



THE PROPOSED
**SECOND
GENERATION
DISTRICT PLAN**

Dunedin City Council, 50 The Octagon, Dunedin 9016
PO Box 5045, Moray Place, Dunedin 9058

Website: www.dunedin.govt.nz/2gp

PROPOSED VARIATION 2 (ADDITIONAL HOUSING CAPACITY) TO THE 2GP

MINUTE 21

Hearing 4 process: Updated procedural directions

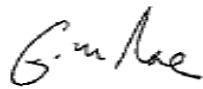
From: The Chairperson, Variation 2 (Additional Housing Capacity) Hearing Panel

To: Legal counsel involved in reconvened Hearing 4

Date: 7 November 2022

1. The Panel has now heard all evidence filed as part of Hearing 4 on Variation 2. It has commenced reviewing the evidence.
2. As signalled at the hearing, the Panel has been cognisant of the new NPS-HPL coming into force on 17 October 2022 (i.e. shortly after the main hearing). As a result, the Panel (in Minute 17) invited legal submissions from interested parties in relation to the application of the NPS-HPL to Variation 2.
3. Several legal submissions were received in response to Minute 17, and a reconvened hearing was held on 21 September 2022. Subsequent to that hearing, and in response to Minute 20, several further written legal submissions were received which summarised the verbal submissions made during the reconvened hearing.
4. The legal arguments and interpretations of the NPS-HPL advanced by the parties have been well canvassed, and the Panel acknowledges that there is a divergence of opinion in relation to the application of the NPS-HPL (in particular the application of clause 3.5(7)). Because of this, the Panel has sought and obtained independent legal advice from Simpson Grierson. A copy of that advice is **attached**.
5. Having considered all of the legal submissions file with the Panel, and the advice prepared by Simpson Grierson, the Panel can indicate to the parties that we favour the following interpretation:
 - a. Variation 2 is a 'plan change' as referred to in clause 3.5(7) of the NPS-HPL, and therefore that clause will apply; and
 - b. the sites requested for rezoning by way of submissions (that were not proposed for rezoning in the notified version of Variation 2) do not fall within the exception in clause 3.5(7) of the NPS-HPL.

6. The Panel has delegated authority from the Dunedin City Council to make decisions on the submissions lodged on Variation 2. The Panel is mindful of the need to proceed with its decision-making, and is aware that it has a statutory decision to make as required by the Schedule 1 process.
7. In order to allow the process to proceed in a pragmatic and efficient manner, the Panel has determined that it will recommence the Hearing 4 process by:
 - (a) Requesting that the DCC reporting team prepare, by **Tuesday, 15 November 2022**, a Section 42A Addendum Report addressing the relevant considerations in the NPS-HPL for those sites classified as LUC 1, 2 or 3, as set out in the Table attached to Mr Morrissey's response to Minute 17 (refer paragraph 26); and
 - (b) Any submitter may submit expert evidence in response to the Addendum report and on the considerations in the NPS-HPL relevant to the sites proposed to be re-zoned, by **Tuesday, 22 November 2022**.
8. Leave is reserved for the parties to request additional directions on any matters raised in this Minute, with any such requests to be made by no later than **15 November 2022**.
9. If you have any questions regarding this Minute please phone Jenny Lapham on 477-4000 or 021-2296166.



Gary Rae,

Chairperson
on behalf of the Variation 2 Hearing Panel

7 November 2022

Our advice

Prepared for	Independent Hearings Panel on Variation 2, Dunedin City Council
Prepared by	Mike Wakefield, Kat Viskovic
Date	7 November 2022

PRIVILEGED AND CONFIDENTIAL

Implication of the new NPS-HPL for Variation 2, and Hearing 4

Background	Variation 2 to the Second Generation Dunedin City District Plan (2GP) was notified by Dunedin City Council (Council) in February 2021. In summary, it proposes changes to the 2GP (which itself remains subject to appeal) in order to provide for additional housing capacity (through both 2GP provisions and rezoning). Variation 2 is being heard across four separate hearings streams. The Independent Hearings Panel (Panel) appointed by the Council issued its decision reports for Hearings 1 to 3 (inclusive) earlier this year, with one appeal received. Hearing stream 4 (Hearing 4) is concerned with the proposed rezoning of greenfield land to provide for additional housing, and submissions that sought for other land to be rezoned to provide for residential development. The substantive part of Hearing 4 has been held and stands adjourned, and we understand that the Panel is now considering the evidence filed. On 17 October 2022 the National Policy Statement on Highly Productive Land (NPS-HPL) came into force. In response, the Panel issued several minutes (Minutes 17-20) that provided an opportunity for parties to comment on the application and relevance of the NPS-HPL to the Panel's decision-making on Variation 2.¹ This advice address two matters raised in those legal submissions.
Questions and Answers	Should Variation 2 be considered a “plan change” when applying clause 3.5(7) of the NPS-HPL? Yes. The purpose of the NPS-HPL, and the statutory and procedural context, support this interpretation. Would land that is the subject of a submission made on Variation 2 seeking rezoning also fall within the exception in Clause 3.5(7) of the NPS-HPL?

¹ In response to Minute 20 (dated 21 October 2022), which invited legal submissions on whether Variation 2 is a “plan change” for the purpose of clause 3.5(7) of the NPS-HPL, legal submissions were received from several parties, including the Council, Otago Regional Council (ORC), CC Otago Limited, Peter Doherty & Outram Developments Limited; and Gladstone Family Trust, all dated 26 October 2022.

No, the exemption provided by clause 3.5(7)(b)(ii) will not apply to land requested for rezoning by a submission made on a proposed plan or variation. Submissions do not have any legal effect and will therefore not trigger the exception, as they do not (substantively) form part of the plan change initiated and notified by the Council.

Reasoning explained

The NPS-HPL will not apply to highly productive land that is subject to a “Council initiated, or an adopted, notified plan change” in terms of clause 3.5(7)(b)(ii)

1. Clause 3.5(7) provides an exception for certain highly productive land. It states:
 - (7) Until a regional policy statement containing maps of highly productive land in the region is operative, each relevant territorial authority and consent authority **must apply** this National Policy Statement as if references to highly productive land were references to land that, at the commencement date:
 - (a) is:
 - (i) zoned general rural or rural production; and
 - (ii) LUC 1, 2, or 3 land; **but**
 - (b) **is not:**
 - (i) identified for future urban development; or
 - (ii) **subject to a Council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.**
2. Without reviewing all of the land that is subject to Variation 2 (and allocated to Hearing 4), we understand that the Council is satisfied that some of the land proposed for rezoning - from a rural zone² to an urban zone (including land sought for rezoning by submitters) – constitutes highly productive land, as per clause 3.5(7)(a).³
3. As the relevant greenfield land is not “identified for future urban development”, as that term is defined in the NPS-HPL,⁴ the only relevant exception is if Variation 2 satisfies clause 3.5(7)(b)(ii).⁵

On a plain reading the RMA makes a distinction between a change and a variation

4. The submissions filed in response to Minute 20 place a degree of focus on the relevance of the term “plan change” in clause 3.5(7)(b)(ii), and that this term is not defined in either the NPS-HPL or the RMA.
5. Section 43AA of the RMA includes the following relevant definitions:

² We understand that Variation 2 proposes to rezone land that is currently (variously) Rural, Taieri Plain Rural, Rural Hill Slope or Rural Coastal zone to a form of residential zoning.

³ We have not considered what proportion of the Variation 2, or submitters land, may fall within this definition. This advice is provided on the assumption that some of the Variation 2 or submitter land satisfies the relevant definition.

⁴ We understand that there is no published Future Development Strategy or strategic planning document (i.e. a non-statutory growth plan or strategy adopted by local authority resolution) for Dunedin that identifies the land subject to Variation 2 (or sought to be rezoned via submissions) as being identified for future development.

⁵ We note that the reference in clause 3.5(7)(b)(ii) to the Council “adopting” a plan change will not apply, as the Council initiated Variation 2 itself.

Plan means a regional or district plan.

district plan—

- (a) means an operative plan approved by a territorial authority under Schedule 1; and
- (b) includes all operative changes to the plan (whether arising from a review or otherwise)

change means—

- (a) a change proposed by a local authority to a policy statement or plan under clause 2 of Schedule 1, including an IPI notified in accordance with section 80F(1) or (2); and
- (b) a change proposed by any person to a policy statement or plan by a request under clause 21 of Schedule 1.

variation means an alteration by a local authority under clause 16A of Schedule 1 to—

- (a) a proposed policy statement or plan; or
- (b) a change.

operative, in relation to a policy statement or plan, or a provision of a policy statement or plan, means that the policy statement, plan, or provision—

- (a) has become operative—
 - (i) in terms of clause 20 of Schedule 1; or
 - (ii) under section 86F; and
- (b) has not ceased to be operative

6. **Proposed plan** is defined in section 43AAC (relevantly):

means a proposed plan, a variation to a proposed plan or change, or a change to a plan proposed by a local authority that has been notified under clause 5 of Schedule 1 or given limited notification under clause 5A of that schedule, but has not become operative in terms of clause 20 of that schedule; and

- 7. When reading these definitions, it is clear that there is a legal distinction between a variation and a change. Namely, a *change* alters an operative plan, whereas a *variation* alters a change or a proposed plan.
- 8. While a strict reading of these definitions creates such a distinction, as discussed below we do not agree with ORC's argument that the words *plan change* in clause 3.5(7) "cannot possibly comprehend a 'proposed plan'".⁶ In our view, that would amount to an overly narrow or technical reading of the definitions in the context of the NPS-HPL.
- 9. In our view, the starting point should be to apply the defined term *change* to the use of the phrase *plan change* in clause 3.5(7). The definition of *change* in the RMA refers to clause 2 of Schedule 1, which in turn addresses the preparation of a *proposed plan*. As defined in section 43AAC, a proposed plan is inclusive of a: *proposed*

6 ORC submissions re Minute 20, at paragraph 23.

plan, a variation to a proposed plan, and a change.

Purpose of clause 3.5(7) supports the interpretation that Variation 2 is a “plan change”

10. The principles governing statutory interpretation have been outlined in the submissions filed for the Gladstone Family Trust. We generally agree with those submissions.

11. Section 10 of the Legislation Act 2019 clarifies that:

(1) *The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.*

12. In considering the above definitions, we consider that Variation 2 in this context should be considered part of a *plan change*.⁷

13. We say this because:

13.1 The 2GP is a *proposed plan* prepared and notified by the Council under clauses 2 and 5 of Schedule 1(respectively).

13.2 The 2GP can be characterised as a proposed plan (and therefore a change, in section 43AAAC terms) for the purpose of interpreting clause 3.5(7) of the NPS-HPL.

13.3 Variation 2 is therefore an alteration to a proposed plan, and will (at a point in time), merge with the 2GP.

13.4 The definition of “proposed plan” is inclusive of both variations and changes, which reflects the reality that variations and changes are proposed rather than becoming operative at the point of notification under clause 5 (in which case they would be plans, as defined).

13.5 The reference in clause 3.5(7)(b)(ii) to “Council initiated” implies Council responsibility for the preparation of the plan change. This could be in clause 2 terms for a proposed plan, or clause 16A terms for a variation. It is relevant, in our view, that clause 16A uses the same “initiate” terminology as in 3.5(7)(b)(ii), stating:

A local authority **may initiate variations** (being alterations other than those under clause 16) **to a proposed policy statement or plan, or to a change...**

13.6 Clause 16A(2) goes on to state that:

The provisions of this schedule, with all necessary modifications, **shall apply to every variation as if it were a**

⁷ We note that “variations” are not generally referred to specifically in other national policy statements, an in particular that the term is not used in the National Policy Statement on Urban Development 2020. We acknowledge that the National Policy Statement on Renewable Electricity refers to variations in Policy H2, and in the explanatory note; and the Coastal Policy Statement mentions variations in its introduction section).

change.

13.7 The implication of clause 16A(2) is that the procedure for a variation is substantially the same as for a change. Clause 16B then requires that a variation shall merge with the relevant proposed plan, when both are at the same procedural stage. Both of these provisions provide statutory indications that a variation is, in real terms, to be processed and then treated as part of a proposed plan (albeit progressing separately, initially).

14. In applying section 10 of the Legislation Act, and without there being any guidance or other indications that limit or restrict the interpretation of “plan change” in clause 3.5(7), we consider that this phrase should be interpreted as including both plan changes and variations that are notified by Council.
15. Interpreting and applying clause 3.5(7)(b)(ii) to exclude a variation is, in our view, an unduly technical reading of the definitions, that would not align with the purpose or context of the NPS-HPL.
16. In taking this further, the purpose of clause 3.5(7) is to provide a transitional arrangement in circumstances where highly productive land has not yet been mapped in a regional policy statement. This transitional arrangement acknowledges that local authorities may have already undertaken prior work that identifies highly productive land as being potentially appropriate (or needed) for urban or rural lifestyle zoning. The exception essentially acts as a savings provision to recognise that existing work (including section 32 analysis) has already been undertaken, leading to either an initiated or adopted proposed plan to achieve the rezoning.
17. If the above interpretation was to be applied, it would seem to us to be perverse that a proposed plan or variation would not be captured by clause 3.5(7)(b)(ii). There would be no obvious rationale for the distinction, as the same requirements and procedure would apply to both, as for any other plan change.

The Schedule 1 provisions support the interpretation that a variation is part of a plan change

18. Our preferred interpretation - that a variation is part of a plan change, and therefore (in this context) to be treated in the same way as a plan change - is further supported by clauses 16A, 16B and 17 of Schedule 1.
19. In particular:
 - 19.1 Clause 16A(2) applies the provisions of Schedule 1 to a variation “as if it were a change”;
 - 19.2 Clause 16B(1) requires the merger of a variation with a proposed plan when both reach the same procedural stage;
 - 19.3 Clause 16B(2) states that from notification of a variation, the proposed plan is to be treated as though it had been varied (unless it had been approved under clause 17); and

19.4 If the Council has already approved the part of a proposed plan that is subject to a variation, clause 17(1B) states that the variation is to be treated as being a change to that plan.

20. Taking a purposive approach to these provisions, it is clear that the intent is for variations to become part of the proposed plan that they are varying.
21. The interpretation advanced by ORC is particularly problematic when the point of merger (of a variation with a proposed plan) is reached.
22. If, hypothetically, a variation merges with the proposed plan it is varying, and clause 3.5(7)(b)(ii) did not apply to the variation, the practical implication would be that the variation provisions or zoning would – for the purpose of applying the NPS-HPL – have to be separated out from the initial proposed plan. This would fail to achieve the “merger” required by clause 16B, and continue to treat the variation as a separate document. We struggle to see how this would be possible (nor any rationale for such an approach), and consider that this demonstrates that it cannot have been the intent of the exception to not apply to variations.
23. In addition, post-merger, the variation will become part of the ‘proposed plan’, which is required by section 75(3) of the RMA to “give effect” to the NPS-HPL. This will not be possible if provisions that progressed by variation are effectively divorced from the proposed plan.
24. Clause 3.5(6) of the NPS-HPL is the only other provision to refer to the term “plan change”, and in our view aligns with our preferred interpretation. Clause 3.5(6) recognises that land subject to an approved plan change will cease to be highly productive land from the date it becomes operative. It would, in our view, be an absurd outcome for a variation to be excluded from this clause, based on the technical interpretation advanced by ORC, particularly when a variation is required to merge with a proposed plan before being made operative.
25. Overall, we consider that it would be artificial and practically problematic to treat a variation as not captured by the exemption in clause 3.5(7)(b)(ii). Our preferred interpretation of the words “plan change” in the exemption are that they are all encompassing of changes notified by a Council, whether they are proposed plans, or variations to a proposed plan.

The exception in clause 3.5(7)(b)(ii) of the NPS-HPL does not apply to land

26. There is disagreement about whether land sought for inclusion in the variation by submissions is exempt from the requirements of the NPS-HPL by clause 3.5(7)(b)(ii) of the NPS-HPL.
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**identified in
submissions**

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27. The legal submissions made for several submitters⁸ contend that the words “subject to” capture a submission made on a Council initiated and notified plan change, where the submission seeks the rezoning relief described in clause 3.5(7)(b)(ii).
28. We disagree.
29. The ability to make a submission under clause 6 (or further submission under clause 7) of Schedule 1 is a separate procedural step from the Council’s preparation and notification of a proposed plan. The making of a submission can create jurisdiction to grant relief that is different from the Council’s proposals, and also provides a right to be a part of the Council hearing and decision-making process that will test the Council’s proposals and relief sought by submissions. Other than these procedural / jurisdictional aspects, a submission does not change the legal effect of the proposed change, and provides no other substantive or merits value to the process. Instead, it is through the exchange of evidence, hearing process, and decision-making that the merits of any relief sought by a submission is evaluated in a substantive (and section 32AA) sense. Because of this, a submission should not be able to trigger the exemption provided by clause 3.5(7)(b)(ii).
30. If the act of making a submission was to trigger this exemption, in our view it would lead to absurdity. In practice, a submitter could simply lodge a submission on any plan change without any intention of pursuing the relief sought – yet the submission itself would effectively prevent the subject land being treated as “highly productive land” in the meantime. During the transitional period,⁹ the land owner could then seek a subdivision (for example) to achieve urban development, and not have to engage with the directive provisions of the NPS-HPL.
31. In our view, this would both frustrate the operation of the NPS-HPL and undermine its intent.
32. We consider that the better interpretation of clause 3.5(7)(b)(ii), and the phrase “subject to”, is that it recognises a scenario where land has been evaluated in section 32 terms by a Council, with a decision then made to initiate (and notify) a change of zoning with that evidential support. There is a parallel to be drawn between subclauses (i) and (ii) in this regard, as both involve situations where there has been prior assessment and evaluation by a Council, distinct from a submission on its own.
33. For all of these reasons, we do not consider clause 3.5(7)(b)(ii) will capture land that is proposed to be re-zoned in a submission made on Variation 2.
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8 Legal submissions of CC Otago Limited, Peter Doherty & Outram Developments Limited, dated 26 October 2022; and Gladstone Family Trust dated 26 October 2022.

9 Which ends when a regional policy statement containing maps of highly productive land is “operative”.

**Please call or
email to discuss
any aspect of this
advice**

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