



SECOND GENERATION DISTRICT PLAN

Variation 2 – Additional Housing Capacity

Out-of-Scope Submissions

Revised Recommendations

**Retirement Villages Association of New Zealand
Ryman Healthcare Limited**

13 May 2021

PRIMARY AUTHOR

Name: Ms Emily McEwan

Qualifications: MPlan, University of Otago; BSc (Geography), Massey University; DipHort (Landscape), Massey University.

Experience: I have approximately three years planning experience, including preparing and processing resource consent applications and developing policy. I have been employed by the Dunedin City Council as a Policy Planner since May 2019 and have primarily worked on Variation 2 to the 2GP since then.

Code of Conduct: I confirm that I have read, and agree to comply with, the Environment Court Code of Conduct for Expert Witnesses (Practice Note 2014).

1 SUMMARY

1. This report provides revised 'scope' recommendations on the submission points by Retirement Villages Association of New Zealand (S205) and Ryman Healthcare Limited (S189) that were identified and assessed in the Out-of-Scope Submissions Report of 16 April 2021 and Addendum of 4 May 2021. It also provides other responses to the matters raised in the joint response received from these submitters. As for my original recommendations, I have sought legal review of my assessment by DCC's lawyer, Michael Garbett.
2. The submitters (who are represented by the same legal counsel) were granted by the Hearing Panel an extension to provide responses to the Out-of-Scope Submissions Report after an administrative error occurred with the lodging and processing of the submission by Ryman Healthcare Limited.
3. Overall, I have not made any changes to my recommendations as a result of reviewing the response from these submitters.

2 RESPONSE FROM THE SUBMITTERS

4. Broad matters raised in the response from the submitters are outlined below, with some background information provided and a brief commentary on whether these may affect the decision at hand.
5. The submitters have raised that not having access to Council's legal advice regarding the process whereby submissions considered to be outside the scope of Variation 2 are to be struck out has prejudiced their response. I note that legal advice was provided to the Council planners to inform work on Variation 2 and legal privilege applies. The relevant statutory test and case law identified in the legal advice to assist me was incorporated in the Out-of-Scope Submissions Report in the summary of case law and tests to determine whether submissions are out of scope. All submitters have had this report to review and consider, and they have addressed these and other cases in their submissions. No submitters have been provided details of Council's legal advice. Therefore, I disagree that the submitters' positions have been prejudiced in this regard.
6. The submitters have requested a hearing regarding scope. Other submitters have made similar requests and I addressed this in my original Revised Recommendations report (para. 41). That is, a hearing would cause further delay to Variation 2 processes and the provision of additional housing capacity. My recommendation is that the panel decide its process. I consider the key issue is to interpret the scope of Variation 2 and the submissions made to determine if they are in scope or not.
7. With respect to the submitters' comments at para. 21 of their response (that the potential for submissions to interact with appeals on the 2GP should not be considered as part of the legal question of whether submissions are within or outside of scope), I agree to the extent that this consideration has not formed part of the tests I have applied in assessing whether submissions are out of scope or not. Consideration of the potential interaction with appeals occurred earlier in the Variation 2 process when staff were determining what proposals to include as part of Variation 2 and this is simply background to the matters at hand.

8. As for other responses, the submitters consider that the variation has an overall purpose to give effect to all the policies of the NPS-UD, address a shortfall in housing capacity over the short and medium term (10 years) and address wider housing-related issues in Dunedin, including those associated with Dunedin's ageing population (para. 22). I addressed this type of response in Section 2.2 of my original Revised Recommendations report. For the avoidance of doubt, Variation 2 is a collection of defined individual proposals, rather than one overarching proposal, and each proposal has its own purpose. I rely on Section 32(6) of the RMA for the meaning of 'proposal' and consider the purpose of proposal and scope of change statements to meet the definition of 'objective' for each proposal. I note that proposals within Variation 2 do not seek to give effect to all the policies in the NPS-UD, for example Policy 7 on setting housing bottom lines or Policy 11 in relation to car parking are not addressed. Some proposals also extend beyond housing-related issues, such as those which comprehensively review the 3 Waters provisions for a wide range of activities.
9. The response considers that Variation 2 is "the only opportunity to ensure short and medium term demands for retirement living are properly addressed" (para. 30). However, this is certainly not the case. The Future Development Strategy must show how sufficient development capacity will be provided over the next 30 years and does not exclude consideration of the short and medium terms. This was not clear in my statement at para. 8 of the Out-of-Scope Submissions Report. In addition, I note that the NPS-UD requires ongoing monitoring of housing demand and capacity and we anticipate undertaking additional focused plan changes as required to ensure our obligations under the NPS-UD continue to be met.
10. The submitters draw attention to background on the inclusion of section 41D in the RMA. With respect, I do not agree that striking out a submission because it discloses no reasonable or relevant case would have a draconian impact on the right to public participation when those submissions are on things that are not relevant to the extent to which the proposals are changing the Plan. One of the primary reasons for seeking to strike out submissions prior to further submissions or hearings is to save time and enable the housing capacity added through Variation 2 changes to become operative as soon as possible without distraction by side winds. This is related to the reasons for the inclusion of section 41D in the RMA that the response sets out at para. 39.
11. The submitters also suggest that section 41D be applied with a high degree of caution (paras. 52-52). I consider that, as the purpose of each proposal within Variation 2 is clearly set out, it is relatively straightforward to determine which aspects of a submission are on a proposal or not. If additional caution were applied (by retaining all or selected submission points as part of Variation 2), this would disadvantage those who have understood and accepted that Variation 2 is limited in scope and have chosen not to submit. Therefore, it would become necessary to renotify Variation 2 to enable any suggestions regarding housing provision to be put forward, to not give preferential treatment to parties who have made submissions that are, in my view, out of scope. This is also addressed in my original Revised Recommendations report regarding retaining out of scope rezoning suggestions (paras. 3-4 and others).

12. I note that the objection process for strike-out decisions does not require the variation to be put on hold pending the decision on objections. Variation 2 hearings are already likely to be split into topic streams and any submissions that are brought back into Variation 2 can be dealt with through their own stream/s (as they will be on different matters to those already within Variation 2).
13. Regarding comments made in para. 44 of the response on the legality and appropriateness of using section 41D at this stage of the process, I note that section 41D(2)(a) provides for an authority to make a direction under this section before, at, or after the hearing.
14. Regarding comments made in para. 47 of the response, I consider it important to distinguish the use of section 279(4) by the Court from that of section 41D(1). I consider that my recommendations to strike out submissions only apply to those submission points clearly outside scope.
15. I disagree that the application of section 41D is contrary to section 18A, as it is intended to uphold the outcomes set out in section 18A and contribute to the provision of additional housing capacity in a timely manner.
16. While the submitters consider that applying section 41D raises significant natural justice issues, it is my view that not applying it is of much greater concern given how the limited scope of Variation 2 has been clearly set out. Of note, there will be members of the public who have chosen not to submit on Variation 2 at all because they understood and accepted that it is limited in scope. Should others then have their out-of-scope submissions considered, this would be unfair to those who did not submit but would have if scope was not limited. This issue cannot be resolved through the further submissions process.
17. The response has put forward arguments as to why the submissions are in scope (para. 60 onwards). However, I disagree with these because the purpose of each proposal included in Variation 2 has been clearly set out and none of these provide scope for consideration of the identified submission points as an alternative option. Variation 2 does not include any broad changes to the pre-existing status quo for supported living facilities, rest homes or retirement villages.

3 REVISED RECOMMENDATIONS

45. The table below summarises the revised recommendations for the relevant submission points, based on the response. I have made no changes to my overall recommendations.

Row in Report	Submission point	Original assessment	Response agrees or disagrees?	Narrows submission?	Revised recommendation
117 185	205.004 Retirement Villages Association of New Zealand; 189.004 Ryman Healthcare Limited	Submission is out of scope as it is not within the scope of any of the purpose of proposals in Variation 2 and is seeking changes to policy and management regimes that are not being reviewed in Variation 2.	Disagrees Considers the submission is within the scope of Variation 2 because it provides an option to give effect to the NPS-UD; related provisions are being amended; the submission fits within the purpose of Change B5 (see response for full details).	No	Retain original recommendation to consider these points out of scope as matters relevant to determine if the submissions are in scope are unchanged. Elements of the submissions that are considered to fall within the purpose of Change B5 have been included in separate submission points that are considered in scope. Change B5 only relates to the density provisions, whereas the request extends beyond this.
119 186	205.007 Retirement Villages Association of New Zealand; 189.007 Ryman Healthcare Limited	Submission is out of scope as it is not within the scope of any of the purpose of proposals in Variation 2 and is seeking changes to policy and management regimes that are not being reviewed in Variation 2.	Disagrees Considers the submission fits within the purpose of Change B5, including that the current provisions do not give effect to the NPS-UD; that it provides an option to give effect to the NPS-UD.	No	Retain original recommendation to consider these points out of scope as matters relevant to determine if the submissions are in scope are unchanged. Change B5 only relates to the density provisions, whereas the request extends beyond this to add a new objective and policy that would apply broadly. Change B5 addresses the inconsistency with the NPS-UD without making broad changes.

