that adequate notification was provided to interested parties because such matters were referenced within the s32 report. I take point of this evidence to be DCC was making it clear despite the earlier consultation, even absent an end date that by including the site selection process in V2 persons would know how sites were selected and that selection was completed.
- 76 Moving beyond the words used within the s32 analysis Ms McEwan records in her 16 April 2021⁴ report that it had been made clear to all potential submitters that requests for rezoning of various sites beyond those considered in V2 was outside the scope of consideration.
- 77 She further records that all interactions with the public on V2 reiterated this position. She further records that people that were directly adjacent to areas being rezoned were advised that minor changes to proposed new zone boundaries may be considered within scope and people could choose to submit on that particular aspect.
- 78 Mr Garbett in his principle submissions⁵ notes the objectors contended the IHP should have more closely interrogated the accuracy and adequacy of consultation undertaken by DCC prior to Notification of V2.
- 79 Mr Garbett notes that there were a wide range of sites identified through consultation with stakeholders, including local planners surveyors and developers, and as well consultation undertaken 2019 through the planning for Housing Survey.
- 80 Mr Garbett advised that survey provided the general public with the opportunity to suggest areas that might be suitable for additional housing. He advised these processes were run by DCC to inform both V2 and the initial background stages of work to develop the FDS. It

⁴ Paragraph 18 Page 6

⁵ At paragraph 43

was his submission this consultation process was both comprehensive and adequate.

- 81 Mr Garbett's further response is included in his submissions in reply⁶ where he records that Mr Page in many places in his submissions states the Council "*should have*" assessed more sites particularly those of his various clients.
- 82 Mr Garbett notes that this is, in his submission, revealing of the true complaint here which is for a variation much be wider than what V2 actually is.
- 83 Mr Garbett's further response is to note DCC has chosen to notify a targeted variation and made it clear in its documents that V2 is not a review of the zoning throughout the city. He submits that while the objectors might find that frustrating because their properties have not been included within V2 that does not change the essence of V2 being targeted to the sites assessed.
- 84 On the "*should have*" issue Ms McEwan in her evidence noted that the question of whether DCC should have assessed additional sites is a factual question requiring consideration of whether the sites are appropriate for rezoning or not. She contended it was a circular argument to say additional sites should have been included as the only way to determine the site is appropriate as to assess it. Therefore she said DCC should have assessed all possible rezoning sites not just those that are the subject of the objections.
- 85 Ms McEwan further contended that the merits of a suggested rezoning site did not form part of the test to determine whether a submission was within scope of V2 or not. She therefore declined to address the merits of the site subject to objections as part of her evidence.
- 86 On a slightly different but related point she noted that it is not a requirement of s32 to identify every theoretical alternative so as to undertake a detailed assessment of every site in the city would be onerous and unworkable.

Findings on Prior Consultation

⁶ At paragraph 22

- 87 In my assessment I cannot find anything out of the ordinary in respect of the consultation undertaken prior to notification of V2. To me the nature and extent and detail as covered in the prior consultation are what I would expect to occur given the then context of the Dunedin planning environment.
- 88 I do not consider anything turns on the complaint that DCC did not set a cut-off date. Consultants involved in consultation process know these processes have an end date before new phases commence. So I agree with the IHP if concerned an end date should have been requested.
- 89 As I read the s32 report it adequately reflects the prior consultation that took place. As well I find just because the prior consultation was broad it does not follow that the variation promoted will match the breadth of that prior consultation.
- 90 Any manner of other influences could determine the extent of the variation ultimately notified. In this case those influences were the planning context including the 2GP, resolution of 2GP appeals, the NPS-UD, the need to ensure sites rezoned would be developed for housing (Quick Wins) and allowing for the FDS.
- 91 I have not found anything similar to the finding made by the Environment Court in the *Calcutta Farms Limited* case⁷. In that case as a result of prior consultation, including by letter *Calcutta Farms Limited*, was advised by the Council prior to notification of the plan change that at one point the Council preferred area included *Calcutta's* land. That changed sometime later. In contrast it seems to me based on Ms Mc Ewan's unchallenged evidence DCC information exchange by letter was informing and accurate.
- 92 In my view there is not anything out of the ordinary with the consultation undertaken prior to Notification of V2. More importantly I conclude there is nothing in that prior consultation that would on a reasoned basis create an expectation that the rezoning of a specific area or site would be certain. I could find no evidence of any form of commitment given by DCC to any party involved in the prior consultation.

⁷ Decision No. [32018] NZEnvC 187 paragraphs [8] to [15].

- 93 In my view prior consultation is one thing. While important to gain information I have formed the view that absent any direct communication, including commitments, then the content of the variation document including the s32 report are the most important elements in determining the intent and purpose of V2.
- 94 I agree and accept the evidence of Ms McEwan and submissions of Mr Garbett on the '*Should have*' point raised by Mr Page including that a merits assessment of a particular site is not part of the test for determining scope for the reasons they both advance.

Variation 2 - Ascertaining its Intent/ Purpose

Structure

- 95 Essentially Ms McEwan noted that within the s32 report, the scope of V2 is managed by inclusion of a purpose of the proposal and scope of change statement for each proposed change. Submissions were enabled on matters encompassed by these scope statements. She noted that in some cases the scope statements specifically excluded some matters so as to emphasise the limited focus of V2. This is what I term the structure of V2.
- 96 Mr Page submitted that this collection of individual proposals approach misunderstands "*proposal*" as defined in s32 (6) RMA. He further submitted that categorising V2 as a collection of refined *proposals* is an incorrect application of the RMA. He submitted if each amendment is its own independent *proposal* then the exercise within s32 (3) is not possible to achieve. He further submitted if the scope of exchange is restricted to DCC's '*purpose of proposal*' then there is no method available to consider whether the provisions are the most appropriate way to give effect to the objectives of the plan or to achieve s32 (3)
- 97 Further Mr Page submitted statements of scope or purpose associated with provisions and groupings like rezoning, must vertically integrate with V2 higher order changes and cannot limit the scope of that change in the way recommended by Ms McEwan and accepted by the IHP.
- 98 In her evidence Ms McEwan addressed this issue of the appropriateness of confining proposed changes to their specific

purpose statements. She directed me to her first report on scope at section 4.1.1 which explained how the proposals contained in V2 were assessed in accordance with s32 of the RMA.

- 99 In detail she said this process ensured that each proposal was assessed in terms of its efficiency and effectiveness in achieving the relevant objectives of the plan including assessment of alternative options.
- 100 She further noted the plan objectives had recently been the subject of a comprehensive review through the 2GP process and found to be the most appropriate way to achieve the purpose of the RMA.
- 101 More directly she noted a summary of the collective impact of the changes proposed in V2 would have on available housing capacity was undertaken. That is to be found in chapter 21 of the s32 report.
- 102 Ms McEwan agreed with Mr Page that the variation should recognise the interconnected nature of planning provisions. She was of the view that the V2 process had achieved this while balancing other imperatives such as timeliness, not entangling outstanding 2GP appeals and not undermining the upcoming FDS project.

Words Used

- 103 Given the content of the objections it is not surprising that Ms McEwan in her Out Of Scope Submissions Reports detailed how the scope of V2 was made clear.
- 104 Ms McEwan is clear that V2 is limited both in terms of plan provisions or changes to them and subsequent drafting and also in terms of the sites considered for rezoning. In particular she referred to the s32 report which states at paragraph 657 onwards:

In the context of needing to identify additional residential capacity, the purpose of the proposal is to assess the appropriateness of rezoning a number of identified sites.

The sites that were assessed as part of this proposal include the sites that are proposed for rezoning outlined in section 2.04, and those that were assessed but are not being proposed for rezoning and V2, which are listed in appendix 4...

V2 does not include a full review of zoning in the city, but instead a limited review of the zoning of some sites. The scope of the proposal is

to rezone land includes the need for specific plan provisions (for example Overlays or site specific rules) to manage adverse effects of development of the sites being rezoned.

Review of the zoning of sites outside those considered (and identified in section 20.4/appendix 4) is not within the scope of this proposal.

- 105 As well she referenced appendix A, that detailed the site assessment methodology utilised so as to identify land that could potentially meet the criteria in the 2GP policy 2.6.2.1 (for new residential zoning) and policy 2.6.2.3 (for new medium density zoning).
- 106 The relevant paragraph of the s32 analysis, being 672, notes that this was not a full assessment of sites or a comprehensive review of existing zoning across the whole of the city, but was instead, limited to identifying sites that were most likely to meet those criteria and so provide capacity for the medium term.
- 107 Ms McEwan noted heading "*Sites Proposed for Rezoning – Individual Site Assessments*" commencing at paragraph 696 summarised the assessment of the sites and the area proposed for rezoning to be read in conjunction with the relevant site assessment sheet in appendix 6 and site maps in appendix 10.
- 108 These matters were referenced by Ms McEwan in detail to support her view that V2 was a focused and limited to specific sites and areas as identified within the Variation.
- 109 Mr Garbett while focusing on the mapping changes, which are critical to the objectors, referred to the introduction to V2 at page 22 and submits the purpose of the V2 proposal is there found. He quotes directly from page 22 coincidentally at paragraph 22 of his legal submissions.
- 110 Mr Garbett refers to page 22 again in his reply submissions. He submits the true position in relation to zoning is that V2 identifies that it is not a full review of zoning in the city, but a limited review of the zoning of some identified sites. The V2 proposes to change the zoning of 17 identified sites.
- 111 He stresses the V2 states this expressly. He stresses again the V2 also states that the review of zoning of sites outside those considered is not

within the scope of this proposal. Further he contends the words of V2 need to be given paramount weight when evaluating what is, and is not, within scope of the variation.

112 Mr Page submitted when endeavouring to ascertain the purpose of V2 to determine whether submissions are within scope requires the entire context of V2, not just the limited purpose statements, to be considered.

113 In addition he contends submitters as well as any decision-maker is entitled to assessed the scope of V2 themselves and not just rely on the purpose statements provided by DCC.

114 Mr Page identified the purpose of V2 which he extracted from the s32 report summary of changes, Table 1, H1 as:

amend the objective 2.6.2 to clarify that capacity must be provided to "at least" meet the demand over the medium term and amend 2.6.2.1a to simplify the explanation of the criteria related to demand incapacity to just refer to needing to meet the demand over the short and medium term and

the purpose of this proposal is to review the description of the residential rezoning criteria related to housing development capacity and demand that are in policy 2.6.2.1a and align them with the NPS-UD. The scope does not include a review of other aspects of policy 2.6.2.1 as these criteria for zoning have recently been through a review process as part of the two GP and have been settled. It also does not include reviews of object of 2.6.2 (other than to clarify the matter identified).

115 Mr Page submitted the IHP placed too much weight on the description of V2 rather than making its own determination on what was the purpose of V2. He contended that the purpose of the amendment (V2) is to achieve compliance with the NPS-UD 2020 in particular to meet short and medium term capacity requirements.

Significance of amendments to residential strategic provisions of the plan.

116 Mr Page further submitted that if the DCC's purpose summary is taken at face value then the amendments to policy 2.6.2.1 are not substantive. He submitted that cannot be accurate as the need for

residential capacity is the only change to the residential zoning criteria.

- 117 Further he contended given the introduction of the words '*at least*' that is what V2 must achieve. In other words there should be sufficient housing capacity to meet the short and medium term demand. He contended that submitters should be entitled to ensure compliance with the standard is achieved and they should be able to submit and challenge the methodology to achieve that outcome through zoning and rules.
- 118 Ms McEwan was of a contrary view. She said V2 does not have an overall purpose to give effect to the NPS-UD. Furthermore the change contained in V2 has its own specific purpose.
- 119 As well as I have earlier noted she contended V2 is not intended to be a complete mechanism to achieve compliance with the NPS-UD. She noted that the NPS-UD includes a requirement for the preparation of a FDS in conjunction with the Otago Regional Council. She expressed the view that broadening the scope of V2 to include a wider selection of rezoning sites or other changes would inappropriately pre-empt the development of that FDS.
- 120 It was her view that the changes made by V2 to objective 2.6.2 constitute a clarification and are not substantive. She acknowledge that while changes made to policy 2.6.2.1 (a) are more substantive in nature they relate, she said, to the wider context of when additional housing capacity should be added via rezoning, rather than the merits of any given rezoning site over another.
- 121 Ms McEwan also made the point in relation to changes made to objective 2.6.2 and policy 2.6.2.1 no submissions had been received in opposition to these changes or seeking amendments, therefore those changes can now be deemed operative and as such those provisions were no longer subject to change.
- 122 Ms McEwan in her evidence at paragraph 15 (f) stated that changes proposed to strategic directions as part of V2 are not relevant to determine the scope of rezoning sites that should have been assessed.
- 123 Mr Garbett submitted the IHP decision on whether or not the NPS-UD widened the purpose of V2 was correct. In particular he pointed out that the IHP was ultimately satisfied that the variation comprises a

series of limited review topics and proposals, not all of which were considered to directly implement the NPS-UD. Therefore he said the panel was not convinced that the purpose of V2 was to give effect to the NPS-UD.

- 124 Mr Garbett submitted that the purpose of V2 is clearly limited in scope to amend the 2GP in targeted ways. V2 did not have the overall purpose of implementing the NPS-UDC. He submitted V2 amends and builds on the provisions in the 2GP to provide for capacity for urban development. The variation is not a stand-alone planning package.
- 125 The objectors contended given DCC notified amendments to the residential strategic provisions of the plan that when assessing the appropriateness of amendments to those provisions DCC should not predetermine the outcome (particularly spatially) of any subsequent zonings or rules.
- 126 In response Mr Garbett in his reply notes that the objectors argument that by amending the text of objective 2.6.2 policy 2.6.21 that opens up all sites for zoning submissions ignores the actual wording of the V2. He submits that it is clear from V2 that the zoning of all sites is not as he puts it up for grabs.
- 127 In his submission the 17 sites that were identified for zoning changes by V2 are not a direct result of any amendments or alterations to this objective or policy. These changes he said are not driving specific zoning decisions at site level at all. He submitted that these changes to the objectives and policies do not invite as a consequence submissions on any site within the city for rezoning.

Overall Purpose

- 128 Mr Page submits that V2 has an overall purpose. He submits that overall purpose can be found within the additional housing capacity s32 report at paragraph 3. There he references the following words:
- V2 is being proposed primarily to give effect to the requirements of the national policy statement on urban development 2020 (NPS-UD)*
- 129 I have already recorded and commented on Ms McEwan's response to the proposition that V2 has as its purpose to give effect to the NPS-UD. She acknowledges one outcome of V2 is to give partial effect to a

particular part of the NPS-UD. But V2 in her opinion is not solely or principally intended to give effect to the requirements of the NPS-UD.

130 Mr Garbett in his reply at paragraph 7 submits that inferring as Mr Page does that V2 has an overall purpose is contrary to the wording of the variation itself and therefore is not correct.

131 In addition he submits that the sum of the parts of this variation do not constitute some greater purpose than the various components. He submits, to explain that another way, the sites assessed and put forward in the variation are the extent of the zoning changes in scope. Adding an overall purpose to these in scope sites does not add additional sites in his submission.

Findings - Purpose, Principles, Intent of Variation 2

132 In my view ascertaining the purpose or intent of V2 is best achieved by concentrating on the words used within V2 and the accompanying s32 report rather than seeking to derive purpose and intent from related background reports and surveys.

133 I consider the structure of V2 conveys to the reader that V2 is a focused and limited variation. To me it is clear that from reading V2 submissions were enabled on matters encompassed by these scope statements.

134 I do not accept Mr Page's submissions that the structure of V2 prevents a proper or appropriate s32 evaluation to take place. For the reasons Ms McEwan advances on this issue I prefer and accept her evidence that the structure of the variation actually enables a s32 evaluation to take place.

135 Turning to the words used within V2 particularly having regard to the evidence of Ms McEwan and the submissions of Mr Garbett I accept the evidence and submissions that V2 is limited, confined and focused on the subject matter both identified.

136 I consider the wording they have referred me to makes it plain that a person reading V2 could not reasonably conclude, particularly in the context of the 2GP, that V2 provide an opportunity to submitters to seek residential zoning beyond the 17 identified sites and beyond those that were assessed under s32 but rejected.

- 137 Like the IHP I find when reference is made to the s32 report that a number of paragraphs, but for example at paragraph 657 onwards, it is clear to me that V2 while promoted in the context of needing to identify additional residential capacity has a clear purpose which is to assess the appropriateness of rezoning a number of identified sites.
- 138 As well given the words used in V2 I think it is clear that V2 does not include a full rezoning in the city but instead a limited review of the zoning of some sites.
- 139 In my view Mr Page's submissions ignore the point that some parts and some words in V2 are more informing as to the purpose and intent than others. I think it notable that in his submissions he does not address and provide an explanation as to the much more on point and directive wording that Ms McEwan and Mr Garbett rely on.
- 140 For the purpose of completeness I record I do not accept Mr Page's submissions as they relate to the significance in terms of scope of amendments to residential strategic provisions of the plan. For the reasons she provided I prefer the evidence of Ms McEwan on this point.
- 141 In relation to the overall purpose submissions of Mr Page I consider those submissions are based upon a selective and forced reading of the words used in V2 and the accompanying s32 report. If I were to accept Mr Page's submissions as to overall purpose then I consider I would have to ignore very explicit wording included in V2 that clearly states a differing intent and purpose for V2.

LEGAL PRINCIPLES

- 142 The question of whether or not a submission is on a plan change or variation seems a simple question. But it is not. This is because procedural and substantive safeguards need be available to provide for interests of persons who may be affected by submissions that alter or enlarge a plan change or variation process. As well there are efficiency considerations.
- 143 Both Mr Page and Mr Garbett considered the Environment Court decision in *Calcutta Farms Limited*⁸ was the most helpful. I agree.

⁸ *Calcutta farms limited v Matamata-Piako District Council* [2018] NZEnvC 187

Though I do observe that the facts in *Calcutta* are different from the relevant facts in this case.

144 Nevertheless that decision includes a careful consideration of a range High Court decisions and subsequent Environment Court decisions which all consider the relevant legal principles as to scope.

145 The starting point for those decisions is the *Clearwater Resort*⁹ decision of then William Young J held that:

(a) a submission can only be regarded as being 'on' a plan change or variation of it if it addresses the extent to which the plan change or variation changes the pre-existing status quo; and

(b) if the effects of regarding a submission as being 'on' a plan change or variation would be to permit a planning instrument to be amended without real opportunity for participation by those potentially affected, that is a powerful consideration against finding the submission to be 'on' the change.¹⁰

146 The Court in *Clearwater* also observed:¹¹

.... It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority. It may be that the process of submissions and cross submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however with the proposition advanced by the submitter can be regarded as coming out of "left-field", there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which proposes something completely novel) is "on" the variation.

147 The next decision considered in *Calcutta* is that of the High Court in *Option Five Incorporated v Marlborough District DCC*¹². In that case

⁹ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch, William Young J, 14/3/2003

¹⁰ At[66]

¹¹ At [69]

¹² *HC Blenheim, RonaldJ*,28/9/2009

the district council promulgated a variation to the proposed plan to rezone parts of the central business district is central business zone.

- 148 As with the present case the variation proposed better defining the use of existing land within the Central Business Zone rather than expanding it and only proposed to rezone some vacant land owned by the DCC. So a limited variation.
- 149 However a submission was made seeking that other land be included within the Central Business Zone. Approximately 50 private residential owners would have had their zoning of their properties changed to Central Business Zone if the submission was considered and if it succeeded.
- 150 In reaching its decision that the submission was not 'on' the plan change the Court considered and accepted that the policy behind the variation was not about expansion of the Central Business Zone as had been proposed by the submitter. As well the Court was influenced by the point that the requested relief would have deprived approximately 50 residential property owners of the opportunity to submit on the zoning of their landholdings. The Court held that these property owners could not have anticipated that the plan change would be used for such a different form of rezoning.
- 151 The next case is that of *Palmerston North City DCC v Motor Machinists Limited*¹³. The Palmerston North District Council proposed a plan change which extensively reviewed the Inner Business Zone and Outer Business Zone provisions of its district plan. The plan change proposed substantial changes to the two business zones. It also proposed to rezone 7.63 ha of residentially zoned land to Outer Business Zone.
- 152 *Motor Machinists* filed a submission contending the two lots it owned in the residential zone should be included in the Outer Business Zone. The Council agreed to rezone the back half of those properties as requested because a factory building was situated on them. However the Council position was there was no jurisdiction to rezone the remainder under the plan change.
- 153 On appeal from the Environment Court the High Court noting that, where a landowner is dissatisfied with the regime covering their land,

¹³ HC Palmerston North, Kos J 31 May 2013

they have three principal choices. The first is to seek a resource consent, the second to persuade the DCC to promulgate a plan change and finally to seek a private plan change themselves.

154 The High Court noted that all these three options provide procedural safeguards for directly affected people in the form of notification and a substantive assessment. The High Court noted that the Schedule 1 RMA submission process applicable to plan changes lacks those procedural and substantive safeguards.

155 The High Court considered that a very careful approach needs to be taken to the extent to which a submission may be said to satisfy both limbs of the *Clearwater* test. Kos J observed that¹⁴

Permitting the public to enlarge significantly the subject matter and resources to be addressed through the schedule one plan change process beyond the original ambit of the notified proposal is not an efficient way of delivering plan changes.

156 In relation to whether a submission addresses the proposed plan change itself, Kos J noted that "*the first limb in Clearwater serves as a filter, based on a direct connection between the submission and the degree of notified change proposed to the extent plan*". He described this as the "*dominant consideration...*" involving "*the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration*"¹⁵ He went on to say¹⁶

In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing this is to ask whether the submission raises matters that should have been addressed in the s32 evaluation and report. If so the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not, then the submissions seeking a new management regime for that resource is unlikely to be 'on' the plan change... Incidental or consequent

¹⁴ At paragraph [79]

¹⁵ At paragraph[80]

¹⁶ At paragraph [81]

extensions of zoning changes proposed in the plan change are permissible, provided that no substantial further s32 analysis is required to inform affected persons of the comparative merits of that change.

- 157 Ultimately the High Court held, that the *Motor Machinists* proposed spot zoning was not within the ambit of the existing plan change as it involved more than an incidental or consequential extension of the rezoning proposed by the plan change. Kos J further held that the inclusion of a rezoning of two isolated lots in a side street could be said to 'come from left-field'¹⁷.
- 158 In *Blue Haven Management Ltd and Rotorua District DCC v Western Bay of Plenty District DCC*¹⁸ the Environment Court after expressly noting Kos J's observations about the role of the s32 evaluation report in determining whether a submission falls within the ambit of a plan change concluded that a submission point or approach that is not expressly addressed in the Council's s32 analysis ought not to be considered out of scope of the plan change if it was an option that should have been considered in the s32 analysis. Otherwise the Court reasoned a Council would be able to ignore potential options for addressing the matter that is the subject of the plan change, and prevent submitters from validly raising these options in their submissions.
- 159 In *Blue Haven* after reviewing the s32 evaluation report the Court, though a tentative conclusion, found that there had been a potential failure to address some of the alternatives that should have been addressed within the s32 report. The Court held that the failure of the s32 report to address the options raised by the submitters did not prevent this submission from being 'on' the plan change.
- 160 Mr Page relies on the *Blue Haven* decision for his submission that in this case the s32 analysis is not determinative of the scope of the plan change. This is because he submitted the panel accepted a flawed understanding of what V2 is about and as a result failed to correctly define the purpose of V2. As well as I understood the submission of Mr Page he contends the s32 analysis should have included the sites

¹⁷ At paragraph [89]

¹⁸ [2016] NZEnvC191 Environment Court, 30/9/2016 Judge JA Smith and Judge DA Kirkpatrick.

promoted by the objectors as an alternative means of achieving the purpose of V2.

ANALYSIS

161 I now move to address the facts of this case in accordance with the *Clearwater* test as further elaborated upon in *Motor Machinists* and subsequent cases.

Do the objector's submissions address the extent to which V2 changes the pre-existing status quo?

162 I have found that V2 is not a full plan review but rather a constrained focused suite of changes to enable additional housing capacity in Dunedin through specific rule and policy changes and by the rezoning of specific sites¹⁹

163 The scope of each proposal within V2 is identified in the purpose of the proposal and scope of change for each proposed change. V2 states that submissions may be made on matters encompassed by the scope statements.

164 Further V2 states submissions are encouraged to improve and fine tune the changes proposed, or to suggest alternative methods of achieving the purpose of the proposal, so long as the suggestions are within the limits of the scope statement.

165 I have found the changes proposed in V2 are of constrained focus and have been deliberately limited to avoid reconsideration of a wide range of provisions given that DCC is contemporaneously completing the 2GP process.

166 As to changes to zoning and other spatial layers, which is a complaint raised by the objectors, I have found the summary document noting the need to identify additional housing capacity states that the purpose of the proposal is to assess the appropriateness of rezoning several identified sites. This is explicit in the introduction to V2 at page 22. As well V2 states that it does not include a full review of zoning in the city, but instead only a limited review of the zoning of some sites.

¹⁹ Dunedin City Council, variation to-additional housing capacity, summary of changes, February 2021, introduction to variation to

- 167 The fact that V2 expressly states a number of times and ways it is a limited review of the zoning of the sites identified is I consider critical to understand the scope and coverage of V2.
- 168 Returning to *Motor Machinists*, Kos J when applying the first limb of *Clearwater* noted while the first limb serves as a filter it is based on a direct connection between the submission and the degree of notified change proposed to the existing plan.
- 169 Kos J described this assessment is the dominant consideration involving the breadth of alteration to the status quo entailed in the proposed plan change and whether the submission then addresses that alteration.
- 170 When analysing that point he raised a number of questions. In my view the second question he asked is very relevant in determining the issue of scope in this case. So the question to ask is whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change? If it is not, then the submissions seeking a new management regime for that resource is unlikely to be 'on' the plan change.

Findings

- 171 So in my view given V2 proposes to change the zoning of 17 identified sites then a submission seeking to alter the management regime for a site beyond or outside of those 17 identified sites cannot possibly secure an affirmative answer to that critical question and is accordingly out of scope. In other words the submitter's lots are not altered by V2.
- 172 The scope of the proposal is to rezone identified land and includes the need for specific plan provisions for example overlays or site specific rules to manage adverse effects of development of the sites being rezoned. Explicitly V2 records that review of the zoning of sites outside those considered is not within the scope of this proposal.
- 173 So V2 is not a wide-ranging proposal to amend the zoning of any sites. It is clearly targeted in its scope to those sites identified and assessed in the s32 report, including those listed within appendix4 as assessed but not included.

174 So unlike PC 47 in the *Calcutta* case V2 is not broad in its purpose to include a review of all residential zones including introduction of new areas and the introduction of a new future as eventual policy area for future urban growth.

175 In the *Calcutta* case given the breadth of PC 47 the Court observed that the absence of a consideration of the submission advanced by *Calcutta Farms* to include the Bank's Road options was seen as being consistent with the stated purpose and principles underpinning PC 47. Clearly the same cannot be said in the context of V2 about objector's submissions.

176 So based on the above my answer to the question is no.

Do the submissions permit the planning instrument to be appreciably amended without real opportunity for participation by those potentially affected?

177 Mr Page submitted that the approach taken by the IHP, Ms McEwan and Mr Garbett as to determining those parties that may be potentially affected by accepting the submissions in scope was incorrect.

178 It was Mr Page's view that the prejudice to external third parties who choose not to submit on V2, which is what the IHP, Ms McEwan and Mr Garbett relied on, was not the prejudice contemplated by Young J within the second limb of the *Clearwater* test.

179 It was Mr Page's view that the second limb of the *Clearwater* test identified parties who were affected by a specific submission and whether that submission may potentially affect them. He submitted the second limb does not concern itself with whether other people in the district could have made a similar submission to those of the objectors if they had thought of doing so.

180 Mr Page submitted that the relevant authorities' show the relevant prejudice is to persons directly affected or likely to be directly affected by the change submitted, not whether other parties could have made the same submission. He then went on to consider and detail the meaning to be attached to the word 'effect' and 'affected person' in the RMA.

181 I note that none of the cases I was referred to on scope referred to 'effect' and 'affected person' in the same manner as Mr Page did within

his submissions. I would have thought if it was appropriate to apply that approach then it would have been clearly articulated within those Court decisions and it was not.

182 Mr Garbett submitted that DCC is required to run an even handed and fair process consistent with the provisions of the RMA. He was of the view that where a s32 assessment of the site has not occurred and where it has not been notified as part of V2 then the required statutory assessments have not been undertaken for those sites. I accept that.

183 Mr Garbett submitted that should further sites be admitted into V2 by these objectors' submissions, neighbours and those potentially affected by those sites would only be invited to make further submission either in support or in opposition to those original submissions.

184 Mr Garbett submitted that normally such persons would have a s32 analysis to review prior to submission close, to be able to make primary submissions about the merits of the proposed site such as its boundaries, and or if the zoning and conditions are appropriate. This opportunity he submitted arose from the s32 report itself. So he identified how potential submitters could be both disadvantaged and dissuaded from lodging a submission.

185 Further Mr Garbett submitted that there are likely to be a number of landowners who may have wished to have their properties considered for rezoning, but after reading the wording and accepting the limited and constrained focus of V2 have not done so. He submitted that those persons could be prejudiced by allowing the objectors sites to now be included in scope of V2.

186 Mr Garbett considered that Mr Page was much too narrow in his approach. Consequently Mr Page failed to recognise the range of prejudice that could result from the remedy he sought.

Findings

187 As I read the legal principles discussed in *Calcutta* particularly those parts of that decision that consider the second limb of *Clearwater* I do not find that the words '*potentially affected*' as they appear in the second limb should be read in such a restrictive manner as Mr Page submits.

- 188 The second limb, as I read it, is concerned about permitting a planning instrument to be amended without real opportunity for participation by those potentially affected. How and who they might be potentially affected is not elaborated upon. However I do think persons could be potentially affected in the range of ways identified by Mr Garbett and not only in the way in which Mr Page suggests.
- 189 I take support for this view from paragraph [58] in *Calcutta* where the Court referred to paragraph [69] in *Clearwater*. In paragraph [69] the Court in *Clearwater* noted that it was common for a submission on a variation or a proposed plan to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority.
- 190 The Court in *Clearwater* observed it may be the process of submissions and cross submissions will be sufficient to ensure that all those likely to be affected or interested in the alternative method suggested in the submission have an opportunity to participate.
- 191 However importantly the Court went on to note that in a situation, where the proposition advanced by the submitter can be regarded as coming '*out of left field*' there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which you propose something completely novel) is '*on*' the variation.
- 192 In my view where the variation is a focused and restricted variation and in particular where it is focused and restricted to nominated sites for rezoning purposes then a submission which seeks to have an additional site included triggers the need for caution identified in *Clearwater*.
- 193 For further support for my view I refer to paragraph [66] in *Calcutta*. The Environment Court in that paragraph considered the High Court judgement in the *Motor Machinists* case.
- 194 The High Court after noting the principal choices for a landowner to change the planning regime covering their land noting that all those options provide procedural safeguards for directly affected people in the form of notification and a substantive assessment of effects or merits of the proposal, contrasted that position with the Schedule 1 submission process applicable to variations.

195 The High Court noted that by way of contrast the Schedule 1 submission process lacks those procedural and substantive safeguards. Therefore the High Court considered that a very careful approach needs to be taken to the extent to which a submission may be said to satisfy both limbs of the *Clearwater* test in particular the presiding judge noted that²⁰

permitting the public to enlarge significantly the subject matter and responses to be addressed through the schedule one plan change process beyond the original ambit of the notified proposal is not an efficient way of delivering plan changes '

196 So for these reasons I prefer the position advanced by Mr Garbett and Ms McEwan on this point of potential prejudice and related fairness.

197 It follows I do not accept Mr Page's submissions on what he considers to be the appropriate relief namely re-notifications of the sites thus enabling parties to submit on them.

198 In my view providing a specific list of sites to be the subject of an additional notification process does not recognise and provide for the prejudice of those parties who did not originally submit because they correctly read and understood the limited nature and constrained focus of V2.

199 If those parties were to now see additional sites being considered there is no means by which their interest in the planning outcome for their own sites can be provided for nor is there any way to cure the prejudice they will have experienced.

200 So based on the above reasons my answer to the question is yes.

The IHP Decision

201 Given what is covered above it is not necessary for me to undertake a detailed critique of the decision of the IHP. Nevertheless I have carefully read that decision a number of times. The IHP has considered much the same information as I have. Furthermore I agree with the IHP decision.

202 To the extent Mr Page submissions and his points made verbally were not before the independent hearings panel I have endeavoured to

²⁰ At paragraph [79]

address them. Though I do note many of the objector's argument were addressed by the IHP.

203 Mr Page submitted that IHP decision making process, presumably because it did not hear from the objectors in person has resulted in an unsound decision based on fundamental errors about the legal test of 'on' a plan change, the scheme of the RMA disclosed by the meaning of 'variation' 'change' and 'proposal' and the purpose of V2.

204 I have already addressed and made findings on the latter two points. From those findings that will be clear that I agree with the IHP Decision for the reasons advanced on the latter of those two points.

205 As to the submission that the IHP issued an unsound decision based on fundamental errors about the legal test of 'on' a plan change I disagree with Mr Page.

206 The legal test the IHP identified and utilised is set out at paragraph 13 and 14 of Mr Page's submissions. When I compare the IHPs identification of the test with that discussed by the Environment Court in *Calcutta* I do not see any points of difference between the two.

207 So the issue is the application of the *Clearwater* test. As I understand Mr Page's submissions in his paragraphs 16 through 19 he is essentially submitting that the situation faced by the objectors here is the same as the factual scenario discussed in *Calcutta*. So it follows, he submits, if the application of the test in *Calcutta* resulted in a submission being accepted as within scope, then the same result should occur for the objectors here.

208 Mr Page is also critical that Mr Garbett's legal submissions on *Calcutta* do not provide a full analysis on how *Calcutta* treats scope. The suggestion is if they did then the objector's submissions would be found to be within scope.

209 However in my view there is a significant diversions in the facts in *Calcutta* with the facts in this case. Firstly there were the prior notification exchanges between *Calcutta Farm*, the submitter, and the District Council in which the Council acknowledged support to include in the plan review *Calcutta* land in the Bank's Road area.

210 Next the breadth of PC 47 in the *Calcutta* case was much broader than V2. Clearly the breadth and purpose or intent of the plan change is

critical to determinations on scope. Because of that wide breadth the Court found it surprising that the s32 report did not provide a detailed comparison of the Banks Road site.

- 211 As well in *Calcutta* the Council, despite maintaining that the *Calcutta Farm* submission to include the Banks Road area was not on the plan, the hearings report and decision adopted by the Council proceeded to include a new residential zone in the Banks Road area.
- 212 So the Court in *Calcutta* asked the question how the new residential zone and new future residential policy area were within scope, but the remainder of what was sought by *Calcutta Farms* was not. That factual circumstance does not exist here.
- 213 For these reasons I do not agree with Mr Page that the situation faced here is akin to the factual scenario discussed in *Calcutta*. As well in terms of scope much will depend upon the nature of the plan change and what the purpose of the plan change is. In *Calcutta* the nature of the plan change and its purpose were quite different from V2. So in my view it's not surprising that the outcome in *Calcutta* was different to outcome in this case.
- 214 In my view for the reasons advanced I consider the IHP identified the correct legal test and applied the correct legal test as did Ms McEwan having close regard to the facts and circumstances of V2.

Section 32 – Being Determinative of Scope

- 215 The next point raised by Mr Page I want to address is his submission that the s32 analysis should not be seen as being determinative of the scope of a plan change.
- 216 Essentially he says the enquiry cannot simply be whether the s32 evaluation report did or did not address the issue in the submission. This is because such an approach would enable a planning authority to ignore a relevant matter and avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal with robust notified and informed public participation.
- 217 In the *Calcutta* case and the *Blue Haven* case Mr Page cites, I agree with him that if the breadth, scope and extent of a s32 evaluation report does not reflect the breadth, scope and extent of the plan

change or variation especially by not considering alternatives, then there is a problem with the s32 analysis.

- 218 Expressed another way, in my view, there is a relationship between the scope and extent of the plan change and the s32 analysis of the same. The broader the variation the broader the s32 analysis should be. There is a causal connection between the two. In detail when referring to or identifying alternatives those alternatives so identified will be influenced by the scope and extent of the plan change.
- 219 However in the instance where the variation is a limited one focusing on, as in this case some 17 sites identified for rezoning, as well as those that had been considered and rejected, then the scope to consider within s32 alternatives must be, I consider, much more limited.
- 220 Having already found that V2 is limited in its extent and scope and is a much focused plan change, I conclude that the s32 analysis was appropriate in that it reflected the limited scope and purpose of V2. Accordingly the scope to consider alternatives was also extremely limited.
- 221 Mr Garbett and Ms McEwan are of the view that the s32 assessment was adequate because it identified and assessed reasonably practical options for rezoning sites in changes to provisions, the options progressed were suitable, and there is no requirement to identify all alternate sites. I agree with them. This is particularly so given the focused nature of V2 to. As well I agree with them that the s32 analysis does not need to consider every possible alternative.
- 222 Ms McEwan within her evidence details the way in which she deals with incremental or consequent extensions to zoning changes particularly where they require no additional s32 analysis.
- 223 In my view the IHP in its decision correctly applied that approach to support acceptance of submissions as being within scope namely that those submissions related to generally small areas being part of a property that has been assessed in part already, and where the necessary extensions to the s32 assessment were likely to be contained and easily managed within the scope of the request.

- 224 As well any additional directly affected persons were to be directly notified of those submissions and provided with an opportunity to make a further submission.

Consultant Planner Evidence

- 225 While I agree with Mr Garbett that the evidence from the consultant planners is about the merits of particular sites I have nevertheless considered it.
- 226 I have also read and considered that part of Ms McEwan's evidence that addresses the notices of objection from the various submitters. In that part of her evidence she addresses some of the points made by the consultant planners.
- 227 I have also read and consider her views on the objector's submissions as detailed within her Out of Scope Reports. I agree with her reasons and the reasons expressed within the IHP decision as to why those original submissions should be struck out under section 41D. Nothing I have read or heard causes me to arrive at a different conclusion.
- 228 I have considered the consultant's evidence to also help determine if I should allow any of the objections in part.

Objector Sites

- 229 Many of the objectors sought rezoning for land in new areas which are not contiguous with the area included in V2. For the most part the land requested to be rezoned is well separated from areas assessed in V2. In many cases the land is also of large area meaning that the s32 assessment that was carried out for V2 is not applicable.
- 230 In my view those objectors submissions do not address the extent to which V2 changes the pre-existing status quo and are therefore not in scope. I also accept that if these objectors' submissions were to now be included that would give rise to issues relating to prejudice and natural justice because the addition of rezoning those particular sites could not have been anticipated by members of the public given how clearly the scope limitation for a variation to was set out in accompanying documentation.
- 231 Taking the Bush Road site as identified on page 4 of Ms McEwan's maps of sites subject to s357 objections dated 5 August 2021 as an example. Mr Page in his submissions at paragraph 95 explains this

area contain RS 212, which was rejected due to disconnection from existing residential areas. He notes because this was a rejected site in terms of V2 DCC did not undertake a substantial s32 assessment. Ms Peters has endeavoured to do so by undertaking an Appendix 5 assessment. While that assessment seeks to demonstrate among other things the disconnect has been remedied what that assessment cannot do is adequately provide for the prejudice and natural justice issue.

- 232 Other objectors sought in their submissions extensions to areas assessed in V2. These submissions sought extensions to greenfield zoning areas and intensification rezoning areas.
- 233 I considered each site on the maps provided and referred to the original submissions. I have also had regard to Mr McEwan's recommendations with respect to those submissions. I agree with her recommendations
- 234 In some instances, as with the Gladstone Road South site not only was the submission site not included in V2 but it is a large site which in Ms McEwan's view necessitated an additional assessment under s32. I agree with that view. I note the IHP also accepted this view.
- 235 The Gladstone Road South site is identified at page 8 of Ms McEwan's maps. The inclusion of the site at this time would result in additional parties being affected leading to additional forms of notification. Again I do not think that this approach appropriate cure all forms of prejudice.
- 236 How the North Taieri Road site identified on page 10 of Ms McEwan's maps of sites was processed by DCC is the subject of a number of complaints in Mr Page's submissions at paragraphs 108 to 114. As I understand the evidence this site having been suggested to DCC during the time that suggestions were still being accepted was ultimately rejected or considered inappropriate due to its large size. As I read the IHP decision on this site they also accept the large-scale of the submitter property counted against accepting the submission was in scope. Therefore it was not included in V2 and in my view to now included would result in significant prejudice, natural justice and procedural issues.

- 237 The Stevenson Road site is discussed at Mr Page's submissions between paragraphs 115 through to 122. The submitter site is identified at page 11 of Ms McEwan's maps. This submitter site is contiguous with change GF 08 and IN04. However the submitter site is a very large-scale site. I consider even after reflecting on the appendix 5 assessment that Ms McEwan's assessment of this submitter site and the IHP's decision to determine the relevant submission was out of scope is correct.
- 238 Ms McEwan's evidence was to the effect that the s32 assessment would need be extended due to constraints present on the submitters area. There is that as well as the significant natural justice concerns arising from the scale of change. As earlier stated many times in my view many people would not have anticipated such a significant change where possible having regard to the content of V2.
- 239 8 and 26 Camp Street Broad Bay is considered in Mr Kurt Bowen's evidence. The relevant submitters sites are not contiguous with areas included in V2 and or are, of large-scale. Again I am in agreement with Ms McEwan's scope assessment as included in her out of scope reports and recommendations as well as the IHP decision on this site.
- 240 18 and 14 Centre Road Tomahawk are considered in Mr Kurt Bowen's evidence. The subject sites are identified on page 6 of Ms McEwan's maps. Part of the submitter site is affected by an outstanding natural landscape area. In similar fashion to others the submitters sites are well separated from areas assessed in V2 and are relatively large holdings. I accept Ms McEwan's original out of scope recommendations as well as I am in agreement with the IHP decision to reject the submissions as being out of scope for the reasons they recorded.
- 241 The Gladstone Road North of site is also considered in Mr Bowen's evidence. The site is identified in Ms McEwan's maps at page 7. The submitter sought the addition of a structure plan mapped area to property is at 90, 98 and 100 Gladstone Road North Mosgiel. Essentially the submitter wished to increase the density of development available on these sites. However I agree with the assessment of Ms McEwan and the IHP decision, that is, with those submissions seeking a similar outcome through a change of zoning on site where this is not being reviewed, then the submission is clearly out of scope.

- 242 Mr Bowen also addressed the John Street/Brighton Road Oceanview submitters sites identified on Mr McEwan's maps at page 14. Again the subject submitter sites were not included within V2 greenfield zoning. As well the submitters sites are well separated from areas assessed in V2 and in combination present reasonably large scale sites. For the reasons contained in Ms McEwan's recommendations on scope and the reasons included within the IHP decision on these submissions I to consider that the submissions are out of scope.
- 243 The Signal Hill site was the last site assessed by Mr Bowen. The subject site is found at page 13 of Ms McEwan's maps. It is a large site and is not connected with areas promoted and assessed in V2. Having read Ms McEwan's out of scope recommendations and assessment I agree with her findings in relation to this submission being out of scope. Ms McEwan in her evidence in paragraph 22 (c) – (e) addresses this site and related submission particularly in relation to distance between the submitter site and V2 sites. Her views were not contradicted. I accept her evidence. I also agree with the IHP finding including its view that am now include the site would raise significant issues in terms of prejudice natural justice and procedure.
- 244 The Puraaunui submitter site is identified on page 12 of Ms McEwan's maps and addressed in the evidence of Emma Peters. Ms Peters provided some detail on the subject site and its surrounds. However like many other submitters sites it is well separated from areas already assist in V2 and of reasonably large-scale. I agree with the scope assessment undertaken by Ms McEwan and I agree with the findings of the IHP that this submission is out of scope.

CONCLUSION

245 For all of the reasons noted above under s357D I dismiss in full all of the objections before me to the IHP decision to strike out under section 41D their respective submissions on V2.

DATED: 26 November 2021



Paul Rogers
(Independent Commissioner)

Schedule A

<i>Submitter</i>	<i>Submission point & row from first report</i>	<i>Decision requested</i>	<i>Decision</i>
Richard Muir	156.001, Row 88	Rezone 124, 130, 134, 142, 144, 150, 152, and 154 Bush Road, and 164 Riccarton Road West and consider Low Density Residential zone or other alternatives. This point excludes sites covered by rejected Change RS212, which is addressed in a separate point.	Dismiss the objection in full
Alec Cassie	168.001, Row 20	Rezone 130 Bush Road Mosgiel, and adjacent properties, from Rural Taieri Plain zone to Low Density Residential zone, Large Lot Residential 1 zone, or another alternative.	Dismiss the objection in full
Roger and Janine Southby	191.001, Row 89	Rezone all properties bounded by the Silverstream to the north, Riccarton Road West to the west, Bush Road to the south and the existing residential zoned part of Mosgiel to the east (excludes sites covered by RS212, as this is addressed in a separate point) from Rural Taieri Plain zone to General Residential 1 zone, Low Density Residential zone and/or General Residential 1 zone.	Dismiss the objection in full
Tony McAuliffe	50.001, Row 10	Rezone 8 Camp Street, Broad Bay, from Rural Residential 2 zone to Township and Settlement zone.	Dismiss the objection in full
Murray Wilson & Paula Parker – Wilpark Trust	31.001, Row 13	Rezone 26 Camp Street, Broad Bay, from Rural Residential 2 zone to a residential zone (inferred not stated).	Dismiss the objection in full
Brendan Murray	251.001, Row 58	Rezone part of 14 and 18 Centre Road, Tomahawk, and surrounding properties with rural zoning but residential land use, from Rural Peninsula Coast zone to General Residential 1 zone or a Large Lot Residential zone, and apply a structure plan mapped area.	Dismiss the objection in full

<i>Submitter</i>	<i>Submission point & row from first report</i>	<i>Decision requested</i>	<i>Decision</i>
	251.002, Row 102	Amend the extent of the Outstanding Natural Landscape overlay zone at 14 and 18 Centre Road, Tomahawk, and surrounding properties with rural zoning but residential land use, to follow the contour of the land and the periphery of the mature vegetation.	Dismiss the objection in full
Gladstone Family Trust	219.001, Row 101	Add a structure plan mapped area to the properties at 90, 98 and 100 Gladstone Road North, Mosgiel, to enable residential activity at a higher density than provided in the underlying Low Density Residential zone.	Dismiss the objection in full
Invermark Investments Limited	240.001, Row 68	Extend Change GF02 (rezoning 201, 207 and 211 Gladstone Road South, East Taieri, from Rural Taieri Plain zone to General Residential 1 zone) to include part of 225 Gladstone Road South and all of 100 Main South Road in accordance with the submitter's map, and apply a structure plan mapped area.	Dismiss the objection in full
Willowcroft Limited	238.001, Row 91	Rezone part of 60 Huntly Road, Outram, from Rural Taieri Plain zone to Township and Settlement zone and apply a structure plan mapped area but not a new development mapped area.	Dismiss the objection in full
Wendy Campbell	228.002, Row 59	Rezone part of 188 North Taieri Road in the vicinity of Abbots Hill Road and Mount Grand Road (as shown in the submitter's maps) from Rural Hill Slopes zone to a mixture of zones in accordance with the submitter's proposed structure plan, including General Residential 1 zone and Low Density Residential zone.	Dismiss the objection in full
	228.001, Row 90	Rezone 45 McMeakin Road and part of 188 North Taieri Road, Abbotsford, as outlined in the submitter's maps, (except for the area covered by rejected Change RS014, which is addressed in a separate point) from Rural Hill Slopes zone to a mixture of zones in accordance with the submitter's proposed structure plan, including General Residential 1 zone, Low Density Residential zone and Recreation zone.	Dismiss the objection in full

<i>Submitter</i>	<i>Submission point & row from first report</i>	<i>Decision requested</i>	<i>Decision</i>
Custom Investments Limited	132.001, Row 71	Extend Change GF08 (rezoning 19 Main South Road, Concord, from Rural Hill Slopes zone to General Residential 1 and 2 zones) to include the property at 50 Stevenson Road (inferred not stated).	Dismiss the objection in full
Paddy Bleach	89.001, Row 72	Extend Change GF08 (rezoning from Rural Hill Slopes zone to General Residential 1 and 2 zone at 19 Main South Road, Concord) to rezone 50 Stevenson Road, from Rural Hill Slopes to General Residential 1 zone.	Dismiss the objection in full
Ben and Raewyn Waller	236.001, Row 61	Rezone part of 457 Purakaunui Road from Rural Coastal zone to Township and Settlement zone in accordance with the submitter's proposed draft structure plan.	Dismiss the objection in full
Grandview 2011 Limited	80.001, Row 37	Rezone 231 Signal Hill Road from Rural Hill Slopes zone to Large Lot Residential 1 zone (inferred not stated).	Dismiss the objection in full
Michael Byck and Nicola O'Brien	293.001, Row 63	Rezone the Rural Coastal zoned part of 23 John Street, Waldronville, to a residential zone (inferred not stated).	Dismiss the objection in full
Meghan Mills	250.001, Row 15	Rezone 29 John Street, Ocean View, from Rural Residential 1 zone to a residential zone (inferred not stated).	Dismiss the objection in full
Justine Ragg	312.001, Row 52	Rezone 810 Brighton Road from Rural Residential 1 zone to a residential zone (inferred not stated).	Dismiss the objection in full
Simon Roberts	313.001, Row 51	Rezone 808A Brighton Road from Rural Residential 1 zone to a residential zone (inferred not stated).	Dismiss the objection in full