

Before the Independent Hearings Panel
Waikato, Waipā and Hamilton

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

in the matter of: Submissions and further submissions in relation to Plan Change 12 to the Hamilton City Plan, Plan Change 26 to the Waipā District Plan and Variation 3 to the Proposed Waikato District Plan

and: **Ryman Healthcare Limited**

and: **Retirement Villages Association of New Zealand Incorporated**

Legal submissions for Joint Opening Hearing on behalf of
Ryman Healthcare Limited and the **Retirement Villages Association of New Zealand Incorporated**

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LEGAL SUBMISSIONS FOR JOINT OPENING HEARING ON BEHALF OF RYMAN HEALTHCARE LIMITED AND THE RETIREMENT VILLAGES ASSOCIATION OF NEW ZEALAND INCORPORATED

Introduction

- 1 These legal submissions are lodged jointly on behalf of the Retirement Villages Association of New Zealand (RVA)¹ and Ryman Healthcare Limited (*Ryman*).² Both parties have made submissions on Plan Change 26 to the Operative Waipā District Plan, Plan Change 12 to the Operative Hamilton City District Plan and Variation 3 to the Proposed Waikato District Plan (*intensification planning instruments* or *IPIs*). The parties generally seek fit for purpose planning provisions to support the intensification needs of an ageing population in the Waikato Region.
- 2 We address key issues, requirements and approaches associated with the IPIs that should inform the Panel's approach to the conduct of later substantive hearings.³ We do not address territorial authority specific themes identified in the section 42A report.⁴ The RVA and Ryman agree with the Councils that these themes are more appropriately addressed as part of the substantive hearing for each Council's IPI.
- 3 We note that counsel have briefly read the opening legal submissions for the councils dated 8 February. In view of their comprehensive nature, the directions made as to the approach to this hearing and its scene setting nature, we do not respond to these in detail, but will do so as relevant in later hearings.
- 4 These submissions support the planning evidence of **Mr John Kyle** on key issues.⁵

Overview

- 5 It is important to acknowledge, at the outset, that the primary purpose of the present intensification streamlined planning process (*ISPP*) is to address New Zealand's housing crisis. As stated by the government in support of legislative reform for housing, "*New Zealand is facing a housing crisis and increasing the housing supply*

¹ Waikato – Submitter 107; Waipā – Submitter 73; and Hamilton – Submitter 330.

² Waikato – Submitter 108; Waipā – Submitter 70; and Hamilton – Submitter 294.

³ Independent Hearing Panel, Direction 1, at [2.2].

⁴ Waikato Region Intensification Planning Instruments Themes and Issues report Joint Opening Hearing, 15 December 2022.

⁵ Statement of evidence of John Clifford Kyle, dated 1 February 2023.

*is one of the key actions the Government can take to improve housing affordability.*⁶ In terms of the RVA and Ryman's submissions, retirement housing is having its own unique crisis. Demand for retirement village accommodation is outstripping supply as more of our ageing population wish to live in retirement villages that provide purpose-built accommodation and care.

- 6 The ISPP has a narrow focus. It seeks to expedite the implementation of the National Policy Statement on Urban Development (NPSUD). This, as Cabinet has said, is needed because, *"The National Policy Statement on Urban Development 2020 (NPS-UD) is a powerful tool for improving housing supply in our highest growth areas"*. And, *"the intensification enabled by the NPS-UD needs to be brought forward and strengthened given the seriousness of the housing crisis and this can be done by amending the Resource Management Act 1991 (RMA) and the NPS-UD ahead of the Government's resource management reforms."*⁷
- 7 A key outcome of the process is to enable housing acceleration by, *"removing restrictive planning rules"*.⁸ These restrictions are to be removed via mandatory requirements:
 - 7.1 "To incorporate", the new "medium density residential standards" (MDRS) as default standards, in "Every" relevant residential zone.⁹
 - 7.2 In addition, in this case, to *"give effect to"* policy 3, NPSUD.
- 8 The force of these mandatory requirements is framed at the highest level, as a "duty" on the specified territorial authorities.¹⁰
- 9 In addition to these mandatory obligations, there are a range of other options for councils to enable housing acceleration including by:
 - 9.1 establishing new residential zones or amending existing residential zones;¹¹

⁶ Cabinet Legislation Committee LEG-21-MIN-0154 (*Cabinet Minute*), at 1.

⁷ Paragraphs 2-3, *Cabinet Minute*

⁸ Paragraph 4, *Cabinet Minute*.

⁹ Section 77G(1), RMA.

¹⁰ Section 77G, RMA.

¹¹ Section 77G(4).

- 9.2 including additional objectives and policies, to provide for matters of discretion to support the MDRS;¹²
 - 9.3 providing more lenient density provisions.¹³
- 10 Councils can also impose restrictions that are less enabling of development - "qualifying matters" - but only where they meet the strict tests outlined.¹⁴
- 11 Housing acceleration is also intended to be enabled by the ISPP process itself. This process materially alters the usual traditional schedule 1, RMA process, particularly in terms of:
- 11.1 Substantially reduced timeframes;¹⁵
 - 11.2 No appeal rights on the merits;¹⁶ and
 - 11.3 Wider legal scope for decision-making.¹⁷
- 12 It will be seen that this process is not about going through the usual motions of a schedule 1 plan making process. And, it is not about providing the 'bare minimum' to respond to the various legislative steps. Rather, the task ahead is a very important one. The IPIs and the ISPP are a means to solve an important national housing issue. Counsel respectfully submits that the above overarching legislative purposes - addressing New Zealand's housing crisis, accelerating housing supply, and removing planning restrictions - should therefore resonate heavily in all of your decision-making through the ISPP.
- 13 Careful consideration will of course also need to be given to the wording used in the various RMA sections and in the MDRS provisions themselves. The Panel will need to operate within those

¹² Section 77G(5)(b) and see also the wider terms used section 80E(b)(iii).

¹³ Section 77H.

¹⁴ Sections 77I-77L.

¹⁵ Under section 80F, tier 1 councils were required to notify IPIs by 20 August 2022. Under the ISPP the usual timeframes for plan changes are compressed and the decision making process is altered.

¹⁶ There are no appeals against IPIs that go through the ISPP, aside from judicial review (section 107 and 108). The new process will allow for submissions, further submissions, a hearing and then recommendations by an Independent Panel of experts to Council (section 99). If the Council disagrees with any of the recommendations of the Independent Panel, the Minister for the Environment will make a determination (section 105).

¹⁷ Clause 99 of Schedule 1, Enabling Housing Act.

terms. But, applying the usual “purposive approach” the overriding purpose of ISPs and the ISPP needs to remain a clear and separate focus.¹⁸

Theme 1 - Fundamental opposition to or support for intensification

- 14 In view of the above overarching comments, the RVA and Ryman consider the Councils’ focus in this theme with respect misses the key point of the process. Key questions that respectfully should be asked on the overarching intensification theme are:
- 14.1 Do the provisions in the IPIs achieve the statutory intent of enabling and promoting intensification and the overarching requirements of the NPSUD?
 - 14.2 Applying section 32 concepts – are the IPI provisions effective and efficient; are there other options?
 - 14.3 Have inappropriate planning restrictions been removed?
 - 14.4 Are the provisions ‘fit for purpose’ for the housing activities that will need to deliver on the necessary housing needs?
- 15 Counsel submits therefore that subsequent hearings will need to address in greater detail:
- 15.1 the purpose of the Enabling Housing Act (*EHA*) and the specific tools it employs to enable intensification;
 - 15.2 the terms of the NPSUD – its overarching purpose, the relevant objectives and policies,¹⁹ and of course, greater focus on the meaning of policy 3;
 - 15.3 whether provisions that support or are consequential on the MDRS or policy 3 are consistent with the purpose of the *EHA* and NPSUD;²⁰

¹⁸ See *Auckland Council v Teddy and Friends Limited* [2022] NZEnvC 128, at [27], when considering the dicta of the Supreme Court *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36 at [22].

¹⁹ For example, Mr Kyle has drawn attention to Objective 1 and Policy 1 of the NPSUD (at [26] of his Statement of Evidence) and the need for the Panel to consider the extent to which the NPSUD requires District Plans to specifically respond to the need to provide housing choices and options for the ageing population.

²⁰ RMA, section 80E(1)(b). Within the MDRS itself (for example) policy 5 requires the district plan to provide for ‘developments that don’t meet permitted activity

- 15.4 where IPI provisions limit non-permitted development, whether these provisions are consistent with the statutory purpose.
- 16 As highlighted by Mr Kyle, there is also an important activity specific sub theme on intensification. The RVA and Ryman are tasked with accelerating housing intensification for an ageing demographic that has unique needs. The building and operation of retirement villages often require multiple approvals under district and regional plan rules. The RVA and Ryman are therefore regular participants in district and regional planning processes to ensure activities can be practicably undertaken.
- 17 Building on that experience – and the outcomes achieved in other recent planning processes - they seek a consistent and enabling regulatory framework, which appropriately responds to the needs of an ageing population within the Waikato, Waipā and Hamilton City districts. Mr Kyle also highlights other important factors such as the benefits of national consistency and the importance of that in the present process.²¹

Theme 2 - Application of NPSUD Policy 3

- 18 Turning to the specific application of policy 3 it is worth emphasising sections 77G and 77N, which require that councils:
- 18.1 have the MDRS incorporated into relevant residential zones;
and
- 18.2 give effect to policy 3 in both residential and non-residential zones.
- 19 Policy 3 is a separate part of the IPI. As such, giving effect to it requires more than just including the MDRS and policies set out in the schedules of the RMA.
- 20 As noted in *King Salmon*, 'give effect' means 'implement' and is a requirement that is intended to constrain decision makers.²² District plans are already required to give effect to national policy statements.²³ The singling out of a specific policy within the NPSUD

status, while encouraging high-quality developments', without mandating specific provisions.

²¹ See for example, paragraphs 11-13 of Mr Kyle's statement.

²² *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, at [77-80 and 91].

²³ RMA, section 75(3)(a).

to be given effect to is submitted to be a very strong legislative direction that this policy must be carefully and fully implemented.

- 21 Implementing policy 3 means making changes that give effect to directions to 'enable', for example, as much development capacity as possible (in city centre zones), building heights and density to reflect demand for housing (in metropolitan centre zones). Further, the policy requires that building heights and density be commensurate with commercial activities and community services within and adjacent to neighbourhood centre zones, local centre zones and town centre zones.
- 22 Determining what is enabling in the circumstances of each IPI will be a matter of careful evaluation of evidence. The evidence will need to be considered in light of purposes and wider policy context of the NPSUD and EHA. As Mr Kyle notes, the RVA and Ryman seek an intensification approach that properly recognises the need for older people to 'age in place' and acknowledges the different living patterns of these people compared to typical residential households.²⁴

Theme 3 - Qualifying matters

- 23 As directed by the Panel,²⁵ the RVA and Ryman are not making a detailed presentation on qualifying matters. In any case, the RVA and Ryman's submissions are not deeply engaged with this topic.
- 24 That said, the question of whether qualifying matters are justified is an important one and must be carefully guided by the statutory provisions. Determining the application of qualifying matters does not simply require checking whether the matter is listed in 77I. It also requires a careful consideration of whether associated changes to the MDRS and height and density requirements in policy 3 are the *minimum necessary*.²⁶
- 25 A territorial authority that is proposing to add a qualifying matter (including any submitter seeking such matters) must provide detailed supporting material including a description of how modifications to MDRS are limited to those necessary to

²⁴ Paragraph 28 of Mr Kyle's statement.

²⁵ Independent Hearing Panel, Direction 4, at [4].

²⁶ RMA, section 77I, "A specified territorial authority may make the MDRS and the relevant building height or density requirements under policy 3 less enabling of development in relation to an area within a relevant residential zone only to the extent necessary to accommodate 1 or more of the following qualifying matters that are present:..."

accommodate qualifying matters.²⁷ It is not enough for qualifying matters to be asserted.

- 26 Additional requirements apply to 'other qualifying matters' that are not specifically listed in section 77I, including justification in light of the objectives of the NPSUD, site-specific analysis, and a range of options.²⁸
- 27 The overall provisions collectively emphasise the role of qualifying matters as true exceptions to the general expectation represented by the MDRS and policy 3. Such exceptions need to be justified and substantiated by clear evidence that shows statutory requirements are met.

Theme 4 - Transport/carparking

- 28 The RVA and Ryman have nothing substantive to add at this stage to the section 42A report consideration of transport and carparking. It is agreed that the NPSUD provides a statutory bar on minimum carparking requirements.²⁹

Theme 5 - Out of scope matters

- 29 In accordance with the Panel's directions, these submissions do not engage in substantive scope discussions.

Luke Hinchey

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10 February 2023

²⁷ RMA, section 77J(4)(b). Note that alternative requirements in section 77K can apply to qualifying matters that are already operative in the district plan.

²⁸ RMA, section 77L.

²⁹ NPSUD, policy 11(a) and section 3.38.