Before the Independent Hearings Panel
Waipā District Council

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

in the matter of: Submissions and further submissions in relation to Plan Change 26 to the Waipā District Plan

and: **Retirement Villages Association of New Zealand Incorporated**
Submitter 73

and: **Ryman Healthcare Limited**
Submitter 70

Supplementary legal submissions on behalf of the **Retirement Villages Association of New Zealand Incorporated** and **Ryman Healthcare Limited**

Dated: 5 May 2023

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SUPPLEMENTARY LEGAL SUBMISSIONS ON BEHALF OF THE RETIREMENT VILLAGES ASSOCIATION OF NEW ZEALAND INCORPORATED AND RYMAN HEALTHCARE LIMITED

1 These supplementary legal submissions are provided on behalf of the Retirement Villages Association of New Zealand (*RVA*) and Ryman Healthcare Limited (*Ryman*) in relation to Plan Change 26 (*PC26*) to the Operative Waipā District Plan.

2 They address a request from the Panel at the hearing of the RVA and Ryman's submissions on 2 May 2023 for brief submissions and supporting case law commenting on whether retirement villages as a whole are a residential activity. The two High Court cases mentioned are **attached**.

3 As highlighted by the witnesses at the hearing, retirement villages are the permanent residence of the residents, who consider the retirement village their 'home', no matter the level of care they need in those homes.[1] The services and recreational amenities in retirement villages are for the residents and visitors. These services and recreational amenities do not change the essential nature of retirement villages as residential activities.

4 The National Planning Standards confirm that retirement villages are a residential activity through the relevant definition of 'retirement village', as outlined by Ms Nicki Williams.[2]

5 This definition puts residential accommodation 'front and centre' as the primary use in a retirement village. It aligns with the wider definition in the National Planning Standards of "residential activity". Where retirement villages are a "residential complex or facilities used to provide residential accommodation for people…", a "residential activity" is:[3]

> the use of land and building(s) for people's living accommodation.

6 The other activities that may be included in a retirement village include recreation, leisure and supported care. Importantly, these activities must be "for residents within the complex". This limitation essentially means they must be ancillary or complementary to the overall residential use.

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1 Statement of Evidence Professor N Kerse, at [37-38]. Statement of Evidence M Brown, at [52-54]. Statement of Evidence M Owens, at [82].

2 Statement of Evidence N Williams, at [14].

3 National Planning Standards (November 2019), page 62.

7 In practice, the services and amenities in retirement villages are designed specifically for the residents. The RVA and Ryman witnesses, including gerontologist expert Professor Kerse, highlight the many health and social factors which contribute to older people having less mobility. These factors make it important that many of the day to day needs of residents are met on site. As Professor Kerse notes, "*the care facility in the retirement village is their home and there is an emphasis on those delivering care to make it homelike and preserve the autonomy of the residents*".[4] In Ryman villages, the amenities and services meet the needs of frail residents, or those with mobility restrictions, and are not available to the general public.[5]

8 The activity classification of retirement villages that provide additional services or facilities to their residents has been the subject of rulings by the higher courts.[6] Two High Court cases have found that aspects of a retirement village that are incidental and ancillary to the residential activity (e.g. cafes and hair salons), do not alter the overall status of retirement villages as residences.[7]

9 In the most recent case, the High Court addressed the question of whether retirement villages including the services and amenities within them were a residential use. The question arose in the context of whether a retirement village operator could rely on the then legislative restrictions preventing section 120, RMA appeals on residential activity consent decisions.

10 In response to an argument that retirement villages are not the type of housing contemplated by the relevant legislative provisions, the Court said:[8]

> As to the submission by the Ngāti Awa parties that s 120(1A) was introduced to respond to a housing supply and affordability crisis that is not applicable to retirement villages, I agree with MMS that argument cannot be sustained. Fundamentally, retirement villages house people and therefore assist with housing supply and affordability either by housing older people or freeing up housing stock for the market as older people move into retirement villages.

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4 Statement of Evidence Professor N Kerse, at [37].

5 Statement of Evidence M Brown, at [54].

6 *Hawkesbury Avenue, Somme Street and Browns Road Residents Association Inc v Merivale Retirement Village Ltd*, AP 139/98 (Christchurch), 3 July 1998, Chisholm J, at pages 21-22. See also *Te Rūnanga o Ngāti Awa v Whakatāne District Council* [2022] NZHC 819.

7 *Hawkesbury*, at pages 21-22.

8 *Te Rūnanga o Ngāti Awa*, at [65].

11 Although the statutory provisions at issue are different, the wider statutory purpose in that case is highly analogous to the present process. Both scenarios involve amendments to the RMA that are intended to respond to a housing supply and affordability crisis. Retirement villages are a residential use that contributes to both aspects.

12 On the specific question of whether ancillary services and facilities were part of a dwellinghouse activity, the Court said:[9]

> Importantly, services and facilities are limited to "the care and benefit of residents" only, but "activities pavilions and/or other recreational facilities or meeting places" can be used by residents and their visitors. By linking these activities to residents, the purpose of the activities is, in my view, inextricably linked to the definition of "dwellinghouse" and thereby to the definition of "residential activity" in s 95A(b).

13 The Court also stated that the ancillary services provided by the retirement villages in that case were for residents only. They complemented the residential function of retirement villages by meeting the particular needs of older residents.[10]

14 In light of this context, it is difficult to conceptualise that the National Planning Standards intended retirement villages to be classified as anything other than residential activities. The cases discussed above also confirm the status of retirement villages as a residential activity.

Luke Hinchey / Alice Hall
Counsel for the RVA
5 May 2023

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9 *Te Rūnanga o Ngāti Awa*, at [63].

10 Ibid.

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP139/98

IN THE MATTER of an appeal under Section 299 of the Resource Management Act 1991

AND

IN THE MATTER of an application for a declaration under Section 311 of that Act by Merivale Retirement Village Limited

BETWEEN HAWKESBURY AVENUE, SOMME STREET AND BROWNS ROAD RESIDENTS ASSOCIATION INCORPORATED

Appellant

AND MERIVALE RETIREMENT VILLAGE LIMITED

Respondent

AP137/98

BETWEEN THE CHRISTCHURCH CITY COUNCIL

Appellant

AND MERIVALE RETIREMENT VILLAGE LIMITED

Respondent

Hearing: 2 and 3 July 1998

Counsel: E D Wylie QC and M J Sleigh for Residents Association
A C Hughes-Johnson QC for Christchurch City Council
N R W Davidson QC for Respondent

ORAL JUDGMENT OF CHISHOLM J

These appeals arise from a declaration made by the Environment Court pursuant to s311 of the Resource Management Act 1991. The Court's declaration was to the effect that a rest home complex proposed by the respondent is a permitted activity under the Christchurch City Council Proposed District Plan.

Urgency has been accorded in both the Environment Court and this Court. Difficult issues arise. Excellent submissions have been advanced by all counsel. An oral, rather than a considered decision, is prompted by urgency considerations.

Background

The respondent wishes to build in Christchurch a rest home complex comprising 48 rest home beds, 18 studio beds, nursing care and associated facilities. As is apparent from its description, the complex would be occupied by elderly persons. While residents could not be sure about the length of their tenure, they would regard the complex as their home. They would stay until they die or move to a higher level of care provided, for example, by a hospital.

This would be a multi-million dollar project involving a substantial two storey building. The site comprises 7,098 square metres. Access is available from Browns Road and Somme Street. Currently the site is

divided into seven titles. Having regard to the form of the declaration made in the Environment Court I proceed on the basis that the titles will be amalgamated. The site is within the Living 2 zone of the proposed District Plan. In broad terms that zone accommodates medium density residential activities.

My understanding is that there would be the equivalent of nine full time care givers. Put another way, there would be a total staff of somewhere between 16 and 20 persons. At peak times 11 or 12 staff would be on site at the same time. During the night there would be around three staff members at the rest home.

Early in 1997 the respondent entered into discussions with the City Council about the proposed complex. At that time the Council considered the proposal complied with the transitional and proposed Plans. The Council accepted that rest homes were a *"residential activity"* under the proposed Plan and that if the particular proposal met relevant performance standards, it was a permitted activity . On the strength of the Council's then interpretation other rest home projects have proceeded. As recently as October 1997 the green light was given to a rest home project.

A number of project information memoranda were issued by the Council to the respondent during 1997. On 6 November 1997 the respondent

applied for a building permit in the belief that the proposed rest home was a permitted activity. At that time the Council supported that view. But a few days later, on 11 November 1997, the Council advised the respondent that the Council's earlier interpretation of the proposed plan had been reconsidered and that the Council no longer regarded the proposed activity as a permitted activity. This was unwelcome news to the respondent who was facing tight timeframes imposed by a public funding authority. On 10 March 1998 the respondent sought a declaration pursuant to s311 of the Act. An application for resource consent was also lodged but that application has remained in limbo pending the outcome of the declaration application.

Pre-hearing conferences in the Environment Court resulted in modifications to the declaration sought. The final form of declaration sought was:

> *"That the construction and operation of a licensed rest home complex proposed by the applicant for the property at Somme Street and Browns Road, Christchurch, comprised and described in the Certificates of Title Scheduled below, and all of which shall be amalgamated in one title, and comprising*
>
> - *48 Rest home beds*
> - *18 Studio beds*
> - *Nursing care*
> - *Associated facilities*
>
> *as described more particularly in the Application for Resource Consent lodged by the applicant and dated 8 December 1997 is a residential activity under the Christchurch City Council Proposed District Plan."*

The appellant Residents' Association opposed the making of a positive declaration. When its appeal was lodged Association was unincorporated. It has subsequently become incorporated. At the beginning of this hearing leave was granted to amend its name by including the word *"incorporated"*.

Before the Environment Court the key issue was whether the proposed rest home was a *"residential activity"* in terms of the proposed Plan. The Plan definition reads:

> ***"Residential activity***
> *means land and buildings used by people for the purpose of living accommodation where the occupiers voluntarily intend to live at the site for a period of one month or more, and will generally refer to the site as their home and permanent address; and includes accessory buildings and leisure activities. For the purpose of this definition, residential activity shall include:*
>
> - *accommodation offered to not more than four travellers for a tariff in association with a permanent resident as described above;*
>
> - *emergency and refuge accommodation."*

Throughout the respondent has maintained that its proposal fits within that definition. And it is common ground that if the proposal does fall within the definition, all relevant performance standards can be met. Thus if the activity is a *"residential activity"* it can properly be categorised as a permitted activity. On the other hand, the Council now considers that the proposed activity is outside the definition and, in terms of the Plan, comes within the expression *"other activities"*. If the Council is right the respondents would be unable to meet some relevant

performance standards and the activity could not qualify as a permitted activity. The Residents' Association supports the Council's stance.

Environment Court Decision

The Court followed the approach formulated in its earlier decision *McKenzie District Council v Glacier and Southern Lakes Helicopters Limited* [1997] NZRMA 659 and began by considering the definition of *"residential activity"*. The Judge addressed the appellant's submission that the presence of 16 - 20 staff providing services to the residents meant that the activity was primarily of a commercial nature and not a residential activity:

> *"It is true that there will be a number of staff (overnight, perhaps three) on the site at most times, however that has to be compared with the 66 residents. The presence of other people to care for the residents does not mean that the primary use of the site is not for accommodation. Nor does it mean that there is a separate if minor commercial use (like a home occupation): in this situation the professional care-givers are a part of the residential use. The definition allows some flexibility. I hold that the proposed land and building is to be used for living accommodation within the meaning of the definition.*
>
> *As for the other essential elements of the definition I am satisfied, and indeed there was little challenge to this, that the residents will occupy their rooms voluntarily, with an intention to reside permanently and regarding the 'Home' as their home."*

Having completed his analysis of the definition the Judge was *"nearly satisfied"* that the rest home complex was a *"residential activity"* as defined. But he considered that it was appropriate to take the next step of considering the definition in the context of the rules.

When assessing the rules His Honour noted, inter alia, the definitions of *"care home"* and *"residential unit"* and the broad structure of the rules relating to the Living 2 zone which divided activities into two categories, namely, *"residential"* and *"other"*. His analysis led him to three broad conclusions: first, that some care homes as defined would fall within the definition of *"residential activity"* and that the definition of *"care homes"* did not significantly influence the interpretation to be placed on *"residential activities"*; secondly, an interpretation of *"residential activity"* which accommodated the proposed complex would not undermine the performance standards specified in the rules and would certainly not lead to an absurd result; thirdly, that it was significant that the rules did not define *"residential activity"* by reference to effects with the result that an activity which was included in the definition must be deemed to be acceptable which led to the conclusion that the scale and effects of the proposed complex could not exclude it from the definition.

A third step was then taken by the Judge. He considered the proposal in the context of the Plan objectives and policies which, he noted, expressly contemplated the provision of accommodation for elderly persons and that:

> *"... there are forms of elderly persons housing which fall outside self-contained units. That of course reflects the reality that some older people will not be independent enough to have self-contained accommodation but equally will not have deteriorated physically to the point where they need hospital care. The applicant's rest home complex caters for such people. It is clearly contemplated by the residential activity definition."*

These considerations reinforced his view that the proposed rest home complex came within the definition of *"residential activity"* and would be consistent with the objectives and policies of the proposed plan.

Determination

Counsel were in broad agreement as to the principles of interpretation to be applied. The steps suggested in *McKenzie* (supra) were considered to be a useful guide:

> *"There seem to be four steps, each one of greater generality and correspondingly less certainty, as one ascends.*
>
> *The first step is to look at the words to be interpreted and give them "their plain ordinary meaning": Waimairi County Council v Hogan [1978] 2 NZLR 587 (CA) at 590. There is high authority for the proposition that if the result of the first step is clear one need go no further: J Rattray & Son Ltd v Christchurch City Council (1984) 10 NZTPA 59 (CA). There Woodhouse P said:*
>
> > *'... [L]anguage used to describe ... [permitted activities] within a particular zone will have an immediate significance and must be given its intended effect when that is unmistakable and can be clearly ascertained within the same close environment' (at p61).*
>
> ...
>
> *The second step is to look at the words in the context of the rules as a whole: '... words take colour from their general context' - Rattray's case (p61). Again if the meaning is clear, one need go no further. In McLeod, McGechan J, after looking at the words in the context of the rules said:*
>
> > *'I have some doubts whether sufficient ambiguity or obscurity exists on the present general question to justify reference beyond ordinances into [the] Scheme Statement'. (McLeod) p371).*
>
> *And, as that sentence suggests, the third step is to examine the objectives and policies of the plan. Speaking of a scheme statement (of objectives and policies) under the Town and Country Planning Act 1977 the Court of Appeal in Rattray's case (p61) stated:*
>
> > *'In itself it clearly has not got the force of an ordinance [rule] nor is it to have a final influence on the language of particular ordinances but it is intended to have a greater significance, for example, than the explanatory note to be found associated with certain regulations because it is an essential part of the whole district scheme'*

> *The Court also stated that a plan (formerly a scheme) has to be dealt with as 'a living and coherent social document' (p61).* .
>
> ...
>
> *The fourth step is that the Court must have regard to the purpose and scheme of the Resource Management Act 1991."*

Like Mr Hughes-Johnson I have some reservations about expressly isolating the Resource Management Act from the initial steps. That Act might be relevant at each stage. There is also force in Mr Sleigh's submission that a definition should not necessarily be interpreted in isolation because it needs to be slotted into the rules. But for present purposes the *McKenzie* (supra) approach offers a useful guide for tackling the issues before the Court.

At the outset it is necessary to interpret *"residential activity"* as defined. As far as possible the words should be construed in their plain ordinary sense. Counsel agree that the definition is an exclusive definition with the result that there are at least initial indications that the definition can be regarded as a complete package. Counsel also appeared to agree that the definition was relatively clear. But the interpretation of each side led them to the opposite result: the appellants concluded that the definition clearly excluded the proposal; the respondent was equally adamant that the proposal was clearly included.

An underlying theme that the land and buildings are to be used for long term residential accommodation can be extracted from the definition. I

agree with Mr Davidson that words such as *"residential", "living"* and *"home"* indicate that the definition is aimed at land and buildings *used as a home*. Plainly the one month threshold, coupled with reference to the use of the site as a home and permanent address, is intended to exclude facilities offering short term accommodation. Facilities such as motels and hotels, which provide predominantly short term accommodation, would be excluded from the definition.

The subtle change from the use of the word *"people"* on the first line of the definition to the use of the word *"occupiers"* on the second line attracted considerable debate. The appellants claimed that those different words had been used for the purpose of distinguishing persons using the land from the occupiers where those groups were not synonymous. In the present context it was alleged that the commercial use of the respondent needed to be distinguished from the residential use of the elderly persons. In response Mr Davidson cautioned against an unnecessarily sophisticated interpretation which could lead to too much being read into the definition when the words could be read perfectly adequately in a plain ordinary sense.

If the appellants are right and it was intended that the words *"people"* and *"occupiers"* were to signal that commercial activities of the nature under consideration were to be excluded, that subtlety appears to have escaped the attention of those administering the Plan until very late in

the piece. Moreover, in my opinion the appellant's argument based on a split between the commercial operator and the residents cannot withstand scrutiny.

First, the appellant's arguments can be tested by asking whether there should be a different outcome depending on who owns the complex. For example, if the complex was co-operatively occupied and owned by all the residents one of the principal complaints of the appellant, namely, that the complex was being used for commercial purposes, would vanish. Plainly it would be their home even if they were engaging staff to assist them with their living requirements. Yet in other respects the complex and its effects would be the same. If the appellant's argument is taken to its logical extreme, a complex owned and operated on a co-operative basis would be within the definition but the proposed complex owned by the respondent company outside the definition. For the purposes of the Resource Management Act the *effects* would appear to be the same. Such an outcome would be difficult to reconcile with the effects based philosophy of the Act.

Secondly, the appellants relied on the Court of Appeal decision in *Hutt City Council v Aged-Care Hospitals Ltd* (CA239/97, 12 March 1998) to justify its split between the owner and residents. But that decision involved the application of the Rating Powers Act 1988 to a rest home. In my view the issues in that case are well removed from those now

under consideration. It would be distinctly unhelpful to use that decision as an aid in interpreting an exclusive definition in a District Plan. Reference was also made to *Hopper Nominees v Rodney District Council* [1996] 1 NZLR 239. That decision also involved the Rating Powers Act. For the same reasons I decline the invitation to apply that decision.

Notwithstanding the ingenuity of arguments advanced by counsel for both appellants based on the words *"people"* and *"occupier"*, I am not persuaded that it would be safe to read too much into the use of those words. Accordingly I reject those submissions and interpret the words in a plain ordinary sense.

Once any subtlety arising from the words *"people"* and *"occupiers"* is eliminated from the equation it becomes apparent that the definition conveys a neutral attitude towards residential activities which have commercial connotations. Undoubtedly the proposed rest home would be a commercial operation. But my interpretation is that the commercial connotation per se would not exclude the proposal from the definition of *"residential activity"* if it otherwise qualifies. Rental flats would carry commercial connotations but no-one has suggested that they would be outside the definition. Indeed, on this very site an extremely large complex of rental flats could be established provided they met performance standards. Taking an even further extreme, it would be preposterous to suggest that a house built by people intending to live

overseas indefinitely would be excluded from the definition (or the definition of *"residential unit"*) simply because the house was to be rented on a commercial basis indefinitely. In my opinion a commercial component will not necessarily exclude from the definition an activity which otherwise qualifies as a residential activity.

Reference in the definition to *"accessory buildings"* and *"leisure activities"* also attracted submissions. In my opinion those references are entirely neutral. The concepts of *"accessory buildings"* and *"leisure activities"* are quite compatible with the complex under consideration. Counsel for the appellants suggested that those two definitions provided a flavour of the Plan's concept of *"residential activity"*. In my opinion if any flavour exists it must be very faint. So I do not find any significance in the use of those words.

The final part of the definition introduces the two bullet points relating to *"accommodation for not more than four travellers for a tariff"* and *"emergency and refuge accommodation"*. My interpretation is that those matters are specifically included because they would otherwise be excluded from the definition on account of the short term nature of the accommodation provided. In other words, the accommodation would not otherwise satisfy the minimum one month threshold or the requirement that the occupiers regard the place as their home and permanent address. I note in passing that the word *"tariff"* is also used after the

first bullet point. To my mind the use of that word, despite its obvious commercial connotations, does not have any implications for the definition as a whole. It applies only to *"travellers"* mentioned after the first bullet point.

This concludes my assessment of the definition of *"residential activity"* as a package. In my opinion the assessment to this point indicates, at least to a prima facie level, that it was intended that a rest home of the kind proposed would fall within the definition. But I acknowledge that this conclusion is not completely clear-cut and needs to be checked in a wider context. Accordingly it is appropriate to take the next step of considering the definition in the context of the rules. This effectively represents step two of the *McKenzie* (supra) framework.

Two definitions have received considerable attention: *"care home"* and *"residential unit":*

> ***"Care home***
> ***means an old people's home within the meaning of the Old People's Home Regulations 1965 and subsequent amendments thereto, or a home for the residential care of people with special needs (registered disabled) and/or any land or buildings used for the care during the day of elderly persons or the registered disabled***
>
> ***Residential unit***
> ***means a residential activity which consists of a single self contained housekeeping unit, whether of one or more persons, and includes accessory buildings and a family flat. Where more than one kitchen facility is provided on the site, other than a kitchen facility in a family flat, there shall be deemed to be more than one residential unit. For the purpose of this definition a residential unit shall include any emergency or refuge unit."***

The Environment Court Judge concluded that some care homes, as defined in the Plan, can constitute a *"residential activity"* and that a *"residential unit"* is a sub-category of the wider concept of *"residential activity"*. In my view he was right, for the following reasons.

It is significant that the concept of a residence or home is common to all definitions. The emphasis is on a place people regard as their home, their place of residence. None of the definitions contemplate hospitalisation because it is apparent that hospitals are excluded from the definitions. In the case of a *"care home"* the definition in the Plan is linked to the Old People's Home Regulations 1965 (now 1987) which excludes hospitals. And the proposed Plan itself specifically defines *"hospital"*.

There seems to be agreement between counsel that the expression *"care home"*, as defined, is only used in the Plan in one place. That reference relates to the narrow issue of parking requirements in Table 1b. When this isolated use of the expression is taken into account it is difficult to see how its presence in the Plan could influence whether or not a rest home comes within the definition of *"residential activity"*.

At this juncture I pause to note that Table 1b itself illustrates an anomaly in drafting. *"Care homes"* are included under the heading *"special needs housing units"* (my emphasis). Plainly care homes are not *"units"*. I

mention this to illustrate that while not surprisingly there are some drafting anomalies in this Plan, not too much should be read into such anomalies unless it is apparent that the subtleties of wording are intended to convey a particular message. In the same way (as already concluded) not too much should be read into the use of the words *"person"* and *"occupier"* in the definition of *"residential activity"*.

Returning to the definition of *"residential unit"*, I understand the appellants to maintain that a *"residential activity"* must involve a *"residential unit"*. I reject that proposition. The opening words of the definition of *"residential unit"* make it plain that a *"residential unit"* is a sub-category of a *"residential activity"*. Moreover, if the appellant's interpretation is right there would have only been one definition or else the definition of *"residential activity"* would have specifically used the expression *"residential unit"* as part of the definition.

In my opinion neither the definition of *"care home"* or the definition of *"residential unit"* colour the definition of *"residential activity"* or justify that definition being read down in any way. Some types of care homes can fit within the definition of *"residential activity"*, and all *"residential units"* are within the definition.

The appellants presented strong argument to the effect that major anomalies and distortions would arise if the definition of *"residential*

activity" included a major rest home complex of the nature under consideration. The thrust of their argument was that the proposed complex would not be caught by rules which imposed performance standards for *"residential units"* because the rest home complex would not come within that definition. At first blush this argument seems to be compelling. However, when the performance standards contained in the rules are considered as a whole, the attractiveness of the argument disappears.

In my opinion the performance standards rules relating to the Living 2 zone display a deliberate pattern. Some standards have been deliberately confined to *"residential units"*, for example, site density and outdoor living space. Other standards have been applied across the board to the wider concept of *"residential activities"*, for example, site coverage, recession planes, street scene, separation from neighbours and building heights. Yet other standards distinguish between *"residential activities"* on the one hand and *"residential units"* on the other. I take as an example Rule 2.2.6 (e) which reads:

> *"for residential activities, where a window of a living area of a residential unit faces an internal boundary, the minimum building setback shall be 3m"* (my emphasis).

It is difficult to avoid the conclusion that a pattern has been deliberately established by the Plan.

It is fallacious to suggest that the Council could be left with insufficient controls in the case of a rest home complex. Through its own Plan the Council has determined the controls it requires. It cannot now seek to fill gaps, if there any. That would require a Plan change. Apart from that it is apparent that a wide set of controls are in fact available to the Council in relation to activities falling within the *"residential activity"* definition: site coverage, recession plane, height and separation from neighbours. My interpretation is that the Council was satisfied that those were the controls it required for the broad range of *"residential activities"* and that in the case of residential units additional controls were required because of the particular nature of that activity.

Financial contributions represent an exception. Mr Wylie noted that it did not appear that the financial contribution rules would catch the proposed complex if it was defined as a *"residential activity"*. This is because the financial contribution rules are based on the concept of *"residential units"* rather than *"residential activities"*. Mr Wylie's submission appears to have some strength. But in my view it would be wrong for the Court to attempt to plug that gap by distorting the definition of *"residential activities"* when that definition can otherwise be given a sensible interpretation.

These factors lead me to the conclusion that when the definition of *"residential activity"* is tested in the context of the rules the conclusion

remains the same: *"residential activity"*, as defined, can include rest homes.

The third step is to consider the matter in the context of the Plan's policies and objectives. The relevant objective and supporting policies are as follows:

> ***"Objective: Housing needs***
> ***11.2 Opportunities for housing that meets the needs of all socio- economic groups, Tangata Whenua, and groups requiring specialised housing accommodation***
>
> ***Reasons***
> *There is a variety of housing forms which provide for the wide ranging needs of the City's population. The population has different needs in terms of individual versus grouped housing, elderly housing and families, and form of tenure. Examples of different forms of housing include rooming, boarding houses, elderly persons housing and community and emergency housing. This objective does not distinguish between most forms of permanent living accommodation and seeks to ensure they can be appropriately located throughout the living environment with respect to density and scale.*
>
> ***Policy: Permanent living accommodation***
>
> ***11.2.1 To provide for a range of housing types which offer permanent living accommodation throughout living environment of the City***
>
> ***Explanation and reasons***
>
> *There are many forms of residential accommodation which provide permanent housing options. The "traditional" dwelling on its own site, while compromising the majority of housing in Christchurch, is not the sole option. This policy seeks to enable a variety of housing which comprises permanent accommodation to establish throughout the living environment, subject to performance standards which seek to maintain and enhance the standard of residential amenity.*
>
> *Providing for a variety of forms of housing is an important aspect of addressing social and community needs and there is no reason to make a distinction between different forms of permanent living accommodation, unless it can be shown that there will be specific effects created as a result which will be detrimental to the greater living environment.*
>
> *To provide for meeting a diversity of needs, a range of housing types is necessary. Accepting that a variety of types of accommodation comprise permanent living accommodation, such accommodation is controlled through the Plan by standards to ensure reasonable compatibility of differing types of housing and to minimise adverse impacts on the environment, such as from inappropriate size or detraction from existing residential character.*

> ***Policy: Elderly persons housing***
> ***11.2.2 To recognise the particular characteristics of elderly persons living accommodation and provide for elderly persons living accommodation throughout the living environment***
>
> *Explanation and reasons*
>
> *There are many forms of elderly persons housing. Elderly persons have particular requirements in terms of accessibility to services (public transport routes, shopping facilities, health and welfare services) and site suitability (flat, small sections). Some forms of housing for elderly persons such as retirement villages, however, are self sufficient in terms of services provided and accessibility to existing services is thus not an important locational criterion. In some instances elderly persons housing can be directly associated with other activities, such as recreational activities.*
>
> *This policy recognises that elderly persons housing units in particular within the suburban living environment typically create less adverse effect on adjoining activities than some other forms of permanent living accommodation. This is reflective of the nature of this activity with regard to matters such as traffic generation and noise. Equally, smaller site sizes and a desire for smaller housing units reflect the requirements of many elderly residents.*
>
> *Accordingly, the Plan provides for elderly persons housing units on smaller sites than for other forms of permanent living accommodation in the suburban and medium density living environments."*

The above objective expressly notes that it *does not distinguish* between most forms of permanent living accommodation and seeks to ensure that they can be appropriately located throughout the living environment with respect to density and scale.

Policy 11.2.1 emphasises the theme of *permanent* living accommodation. It indicates that there is no reason to make a distinction between different forms of permanent living accommodation unless it can be shown that there shall be specific effects created as a result of which there will be detriment to the greater living environment. Finally, the concept of permanent living accommodation is again reflected in policy

11.2.2 which relates it to elderly persons' housing units within the suburban living environment.

I think Mr Davidson was right when he said that the objectives and policies reflect a broad brush approach based on permanent living accommodation. The objectives and policies reinforce the idea that an *old people's retirement complex can be entirely compatible with other* components of the Living 2 zone and that it was not intended to exclude such a concept from the definition of *"residential activity"*.

Finally, it is necessary to consider whether the actual complex proposed by the respondent company is within the definition. I adopt the *"totality"* or *"bundle"* approach referred to in *Centrepoint Community Growth Trust v Takapuna City Council* (1985) NZLR 702 (CA). In my view the focus of the proposed rest home is on the permanent residential accommodation to be provided for up to 66 elderly people.

That emphasis on residential accommodation is not altered or overwhelmed in any way by the fact that the residents will also have the benefit of care givers, some of whom will stay overnight. Nor is it altered by the fact that the respondent company as operator of the complex will be involved in a commercial venture. As Mr Davidson said, the concept is nothing more than a communal version of people living at home. It is true that some components of the complex, for example, the

hair salon and shop, are foreign to the concept of a person's home. But within the context of this large scale residential operation those components are, in my opinion, entirely incidental and ancillary. They certainly do not alter the overall picture that the complex will be a permanent residence or home.

Clearly the proposed complex could not be regarded as a hospital. The residents of the complex will regard it as their final home, not a hospital. If more intensive care requirements so demand they may have to move to hospital. So could any person living at home who is receiving individual home care.

In my view the proposed complex qualifies as a *"residential activity"* under the proposed Plan. It follows that the conclusion of the Environment Court Judge was right and that the respondent was entitled to its declaration. The appeals are dismissed.

Costs

Costs are reserved.

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE

CIV-2021-463-66
[2022] NZHC 819

UNDER	the Resource Management Act 1991
IN THE MATTER OF	an appeal under section 299 of the Resource Management Act 1991
BETWEEN	TE RŪNANGA O NGĀTI AWA Appellant
AND	WHAKATĀNE DISTRICT COUNCIL Respondent

(continue over page)

Hearing: 17 November 2021

(Undertaken via VMR during COVID-19 Alert Level 3)

Appearances: H K Irwin-Easthope and K J Tarawhiti for appellant
A M B Green and M S Jones for respondent
V J Hamm and L C Murphy for applicant for consent
N R Coates and A O Houia-Ashwell for section 301 party

Judgment: 26 April 2022

JUDGMENT OF HARLAND J

This judgment was delivered by me on 26 April 2022, at 3:30 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar *Date*.....

Counsel/Solicitors:
Whāia Legal, Wellington
Brookfields Lawyers, Auckland
Holland Beckett, Tauranga
Kāhui Legal, Wellington

MMS GP LIMITED
Applicant for consent

CAROLINE TAKOTOHIWI (ON BEHALF OF NGĀI TAIWHAKAEA)
Section 301 party

Introduction

[1] On 4 March 2021, the Whakatāne District Council (the Council) granted resource consent to MMS GP Limited (MMS) to develop land now owned by it at 77 Bunyan Road, Coastlands/Ōpihi, which is of enduring and significant ancestral value to Te Rūnanga o Ngāti Awa and Ngāi Taiwhakaea (the Ngāti Awa parties). These parties (and one other) appealed the Council's decision to the Environment Court. The Environment Court decided that as a result of amendments made to the Resource Management Act 1991 (RMA) at the time, the Ngāti Awa parties did not have the right to appeal the Council's decision.[1]

[2] The Ngāti Awa parties have appealed the Environment Court's decision to this Court.

The basis for the appeal

[3] Under s 299 of the RMA, the right to appeal a decision of the Environment Court is limited to an appeal on a question of law. In this appeal, I am asked to determine whether the Environment Court's interpretation of s 120(1A)(c) of the RMA (now repealed) was correct. A question of statutory interpretation is clearly a question of law that is able to be appealed to this Court.

[4] For reasons I develop later in this judgment, the Environment Court was required to determine whether the consented activity in the Lifestyle and Retirement Precinct part of the development was a "residential activity" as defined under the RMA because, if it was, the right to appeal would only be available if the residential activity was a non-complying activity and it was common ground that it was not.

[5] The Environment Court determined that the consented activity was a residential activity and therefore concluded it had no jurisdiction to consider or determine the three appeals brought to it by the Ngāti Awa parties.

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1 *Manukorihi Tarau – Ngāti Taiwhakaea v Whakatāne District Council* [2021] NZEnvC 108 (*Environment Court decision*).

[6] In this appeal, the Ngāti Awa parties submit that the Environment Court erred in law in determining that the Court was precluded under section 120(1A)(c)[2] of the RMA from considering or determining the three appeals,[3] including by:

- applying an erroneous approach to the interpretation of "residential activity" as defined under the RMA (including at paragraphs [24], [25], [27], [28], [30], [33], [36], [38] and [40]);

- concluding that the consented activity is a residential activity within the meaning of section 95A(6) of the RMA as at 30 September 2020 (at paragraph [42]);

- determining that section 120(1A)(c) of the RMA as at 30 September 2020 precludes a right of appeal against the Whakatāne District Council's decision granting resource consent for the consented activity and therefore the Court has no jurisdiction to consider or determine the three appeals (at paragraph [43]).

[7] The appellant asks the Court to allow the appeal and to refer it back to the Environment Court to hear the substantive appeals against the resource consents granted by the Council.[4]

Background

[8] The background was set out in the Environment Court's decision as follows:[5]

> [6] The subject property is an area of land of approximately 27 ha at 77 Bunyan Road, Coastlands, within a larger block of approximately 40.5 ha. The block is known variously as the Ōpihi block or the Piripai block. The block lies to the north of Whakatāne between the Orini Stream and the Whakatāne River and the sea. To the east is the Ōpihi Whanaungakore urupā, which is a place of great significance to tāngata whenua and which, together with the broader areas surrounding it, is considered by the appellants in these proceedings to be ancestral land of significant cultural value.

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2 As the RMA stood between 19 October 2017 and 30 September 2020 (as section 120(1A) (c) was repealed on 1 October 2020).

3 The three appeals were brought by Te Rūnanga o Ngāti Awa, Manukorihi Tarau on behalf of Ngāi Taiwhakaea and Cletus Maanu Paul on behalf of Ōpihi Whanaungakore Trustees.

4 Consequential relief and costs are also sought.

5 *Environment Court decision*, above n 1.

[7] The land has been the subject of previous proceedings before the Environment Court. In 2002 the Court heard two appeals against the grant of land use consents by the Council to an application by the Council to subdivide the land for residential, reserve and marae purposes and to an application by Te Rūnanga o Ngāti Awa to build a marae on part of the eastern side of the block.[6] The Court confirmed the Council's decisions. In the course of its decision, the Court considered the application of the Act, and in particular ss 6(e), 7(a) and 8, and the approach that ought to be taken to the assessment of tāngata whenua evidence according to a 'rule of reason' approach.[7]

[8] In 2016 the land was the subject of four appeals from decisions of the Council on submissions on the proposed Whakatāne District Plan.[8] The principal issue before the Court, remaining after settlement of other issues, was whether the land should be zoned to enable its subdivision and development for residential purposes in accordance with a proposed structure plan. The Court confirmed the appropriateness of such a structure plan in its interim decision and, in its final decision, confirmed the terms of the Ōpihi Structure Plan.

[9] The block has now been subdivided to create the subject property and several reserves around it. On the seacoast immediately to the north is a local purpose reserve for coastal protection. Immediately to the south on the Bunyan Road frontage is a local purpose reserve as a landscape buffer. In the southwestern corner is a small local purpose reserve for a pumping station. To the west is existing residential development known as Coastlands. Immediately to the east is a lot identified as a buffer to the Ōpihi Whanaungakore urupā, which is on another block further to the east.

[10] The subject property is zoned Residential in the operative District Plan and is also subject to the Ōpihi Structure Plan. Dwellings, including multiple dwellings per lot, are provided for as permitted, controlled or restricted discretionary activities. Retirement villages excluding or including a hospital are provided for as controlled or restricted discretionary activities. The purpose of the Ōpihi Structure Plan, as identified in Strategic Policy 5 of the District Plan, is to enable the development of residential land. Strategic Policy 8 is to provide for a wide range of housing opportunities including, among other things, retirement-style development in the Residential Zones.

[9] In July 2019, MMS GP Limited (MMS) applied for resource consent to subdivide and develop the land in stages in the main for residential activities. There were various iterations to the subdivision and land use application, at least one of which was made following receipt of cultural impact assessments. Another amendment deleted an area proposed to be zoned for mixed use which included commercial activities such as neighbourhood convenience, retail and café activities.

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6 *Ngāti Hokopu ki Hokowhitu v Whakatāne District Council* (2002) 9 ELRNZ 111 (EnvC).

7 At [53].

8 *Trustees of Ōpihi Whanaungakore v Whakatāne District Council* [2016] NZEnvC 035 (interim decision) and [2016] NZEnvC 067 (final decision).

[10] Eventually the application sought to create 240 residential allotments with 13 access lots, seven road lots and eight reserve lots, as well as a large lot of approximately 8.8 ha for a proposed retirement village. The latter is referred to as a Lifestyle and Retirement Precinct. Under the relevant plan, the subdivision was required to be considered as a restricted discretionary activity.[9]

[11] In October 2020, the Council appointed Independent Hearing Commissioners to hear and decide the applications.[10]

[12] A hearing was held in February 2021 and the Commissioners issued their report and decision in respect of it on 4 March 2021. They granted the application subject to conditions.

[13] The decision contains a section entitled "Māori values". Although it is the Commissioners' interpretation of the issues presented to it, what is evident from their report is that the Ngāti Awa parties have been resolute in their opposition to residential development at Ōpihi from at least the turn of the 20th century which, as the Commissioners noted, was based primarily on their traditional status as tāngata whenua in the Whakatāne district.[11] It is also clear from the Commissioners' decision that the lot proposed for the retirement village was a significant part of their opposition to the application because of its proximity to the Ōpihiwhanaungakore Urupā nearby. Although a buffer is provided between the Ōpihiwhanaungakore Urupā and the development, in the Ngāti Awa parties' view, this was not sufficient to mitigate the effects they consider they will experience if the development proceeds.

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9 *Environment Court decision,* above n 1, at [11].
10 Under ss 100A–101, 104C, 108, 220 and 221 of the RMA.
11 At [55], CBD page 1098.

[14] Condition 4 of the land use consent relates specifically to the Lifestyle and Retirement Precinct.[12] For the purposes of this appeal, the relevant parts of condition 4 are now reproduced:

> **General**
>
> Lifestyle and Retirement Precinct activities shall comply with the relevant Residential Zone rules of the operative District Plan unless otherwise provided for below:
>
> **Activities**
>
> Lifestyle and Retirement Precinct activities may include:
>
> 1. Dwellings for the purpose of housing people predominantly in their retirement.
>
> 2. Services and facilities for the care and benefit of the residents.
>
> 3. Activities pavilions and/ or other recreational facilities or meeting places for the use of residents of that complex and visitors of residents.
>
> ...
>
> **Detailed Design Plan**
>
> A Detailed Design Plan for the Lifestyle and Retirement Precinct development shall be submitted with supporting plans and other documentation for approval by the Council or delegate prior to any application for building consent. The detailed design plan shall demonstrate compliance with the standards as set out above.
>
> ***Advice Note:*** *Development Contributions will be assessed at the time of the submission of the Detailed Design Plan taking into account the policies applicable at that time and the nature and scale of the activity.*

[15] Three appeals from the Council's decision were filed in the Environment Court by the Ngāti Awa parties. Copies of these appeals were not provided as part of the Common Bundle and no party considered that I should refer to them as part of this appeal, however, I was advised that the appeals focus on the part of the subdivision proposed for a retirement village and in particular the activities outlined as 2 and 3 in condition 4, not 1 which permits dwellings for the purpose of housing people predominantly in their retirement.

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[12] Tab 18 Common Bundle of Documents 1041220 (page 1106).

[16] The Environment Court decided that it had to determine whether it had the jurisdiction to hear the appeals as a preliminary issue. This required it to interpret ss 95A(6) and 120(1A)(c) of the RMA.

The amendments to the right to appeal to the Environment Court

[17] The Environment Court is a creature of statute. It is established under the RMA and its powers are also set out in the RMA. The right to appeal a decision to the Environment Court is provided by s 120 of the RMA. This section remained largely unamended as to substance until 18 October 2017 when by virtue of the Resource Legislation Amendment Act 2017,[13] the right to appeal against the decision of a consent authority on an application was restricted.[14] Because the application for resource consent in this case was lodged between 19 October 2017 and 1 October 2020, the provisions of s 120 as amended by the Resource Legislation Amendment Act 2017 apply to the appeals filed in the Environment Court by the Ngāti Awa parties.

[18] Two new subsections, (1A) and (1B) were inserted into s 120 of the RMA, however only subs (1A) is relevant this appeal. It provides:

> **120 Right to appeal**
>
> (1) Any 1 or more of the following persons may appeal to the Environment Court in accordance with section 121 against the whole or any part of a decision of a consent authority on an application for a resource consent, or an application for a change of consent conditions, or on a review of consent conditions:
>
> (a) the applicant or consent holder:
>
> (b) any person who made a submission on the application or review of consent conditions:
>
> (c) in relation to a coastal permit for a restricted coastal activity, the Minister of Conservation.
>
> (1A) However, there is no right of appeal under this section against the whole or any part of a decision of a consent authority referred to in subsection (1) to the extent that the decision relates to 1 or more of the following, but no other activities:

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13 2017 No 15.

14 This section has now been repealed and replaced by ss 33 and 37(1) of the Resource Management Amendment Act 2020, which came into force on 1 October 2020.

(a) a boundary activity, unless the boundary activity is a non-complying activity:

(b) a subdivision, unless the subdivision is a non-complying activity:

(c) **a residential activity as defined in section 95A(6), unless the residential activity is a non-complying activity.**

...

(emphasis added)

[19] During the same period, s 95A(6) of the RMA defined "residential activity" as:

> ... an activity that requires resource consent under a regional or district plan and that is **associated with the** construction, alteration, or **use of 1 or more dwelling houses on land that**, under a district plan, **is intended to be used solely or principally for residential purposes.**
>
> (emphasis added)

[20] The term "dwellinghouse" in s 2 of the RMA provided:

> **dwellinghouse** means any building, whether permanent or temporary, that is occupied, in whole or in part, as a residence; and **includes any structure or outdoor living area that is accessory to, and used wholly or principally for the purposes of, the residence**; but does not include the land upon which the residence is sited.
>
> (emphasis added)

[21] As outlined above, if the activities referred to as 2 and 3 in condition 4 of the consent are not residential activities, they would be non-complying activities. As the Environment Judge noted, on the basis that the activity status of all activities forming part of the retirement village should be bundled together, the whole proposal would then fall to be considered as a non-complying activity and would provide the Ngāti Awa parties with a right to appeal to the Environment Court.[15] Given that appeals to the Environment Court are appeals de novo, this would mean all aspects of the proposal, including cultural issues could be reconsidered by the Court.

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15 At [21].

The Environment Court decision

[22] After setting out the issues in contention, the background and the statutory provisions applicable, the Environment Judge considered the general principles that apply to provisions that seek to oust the Court's jurisdiction. He then identified that the issue he was required to focus on was how the proposed retirement village activity should properly be considered in light of the statutory definition of "residential activity". He undertook this interpretation exercise with reference to *Hawkesbury Avenue, Somme Street and Browns Road Residents Association Inc v Merivale Retirement Village Ltd*,[16] *Mackenzie District Council v Glacier and Southern Lakes Helicopters Ltd.*[17] He evaluated the statutory provisions in light of the principles established in those cases.

[23] The Environment Judge concluded that the activity that had been consented was a residential activity within the meaning of s 95A(6) and because under the plan it was in accordance with s 120(1A)(c), the Environment Court had no jurisdiction to consider or determine the three appeals by the Ngāti Awa parties. Although invited to strike out the appeals, the Environment Judge did not do so pending the outcome of this appeal.

Legal principles

[24] Section 120(1A)(c) is an ouster clause. Also known as a privative clause, this is a statutory provision which restricts the supervisory jurisdiction of the Court over executive government decision making by preventing those affected by such decisions from appealing or bringing judicial review proceedings against them.

[25] The Court of Appeal has held, adopting the reasoning of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission*, that ouster clauses will not apply to "an error on a question of law which the authority is not empowered to decide conclusively".[18] The true question is whether the clause exhibits Parliament's

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16 *Hawkesbury Avenue, Somme Street and Browns Road Residents Association Inc v Merivale Retirement Village Ltd* HC Christchurch AP139/98, 3 July 1998.

17 *Mackenzie District Council v Glacier and Southern Lakes Helicopters Ltd* [1997] NZRMA 569 (EnvC).

18 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133; citing *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

intention to give the decision maker the power to determine questions of law conclusively:[19]

> It would be surprising if the legislature were to give a quintessentially administrative officer, however senior... power to determine material questions of law conclusively; ...

[26] Because ouster clauses purport to limit the Court's ordinary supervisory role over government power, they should be interpreted narrowly.[20] There is a presumption that Parliament does not intend to exclude judicial review for error of law, though this can be rebutted by clear statutory language.[21]

Did the Environment Judge correctly conclude that he did not have jurisdiction to hear the Ngāti Awa parties' appeals?

[27] A key aspect of the appeal is whether the consented activity is a "residential activity" under s 95A(6) of the RMA.

The Environment Court's analysis

[28] The Environment Judge outlined the Ngāti Awa parties' argument in para [17] of his decision. He said:

> [17] The appellants presented submissions focussing on the definition of "residential activity" in s 95A(6) of the Act and the related definition of "dwellinghouse" in s 2. Their central argument is based on the application of those definitions to the terms of the resource consent in relation to the lifestyle and retirement precinct. It is that while the dwellings to be occupied by inhabitants of the retirement village are residential activities on land intended to be used for residential purposes, the services and facilities included in the proposed activities of the retirement village go beyond being "associated with" the use of the dwellinghouses, are not "accessory to" such activity and are not used "for the purposes of" the residences. **On a strict reading of the statutory provisions against the terms of the resource consent, they submit that the only activities for which a right of appeal is not ousted by s 120(1A)(c) are those directly associated with the use of one or more dwellinghouses. On that basis they argue that the resource consent goes beyond the ambit of s 120(1A)(c) of the Act and so the ouster of jurisdiction for an appeal does not apply. The evaluation of this argument is the focus of this decision.**
>
> (Emphasis added.)

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19 At [136].

20 *Kaur v Ministry of Business, Innovation and Employment* [2012] NZHC 3563 at [71].

21 *Kaur v Ministry of Business, Innovation and Employment* [2016] NZHC 2595 at [38] and [39].

[29] The Ngāti Awa parties' argument was that the service and associated facilities component of the retirement village were not sufficiently associated with the residential part of it and as such, the ouster of the right to appeal did not apply to their appeals.

[30] The Environment Judge then considered how the proposed retirement village, as it was described in the land use consent, aligned with the statutory definition of "residential activity".[22] Having noted that in respect of the retirement village as part of the proposal, the applications for consent did not include a great deal of detail, he observed that although the consent refers to a Comprehensive Development Plan in respect of the lot for the retirement village, the word "comprehensive" appeared to be in the sense of "overall" rather than "detailed".[23] He noted that the plans did not give any indication about how the retirement village might be laid out or how its various facilities might relate to its proposed dwellings.[24]

[31] The Environment Judge then analysed the meaning of *associated with*, *accessory to* and *for the purposes of*, being the phrases contained in s 95A(6) and in the definition of "dwellinghouse" in s 2 of the RMA he had been asked to interpret.

[32] He first referred to s 5 of the Interpretation Act 1999, noting that the meaning of an enactment must be ascertained from its text and in light of its purpose. With reference to the meanings of the phrases referred to, he said they were phrases consisting of "ordinary words in ordinary use". He said:

> [23] ... In their context in the Act, they connote relationships between activities or structures. In this case, the particular relationships are those which arise out of residential activities. It follows that the main purpose of the phrases should be understood in terms of a resource management context and residential purposes. Further, it appears to be uncontentious that the purpose of the enactment of ss 95A(6) and 120(1A)(c) of the Act in 2017 was to promote residential activity by reducing consenting costs.

[33] Section 5 was a useful and appropriate place to start, and the Environment Judge's reference to the phrases in terms of a resource management context and residential purpose was the correct framework to apply.

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22 At [20].
23 At [12].
24 At [13] and [14].

[34] The Environment Judge then turned his attention to the meaning of "associated with". He decided that the ordinary meaning of this phrase, as it is used in s 95A(6), and when considered with reference to the case law, meant "being connected" or "joined in function (with)". He did not consider the phrase to have the same meaning as "ancillary to" and he said it "did not convey the idea of subordinate use".[25]

[35] The Environment Judge then considered the meaning of "accessory to" used in the definition of "dwellinghouse" in s 2 of the RMA. Unsurprisingly, he found it to be "something that is incidental to another structure or activity".[26]

[36] The Environment Judge next, considered the phrase "for the purposes of" used in the definition of "dwellinghouse". He said:[27]

> [27] ... Close attention to the purpose of the structure or area may be a surer guide to the nature of the association than the use of a dictionary because such a purposive approach guides one's sense of the context, whereas reliance on a definition carries the risk of fixing the boundaries of meaning too rigidly.

[37] Having considered the purposive approaches taken by the High Court in *Hawkesbury Avenue* and the Environment Court in *Mackenzie District Council*, but particularly with reference to the former which involved deciding, following an appropriate statutory interpretation exercise, that a rest home was a residential activity, the Environment Judge then went on to apply the statutory interpretation principles articulated in those cases to the facts of this case.

[38] While noting that there was no issue between the parties that occupation of a dwellinghouse in a retirement village is a residential activity,[28] the Environment Judge next asked whether the element of the resource consent allowing "services and facilities for the care and benefit of the residents" expanded that residential character. He determined that it did not, because the central purpose of such services and facilities must be "for the residents".[29]

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25 The case law referred to by the Judge was *Manukau City Council v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58 (HC).
26 At [25].
27 At [27].
28 At [34].
29 At [36].

[39] The Environment Judge then identified examples of activities within the definition that could be envisaged as "services and facilities for the care and benefit of the residents" such as rubbish collection, kitchen, dining and healthcare facilities, but he accepted that other activities would require closer analysis. Using "hairdressing" as an example, he noted that such services could be provided on-site to residents who may otherwise have difficulty in travelling to obtain such services elsewhere, and he said this would be "for the purposes of" or "association with", however, establishing a stand-alone hairdressing salon would not.[30]

[40] Accepting that other personal services such as this might arise, the Environment Judge nonetheless did not consider it "necessary to attempt to draw a bright line".[31] He noted that the area zoned in the original proposal for mixed use included commercial activities which he said, "demonstrated how associated commercial activity could clearly go beyond being a residential activity", but, he said, "the removal of that zoning addressed that issue." He said, "the retirement village cannot be used as cover for the reintroduction of such activities."[32] By this, I apprehend he meant that on the facts of this case, because of this background, the prospect of commercial activities developing on site that were not primarily providing a service to residents would not arise.

[41] The Environment Judge accepted that the part of the resource consent allowing "activities pavilions and other recreational facilities or meeting places for the use of residents of that complex and visitors of residents" had the potential to go beyond the provision of services and facilities for the care and benefit of the residents. However, he decided, adopting a purposive approach, that the scope to do so was not great because of the primary limitation that use of such facilities is restricted to residents and their visitors.[33]

[42] In respect of this part of the resource consent, the Environment Judge again considered that a bright line was unnecessary and might cause its own problems. He observed that recreational facilities on a domestic scale are an ordinary part of

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30 At [38].
31 At [39].
32 At [39].
33 At [40].

residential activities and provided swimming pools, tennis courts, games rooms and, workshops as examples of such activities. And he noted that such facilities could be housed in separate buildings or pavilions. By way of analogy, he therefore concluded that a retirement village could include such facilities for its residents and their visitors without (I infer) losing its residential character.[34]

[43] For these reasons, the Environment Judge concluded that the activities outlined in condition 4 as 2 and 3 were residential activities within the meaning of s 95A(6) of the RMA.

The Ngāti Awa parties' submissions

[44] The Ngāti Awa parties agree with the Environment Judge that definitions in plans cannot affect the statutory definition central to the preliminary issue of jurisdiction. They contend, however, that despite recognising this, the Environment Judge nonetheless went on to do the opposite. This is because, they submit, the Environment Judge considered and ultimately determined the nature of the jurisdictional bar by reference to what is in the contemplation of a retirement village based on definitions from planning documents that had been examined through the case law. The Ngāti Awa parties contend that the Environment Judge's analysis wrongly focused on whether or not activities are "associated with" a retirement village, rather than whether the activities are "associated with" a dwellinghouse for the purpose of residence.

[45] The Ngāti Awa parties submit that in determining whether the jurisdictional bar to an appeal applies under s 120(1A) of the RMA, it is necessary to consider *all* aspects of the application against the definition of "residential activity" in s 95A(6) and determine whether *all* the activities sought by MMS are "associated with the construction, alteration or use of one or more dwellinghouses" or, in turn, a subdivision consent (other than non-complying). It was submitted that this is particularly the case because the emphasis in s 120(1A) in relation to the jurisdictional bar only applies to decisions that relate to those activities that are listed "but no other activities". Counsel

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[34] At [41].

submitted that this requires the Court to carefully consider what is included in the proposed retirement village.

[46] In support of this argument, counsel referred to the evidence called before the Independent Commissioners about the proposed retirement village, which was limited as to detail. I was referred to the evidence of Mr McDonald, a director of MMS[35] indicating that the establishment of a retirement village was central to the Council's aspiration for the site and formed part of the obligations MMS had as purchasers of the land. However, counsel noted that as at 29 January 2021, no retirement operator had been appointed and therefore limited information had been provided at the Council hearing about what may be included. Counsel also referred to the s 42A report and the Council's decision and submitted that neither describe in detail the non-residential aspects of the retirement village.[36] As outlined above, the Environment Judge specifically referred to the limited detail about the retirement village in his decision, but he did not consider it limited his ability to interpret condition 4 as required and in relation to the provisions of the RMA.

[47] The lack of information about the nature of the retirement village supports, it was submitted, the need for caution to be applied in considering the jurisdictional bar in this case.

[48] The Ngāti Awa parties submitted that the "activities pavilions", "recreational facilities", "meeting places" and "care services and facilities" provided in the Lifestyle and Retirement Precinct are not associated with "the construction, alteration or use of one or more dwellinghouses" as required under s 95A(6) in order for them to be categorised as a residential activity for the purposes of the jurisdictional bar.

[49] Counsel then sought to distinguish *Hawkesbury* and *Mackenzie District Council* as both were decided prior to the introduction of the Interpretation Act 1999. It was submitted that both relate to the proper interpretation of a district plan, rather than what is contemplated in the context of a jurisdictional bar. It was submitted that if the jurisdictional bar was to be interpreted by whether or not the activity was enabled

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35 Common bundle 201.0001.
36 Vol 104 CBD, P 0882.

by the District Plan, then a wide ambit of activities would be captured by s 120(1A)(c) and, ultimately, inappropriately restrict natural justice beyond that which had been intended by Parliament.

[50] Counsel next referred to the context for the Resource Legislation Amendment Act 2017 which it was submitted sought to respond to a housing supply and affordability crisis.[37] It was submitted that a retirement village, such as the one before the Court, was not the type of housing infrastructure in contemplation of Parliament at the time s 120(1A) was promulgated and then enacted.

[51] Overall, counsel submitted that the other activities and services of the retirement village "tip the application over" for the purpose of the jurisdictional bar.

[52] Agreeing with the Judge that the natural and ordinary meaning of "associated" is "being connected" or "joined in function",[38] counsel submitted that the natural and ordinary meaning of "associated with" must be informed by the words of ss 95A(6) and 120(1A) of the RMA and the definition of "dwellinghouse". In other words, the associated activity must be connected or joined in function to any building that is occupied as a residence, including any structure or outdoor living area that is accessory to and used wholly or principally for the purpose of residents. By way of comparison, counsel submitted that "activities pavilions", "recreational facilities", "meeting places" and/or "care services and facilities" are not connected or joined with a dwellinghouse or the purpose of residence. To take that approach, counsel submitted, would mean that any structure in the vicinity of a housing development would qualify as "associated with" the dwellinghouse.

[53] Further, if the gateway to s 120(1A) is to be merely ancillary to the construction, alteration or use of one or more dwellinghouses, counsel submitted that all manner of other activities could be considered to be associated with dwellinghouses, thereby restricting appeals against a wide category of activities.

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37 Reference was made to Hansard where the first and second reading of the Resource Legislation Amendment Bill specifically stated that it was focused on addressing long-term issues around housing and particularly enabling housing infrastructure.

38 *Manukau City Council v Trustees of Mangere Lawn Cemetery*, above n 27.

The Council's submissions

[54] In terms of the meaning of "associated with", the Council also agreed that the Environment Judge correctly interpreted this phrase by finding that it means "being connected" or "joined in function". It was submitted that the Lifestyle and Retirement Precinct activities would not only be paid for by the residents and managed by the village operators, but more importantly, they are necessary to provide the proper care and benefit for elderly residents. In this regard, the Council adopted the Environment Judge's finding that "the sufficient association or connection involves the inter-relationship of functions, management and financial considerations rather than differences in the processes used".[39]

[55] In relation to the argument about whether the activity is associated with the construction, alteration, or use of a "dwellinghouse", counsel for the Council explained that the construction and alteration activities for the Lifestyle and Retirement Precinct are defined by land use consent conditions 3 and 4 and the Comprehensive Development Plan (CDP) – Development Controls.[40] In addition to the conditions of consent, counsel submitted that the CDP and the Structure Plan provisions apply and the development is also subject to the relevant residential zone rules in the District Plan.[41] As a result of these measures, counsel submitted the scale, character and intensity of the development is adequately delineated, I infer, to require the activities noted as 2 and 3 in condition 4 to be appropriately "residential".

[56] It was further submitted that "dwellings for the purpose of housing people predominately in their retirement" clearly come within the definition of "dwellinghouse" in s 2 of the RMA. For this reason alone, counsel submitted that s 95A(6), which requires the activity to be associated with the construction, alteration or use of one or more dwellinghouses, has been satisfied. However, it was further submitted that the Environment Judge had gone further and examined whether the proposed lifestyle and retirement precinct activities could be included in the definition

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39 *Environment Court decision,* above n 1, at [24].
40 Common bundle page 101.0100
41 Common bundle page 104.1221

of "dwellinghouse" as structures that are "accessory to", and used wholly and principally "for the purposes of" a residence.[42]

[57] Ultimately, the Council submitted that the Environment Judge correctly adopted a purposive and contextual approach to his interpretation of the relevant definitions, correctly focused his interpretation on the definitions of "residential activity" and "dwellinghouse" as defined by the RMA and interpreted them in the context of their association with the proposed lifestyle and retirement precinct activities. It was submitted that this was the correct approach to take and no error of law was made.

[58] With reference to the Ngāti Awa parties' submission that the Environment Judge erred by relying on case law which focused on plan provisions, the Council submitted that reference in the decision to the cases was simply in relation to matters of general principle to assist the Court with the interpretative exercise. It was submitted that there could be no error of law in referring to those cases for that purpose.

MMS submissions

[59] MMS adopted the same approach as that taken by the Council. In relation to the activities referred to in condition 4 of the land use consent, MMS submitted that the consented activities are clearly limited to dwellings, or by the express reference to "residents", to activities associated with the dwellings within the retirement village.

[60] MMS also submitted that:

- the approach adopted by the Environment Court was entirely conventional, it did not refer to irrelevant factors such as the District Plan and further, the language of the statute was sufficiently clear to permit ouster of the Environment Court's jurisdiction;

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42 *Environment Court decision*, above n 1, at [25] and [26].

- the Environment Court adopted an approach of identifying the plain, ordinary meaning of the words, having regard to the purpose and scheme of the RMA and evaluated the consented activity against the plain ordinary meaning of the words; and

- the Environment Court's discussion of *Hawkesbury* did not detract from the interpretative exercise undertaken.

Discussion

[61] The Environment Judge was correct to start with the statutory definitions. The key is the definition of "dwellinghouse" which includes "any structure … that is accessory to, and used wholly or principally for the purposes of, the residence". The Environment Judge analysed this definition in relation to the CDP provisions applicable to the Lifestyle and Retirement Precinct. Given that the "services and facilities", "activities pavilions and/or other recreational facilities or meeting places" are defined respectively as "for the care and benefit of the residents", and "for the residents of that complex and visitors of residents", it is hard to see how any activity beyond that which relates to the purpose of residence could be permitted. Arguably, within the definition of "precinct" therefore the reference to "facilities", "pavilions" and "other recreational facilities or meeting places" would come within the definition of dwellinghouse.

[62] For the same reasons, the Judge was right not to put much weight on the limited detail about services and facilities.

[63] In my view although the Environment Judge correctly concluded that the limitation for the activities in the Lifestyle and Retirement Precinct to "residents and visitors of the residents" meant that the definition of "residential activity" under s 95A(6) of the RMA applied to them, I do not agree that he determined these terms with reference to the retirement village rather than dwellinghouses. The activities noted as 2 and 3 in condition 4 specifically limit them to the care, benefit or use of residents or their visitors. Importantly, services and facilities are limited to "the care and benefit of residents" only, but "activities pavilions and/or other recreational

facilities or meeting places" can be used by residents and their visitors. By linking these activities to residents, the purpose of the activities is, in my view, inextricably linked to the definition of "dwellinghouse" and thereby to the definition of "residential activity" in s 95A(b).

[64] Further, I am not persuaded that the Environment Judge misapplied the cases when he undertook his interpretative exercise. It is clear that it was the reasoning in the cases that he considered helpful, particularly in relation to the *Hawkesbury Avenue* case where he specifically said that the Court's reasoning had been helpful given the purposive way in which it had undertaken the interpretive exercise. In my view, the process adopted by the Environment Judge was orthodox, namely, he identified the plain ordinary meaning of the words, and had regard to the purpose and scheme of the RMA.

[65] As to the submission by the Ngāti Awa parties that s 120(1A) was introduced to respond to a housing supply and affordability crisis that is not applicable to retirement villages, I agree with MMS that argument cannot be sustained. Fundamentally, retirement villages house people and therefore assist with housing supply and affordability either by housing older people or freeing up housing stock for the market as older people move into retirement villages. I take this matter no further because it is not something which appears to have been argued before the Environment Judge.

[66] It is well established that Courts with supervisory jurisdiction will not lightly accept the ouster of their jurisdiction. However, if Parliament speaks clearly about its intention to oust the jurisdiction of the Court, that must be respected.[43]

[67] As to whether a special approach ought to be taken because s 120(1A) is an ouster provision, I agree that caution must be taken, however, it is caution in relation to the clarity about which Parliament has spoken of its intention to oust the jurisdiction of the Court, rather than the fact itself of ouster. In my view, the intention of Parliament as expressed in s 120(1A) is clear. It only intended to allow parties to

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43 *Bulk Gas Users Group v Attorney-General*, above n 19, at 133.

appeal decisions concerning residential activities where those activities were assessed as non-complying activities.

[68] Having reached the conclusion that ouster was intended, the Court should approach the question of how broadly that ouster extends in a conventional way, namely, by reference to the purpose and scheme of the legislation. This is the approach the Environment Judge adopted.

[69] Even if I am wrong about this, in my view, the ouster here is not of the same kind as that which appears in decisions such as *Bulk Gas*. That case concerned limits to the High Court's constitutional role of supervising the lawfulness of executive decision-making. The importance of this role is recognised by the New Zealand Bill of Rights Act 1990, which includes the right of those affected by the decisions of public authorities to apply for judicial review.[44] The Environment Court is created and its powers are strictly delineated by the RMA. The RMA grants the right to a full de novo hearing on issues of fact and law, but did not, at the time, extend that right to decisions relating to all residential activities. I agree with counsel for MMS that the general scepticism about ouster revealed in the cases is less applicable in these circumstances.

[70] As well, the scheme provided under ss 95A and 120(1A) has applied in relation to the standing of parties to appeal notification decisions to the Environment Court for some time now. The reference to this well-known definition further clarifies the purpose of the ouster.

[71] I conclude that the ouster of the Environment Court's jurisdiction to hear certain appeals was clearly outlined in the amendments to s 120 which, although now repealed, were in force at the time the Environment Court was contemplating the Ngāti Awa appeals. Given the conclusion I have reached that the Environment Judge made no error of law interpreting the provisions of s 95A(6) as they apply to this consent; he was correct to conclude that the Ngāti Awa parties had no right to appeal to the Environment Court.

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44 New Zealand Bill of Rights Act 1990, s 27(2).

Result

[72] The appeal is dismissed.

[73] I appreciate this decision will be disappointing to the Ngāti Awa parties. It is a decision that has required a clinical approach to the interpretation of statutory provisions. In other words, it has nothing to do with the merits or otherwise of the appeals sought to be argued before the Environment Court. The provisions in issue have now been repealed but that will be cold comfort to the Ngāti Awa parties as they have lost the opportunity to advance the matters they wished to argue before the Environment Court.

[74] It has been important for me to express clearly the nature of the decision before the Court. A party who does not feel they have been afforded an opportunity to have the full ambit of their argument advanced in an appropriate forum will often feel aggrieved. Our system of democracy, however, provides that laws made in Parliament are supreme with the question of their interpretation remaining a matter for the Courts. In this case, both the Environment Court and this Court on appeal have determined that the limitation on the right to appeal applicable at the time means that the Environment Court is not empowered to address the merits of the parties' respective positions on the substance of the matters in issue between them.

[75] The appeal having been dismissed, the question of costs arises. If costs cannot be agreed, the Council and MMS are to file and serve a memorandum (not exceeding three pages) in relation to costs within 14 days of the date of receipt of this judgment. The Ngāti Awa parties are to file any memorandum in reply (not exceeding three pages) no later than 14 days thereafter. Costs will be dealt with on the papers unless the Court considers upon reading the memoranda that a further hearing is required.

Harland J