

Before the Hearing Panel
of Dunedin City Council

Under the Resource Management Act 1991 (**RMA**)

In the matter of Hearing 4 – Greenfields Zoning in relation to Variation 2 to the
proposed Second Generation Dunedin City District Plan (**2GP**)

Submission of Counsel for Dunedin City Council in Reply

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Overview

- 1 These legal submissions are provided in support of the section 42A Officers reply report. I respond in particular to the legal submissions presented by Mr McLachlan on behalf of CC Otago Limited, Peter Doherty and Outram Developments Limited.
- 2 I also respond to some of the principles argued by Mr Page and Ms Crawford, particularly public infrastructure costs and the role of considering amenity under the NPS-UD.
- 3 Mr McLachlan argues that it is the role of Variation 2 to "achieve compliance" with the NPS-UD (paragraph 30 of submissions dated 24 August 2022). It seems to follow in his argument that the NPS-UD needs to be achieved for Outram essentially as a standalone centre. This raises the question of the extent to which Variation 2 is required to give effect to the NPS-UD.
- 4 This issue, or variations on the theme, has previously been argued before this Hearing Panel at the scope hearing on the scope of various submissions. The hearing panel has already considered and made a decision on this issue (or a very similar issue). There it was decided that Variation 2 is a series of plan changes that contribute to giving effect to the NPS-UD but did not have an overarching purpose of achieving compliance with the NPS-UD as Mr McLachlan argued. Variation 2 builds upon and adds to the existing provisions of the 2GP and is one component of giving effect to the NPS-UD within the scope of what the Variation can achieve.
- 5 A Future Development Strategy is also an important part of giving effect to the NPS-UD which is a future work stream for Council to meet its obligations under the NPS-UD.
- 6 Overall it is submitted that Variation 2 appropriately builds on the provisions of the 2GP in giving effect to the NPS-UD to the extent the scope of Variation 2 can do. The Council here has targeted zone changes and other density changes across the city. There is no obligation in the NPS-UD, or authority for the proposition that Mr McLaughlan advances, that the NPS-UD needs to be "complied with" for Outram, in a standalone fashion. That seems to suggest each township has a standalone need for compliance with all aspects of the NPS-UD. Rather, it is submitted a strategic city-wide assessment of capacity, and supply is appropriate and valid.

- 7 Arguments and evidence on the merits of the proposed site at Formby Street is responded to by the Council staff who address the merits of the arguments put forward by Mr McLachlan and Ms Peters.

Detailed Submissions

- 8 Variation 2 as notified achieves the appropriate level of compliance with the NPS-UD. Variation 2 is not intended to be a complete stand-alone mechanism to achieve compliance with the NPS-UD. Variation 2 alters and builds on the existing provisions in the 2GP to add housing capacity. Council is also required to prepare a Future Development Strategy (**FDS**) in conjunction with Otago Regional Council.

Variation 2

- 9 It is Council's position that Variation 2 is not a full plan review, but rather a focussed suite of changes to enable additional housing capacity in Dunedin through specific rule and policy changes and by rezoning specific sites¹. Council's Summary of Changes document (**Summary Document**) for Variation 2 helpfully sets out an introduction to Variation 2 which includes the following purpose of the variation²:

A full review of all the residential zone provisions and residential zoning across the entire city was not undertaken as this was recently done through the development of the 2GP. The 2GP is still in the appeal phase and re-opening large parts of the plan to a new variation will slow the progress towards making the plan fully operative. Until the 2GP is operative, parts of the 2006 District Plan continue to apply along with the 2GP provisions, which increases the complexity and costs of processing consents. The changes proposed in Variation 2 are therefore as focussed as possible, and scope has been deliberately limited to avoid re-consideration of a wide range of provisions.

The scope of each proposal is identified in the 'purpose of proposal and scope of change' for each proposed change. Submissions may be made on matters encompassed by these scope statements. Submissions are encouraged to improve and fine-tune the changes proposed, or to suggest alternative methods of achieving the purpose of

¹ Dunedin City Council, Variation 2 – Additional Housing Capacity, Summary of Changes, February 2021, Introduction to Variation 2

² Dunedin City Council, Variation 2 – Additional Housing Capacity, Summary of Changes, February 2021, Introduction to Variation 2

the proposal, so long as these suggestions are within the limits of the scope statement.

Changes to zoning and other spatial layers

- 10 The Summary Document sets out that, in the context of needing to identify additional housing capacity, the purpose of the proposal is to assess the appropriateness of rezoning several identified sites and states that³:

The sites that were assessed as part of this proposal include the sites that are proposed for rezoning outlined in the *Variation 2 – Section 32 Report*, and those that were assessed but are not being proposed for rezoning in Variation 2, which are listed in Appendix 4 of the same report. The sites that were assessed but are not proposed for rezoning in Variation 2 do not meet relevant policy assessment criteria (or there is insufficient information to be confident that they would likely meet these criteria).

Variation 2 does not include a full review of zoning in the city, but instead only a limited review of the zoning of some sites. The scope of the proposals to rezone land includes the need for specific plan provisions (for example, overlays or site-specific rules) to manage adverse effects of development of the sites being rezoned.

Review of the zoning of sites outside those considered is not within the scope of this proposal.

The sites that were evaluated include sites being considered for rezoning:

- to General Residential 2 Zone from General Residential 1, Rural, Major Facility, Industrial and Rural Residential zones;
- to General Residential 1, Township and Settlement and Large Lot Residential 1 from Rural, Rural Residential, Large Lot Residential and Industrial zones; and
- to Recreation Zone from Rural Zone.

Decision of the Hearings Panel and the NPS-UD

- 11 The Hearings Panel has already considered the scope of Variation 2 in light of the NPS-UD. The Panel determined that the purpose of the Variation was not to solely give effect to the NPS-UD⁴. The Panel was ultimately satisfied that the variation comprises a series of limited review topics and proposals,

³ Dunedin City Council, Variation 2 – Additional Housing Capacity, Summary of Changes, February 2021, Introduction to Variation 2, page 22

⁴ Decision of the Hearings Panel, dated 31 May 2021, paragraph 26

not all of which were considered to directly implement the NPS-UD, and therefore were not convinced that there is an overarching purpose of Variation 2 to (fully) give effect to the NPS-UD⁵. The Panel rightly considered that this variation does not solely give effect to the NPS-UD.

12 Relevant passages of the "Scope Decision" dated 31 May 2021 provide:

27. Similarly, we considered Mr McLauchlan's (and others) assertion that "Council's description of the 'purpose' of the plan change is inaccurate. The purpose of the Variation is to give effect to the NPS-UD 2020". Having read the section 32 report and considered Ms McEwan's evidence we were satisfied that the variation, while clearly having a major driver to add more housing capacity (and ensure compliance with the NPS-UD Policy 2), comprises a series of limited review topics and proposals (each with a 'purpose of proposal') that traverses topics from minor changes of clarification to more significant reviews of various management regimes in the Plan. Not all of those topics and changes are concerned with adding housing capacity or implementing the NPS-UD. We were therefore not convinced that this argument had merit.

....

30. We understand and see as pragmatic the rationale that the s42A Report explained as to why Council has chosen to limit scope. Having considered the requirements of the NPS-UD we accept Ms McEwan's view that the NPS requires a strategic approach to growth planning, as well as immediate action if a shortage of the medium-term capacity is found. We can find no flaw in the Council's approach to undertake a limited 'early wins' plan variation, ahead of completing a Future Development Strategy (FDS) which is also required by the NPS-UD.

13 It is Council's position that the Hearings Panel correctly acknowledged that Council will be undertaking the Future Development Strategy to ensure that it meets its ongoing obligations under the NPS-UD⁶.

14 It is submitted that the purpose of Variation 2 was clearly limited in scope to amend the 2GP in targeted ways. Variation 2 did not have the overall purpose of implementing the NPS-UD, far from it. This variation amends and builds on the provisions in the 2GP to provide for capacity for urban development across the city. This variation is not a "stand-alone" planning package. The NPS-UD does not require each variation or each centre to

⁵ Decision of the Hearings Panel, dated 31 May 2021, paragraph 27

⁶ Decision of the Hearings Panel, dated 31 May 2021, paragraphs 30, 31 and 46

have to fully implement the NPS-UD. A city-wide strategic approach by the Council for how it gives effect to the NPS-UD is appropriate and valid. It is submitted that the overall findings and decisions of the Hearings Panel on scope were correct and apply equally now to the merits assessment.

- 15 For these reasons it is submitted Mr McLachlan's interpretation of the NPS-UD as it applies at Outram should not be preferred. Such an interpretation of the NPS-UD is too narrow.
- 16 Council staff will address the merits of the appropriate zone for the property at the Formby Street, Outram in their evidence in reply.

Response to submissions presented on behalf of Fletcher Glass and FBG Developments Limited

- 17 Mr Page and Ms Crawford submitted in paragraph 11 that "...the viability of funding infrastructure requirements is a business decision for the developer not a basis to refrain from rezoning the site."
- 18 This submission that has been made does not address Objective 2.7.1 and the related policies that relate to efficient public infrastructure. Objective 2.7.1 provides:

Public infrastructure networks operate efficiently and effectively and have the least possible long-term cost burden on the public.
- 19 Related Policies 2.7.1.1 and 2.7.1.2 seek to achieve the least possible long-term cost to the public through the provision of public infrastructure via a range of methods.
- 20 It is therefore submitted that the potential long-term cost to the public of public infrastructure is clearly a matter to be directly considered at the time of considering zoning for the intensification of housing.
- 21 To the extent that on site or internal reticulation costs which will be met by the developer is being referred to by Mr Page and Ms Crawford, then these will involve a business decision for a developer to consider. However, where residential intensification has the need for public infrastructure capacity then the Objective and Policies referred to directly seek to ensure the least possible long-term cost to the public. The Council often has to meet those costs and will have to recoup that off future owners, or ratepayers.

- 22 It is therefore submitted that it is not a matter of just discounting infrastructure requirements, particularly to public networks as a business decision as has been submitted. Rather this is a relevant planning matter that needs to be directly assessed in my submission.

Reply to submissions on behalf of Gladstone Family Trust

- 23 Mr Page and Ms Crawford have made submissions on behalf of Gladstone Family Trust. One of the legal issues submitted on is that:

"... amenity in appropriate circumstances, must yield to providing for demand."

- 24 Counsel have quoted policy 6(b) of the NPS-UD. In footnote 1, following paragraph 5 it is asserted that changes to the amenity values experienced by people as a consequence of a change to the urban form is not an adverse effect.

- 25 It is submitted that this incorrectly summarises policy 6(b) of the NPS-UD. Mr Page and Ms Crawford's argument also extrapolates that policy to incorrectly apply to proposed zone changes such as that advocated by Gladstone Family Trust.

- 26 Policy 6 is attached. Firstly this policy requires decision-makers to have particular regard to Policy 6(a), which provides:

The planned urban built form anticipated by those RMA planning documents that have given effect to this National Policy Statement.

- 27 Two points arise. Firstly, regard is had to planned urban built form. This is urban form that is already identified for urban uses in approved RMA planning documents.

- 28 The second point is that this is referring to those RMA planning documents that have given effect to the NPS. This is referring to existing documents, by use of the word "have". Such documents could be an RPS, a Future Development Strategy or an operative District Plan. Such RMA documents are required to give effect to the NPS-UD and are treated as doing so once operative. This is not a forward looking provision. It does not therefore apply to proposed greenfields sites that are promoted for rezoning.

- 29 Policy 6(b) then requires decision-makers to have regard to the fact that planned urban built form in those approved planning documents involves significant changes to the area. Those changes are not of themselves treated as an adverse effect.

- 30 This means that when considering planning decisions adverse effects of amenity arising from planned urban built form in an existing approved RMA planning document is not to be considered an adverse effect.
- 31 This is a very different situation from arguing that proposed greenfield sites that may affect rural amenity or character, is not an adverse affect to be taken into account at the time of rezoning. It is submitted this is entirely an incorrect application of the NPS-UD. The effects on the environment are perfectly appropriate to assess when deciding whether a greenfield site should be rezoned as part of an urban environment.
- 32 The NPS-UD is intended to mean that once a site is part of a planned urban development in an operative RMA document that has given effect to the NPS, then effects on amenity of people is at that point considered appropriate and not an adverse affect.
- 33 Applying this principle to the current case, it is submitted that adverse effects on rural character and amenity are squarely an issue that the panel should take into account and consider the evidence on that issue.

Dated this 5th day September 2022



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- (b) have or enable a variety of sites that are suitable for different business sectors in terms of location and site size; and
- (c) have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport; and
- (d) support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets; and
- (e) support reductions in greenhouse gas emissions; and
- (f) are resilient to the likely current and future effects of climate change.

Policy 2: Tier 1, 2, and 3 local authorities, at all times, provide at least sufficient development capacity to meet expected demand for housing and for business land over the short term, medium term, and long term.

Policy 3: In relation to tier 1 urban environments, regional policy statements and district plans enable:

- (a) in city centre zones, building heights and density of urban form to realise as much development capacity as possible, to maximise benefits of intensification; and
- (b) in metropolitan centre zones, building heights and density of urban form to reflect demand for housing and business use in those locations, and in all cases building heights of at least 6 storeys; and
- (c) building heights of at least 6 storeys within at least a walkable catchment of the following:
 - (i) existing and planned rapid transit stops
 - (ii) the edge of city centre zones
 - (iii) the edge of metropolitan centre zones; and
- (d) within and adjacent to neighbourhood centre zones, local centre zones, and town centre zones (or equivalent), building heights and densities of urban form commensurate with the level of commercial activity and community services.

Policy 4: Regional policy statements and district plans applying to tier 1 urban environments modify the relevant building height or density requirements under Policy 3 only to the extent necessary (as specified in subpart 6) to accommodate a qualifying matter in that area.

Policy 5: Regional policy statements and district plans applying to tier 2 and 3 urban environments enable heights and density of urban form commensurate with the greater of:

- (a) the level of accessibility by existing or planned active or public transport to a range of commercial activities and community services; or
- (b) relative demand for housing and business use in that location.

Policy 6: When making planning decisions that affect urban environments, decision-makers have particular regard to the following matters:

- (a) the planned urban built form anticipated by those RMA planning documents that have given effect to this National Policy Statement
- (b) that the planned urban built form in those RMA planning documents may involve significant changes to an area, and those changes:

- (i) may detract from amenity values appreciated by some people but improve amenity values appreciated by other people, communities, and future generations, including by providing increased and varied housing densities and types; and
- (ii) are not, of themselves, an adverse effect
- (c) the benefits of urban development that are consistent with well-functioning urban environments (as described in Policy 1)
- (d) any relevant contribution that will be made to meeting the requirements of this National Policy Statement to provide or realise development capacity
- (e) the likely current and future effects of climate change.

Policy 7: Tier 1 and 2 local authorities set housing bottom lines for the short-medium term and the long term in their regional policy statements and district plans.

Policy 8: Local authority decisions affecting urban environments are responsive to plan changes that would add significantly to development capacity and contribute to well-functioning urban environments, even if the development capacity is:

- (a) unanticipated by RMA planning documents; or
- (b) out-of-sequence with planned land release.

Policy 9: Local authorities, in taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) in relation to urban environments, must:

- (a) involve hapū and iwi in the preparation of RMA planning documents and any FDSs by undertaking effective consultation that is early, meaningful and, as far as practicable, in accordance with tikanga Māori; and
- (b) when preparing RMA planning documents and FDSs, take into account the values and aspirations of hapū and iwi for urban development; and
- (c) provide opportunities in appropriate circumstances for Māori involvement in decision-making on resource consents, designations, heritage orders, and water conservation orders, including in relation to sites of significance to Māori and issues of cultural significance; and
- (d) operate in a way that is consistent with iwi participation legislation.

Policy 10: Tier 1, 2, and 3 local authorities:

- (a) that share jurisdiction over urban environments work together when implementing this National Policy Statement; and
- (b) engage with providers of development infrastructure and additional infrastructure to achieve integrated land use and infrastructure planning; and
- (c) engage with the development sector to identify significant opportunities for urban development.

Policy 11: In relation to car parking:

- (a) the district plans of tier 1, 2, and 3 territorial authorities do not set minimum car parking rate requirements, other than for accessible car parks; and