

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

6th October 2022

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May it Please the Hearing Panel:

- 1 These legal submissions address the issue raised by the National Policy Statement for Highly Productive Land 2022 ("NPS"), and respond to the Panel's Minute 17.
- 2 The NPS was notified on 12 September 2022. Its provisions come into force on 17 October 2022 (Clause 1.2). A copy of the NPS is attached for the Panel's reference.
- 3 The NPS includes an Objective, and a range of Policies for managing highly productive land. This NPS has relevance for district plans and planning decisions under the RMA.

Decision-making stage

- 4 Because of the stage in the process of Variation 2, the Hearing Panel's jurisdiction now arises under Clause 10, First Schedule RMA. This requires that the decision to be made by the Panel is to give a decision on the provisions and matters raised in submissions. The decision must:
 - (a) include reasons for accepting or rejecting submissions; and
 - (b) include an evaluation under section 32AA; and
 - (c) may include consequential changes or any other matter relevant arising from the submissions.
- 5 Because the plan change has been notified and submissions lodged it is your function to consider those submissions and evaluate their merits.

Role of the NPS

- 6 The role of the NPS as it relates to district plans is under sections 74 and 75 RMA. This requires the territorial authority to prepare and change its district plan in accordance with a national policy statement. Section 75 requires a district plan to give effect to a national policy statement.
- 7 Given the timing of this NPS in relation to Variation 2 it raises difficult issues.

The provisions

- 8 The NPS applies to the management of highly productive land. This is defined in clause 1.3. This is intended to be land mapped by the Regional Council in accordance with the provisions of Clause 3.4. That mapping is to be managed by the Regional Council with maps in a Regional Policy Statement to be notified no later than three years after the NPS becomes

operative (Clause 3.5). The NPS then requires as soon as practical, and not later than six months after the Regional Policy Statement becomes operative, the territorial authority must identify the highly productive land in its district using the Regional Council's maps.

- 9 There is a transitional provision that deems certain land to be treated as highly productive land in the interim. This is addressed in clause 3.5(7). This provides:

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.

- 10 It is submitted that this means that land zoned general rural and LUC 1, 2 or 3 is deemed to be highly productive land in the interim prior to it being mapped under the Regional Policy Statement.

- 11 It is worth noting that the NPS refers to land zoned "general rural", or "rural production", and "rural lifestyle". These terms are not defined directly in the NPS itself. However, clause 1.3(4) of the Interpretation section does identify that reference to a zone in the NPS is a zone as described in the National Planning Standard, or if the standard has not yet been adopted a reference to the nearest equivalent zone. Because the 2GP has not adopted the zones from the planning standard it is considered that the nearest equivalent zones in the 2GP are:

- (a) The Rural Zones – equivalent to general rural or rural production; and
- (b) The Rural Residential Zones – equivalent to rural lifestyle.

- 12 This deeming provision does not apply to land identified for "future urban development", or that is subject to a Council initiated plan change to rezone it from general rural to urban or rural lifestyle.

Land Identified for Future Urban Development

- 13 Land that is "identified for future urban development" is defined as:
- (a) identified in a published Future Development Strategy as land suitable for commencing urban development over the next 10 years; or
 - (b) identified:
 - (i) in a strategic planning document as an area suitable for commencing urban development over the next 10 years; and
 - (ii) at a level of detail that makes the boundaries of the area identifiable in practice
- 14 Dunedin does not yet have a Future Development Strategy in place. A "strategic planning document" is defined as meaning:
- any non-statutory growth plan or strategy adopted by local authority resolution
- 15 None of the land subject to Variation 2 is identified for future urban development in a Future Development Strategy, or a strategic planning document based on the definitions above. These provisions do not therefore exempt Variation 2 land from the NPS.

Land Subject to Council Plan Change

- 16 Clause 3.5(7)(b)(ii) does exempt from the NPS land that is subject to a Council initiated plan change. This provides:
- (b) is not:
- ...
- (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.
- 17 The land identified by Council in Variation 2 for rezoning was subject to the Council initiated Variation 2. This land having been identified previously by Council resolution for rezoning when Council initiated the plan change, should not now be treated as highly productive land under the NPS.

- 18 This is submitted to be because for land where, at the commencement date of the NPS, a Council decision has already been made to rezone land, then the deeming provisions in the NPS do not apply to that land, and it is not treated as highly productive under the NPS.
- 19 It is submitted that because the deeming provision refers to land subject to a Council initiated plan change to rezone it, this exemption does not extend to land put forward in submissions which Council has not adopted or initiated. The consequence of this is submitted to be that where submitters have sought to rezone further areas of rural land that is deemed to be highly productive by the NPS, then the NPS provisions should be considered by the Panel in relation to that land when evaluating whether, in response to submissions, to rezone the land, or not.
- 20 The NPS makes very directive provision for the management of highly productive land. The Objective is that it is protected for use and land based primary production, both now and for future generations.
- 21 Objective 2.1, and Policies 2.2.4, 5, 6, 8 and 9 are the relevant considerations for the Panel in the context of greenfield urban or rural lifestyle zonings.
- 22 In terms of rezoning, Policy 5 provides that rezoning of highly productive land is avoided, except as provided for in the NPS. It is submitted that this is a strong consideration alongside the provisions of Clause 3.6. Clause 3.6 provides the circumstances where urban rezoning of highly productive land is identified as available if the prerequisites are met. These are narrow exceptions to the avoid policy that the NPS has now introduced.
- 23 The NPS in this context has deliberately used the word "avoid". The word "avoid" has been considered in the context of section 5 of the Act and the NZ Coastal Policy Statement by the Supreme Court. The Supreme Court has determined avoid in this context is to be interpreted as having its ordinary meaning of "not allow" or "prevent the occurrence of" (see the decision of the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 28 at paragraph 96). It is submitted that the NPS has adopted "avoid" for the same purpose, and in the NPS "avoid" also has this same meaning.

Restrictions on rezoning highly productive land

- 24 Clause 3.6 of the NPS sets out the criteria for when territorial authorities may allow urban rezoning of highly productive land. This is specified to apply only if all 3 of the sub-paragraphs (a) – (c) are satisfied. These

paragraphs are conjunctive, requiring all to be met. They are linked with "and" (not "or").

- 25 The Hearing Panel now stands in the shoes of the territorial authority with the duty to give effect to the NPS when making decision on submissions (once it is operative). This means the Panel needs to apply this exception to any of the sites put forward by submitters for urban rezoning.
- 26 DCC planning staff intend to address these criteria in their evidence once the Panel confirms which sites it considers the NPS applies to and on which it wishes to receive further evidence. It is noted though that DCC staff have already provided the DCC's housing capacity assessment which is relevant to the criteria in clause 3.6(1)(a) of the NPS.
- 27 It is submitted that it is appropriate for submitters to address the Panel on these provisions of the NPS and what they mean should they wish to do so.

Conclusion

- 28 Once operative on 17 October 2022, the NPS is a relevant consideration for the Panel to evaluate greenfield rezoning of land sought by submitters. It is submitted that it is appropriate for the Panel to turn its mind to the extent to which relief sought by submissions is consistent with the provisions of the NPS. The NPS does not contain any other transitional provisions about when it applies to planning processes that are underway such as this. The NPS has full legal effect as soon as it is operative.
- 29 The provisions are very directive and apply to land that submitters seek to have rezoned. The panel should consider the merits of additional zones that have been sought by submitters under the provisions of the NPS.
- 30 The provisions of the NPS are not deemed to apply to land that has been approved by Council and notified as subject to Variation 2.

Dated this 6th day of October 2022



Michael Garbett
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