

IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHĪ

Decision No. [2022] NZEnvC 234

IN THE MATTER of the Resource Management Act 1991

AND an appeal under clause 14 of the First
Schedule of the Act in relation to
Variation 2 of the proposed Second
Generation Dunedin City District Plan

BETWEEN PATERSON PITTS LIMITED
PARTNERSHIP

(ENV-2022-CHC-35)

Appellant

AND DUNEDIN CITY COUNCIL

Respondent

Court: Environment Judge P A Steven
(Sitting alone under s279 of the Act)

Hearing: at Dunedin on 19 October 2022

Appearances: P Page and R Crawford for the appellant
M Garbett and R Kindiak for the respondent

Last case event: 19 October 2022

Date of Decision: 9 November 2022

Date of Issue: 9 November 2022

DECISION OF THE ENVIRONMENT COURT

A: The relief in the appeal by Patterson Pitts is allowed.

PATERSON PITTS LTD v DUNEDIN CITY COUNCIL



B: Costs are to lie where they fall.

REASONS

Introduction

[1] In February 2021, the Dunedin City Council (the Council) notified Variation 2 – on Additional Housing Capacity to the Dunedin City Second Generation District Plan (2GP). The Hearing Panel (the Panel) gave its decision on the submissions made to the variation on 31 May 2022.

[2] The variation proposed a discrete set of changes to the 2GP provisions and zoning to respond to a projected shortfall in housing development capacity for the next 10 years, and to resolve some other implementation issues. It was developed in the context of the National Policy Statement on Urban Development 2020 (NPS-UD).¹

[3] However, in its decision, the Panel incorporated provisions for the protection of heritage buildings, in the form of a new rule requiring resource consent for demolition of pre-1940 buildings along with other associated additions and amendments (the new heritage provisions) which includes changes to the pre-existing strategic directions and heritage provisions not otherwise touched by the variation.

[4] Paterson Pitts Limited Partnership (‘Paterson Pitts’) appealed the decision on several grounds, the first of which is scope. The gravamen of the appellant’s complaint is that the submission supporting the changes made by the Panel was not on the variation and was therefore unlawful. The appeal requests that the new heritage provisions “be set aside”.

¹ Decision of the Variation 2 Hearing Panel at [6].

[5] This decision follows a preliminary hearing on the issue of scope. For reasons set out, I find that the new heritage provisions must be deleted and to that extent I find in favour of the relief sought by the appellant.

[6] It should be noted that Terramark Limited gave notice under s274 of the Resource Management Act 1991 ('RMA' or 'the Act') supporting the appeal, although it took no role in the hearing of this preliminary issue.

The notified variation

[7] Variation 2 was not a full plan review, but comprised a focussed suite of provisions, each given their own discrete change number and primarily for the purpose of enabling additional housing.

[8] The documents available when the variation was notified included the variation itself; the s32 report and a document titled Summary of Changes addressing the provisions of each identified change (the summary document).

[9] The purpose and scope of each of the changes is explained in this summary document. This includes the statement that all such changes have been "deliberately limited to avoid re-consideration of a wide range of provisions", being a reference to the settled 2GP provisions.²

[10] The change of interest for the purpose of this proceeding is described as Change A2, sharing the following purpose with other changes:³

The purpose of this proposal, which includes a number of changes, is to review the minimum site size (Rule 15.7.4) and density (Rule 15.5.2) performance standards for the General Residential 1 (GR1) and serviced Township and

² Which the court observes had been otherwise settled through the plan promulgation process.

³ Dunedin City Council "Variation 2 - Summary of provision changes" (15 July 2022) Dunedin City Council Website <www.dunedin.govt.nz/council/district-plan/2nd-generation-district-plan/plan-change-dis-2021-1-variation-2/variation-2summary-of-changes> at Table 1.

Settlement (T&S) zones to provide for more housing development capacity and housing choice within these zones, where appropriate. The purpose extends to making any consequential changes to Plan rules necessary to manage any adverse effects of increased density if existing rules are deemed inadequate to ensure the proposal is the most appropriate way to achieve the objectives of the Plan.

[11] The summary document also describes the scope of each of change in the following manner:⁴

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

[12] The summary document contains a summary of all alternative options that were assessed as part of the development of the variation, but which were rejected, as well as the changes being pursued by the variation. It then states:⁵

These changes set the scope for what can be considered as part of any submission on Variation 2.

[13] Provisions of the 2GP that are affected by the changes are also listed against each of the changes. Change A2 amends the density performance standard to permit duplexes in identified residential zones on sites with a minimum site area of 500m². It also permits residential units in one residential building which will

⁴ Dunedin City Council “Variation 2 - Summary of provision changes” (15 July 2022) Dunedin City Council Website www.dunedin.govt.nz/council/district-plan/2nd-generation-district-plan/plan-change-dis-2021-1-variation-2/variation-2summary-of-changes at Introduction to Variation 2.

⁵ Dunedin City Council “Variation 2 - Summary of provision changes” (15 July 2022) Dunedin City Council Website www.dunedin.govt.nz/council/district-plan/2nd-generation-district-plan/plan-change-dis-2021-1-variation-2/variation-2summary-of-changes at Contents of this Summary Table.

enable portioning of an existing residential unit into two.

[14] The summary document contains the statement that the variation is not a full review of the 2GP as the Council did not wish to unduly delay making the 2GP operative, noting that this was already delayed by the variation.⁶

[15] The stated purpose of proposal and scope of the changes cited above are repeated in the s32 report. This report contains an assessment against existing objectives and policies in relation to the form and design of duplexes primarily in terms of street scene. The potential for impacts on existing residential amenity and character by the loss of some green space to new buildings was also assessed.

[16] The s32 report includes an assessment of alternative proposals to address the impacts that were considered.⁷ Some were assessed as possible additional changes, whereas others were assessed as substitutes for the changes proposed (including standalone residential units instead of the duplex option).

Original submissions

[17] Original submissions were lodged to Change A2 by a number of persons, relevantly:

- (a) Paterson Pitts Group, the appellant;
- (b) Anna Johnson (for the Council);
- (c) David Murray; and
- (d) Terramark Limited.

[18] The submission that is the focus of this proceeding is that which was lodged by Mr David Murray (the Murray submission). The Murray submission states that

⁶ As an aside, I note that had it been a review, s79(3) of the Act would have been triggered, with the result that submissions could have been made on the proposed retention of the status quo under the 2GP.

⁷ In section 8.8.

it makes multiple submission points/decisions as outlined therein and in broad terms, read as a whole, the submission expresses support for the variation, albeit “in a targeted way” where that is “integrated with complementary amendments to heritage provisions”. This submission opens with the following statement:⁸

Well balanced plan changes promoting increased residential density in a targeted way are to be welcomed where they are integrated with complimentary amendments to heritage provisions. More affordable housing is of course needed.

[19] The Murray submission proceeds to identify inadequacies with the 2GP protection of heritage buildings, noting that under 2GP, the primary method by which this protection is achieved is by the scheduling of buildings in an appendix that have been assessed for their heritage significance.

[20] However, through his submission, Mr Murray contends that too few buildings are listed as scheduled heritage buildings throughout Dunedin, commenting on the paucity of listed buildings within the residential suburbs. Mr Murray does not specify relief being sought to the variation, although the penultimate paragraph of his submission states that:⁹

Council needs to look better at the flow-on effects of its plan change. Reviewing suburban heritage provisions should be part of this, allowing for densification in a way that better targets it to minimise the loss of the best built heritage and sites of cultural significance.

[21] The Council also lodged submissions to each of the changes, including a submission to A2, which the Council contends is of relevance to the scope issue. This was expressed as a ‘neutral’ submission concluding with the following statement:¹⁰

⁸ Submission on behalf of D Murray, dated 4 March 2021..

⁹ Submission on behalf of D Murray, dated 4 March 2021.

¹⁰ Submission on Variation 2 – Additional Housing Capacity by Dunedin City Council, dated 4 March 2021.

...as an alternative to rejecting any changes that provide for intensification or new residential zoning in response to submissions opposing them, consider the need for additional plan provisions to better manage any adverse effects as an alternative.

[22] Many other original submissions had sought amendments that were not considered to be “on the variation” and these were referred to a Panel for consideration of a strike out under s41D of the Act.¹¹

[23] Numerous s357 objections were lodged to the Panel’s decision striking out various submissions and that was the subject of a further decision from a highly experienced hearing commissioner, Mr Paul Rogers. I was provided a copy of his decision. Questions about the scope of the variation, along with relevant authorities on that topic are comprehensively considered.

[24] In particular, that decision refers to the need for procedural and substantive safeguards underpinning any decision on scope, so as to provide for the interests of persons who may be affected by submissions that seek to alter or enlarge a plan change or variation process.¹²

[25] That is a principle that is central to my resolution of the present issue.

Further submissions

[26] The Council then gave public notice of the availability of the summary of decisions requested, to enable further submissions to be lodged under cl 7 Schedule 1 of the Act.¹³ By cl 7, any further submissions must relate to a “matter in support of or in opposition to” the relevant original submission. In accordance with this requirement, the Southern Heritage Trust (the Heritage Trust) lodged a

¹¹ The Murray submission was not one of the submissions considered for a strike out.

¹² Decision on s357 objections to an out of scope decision on the Variation 2 Independent Hearings Panel, dated 26 November 2021 at [142].

¹³ The summary of submissions excluded those that had been struck out.

further submission in support of a number of original submissions, including the Murray submission.

Evolution of new heritage provisions

[27] One of a number of s42A reports (dated 22 August 2021) included a discussion of the Murray submission under the heading “Broad submission on heritage”.¹⁴ When referring to the background of the variation, the author notes that some assessments (in the form of “high-level advice”) had been made of the effects of intensification on residential streetscape and character but not on the potential effects of intensification on heritage.

[28] In this s42A report, the decision requested by the Murray submission was stated as being to:¹⁵

Amend Changes A2,A3<B1<B3, B4, B6 and E9 ... to ensure that increased residential density is integrated with complementary amendments to heritage provisions.

[29] The author, Ms McEwan, explains that preliminary comments on the Murray submission were sought from the Council’s heritage advisor, Dr Andrea Farminer. Dr Farminer’s comments were incorporated into the s42A report, noting in particular her observation that:¹⁶

Many of the older housing stock are unlikely to meet the criteria for inclusion on the Heritage Schedule as Heritage Buildings (the highest heritage category), as their heritage values would be relatively low and their built form, commonplace. However, in some instances both individually and collectively, their heritage values will be significant, which contribute to the broader, distinctive built heritage

¹⁴ At p 24.

¹⁵ Variation 2 Additional Housing Capacity Part 1 – Provisions 42A report, dated 22 August 2021 at p 24.

¹⁶ At p 26.

character that Dunedin is renowned for.

[30] The s42A report then refers to an analysis undertaken by another council officer (Mr Stocker) of the distribution of older buildings within the areas affected by the changes, using the cut-off date for the age of the older buildings of 1940. The selection of this date evolved from discussions with Dr Farminer.

[31] These discussions lead to formulation of the option of introducing a rule requiring resource consent for the demolition of any pre-1940 building in response to the Murray submission, because, as the s42A report notes, there was insufficient time or resources to assess all of these buildings for their heritage significance and potential listing in the 2GP.

[32] Ms McEwan explained that a resource consent process where demolition is proposed would enable a heritage assessment to be undertaken (by the owner) and a determination made of whether consent to demolish should be granted.

[33] Ms McEwan was also provided with a modelled estimate of the number of sites (in percentage terms) that would be feasible for development that have pre-1940's buildings on them:

- (a) 22% of dwellings in the General Residential 1 Zone, and
- (b) 25% of dwellings in the Township and Settlement Zone.¹⁷

[34] Further analysis by Mr Stocker identified that the rule has the potential to affect owners of:¹⁸

- (a) over the next ten years, a modelled 88 dwellings; and
- (b) over the long term (30 years), a modelled 166 dwellings.

¹⁷ At p 27.

¹⁸ Variation 2 Additional Housing Capacity Part 1 – Provisions 42A report, dated 22 August 2021 at p 28.

[35] Overall, Ms McEwan's recommendation was for a further evaluation of the option of adding a blanket provision to manage effects on heritage values, noting that it would increase the costs of some development due to new consent requirements. Ms McEwan stated that:¹⁹

This should be carefully balanced with managing the risk to heritage values.

[36] Ms McEwan considered that the additional consenting costs could be managed through the appropriate use of non or limited notification clauses, while stating that:²⁰

....any changes progressed through Variation 2 to manage potential effects on heritage must only apply to areas where Variation 2 makes changes to increase development potential.

[37] She noted that any additional changes would be outside the scope of the variation.²¹

Natural justice raised as a preliminary issue by the Panel

[38] In preparation for the hearing on the relevant changes, the Panel presented the author of the s42A reports with a number of questions on selected topics, including on scope in the context of Ms McEwan's recommendation on the Murray submission.

[39] The Panel sought additional information about existing plan methods for protection for unlisted heritage items under the 2GP. The Panel were interested in the level of protection afforded for sites/buildings with heritage values that are not listed.

¹⁹ At p 28.

²⁰ At p 29.

²¹ At p 29.

[40] The Panel also asked about the scope to include “the new rule that impacts on owners of pre-1940 dwellings” putting the following question to Ms McEwan:²²

Would you not consider it beyond the Panel’s powers/and outside of the scope of submissions to introduce a new rule that impacts on owners of pre-1940 dwellings? Could this be an issue of natural justice? Also, can you comment on whether the Panel has sufficient information to be able to do a s32AA evaluation of introducing a new rule of this kind?

[41] In her reply to the Panel, Ms McEwan pointed to the matters raised in the Murray submission, including with reference to his presentation at an earlier hearing, along with the presentation from representatives of the Heritage Trust (also at an earlier hearing) about their concerns at the effects of intensification on heritage values.

[42] Ms McEwan’s reply also referred to the place of historic heritage in s6 of the Act and concluded with an “overall” recommendation that the pre-1940 building rule should be adopted as part of the variation.

[43] Ms McEwan acknowledged the impact on owners of pre-1940 dwellings, although she stated that the costs of the rule are outweighed by the benefits of avoiding the potential loss of significant historic heritage that is not protected by any other method.

[44] Ms McEwan also stated:²³

I am also mindful that many submissions have been received in support of the proposed rule changes (seeking no amendments) and most of these submitters have chosen not to speak at the hearing. Although they have all been sent copies of the section 42A report, lay submitters in particular may not have ascertained

²² Variation 2 Additional Housing Capacity Part 1 – Provisions Reply to the Panel’s Pre-Hearing Questions, dated 10 September 2021 at [53].

²³ Variation 2 Additional Housing Capacity Part 1 – Provisions Reply to the Panel’s Pre-Hearing Questions, dated 10 September 2021 at [54]-[55].

the potential for a rule to manage the demolition of older buildings as a possible outcome in response to another submission. I note that the vast majority of landowners who stand to be affected by changes proposed in Variation 2, or any amendments in response to submissions, have not submitted on it.

In terms of natural justice, I do not believe that a submission, such as Mr Murray's, seeking relief to address valid concerns (as established by Dr Farminer) regarding adverse effects on historic heritage (being a matter listed in section 6 of the RMA) should be dismissed because granting relief would impact on other landowners. I consider that decisions are often made through plan changes which impact large numbers of landowners, including those who have not made submissions, and that this can be appropriate where needed to ensure that the objectives of the Plan are achieved and higher order planning provisions are recognised and provided for.

[45] As part of her evaluation in terms of s32 the rule was assessed against existing objectives in Chapters 2 (Strategic Directions) and 13 (Heritage), neither of which chapter were otherwise affected by the variation.

[46] A further s42A report was prepared for the Panel, authored by a different Council officer. However, Ms McEwan's assessment of the Murray submission was referred to when considering the submissions raising heritage as an issue, with the author endorsing Ms McEwan's recommendations.²⁴

The Panel's decision

[47] The Panel in its decision report titled "Variation 2 – Additional Housing Capacity, First Decision Report: Provisions and Intensification Rezoning", adopted the reporting officers' recommendations to add a new provision requiring a resource consent for the demolition of pre-1940s buildings.²⁵

[48] The Panel noted that historic heritage is a matter of national importance

²⁴ Being the second of four reports to the Panel, this one dated 12 October 2021.

²⁵ Which was released on 31 May 2022.

that requires them to be satisfied that the plan gives adequate protection:²⁶

We broadly adopt the reporting officers' recommendations to add a provision requiring a resource consent for the demolition of pre-1940 buildings where Variation 2 changes will apply. We have departed from the recommendations in so far as we have added Southern Heritage Trust as an affected party in the notification rule, rather than Heritage New Zealand, due to their local knowledge and interest.

In reaching our decision, we give particular weight to the evidence from Mr Murray (S153.001), the Southern Heritage Trust (FS226.11), and the DCC Heritage advisor, Dr Farminer, about the number of significant heritage buildings that may not be on the Schedule. We note that heritage values are a matter of national importance that requires us to be satisfied that the Plan gives adequate protection.

We also considered the analysis of Mr Stocker that the proposed rule would generate an estimated 88 resource consents for demolition over the next ten years. In this context, we consider the consenting costs will not be significant.

[49] The decision was to include the following additional changes to the 2GP provisions in addition to those proposed by the variation:

- (a) addition of new rule 15.3.4.X requiring resource consent for the demolition of pre-1940 buildings;
- (b) addition of new rule 13.6.X setting assessment criteria for new rule 15.3.4.X;
- (c) amendments to the special information requirements rule 13.9.X;
- (d) addition of a new notification rule to Rule 15.4 making Southern Heritage Trust an affected party; and
- (e) amendments to Objective 13.2.1, Policies 13.2.1.7, and 2.2.2.1 to apply to buildings not in the heritage schedule.

[50] The changes introduced a new method for heritage protections within the

²⁶ At [164]-[166].

existing objective and policy framework although changes were made to the Chapter 2 provisions on Strategic Directions, and the Chapter 13 Heritage provisions otherwise unaffected by the variation.

[51] The decision sets out the new provisions in their entirety, which are set out in an attachment to this decision as **Appendix A**.

Panel's section 32AA evaluation

[52] The Panel undertook a s32AA evaluation which was set out in the decision as follows:²⁷

In our view, these changes will better achieve the objectives of the Plan, recognising in particular that heritage is a matter of national importance, and the evidence of Dr Farminer and David Murray that the current provisions would be ineffective given the incompleteness of the District Plan's heritage schedule.

In weighing up the costs and benefits of the change we concluded that the costs of the proposed provisions would be reduced by preventing public notification, so the provision could not be misused to progress other issues unrelated to heritage protection.

We also note this blanket approach is an interim measure to allow time for work to occur to update the schedule of heritage buildings in the 2GP as part of a future plan change, if that is the intention of DCC.

Appellant's case on scope

[53] The appellant's submission raised the issue of scope in both senses in which that issue occurs in this appeal context, including the question of whether the amendment made by the Panel in response to the Murray submission was fairly raised and within the ambit of the submission. However, the appellant focussed on the *Clearwater Resort Limited v Christchurch City Council* and *Palmerston North City*

²⁷ At [169]-[171].

*Council v Motor Machinists*²⁸ line of cases in written and oral submissions.

[54] I am treating the pre-eminent question as whether the submission is “on” the variation and in any event, the second scope issue would only need to be addressed if the Murray submission was found to be on the variation.²⁹

[55] In summary, the appellant submits that:

- (a) the Panel’s decision is “out of scope” of the Murray submission relied upon, which was also a submission that was not “on the variation”;
- (b) neither the scope or purpose statement nor the s32 evaluation addressed heritage protections, only residential character, when considering the effects of intensification;
- (c) the submission raised an issue about the implementation of the existing 2GP for heritage protection which “may be exacerbated” by the variation, although the scope of the variation was deliberate in not extending to the operation of 2GP provisions not amended by the changes contained in the variation including in relation to heritage;
- (d) under the status quo 2GP provisions, heritage was managed through applying rules to scheduled buildings and sites; there was no general policy basis for applying rules to buildings which may have heritage values but which were not scheduled;
- (e) the purpose of Change A2 does not provide for changes to the objectives and policies of the 2GP nor does it provide for the changes to the status quo occasioned by the decision, specifically in relation to the heritage provisions;
- (f) accordingly, the submitter was calling for a fundamental rethink about the unamended 2GP’s policy framework in relation to heritage

²⁸ *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP 34-02, 14 March 2003; *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290.

²⁹ Having considered the documents, and arguments put to the court, I doubt that the Panel’s decision could be said to have blatantly transgressed clause 10 of Schedule 1 although that does not save the Panel’s decision.

protection;³⁰

- (g) the new method adversely affects parties who have been deprived of the opportunity to participate since it does not fall within the clearly circumscribed limits of the scope of the variation.

[56] Mr Page suggested that while Variation 2 might highlight gaps in the Council's policies in relation to built heritage, a fundamental change in heritage policy used by the plan was plainly not within the scope of the variation. Counsel contended that Mr Murray's relief was limited by the scope of the unamended heritage policy provisions since these were not proposed to be changed. In essence, the heritage provisions were not within the four corners of the variation.

[57] Although the notice of appeal challenges all of the changes made by the Panel in response to the Murray submission, including the new pre-1940 rule, in speaking to his written submissions, Mr Page focussed on the changes to the Chapter 2 and 13 objectives and policies, which he described as forming part of the status quo in the 2GP otherwise unaffected by the notified variation.

[58] Mr Page submitted (tentatively) that the subject matter of the Murray submission likely satisfied the first limb of the tests in *Clearwater* (which I will come to shortly) as the focus of the Murray submission concerned the effects (on heritage) of intensification proposed by Change A2. His submission was that the inclusion of the rule was possibly less prone to challenge than the amendments to other provisions.

[59] As to these, Mr Page contended that the changes to the Chapter 2 and 13 provisions were said to affect proposals for development outside of the spatial extent of the variation or the new rule.³¹ He explained that these are city-wide

³⁰ Although this is how the argument was put to the court, I note that this is not what the Murray submission actually sought; rather, it was the Council's response to the same. Mr Page notes elsewhere that the Murray submission called for additional buildings to be assessed and included in the 2GP using the orthodox method of listing in the schedule.

³¹ At [64].

provisions that that apply to all 2GP management zones and all buildings, not just those directly affected by Variation 2.

[60] To illustrate his point, Mr Page referred to a hypothetical proposal for demolition of a pre-1940 industrial building in an industrial zone which is currently able to be demolished as a permitted activity although if it were to be bundled with a development that triggers discretionary activity or non-complying activity status, the bundled proposal engages the objective and policy changes made in the decision and may require an assessment of the heritage values of the building to be demolished.

[61] Mr Page described this as a consequence that is clearly unintended and had not been evaluated during preparation of the variation or in the Panel's decision.

Council's response

[62] The Council's written submissions also addressed scope in both the senses discussed in the appellant's submissions, although the focus was on whether the Murray submission was "on the variation". For the Council, Mr Garbett submitted that:

- (a) the Murray submission sought to achieve better protection for suburban built heritage from intensification, which the Panel provided for in its decision;
- (b) the Council's original submission identified that one approach to submissions opposing intensification is to consider the need for additional plan provisions to better manage any adverse effects;
- (c) the Panel's decision was well within their jurisdiction because:
 - (i) the submissions (the Murray submission and the Council's) met the legal tests for being "on" a plan change and was therefore within the scope of variation;

- (ii) the Murray submission was clearly seeking limits on the changes proposed in Variation 2 to achieve greater housing density; and
- (iii) people affected by Variation 2 as modified in response to the Murray submission, were not denied an effective opportunity to participate in the plan change process because there is a clear connection between the increased density proposed in Variation 2, and the consequential need to protect built heritage, which was identified by Mr Murray.

[63] Mr Garbett noted that the notified text of the variation encouraged submitters to “improve and fine-tune the changes proposed”. Counsel submitted that the new heritage provisions represent an alternative approach to responding to the effects of intensification.

[64] Mr Garbett submitted that the officers’ s42A recommendation to the Panel was based upon the expert assessment of the issue raised in the Murray submission, and that the ultimate decision of the Panel to accept those recommendations was within the scope of, and directly responded to Mr Murray’s submission.

[65] While also pointing to the Council’s submission as affording scope for the changes made by the Panel, Mr Garbett appeared to acknowledge the more relevant point that the Council’s submission could not be construed as expanding the scope of the (earlier notified) variation as explained in the summary document (and repeated in the s32 report) notified to the public.

The *Clearwater* tests

[66] I was referred to various cases including the leading authorities in *Palmerston North City Council v Motor Machinists Ltd*³² where the High Court endorsed the test

³² [2013] NZHC 1290.

in *Clearwater*³³ on whether a submission is “on” a variation (or a plan change).

[67] These cases were summarised in another decision referred to by the parties, being the decision in *Calcutta Farms*.³⁴

[68] Put simply, these cases establish the proposition that if a submission is not “on” a plan change or variation, the Council has no jurisdiction to consider it.

[69] In *Clearwater*, the High Court posed the bipartite test as follows:³⁵

- (a) a submission can only be regarded as being “on” a plan change or a variation of it, if it addresses the extent to which the plan change or variation changes the pre-existing status quo; and that
- (b) if the effect of regarding a submission as being “on” a plan change or variation would be to permit a planning instrument to be amended without real opportunity for participation by those potentially affected, that is a powerful consideration against the submission to be “on” the variation.

[70] *Motor Machinists* states the rationale for this limitation:³⁶

Permitting the public to enlarge significantly the subject matter and resources to be addressed through the schedule one plan change process beyond the original ambit of the notified proposal is not an efficient way of delivering plan changes.

[71] The High Court comments on the caution required where submitters to a variation or proposed plan suggest that the issue in question be addressed in an entirely different way from that proposed, noting a tendency for this to happen:³⁷

³³ HC Christchurch AP 34-02, 14 March 2003.

³⁴ *Calcutta Farms Limited v Matamata-Piako District Council* [2018] NZEnvC 187.

³⁵ *Clearwater* at [66].

³⁶ At [79].

³⁷ *Clearwater* at [69].

It may be that the process of submissions and cross-submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however, whether the proposition advanced by the submitter can be regarded as coming out of “left field”, there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is “on” the variation.

First limb discussed in *Motor Machinists*

[72] Kós J in *Motor Machinists* refers to the first limb in the *Clearwater* analysis as follows:³⁸

.. the first limb in *Clearwater* serves as a filter, based on a direct connection between the submission and the degree of notified change proposed...

[73] This was described as the “dominant consideration” and was expanded upon as follows:³⁹

In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing this is to ask whether the submission raises matters that should have been addressed in the s32 evaluation and report. If so the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource... is altered by the plan change. If it is not, then the submissions seeking a new management regime for that resource is unlikely to be ‘on’ the plan change. ... Incidental or consequent extensions of zoning changes proposed in the plan change are permissible, provided that no substantial further s32 analysis is required to inform affected person of the comparative merits of that change.

[74] However, this passage supports the view that there is no single perspective to take when addressing this analysis. Kós J notes that *Clearwater* had described

³⁸ At [80].

³⁹ At [81].

the question of whether a submission was “on” a variation as one of “apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case”.

[75] Kós J points to the three potential approaches to the question that were identified in *Clearwater*.⁴⁰

- (a) a literal approach, “in terms of which anything which is expressed in the variation is open for challenge”;
- (b) an approach in which “on” is treated as meaning “in connection with”; and
- (c) an approach “which focuses on the extent to which the variation alters the proposed plan”.

[76] In *Motor Machinists* Kós J observes that *Clearwater* rejected the first two and adopted the third, which led to the formulation of the bipartite (or two limb) analysis.⁴¹

[77] As to the first approach, *Motor Machinists* observes that this would unduly expand the scope of the challenge able to be raised in submissions, whereas the second construction represented “so broad an approach that “it would be difficult for a local authority to introduce a variation of a proposed plan without necessarily opening up for relitigation aspects of the plan which had previously been [past] the point of challenge”.⁴²

Limb 2 – Prejudice to potentially affected parties

[78] The second limb is underpinned by natural justice concerns. *Motor Machinists* traces the importance of preserving the opportunity for participation

⁴⁰ At [49].

⁴¹ At [50].

⁴² At [52].

through a series of decisions, commencing with *Halswater Holdings Ltd v Selwyn District Council*,⁴³ *Clearwater*,⁴⁴ and *Option 5 Inc v Marlborough District Council*,⁴⁵ before concluding that this second limb of the *Clearwater* test protects against the mischief of a plan changing such that:⁴⁶

... a person not directly affected at one stage (so as not to have received notification initially under clause 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument.

[79] Having traversed the authorities, the second limb assessment is posed as being:⁴⁷

... whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process.

[80] The “fundamentals” inherent in the sustainable management purpose of the Act are then referred to, the first involving “an appropriately thorough analysis of the effects of a proposed plan (whichever element within it is involved) or activity”,⁴⁸ observing that in the context of a plan change, that is found in the s32 evaluation and report.

[81] Kós J notes that the s32 report will contain a comparative evaluation of the efficiency, effectiveness and appropriateness of options, describing a “core purpose” of the plan change process being to ensure that persons potentially affected, and in particular, those “directly affected” are adequately informed.⁴⁹

⁴³ (1999) 5 ELRNZ 192 (EnvC) cited in *Motor Machinists* at [62].

⁴⁴ *Clearwater* cited in *Motor Machinists* at [55].

⁴⁵ HC Blenheim CIV 2009-406-144, 28 September 2009 cited in *Motor Machinists* at [68].

⁴⁶ *Motor Machinists Limited* at [77].

⁴⁷ At [82].

⁴⁸ At [76].

⁴⁹ At [77].

Kós J observes that access to the s32 report should be available to persons affected, as this analysis provides the justification being offered for the change having regard to all reasonable alternatives that were considered.

[82] His Honour then observes that.

Further variations advanced by way of submission, to be “on” the proposed change, should be adequately assessed already in that evaluation. If not, then they are unlikely to meet the first limb in *Clearwater*.

[83] *Motor Machinists* also provides a detailed explanation on why the further submission process may not always be an appropriate mechanism to cure prejudice to third parties.⁵⁰

[84] The key factor is that pursuant to Schedule 1, unlike cl 5A, the Council is not required to directly serve the summary of decisions requested on potentially affected parties, matters that had been of relevance in the *Halswater* decision.⁵¹ If potentially affected parties do not review the Council’s summary of submissions received, then they may not participate in the process.

[85] *Motor Machinists* cites from *Clearwater* where the High Court drew on the Environment Court decision in *Halswater*, commenting on the “careful and compelling analysis” of the statutory scheme that applied at the time that case was decided.⁵²

[86] *Halswater* had referred to the three layers of protection under the cl 5 notification of a plan change not present in relation to notification of a summary of submissions, commenting that the statutory scheme suggested that:⁵³

⁵⁰ At [74]-[83].

⁵¹ Resource Management Act 1991, Schedule 1, cls 5A and 7.

⁵² *Motor Machinists* at [60].

⁵³ *Halswater Holdings Limited v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC) at [41]; cited in *Motor Machinists* at [61].

...if a person wanted a remedy that goes much beyond what is suggested in the plan change so that, for example, a submission can no longer be said to be “on” the plan change, then they may have to go about changing the plan in another way such as a further variation of plan change.

[87] *Clearwater* had referred to the advantage of this statutory procedure, which in terms of the notification process “goes back to the beginning” and would also enable the Council to consider the effectiveness and efficiency of what was sought in the submissions as required by the s32 analysis.⁵⁴

[88] The relevance of the s32 analysis in this analysis was also discussed in *Calcutta Farms*, with reference to a number of other authorities where the coverage of the s32 analysis had assumed some importance.

[89] The first case referred to in *Calcutta Farms* is *Bluehaven Management Limited v Rotorua District Council & Bay of Plenty District Council*.⁵⁵ *Bluehaven* concluded that a submission point that is not addressed in the Council’s s32 analysis should not be ruled out of scope if it proposed an option that should have been considered, but was not as to rule otherwise would mean that the Council could ignore options to prevent submitters raising them in submissions.⁵⁶

[90] *Bluehaven* involved a plan change that provided for future residential development where the focus was on the extent of the Council’s consideration of the location of alternative rezoning options, where *Bluehaven* was seeking the inclusion of land not included in the notified plan change.

[91] The submitter’s land was not identified as an option that had been considered by the Council in the s32 analysis, although the court held that this did not lead to the result that *Bluehaven*’s submission was not “on” the plan change.

⁵⁴ *Motor Machinists* at [61].

⁵⁵ [2016] NZEnvC 191.

⁵⁶ Presided over by two Environment Judges.

Was the Murray submission “on” the variation?

[92] In this context, the status quo under the 2GP resulted in a likely shortfall in housing capacity over the short to medium term and Variation 2 proposed to provide additional housing capacity through limited changes to remedy the shortfall.

[93] The variation was expressly stated as “not a full review”. The notified variation states that the settled 2GP provisions other than those identified in the variation are not within the scope of the change. This meant that s79(3) was not triggered.

[94] The Council’s position throughout the variation process was that:⁵⁷

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.

[95] Accordingly, submissions seeking amendments to the change, along with the decision had to have raised matters within the purpose and scope of the particular change (Change A2 on this occasion) and the s32 evaluation of that change, to be “on” the variation.

[96] In this case, I agree that there is a connection between the subject matter of the variation and the relief being sought in the Murray submission, as Mr Garbett submitted. However, that is not a complete answer to the issue. The relief sought in the Murray submission was focussed on the adequacy of the management regime for a heritage resource within the 2GP that was *not* being altered by the variation.

[97] The potential for persons to be unaware of the changes had been

⁵⁷ Variation 2 – Additional Housing Capacity Section 32 Report, dated February 2021 at [10].

recognised by the planner reporting to the Panel, and by the Panel, who had engaged with Ms McEwan on that issue.

[98] Referring back to Ms McEwan's response to the Panel,⁵⁸ it is true that decisions will often be made through the plan change process that impact upon people not involved in the process. However, that is unobjectionable if they have otherwise had an effective opportunity to be involved in that process.

[99] Mr Garbett submitted that when Variation 2 was notified, it was reasonably foreseeable that additional heritage protection measures could be included as an outcome of the submission and hearing process. I disagree with that submission. The Council had deliberately limited the scope of the variation, giving notice of that when the variation was notified to the public.

[100] I find that the inclusion of a suite of new provisions providing for heritage protection, incorporating the pre-1940 building rule (which is a novel method not already used in the 2GP) in particular, was not "on" the variation. Even the potential for the existing heritage listings was not an outcome that a person reading the notified documents would reasonably contemplate as an outcome of the submission and hearing process.

[101] Although inadequate heritage protection was raised in the Murray submission, the permissible scope of submissions was framed by the notified variation and accompanying information, particularly the s32 report which were obviously earlier in time to the Murray submission.

[102] Persons reading the variation and accompanying information when it was notified may have elected not to participate knowing the deliberately focussed scope of the proposed changes.

⁵⁸ Variation 2 Additional Housing Capacity Part 1 – Provisions Reply to the Panel's Pre-Hearing Questions, dated 10 September 2021.

[103] While the Murray submission was addressing the potential effects of intensification, this alternative option had not been addressed in the s32 evaluation which had only addressed the effects on street character, gardens and amenity.

[104] The s32 identified a range of alternative options to address the potential effects being considered which included the option of a smaller minimum lot size and/or stand-alone residential units as an alternative to the duplex option.

[105] There are a reasonably large number of owners of pre-1940s buildings who are directly affected by the changes made to the variation in response to the Murray submission. They have been disenfranchised by the process followed by the Council. That brings about a level of unfairness that “militates the second limb” of *Clearwater*.⁵⁹

[106] The Schedule 1 submission process lacks the “procedural and substantial” safeguards built into the plan change and variation process and as Kós J observes, this is not designed as a vehicle to make significant changes to the management regime unaffected by the variation.

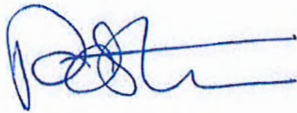
[107] It is also inefficient, particularly as the costs of assessing the heritage values of pre-1940s buildings is transferred to the building owners. That much appears to have been acknowledged in the Panel’s decision, where it was said that “... this blanket approach is an interim measure to allow time for work to occur to update the schedule of heritage buildings in the 2GP as part of a future plan change, if that is the intention of DCC”.

[108] For these reasons, the Decision of the Panel cannot stand insofar as it included the new heritage provisions set out in Appendix A to this decision. Pursuant to s290(2), the decision to include these provisions is cancelled, such that

⁵⁹ Adopting the language in *Motor Machinists* at [78].

they must be deleted.

[109] Although it may not be necessary to address the Murray submission, in the context of the strike out power in s41D, for the sake of completeness the submission is struck out pursuant to s41D(1)(b) as disclosing no reasonable or relevant case, for reasons set out in this decision.⁶⁰



P A Steven

Environment Judge

⁶⁰ Which in terms of s290(1) is a power I hold in resolving this appeal.

APPENDIX A

[1] To implement the Panel's decision, the following amendments to the Plan were made:

- Add a new Rule 15.3.4.X which will require a resource consent as a Restricted Discretionary activity for demolition of all buildings built prior to 1940 in the General Residential 1 Zone, Township and Settlement Zone (except within a no DCC reticulated wastewater mapped area), or in the Variation 2 mapped area (which covers the new intensification rezoning areas). These are the areas where Variation 2 changes will provide a substantive increase in development capacity, based on the nature of the rule changes and rezoning.

Activity	Activity status	Performance standards
<u>Demolition of a building built on or before 1 January 1949 in the General Residential 1 Zone or Township and Settlement Zone (except within a no DCC reticulated wastewater mapped area) or in the Variation 2 mapped area</u>	RD	

- Add a new Rule 13.6.X to guide the assessment of these RD consents (and add new rules linking to this assessment in Rule 15.11.3.Y for General Residential 1 Zone and Township and Settlement Zone, except within a no DCC reticulated wastewater mapped area), and in Rule 15.11.5.AB in a Variation 2 mapped area), as follows:

Activity	Matters of discretion	Guidance on the assessment of resource consents

<u>Demolition of a building built on or before 1 January 1940 in the General Residential 1 Zone or Township and Settlement Zone (except within a no DCC reticulated wastewater mapped area) or in the Variation 2 mapped area</u>	(a) <u>Effects on significant heritage values</u>	<u>Relevant objectives and policies</u> (i) <u>Objective 13.2.1</u> (ii) <u>the demolition of buildings and structures, or parts of buildings and structures, that have significant heritage values, including but not limited to the protected parts of scheduled heritage buildings or scheduled heritage structures is avoided, unless the following criteria are met:</u> (a) <u>the building or part of the building poses a significant risk to safety or property; or the demolition is required to allow for significant public benefit that could not otherwise be achieved, and the public benefit outweighs the adverse effects of loss of the building; and</u> (b) <u>there is no reasonable alternative to demolition, including repair, adaptive re-use, relocation or stabilising the building for future repair; and</u> (c) <u>for buildings and structures located within a heritage precinct:</u> (i) <u>development post demolition will maintain or enhance the heritage streetscape character and amenity in accordance with Policy 13.2.3.6; and</u>
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		(ii) <u>conditions will be imposed which would give reasonable certainty that this will be completed within an acceptable timeframe (Policy 13.2.1.7)</u> <u>General assessment guidance:</u> (iii) <u>for demolition of a building built on or before 1 January 1940, Council will assess whether the building is a significant heritage building using the criteria contained in Policy 2.4.2.1 (see Special Information Requirements in Rule 13.9). If it is assessed as significant, Policy 13.2.1.7 will be considered in assessing whether demolition is appropriate</u> (iv) <u>for buildings that are not assessed as significant Policy 13.2.1.7 will not apply and heritage values will only be relevant if the building is in a heritage precinct and identified as a character-contributing building</u>
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- Amend the special information requirements Rule 13.9.X (after 1), as follows:

For resource consent applications proposing demolition of a building built on or before 1 January 1940, Council may require a heritage assessment to determine if the building has significant heritage values using the criteria outlined in Policy 2.4.2.1. If the Council has reason to believe that the building may meet the criteria for significance, a Heritage Impact Assessment as outlined in clause (1) above will generally be required.

- Add a new notification rule to Rule 15.4 after clause 2, as follows:
 - X. With respect to resource consent applications, the Southern Heritage Trust will be considered an affected person in accordance with s95B RMA where its written approval is not provided for the following:
 - 1. demolition of a building built on or before 1 January 1940 in the General Residential 1 Zone or Township and Settlement Zone (except within a no DCC reticulated wastewater mapped area) or in the Variation 2 mapped area where the building has been assessed as having significant heritage values and requires consent under Rule 13.6.3.X.

- Amend Objective 13.2.1 so that it does not just refer to scheduled buildings and structures but buildings and structures that have significant heritage values, as follows:

~~Scheduled heritage buildings and structures~~ Buildings and structures that have significant heritage values are protected.

- Amend Policy 13.2.1.7 for similar reasons, as follows:

Avoid the demolition of buildings and structures, or parts of buildings and structures, that have significant heritage values, including but not limited to the a protected parts of a schedule heritage buildings or scheduled heritage structures, unless the following criteria are met:

...

- Amend Policy 2.4.2.1 for similar reasons, as follows:

(a) Protect buildings and structures that have significant heritage values, including by:

- (i) ~~identify~~ identifying in a schedule (Appendix A1.1) buildings and structures that have significant heritage values; and
- (ii) ~~use applying rules to buildings and structures that have, or may have, significant heritage values to:~~

- 1. manage additions and alterations, or removal for

relocation of, in a way that maintains important heritage values;

2. restrict demolition except in limited circumstances;
3. support adaptive re-use, heritage values over compliance with other performance standards where there is a conflict.

(b) identify heritage buildings and structures based on the following criteria:

- (i) historic and social significance;
- (ii) spiritual/cultural significance, including significance to Māori;
- (iii) design significance; and
- (iv) technological/scientific significance.

- Applying the Variation 2 mapped area to all intensification rezoning areas except Change IN12 (a single site) and Change IN03 (which is being rejected for rezoning – see Part B).

[2] These changes are shown in Appendix 1 and Appendix 2 with the reference ‘Change A2 Alt3/IN-HER/S153.001’.

