Before the Independent Hearing Panel
Waikato, Waipā and Hamilton

under: Resource Management Act 1991 (*RMA*)

in the matter of: Consideration of out-of-scope submissions on Plan Change 26 (Residential Zone Intensification) to the Waipā District Plan

by: **Retirement Villages Association of New Zealand Incorporated**
Submitter ID: 73

and by: **Ryman Healthcare Limited**
Submitter ID: 70

Submissions on behalf of the Retirement Villages Association of New Zealand Incorporated and Ryman Healthcare Limited in response to the Panel's Directions 5, 8 and 9

Dated: 17 February 2023

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SUBMISSIONS ON BEHALF OF THE RETIREMENT VILLAGES ASSOCIATION AND RYMAN HEALTHCARE IN RESPONSE TO THE PANEL'S DIRECTIONS 5, 8 AND 9

MAY IT PLEASE THE PANEL:

INTRODUCTION

1 These submissions are on behalf of the Retirement Villages Association of New Zealand Incorporated (*RVA*)[1] and Ryman Healthcare Limited (*Ryman*).[2] The RVA and Ryman lodged a submission on Plan Change 26 (*PC26*) to the Operative Waipā District Plan on 30 September 2022. PC26 is Waipā District Council's (*Council*) intensification planning instrument (*IPI*) under section 80E of the RMA.

2 The RVA's and Ryman's submissions, among other matters, questioned why the Council applied a "Deferred Medium Density Residential Zone" as part of its IPI to several large areas of land, given the housing crisis and the purpose of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (*Enabling Housing Act*) to address that crisis. The RVA and Ryman sought that the land instead be zoned Medium Density Residential Zone to enable immediate development as appropriate. These submission points are identified as submissions 73.125 and 70.125 in the Council's summary of submissions (*Submissions*).[3]

3 On 22 December 2022, the Council, Hamilton City Council and Waikato District Council (*Councils*) submitted to the Panel a Joint Memorandum (*Joint Memorandum*) in which the Council:

3.1 identified the Submissions as being "*potentially*" out of scope;[4] and

3.2 sought directions from the Panel that the Submissions be struck out under section 41D of the RMA in advance of the relevant substantive hearings.[5]

4 Subsequently, the Panel directed affected submitters, including the RVA and Ryman, to provide written submissions in support of their relief being within scope (Panel's Directions 5, 8 and 9).

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1 Waipā – Submitter 73.

2 Waipā – Submitter 70.

3 Waipā District Council, "Summary of Decisions Requested to Proposed Plan Change 26: Residential Intensification – by Submitter", November 2022.

4 Joint Memorandum, at [9]-[12] and Appendix 2.

5 Ibid, at [11] and [13].

5 These submissions set out the joint response from the RVA and Ryman to the Panel's Directions 5, 8, and 9.

6 In summary, the RVA and Ryman submit that:

6.1 The exercise of a strike out power is a heavy handed tool in removing usual participatory rights. It should be used sparingly – particularly in this case where participatory rights are already reduced.

6.2 The Councils have failed to identify sufficient or adequate reasons to support the strike out application.

6.3 Notwithstanding that, none of the grounds of section 41D apply. In particular, the Submissions raise a reasonable and/or relevant case. The Submissions address zones that are included in PC26. They relate to the overarching purpose of the IPI and the underlying legislative and policy requirements - to enable residential intensification and accelerate housing.

6.4 It is noted that submitters do not need to "prove" the merits of their case in order for it to be reasonable and/or relevant.

6.5 Although the RVA and Ryman could argue that they meet the usual legal tests for the scope of submissions on a plan change, these do not apply in the same way in this case. Clause 99 of Schedule 1 of the RMA broadens the scope of the Panel's recommendatory powers. In light of that broadened scope, the submitters comfortably raise a reasonable and/or relevant case.

6.6 Further, scope issues are most often best dealt with in the context of legal submissions and evidence. A strike out would deprive the submitters of arguing they have scope, without the support of the detailed evidence that may be produced in later hearings. The Panel does not have the requisite material to reach a certain and definite conclusion at this stage.

6.7 Significant process complexities would arise if the Submissions are struck out. For example, an objection on that decision would create delays and hearing complexities. These outcomes would not enable the housing acceleration objectives of the intensification streamlined planning process (*ISPP*) or conform with section 18A of the RMA.

SECTION 41D OF THE RMA

Section 41D

7 The scope of the Panel's jurisdiction to strike out submissions is limited by section 41D of the RMA.[6] Section 41D provides that an authority conducting a hearing on a proposed plan change may direct that a submission, in full or in part, be struck out if the authority is satisfied that at least one of the specified grounds applies to the submission.

8 There is a lack of case law concerning the use of section 41D.[7] But, helpfully section 41D(1) mirrors the Environment Court's strike-out powers under section 279(4). It is therefore instructive to consider how the Court has used its powers under this section. Generally, case law indicates that there is a "*very high*" threshold to be met before striking out submissions.[8] Strike-out powers are therefore to be exercised "*sparingly*", and only in cases where there is the "*requisite material…to reach a certain and definite conclusion*".[9]

9 It should also be kept in mind that striking out submission points affects people's public participation rights. Public participation is a key hallmark of RMA processes. Here - where the IPI processes already restrict the public's rights of participation by removing appeal rights[10] – decision-makers should be even more hesitant to strike out submissions.

The Council has not raised sufficient or adequate reasons

10 The Council has not provided reasoning as to the legality and appropriateness of using section 41D to strike out submissions in this particular context beyond broad assertions. The RVA and Ryman do not agree that the reasons set out by the Council in Appendix 2 of the Joint Memorandum are "*sufficient*" to enable submitters to respond. These reasons are very limited and unclear. While the Joint Memorandum includes further discussion on out of scope matters, this discussion is also very high-level and does not specifically address the individual submissions identified in Appendix 2.

11 Accordingly, the RVA and Ryman are unaware of which strike out ground/s the Council considers is relevant in the context of the

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6 Under the intensification streamlined planning process, the Panel has the same duties and powers as a local authority, to the extent applicable, under section 41D by virtue of clause 98(1)(h) of Schedule 1 of the RMA.

7 To our knowledge, there is only one decision, from the Environment Court, which mentions section 41D but does not include any substantive discussion on the use of this section.

8 See *Simons Hill Station Limited v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2014] NZHC 1362 at [37].

9 *Hern v Aickin* [2000] NZRMA 475 at [6].

10 RMA, clause 107 of Schedule 1.

Submissions. That situation of itself should be sufficient to reject the strike-out request.

None of the strike-out grounds apply to the Submissions

12 Regardless of the lack of reasoning provided by the Council, the RVA and Ryman submit that the Submissions do not fall under any of the section 41D strike-out grounds for the reasons outlined below.

The Submissions are not "frivolous or vexatious" (s41D(1)(a))

13 This criterion sets a very high threshold. We are unaware of a situation where this ground has been used in the context of plan changes. In the similar context of section 279(4) of the RMA, the Court has held that "*proceedings which cannot lead to any practical result are vexatious proceedings*".[11]

14 It is submitted that the Submissions can lead to the practical outcome of changing the zoning of areas to enable further intensification. This criterion is therefore not applicable to this case.

The Submissions disclose a "reasonable" and "relevant" case (s41D(1)(b))

15 What is "reasonable" or "relevant" will depend on the circumstances of each case. In this particular context, what is "reasonable" or "relevant" should also be read in light of the purpose of the IPI, the Panel's broad recommendatory powers under clause 99 of Schedule 1, as well as the overall purpose of the Enabling Housing Act.

16 It is also important to note that there is no need for the Panel to agree with the *merits* of the case or even to consider if they are strong at this stage. The Submissions simply need to identify a reasonable or relevant case. These concepts represent a lower bar than the merits of the submissions themselves.

17 The RVA and Ryman submit they have raised both a "reasonable" case and a "relevant" case - noting that it is sufficient to establish that only one applies.

18 The Submissions are on zones that were included in PC26. The Council's Section 32 Report includes new proposed planning maps (set out in pages 130 to 166), which include areas with new zoning under the category "Deferred Medium Density Residential Zone". Map 22, for example, shows changes to zoning from "Deferred Residential Zone" to "Deferred Medium Density Residential Zone". The Council itself has *expressly* provided that the proposed planning

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[11] *Hern v Aickin* [2000] NZRMA 475, at [7], referring to *Ngati Kahu v Northland Regional Council* Planning Tribunal Decision A48/94.

maps are within the scope of PC26.[12] The planning maps and changes to zoning are clearly within the scope set out in the Section 32 Report.

19 Given the changes to the planning maps, the public were alerted to the deferred zoning falling within PC26, as well as the wider objective of the IPI, which is to enable more housing intensification in the district. It is therefore submitted that the public could reasonably have expected the possibility of further changes to the zoning. The further submission process could have been used to enter the process if there were any concerns with the Submissions.

20 Further, the IPI process specifically provides for the creation of new, or amendments to existing, residential zones.[13] Proposed changes to zoning are therefore a reasonable and a relevant matter when preparing the IPI.

21 Rezoning areas to allow for residential development is also consistent with the intention of the Enabling Housing Act to rapidly accelerate the supply of housing, and to help address issues with housing choice and affordability.[14] As noted in earlier submissions,[15] a primary purpose of the present intensification streamlined planning process is to address New Zealand's housing crisis. Enabling more zones to be used for that purpose is clearly relevant to the IPI.

22 Further, a key outcome of the process is to improve housing supply by "*removing restrictive planning rules*".[16] Retaining areas zoned as 'deferred' is a clear restriction on the ability to develop these areas, which are in any case anticipated for future development.

23 The policy intent of section 80E of the RMA (which defines the term 'intensification planning instrument' or 'IPI') is for the IPI to provide for a *"comprehensive"* change to the relevant district plan to avoid requiring additional supporting plan changes.[17] Such changes may

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12 The Council's website on PC26 (accessible here) expressly notes the following: "***Please note**: all proposed Planning Maps are within Proposed Plan Change 26 ...*"

13 RMA, section 77G(4). "*New residential zone*" is defined as meaning "*an area proposed to become a relevant residential zone that is not shown in a district plan as a residential zone*" (RMA, section 2).

14 Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill 83-1, 19 October 2021, at page 1-2.

15 Legal submissions for joint opening hearing - 10 February 2023, see paragraphs 5-13.

16 Cabinet Legislation Committee LEG-21-MIN-0154, at [4].

17 Ministry for the Environment, "Intensification streamlined planning process: A guide for territorial authorities", July 2022, page 8.

involve new residential zones to implement the medium density residential standards and related provisions.[18]

24 The Submissions also raise matters that should have been further considered as part of the section 32 evaluation as an appropriate option, and are therefore within the scope of PC26.[19] There may be properties within the district that are currently subject to a deferred zone but ready for immediate development. These should be on the table for consideration.

25 Furthermore, as noted, what is "reasonable" or "relevant" must be considered in light of the Panel's wide recommendatory powers under clause 99 of Schedule 1 of the RMA. New residential zones or amendments to existing residential zones are well within the scope of IPIs, and therefore matters that the Panel may issue recommendations on.

26 Taking into account the above, the Submissions are also considered to be within scope based on the general principles established by case law on when a submission is "on" a plan change.[20] Specifically, the Submissions:

26.1 address the extent to which PC26 changes the pre-existing status quo; and

26.2 do not come out of "left field", (i.e. proposing something "completely novel")[21] which might result in little or no real scope for public participation.

27 In any event, matters of legal scope on submissions on plan changes are not always straightforward and frequently need to be considered in the context of evidence received during the substantive decision-making process. This enables affected submitters and the relevant councils to present evidence before the

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18 Ministry for the Environment, "Intensification streamlined planning process: A guide for territorial authorities", July 2022, page 8.

19 See *Bluehaven Management Limited v Rotorua District Council & Bay of Plenty District Council* [2016] NZEnvC 191. In this case the Court concluded that a submission point or approach that is not expressly addressed in the section 32 analysis ought not to be considered out of scope of the plan change, if it was an option that *should* have been considered in the section 32 analysis. Otherwise, a council would be able to ignore potential options for addressing the matter that is the subject of the plan change. It would prevent submitters from validly raising those options in their submissions.

20 The leading authorities on when a submission is "on" a plan change are the High Court decisions in *Clearwater Resort Limited v Christchurch City Council* (HC, Christchurch, William Young J, 14/3/2003), *Option 5 Inc v Marlborough District Council* (HC, Blenheim, Ronald Young J, 28/9/2009) and *Palmerston North City Council v Motor Machinists* (HC, Palmerston North, Kos J, 31 May 2013). The High Court authorities have been applied in a number of cases by the Environment Court which are also instructive when considering scope matters.

21 *Motor Machinists* at [69].

decision-makers, as well as to address any further questions the decision-makers may have.

No "abuse of the hearing process" (s41D(1)(c))

28 It would not be an "*abuse of the hearing process to allow the submission or the part to be taken further*". The term "abuse" denotes a very high threshold, which is not met in this case. On the contrary, it is submitted that allowing the Submissions to be heard as part of the substantive hearing would allow the Panel to consider submissions in an integrated manner, without the need to undertake separate processes to decide potential scope issues.

29 This approach would also result in a more efficient, timely and cost-effective process, as required by section 18A of the RMA.

Evidence to support submissions not applicable (s41D(1)(d))

30 The fourth strike-out ground under section 41D, concerning evidence to support submissions, is not applicable as the RVA and Ryman have not yet had the opportunity to present evidence on the Submissions.

The Submissions do not contain "offensive language" (s41D(1)(e))

31 There is no suggestion of this ground being in play.

Process considerations

32 Striking out submissions at this initial stage will risk prolonging the hearing process, particularly if any strike out decision is subsequently objected to. The hearing of PC26 would need to be prolonged because it would need to be put on hold until the strike out process is concluded to ensure a fair process for any of the identified submitters. There would be significant process irregularities and natural justice issues if the IPI process was to otherwise continue.

33 Allowing the Submissions to be heard as part of the substantive hearing would therefore be more consistent with the purpose of the process of preparing an IPI, which is "*to achieve an <u>expeditious</u> planning process*" (emphasis added).[22]

CONCLUSION

34 Overall, it is submitted that the Council has not made out any of the grounds in section 41D in the context of the Submissions.

35 In any event, the nature of the Submissions does not meet the very high threshold for strike outs, and therefore we respectfully submit that the Panel has no jurisdiction under section 41D to strike out the

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[22] RMA, section 80D.

Submissions. The power of strike out should be used sparingly. In the present case, and given the wider context of the ISPP process, it is simply too early to make a valid decision on the present scope matter.

36 Regardless, the RVA and Ryman submit that the Submissions are within the scope of PC26.

37 On natural justice grounds, the RVA and Ryman reserve their right to reply to the Council's submissions, including filing evidence as needed, particularly in view of the lack of adequate reasons provided for the strike out request.

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17 February 2023