

Under the Resource Management Act 1991

In the matter of Hearing in relation to Variation 2 to the proposed Second Generation Dunedin City District Plan (**2GP**)

Legal Submissions on behalf of Dunedin City Council

26 October 2022

Dunedin City Council's solicitors:

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May it Please the Hearing Panel:

- 1 As requested at the hearing on 21 October 2022 these further submissions address:
 - (a) the argument by Mr Logan that Variation 2 is not a notified plan change; and
 - (b) elaborate on the point made in reply to Mr McLachlan's argument about the distinction between a notified plan change initiated by Council and sites entering the process by submission.

Notified plan change

- 2 Clause 3.5(7)(ii) of the NPS provides an exemption to the NPS for land that is subject to a Council initiated, or an adopted, notified plan change to rezone that land.
- 3 "Notified plan change" is not defined in the NPS. Nor is plan change.
- 4 Clause 1.3(2) in the interpretation section identifies that terms defined in the Act and used in the NPS have the meanings in the Act unless otherwise specified.
- 5 Notified plan change is not defined in the Act. Nor is plan change. Composite terms of this phrase are defined with definitions of "plan", and "change" respectively in section 43AA of the Act for the purposes of the RMA "unless the context requires another meaning".
- 6 Plan is defined as meaning a regional plan or a district plan.
- 7 District plan in turn is defined as:
 - (a) means an operative plan approved by a territorial authority under Schedule 1; and...
- 8 A local authority approves a plan under clause 17 Schedule 1. Once approved under this clause then the plan is treated as operative (once notified as such under clause 20). Clause 17(1B) also deems any variation to an approved plan to be a change to the plan.
- 9 The DCC has not yet approved the 2GP under clause 17 Schedule 1, so the 2GP does not currently have the status of an approved plan.
- 10 Change is defined as meaning:
 - (a) a change proposed by a local authority to a policy statement or plan under clause 2 of Schedule 1...

- 11 Applying these definitions this would mean that a plan change is a change notified by Dunedin City Council to an operative plan that has been approved by the territorial authority under Schedule 1.
- 12 If these definitions are to be applied in this context, Variation 2 is not a change to the operative plan. This is because the 2GP has not yet been approved by DCC under clause 17, Schedule 1.
- 13 This would mean that Variation 2 remains having the status of a variation and is not treated as a plan change as defined.
- 14 Because the NPS identifies that where terms are not defined in the NPS, the definitions in the Act apply, unless "otherwise specified" (clause 1.3(2) NPS). It is submitted that the NPS does use the words "plan" and "change" and these terms must be reasonably interpreted as having the meanings defined in the Act, as the NPS states. The NPS does not otherwise specify.
- 15 This therefore means that Variation 2 is not a plan change and cannot fall within the exemption to the NPS in clause 3.5(7)(b)(ii). This has the consequence that the merits of re-zoning all land that is subject to the variation needs to be assessed in light of the objective and relevant policies of the NPS.
- 16 It is therefore considered that Mr Logan's argument is technically correct and it is agreed with. However, whether this is the intended meaning may be debateable given there is no obvious policy reason to distinguish between Council initiated variations or plan changes. However until additional information or case law is available that supports a different interpretation the strict technical interpretation promoted by the ORC based on the definitions in the Act is submitted to be the appropriate interpretation to apply to your decisions on Variation 2.

Reply to Mr McLachlan

- 17 This issue may now be overtaken by what has been submitted above and no longer material.
- 18 For completeness though, as was expressed at the hearing it was argued that that the NPS has drawn a deliberate distinction between provisions of plan changes that are initiated and notified by the Council, and those where other sites are sought to be included under the statutory process by submissions. There is a consistent thread in the NPS that elected members of Council making resolutions to either initiate a plan change, or adopt a non-statutory planning document is to have a particular status.

- 19 The distinction drawn by the NPS between land subject to Council initiated plan changes and land being within the scope of a plan change by submission is deliberate and has a deliberate meaning. It is submitted the legislature placed importance on the elected body of Council resolving to initiate a plan change. This ensures that the notified version of a plan is clearly known at a point in time. This is available for all the world to clearly identify from the notified version the land that is subject to the Council initiated plan change when it is initiated by Council.
- 20 As explained, sometimes submissions can be broadbrush, potentially vague and it can be difficult for persons to identify exactly the boundaries of properties subject to submissions. If the exemption in the NPS is intended to apply to land described in submissions, then it can reasonably expected the NPS would have said so explicitly. That is not the case, and it is submitted it is deliberate because that was not intended by the drafters of the NPS.
- 21 The key issue now to determine is whether all of the sites covered by LUC 1-3 that have a rural zoning need to be assessed against the provision of the NPS. The DCC submits that they should be assessed against the NPS.

Dated this 26th day of October 2022



Michael Garbett
Counsel for Dunedin City Council