

Under	the Resource Management Act 1991 (the Act)
In the Matter	of a hearing in relation to Variation 2 to the proposed Second Generation Dunedin City District Plan (2GP)
By	Gladstone Family Trust Applicant

LEGAL SUBMISSIONS ON BEHALF OF GLADSTONE FAMILY TRUST

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GALLAWAY COOK ALLAN LAWYERS

Rebecca Crawford

Rebecca.Crawford@gallowaycookallan.co.nz

P O Box 143

Dunedin 9054

Ph: (03) 477 7312

Fax: (03) 477 5564

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May it please the Hearing Panel:

1. These submissions respond to the Panel's Minute 20.

A gateway in to the NPS

2. The NPS is only concerned with highly productive land which it defines at clause 1.3(1):

***highly productive land** means land that has been mapped in accordance with clause 3.4 and is included in an operative regional policy statement as required by clause 3.5 (but see clause 3.5(7) for what is treated as highly productive land before the maps are included in an operative regional policy statement and clause 3.5(6) for when land is rezoned and therefore ceases to be highly productive land)*

3. Clauses 3.4 and 3.5 set out how regional councils are to map and identify highly productive land.
4. In the period between the NPS commencing and the regional council completing mapping and identification of highly productive land, clause 3.5(7) says land which meets four criteria is to be treated as if it were highly productive land for the purposes of the NPS.
5. It is submitted that these criteria are not intended to require a merits assessment. They can be formed as yes/no questions about the land at the point in time when the NPS took effect. The merits assessment is the task of the regional council under clauses 3.4 and 3.5.
6. If any of the four criteria are not met then the land is not deemed highly productive land. The criteria act as a gateway into the deeming provision, not out. If the land is not highly productive land then it does not require consideration of the objective and policies of the NPS – they only apply to highly productive land.
7. In our submission all the land before the Panel for consideration as part of variation 2, at the commencement date of the NPS is subject to a plan change. Therefore the objective and policies of the NPS do not apply.

8. After the plan change is approved then the land will either be rezoned from rural to urban bringing it into clause 3.5(6) or it will cease to be subject to a qualifying plan change and will as a result meet the clause 3.5(7) criteria deeming it highly productive land. At that point it would fall to be dealt with under the NPS until such time as it was mapped and identified by the regional council.

A snapshot in time

9. In our submission the commencement date is the point in time at which the status of the land under Clause 3.5(7)(b)(ii) is to be assessed.
 - (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:
 - (iii) identified for future urban development; or
 - (iv) 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. In our submission “a council-initiated or an adopted” sets out alternatives. Either a council initiated the plan change, or it is a plan change adopted by a council through clause 25(2)(a) of Schedule 1 of the Act. In this context adoption does not relate to a Council resolution in relation to a particular proposal. Instead it identifies that the plan change must be Council driven to qualify.
11. The Legislation Act 2019 provides the principles to be applied to understand the meaning of Clause 3.5(7)(b)(ii). Section 10 of the Legislation Act states:

10 How to ascertain meaning of legislation

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

(2) Subsection (1) applies whether or not the legislation's purpose is stated in the legislation.

(3) The text of legislation includes the indications provided in the legislation.

(4) Examples of those indications are preambles, a table of contents, headings, diagrams, graphics, examples and explanatory material, and the organisation and format of the legislation.

12. Adopting a purposive approach requires careful examination of the text combined with seating that meaning in its wider context.
13. Clause 3.5(7) imposes a mandatory obligation on the Panel, in the shoes of the DCC to apply the NPS to land which has the status set out in subsection (b)(ii) at the specified point in time --the commencement date.
14. In our submission the enquiry is about the status of the land on 17 October 2022. Theoretically a plan change could have been notified years before this date. In this case Variation 2 was notified in February 2021, over a year prior to the commencement date. If “notified plan change,” is to be read as “the notified version of the plan change proposed by Council at the time of notification” this moves the relevant date to a point before the commencement of the NPS. In our submission this interpretation is not consistent with the plain meaning of the chapeau to clause 3.5(7). It would also defeat the statutory submission rights in the first schedule of the Act by effectively retrospectively requiring the Council to ignore submissions that it has already held to be within scope in a manner that is inconsistent with section 12 of the Legislation Act 2019:

12 Legislation does not have retrospective effect

Legislation does not have retrospective effect.

15. The Panel's obligation is to read the NPS in a manner that is consistent with section 12 of the Legislation Act 2019 by not interpreting clause 3.5(7) to only apply to the notified version of the Plan Change, rather than including the submissions properly made on that Plan Change.
16. In any event, the Section 32 Report to Variation 2 set outs in its appendix 4 the requested sites. In our submission, these sites were

within scope of Variation 2 because Council had considered them. Council preference cannot replace Council consideration. There is no logical reason for the 'Council Stamp' to omit options considered and rejected by the Council in its section 32 analysis. The point of providing evidence on these sites is to overcome those reasons for rejection.

17. By 17 October 2022 both the greenfield sites (council promoted) and the requested sites (submitter promoted) had been the subject of the section 32 Report, submissions, and evidence before the Panel. All that remained of the Schedule 1 process was the decision-making.
18. Variation 2 is therefore well advanced through the schedule 1 process. If the goal of the legislature were to arrest this process through directive policy, they could have done so simply by omitting Clause 3.5(7)(b)(ii).
19. We submit the "purpose and context"¹ of the clause was to allow certain existing plan change processes to continue without being impacted by the NPS, even after 17 October 2022. In other words, the clause has the function of avoiding improper retrospective effect on first schedule processes already on foot when the NPS came into effect.
20. Clause 3.6 of the NPS strongly directs rezoning from rural to urban be avoided, unless the Council has demonstrated the rezoning is necessary. In our submission the interpretation advanced by the Council places an unreasonably high burden on submitters who are not able to undertake that work. Reading in a requirement of council preference which applies one set of regulatory requirements to Council notified sites and another to Submitters is fundamentally inconsistent with natural justice principles. It is submitted that to do so turns the Panel's discretion into an unequal playing field.
21. It is further submitted that Clause 3.5(7)(b)(ii) also responds to the NPS-UD and recognises that Tier 1 and Tier 2 Councils are likely to have initiated changes to their plans to satisfy their NPS-UD obligations. It is submitted that one of the purposes of the transitional

¹ Section 10(1) of the Legislation Act 2019

provision is to mitigate conflict with plan changes initiated by Councils to fulfil their NPS-UD obligations.

22. Variation 2 responds to the NPS-UD and proposes a suite of changes to provide additional residential development capacity, including through rezoning rural land to urban zoning. It is submitted that Variation 2 was a plan change at the commencement date of the NPS of the type that Clause 3.5(7)(b)(ii) is designed to address.

Is Variation 2 a plan change

23. Clause 1.3(2) of the NPS provides:

Terms defined in the Act and used in this National Policy Statement have the meanings in the Act, unless otherwise specified.

24. The Act does not define 'plan change'. Section 43AA of the Act defines 'plan' and 'change' separately.

Plan means a regional or district plan.

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.

25. The same section defines variation:

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.

26. A variation alters a change or a proposed plan, a change alters a plan. The definition of plan refers to the definition of district plan:

district plan—

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)

27. The current operative district plan is the Dunedin City District Plan 2006 (The Operative Plan). Operative is also defined in section 43AA of the Act:

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

28. "Operative" has a two-limb definition. The first limb through (a)(i) is via clause 20 of schedule 1 of the Act. The word 'or' indicates that (a)(ii) is an alternative limb through Section 86F of the Act.
29. Pursuant to section 86F of the Act, a provision becomes operative when there are no submissions or appeals or all submissions and appeals have been determined or withdrawn. Section 86F(2) of the Act refers to Clause 10(4) of Schedule 1 which requires a decision to be made before section 86F applies to limited notified proposed plans. Section 86F does not refer to clause 17 of schedule 1. This tells us that the process for becoming operative under clause 86F is independent from cl 17 of the first schedule.
30. It is submitted that although the 2GP was a full district Plan review, in law the position is that as provisions of the 2GP became operative under section 86F, they became part of a single operative Plan that included the Operative (2006) District Plan in part, and the operative 2GP provisions to form a single operative "Plan" satisfying subsection (b) of the definition of district plan in the Act.
31. This interpretation is consistent with the obligation to always have a district plan in section 73(1) of the Act. In our submission operative provisions become part of the last approved operative plan until such time as a new approval by Council is made, thereby satisfying the Council's obligation to always have a plan.

32. If the converse were true Council would be operating for extended periods of time in breach of its obligation to have a plan under section 73(1) of the Act.
33. Under Clause 16A of Schedule 1 a variation is to be treated as a change in the Schedule 1 process. Variation 2 is progressing through the same process as though it were a change.
34. In our submission, the words 'change' and 'variation' have different meanings to manage the situation where alterations at different points in time apply to the same provision.
35. It is submitted that the structure of Schedule 1 and the definitions in section 43AA anticipate that a variation may become a change in at least two ways.
36. First Clause 16B of Schedule 1, provides for merger of the variation and change if both processes reach the same procedural point before the change is resolved. Separate meanings avoid two conflicting outcomes on the same plan provisions becoming operative.
37. Secondly if the change becomes operative, as was the case when the Gladstone Trust's 2GP appeal was resolved then the variation becomes a change because it is now an alteration to an operative plan. Clause 2 now fits the alteration since the relevant proposal engaging the schedule 1 process was prepared by Council and has followed the same procedural path.
38. In our submission the obligation on the Council under section 75(3) of the Act supports this interpretation. If a variation does not alter the district plan and thus be a "plan change" for the purposes of section 75, then the obligation to give effect to the NPS does not follow. Therefore, the legal effect of the Panel holding that Variation 2 is not, at law, a "Plan Change" would be that the Panel has no need to consider the NPS HPL at all, and certainly no need to give effect to it.
39. At the date of the NPS commencing the following was true:
 - (a) The 2GP zoning of the Gladstone land was operative, and

- (b) The proposal to change the operative 2GP zoning was a reasonably foreseeable outcome of the council-initiated proposed plan change.
40. It is submitted changes to rezone the Gladstone land meet the definition of “change” under the Act because they seek to alter operative provisions of a plan and are consistent with Clause 2 of Schedule 1.

Considerations

41. We acknowledge that the NPS contains strong direction in relation to rezoning HPL which must be given effect to by the Panel in reaching its decision about rezoning the greenfield sites.
42. In our submission, that direction includes recognising that sites before the Panel, are not to be treated as highly productive land.
43. Counterintuitively, acknowledging that these sites are not HPL is, in our submission, the best way for the Panel to give effect to the NPS, because the NPS did not (and could not) intend to retrospectively cut across existing Plan Changes.

Dated 26 October 2022



Rebecca Crawford

Counsel for Gladstone Family Trust