

BEFORE THE HEARING PANEL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Proposed Plan Change 26 to the Operative Waipā
District Plan

**LEGAL SUBMISSIONS IN REPLY OF COUNSEL FOR WAIPĀ DISTRICT COUNCIL
ON THE *SOUTHERN CROSS* DECISION
Dated 14 June 2023**

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Introduction

1. In the legal submissions of counsel for Waipā District Council on the *Southern Cross* decision dated 9 June 2023, counsel requested an opportunity to reply to any legal submissions lodged by other parties under paragraph 3(a) of Direction #15. Reply submissions are appropriate in respect of PC26 as the hearing has been held and closing submissions have been completed.
2. These legal submissions in reply are made having received copies of legal submissions by the following parties in respect of the Waikato IPIs:
 - (a) Kāinga Ora – Homes and Communities (Kāinga Ora);
 - (b) Ryman Healthcare Limited and the Retirement Villages Association of New Zealand Incorporated (RVA/Ryman);
 - (c) Ara Poutama Aotearoa – Department of Corrections (Ara Poutama);
 - (d) Te Tūāpapa Kura Kāinga – Ministry of Housing and Urban Development (HUD);
 - (e) Waikato District Council; and
 - (f) Hamilton City Council.

Implications of the *Southern Cross* decision for IPIs

3. From our review of the legal submissions, it appears that all parties are agreed that:
 - (a) The *Southern Cross* decision confirms that a plan change, including an IPI, must give effect to all of the relevant objectives and policies of the NPS-UD, as required by section 75(3)(a) of the Resource Management Act 1991 (the Act).
 - (b) Unlike other plan changes, the scope of an IPI is prescribed by section 80E of the Act.
4. These matters of agreement have been confirmed in the Minute of the Panel dated 14 June 2023 which concludes that the Panel must give effect to the NPSUD in its entirety (along with other higher order instruments) to the

extent that the matters are in scope of the respective plan changes (as directed by s. 80E RMA and NPSUD policies 3 and 4).

5. However, counsel makes the following submissions in reply to the legal submissions of RVA/Ryman and Ara Poutama, as these legal submissions will now form part of the submissions before the Panel in respect of whether the relief sought by the submitters falls within the scope of PC26.

Reply to legal submissions of RVA/Ryman

6. The legal submissions on behalf of RVA/Ryman propose that:
 - (a) The *Southern Cross* decision supports the submission already made that the NPSUD as a whole must inform the development of 'related provisions';¹ and
 - (b) Unless expressly outside the scope of the IPI (which it is submitted is relatively wide in terms of enabling housing intensification), the IPI must give effect to the NPSUD as a whole in this process because it is practicable to do so.²
7. With respect, these submissions are incorrect and are contrary to RVA/Ryman's acknowledgement that the scope of an IPI is legislatively confined through section 80E of the Act.³ In particular:
 - (a) Section 80E(1)(b)(iii) requires that related provisions must support or be consequential on policies 3, 4 and 5 of the NPS-UD, as applicable. It is not sufficient to show that a proposed amendment is consequential on a different objective or policy of the NPS-UD to fall within the scope of this subsection.
 - (b) The effect of sections 80E and 80G(1)(b) is that the Panel must be satisfied that a proposed amendment is **expressly within** one of the subsections of section 80E, to be within the scope of an IPI.⁴

¹ Paragraph 8 of the Legal Submissions for RVA/Ryman dated 9 June 2023.

² Paragraph 10 of the Legal Submissions for RVA/Ryman dated 9 June 2023.

³ Paragraph 6 of the Legal Submissions of RVA/Ryman dated 9 June 2023.

⁴ As recognised by the Environment Court in *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056 at paragraph 23.

Reply to legal submissions of Ara Poutama

8. Similarly, the legal submissions on behalf of Ara Poutama dated 9 June 2023 propose that the inclusion of *“related provisions... that support or are consequential on the MDRS or policies 3 – 5, as applicable”* within the scope of an IPI is an essential mechanism for ensuring that that change gives effect to all objectives and policies of the NPS-UD.⁵
9. As stated in paragraph 7(a) above, counsel submits that related provisions must support or be consequential on policies 3, 4 and 5 of the NPS-UD to fall within the scope of section 80E(1)(b)(iii); it is not sufficient for a proposed amendment to be consequential on a different objective or policy of the NPS-UD.
10. While counsel for Ara Poutama refers to the approach that has been taken to IPIs *“throughout the country”*⁶ counsel notes that no legal submissions were presented by Ara Poutama at the hearing of PC26 regarding whether the relief sought by the submitter falls within one of the subsections of section 80E.

Interim guidance from the Auckland IHP

11. Counsel’s reply to the legal submissions on behalf of RVA/Ryman and Ara Poutama, in paragraphs 6 to 10 above, is consistent with the recent *“Interim Guidance on matter of Statutory Interpretation and Issues relating to the scope of the relief sought by some submissions”* released on 12 June 2023 by the Independent Hearing Panel for the Auckland Council’s IPI (Auckland IHP), with particular reference to paragraphs 63 to 71 of that guidance.
12. In respect of the relief sought by Ara Poutama, the Auckland IHP considered that:

⁵ Paragraph 3.10 of the Legal Submissions on behalf of Ara Poutama dated 9 June 2023.

⁶ Paragraph 3.11 of the Legal Submissions on behalf of Ara Poutama dated 9 June 2023.

By reference to our analysis of the scope of amendments to related provisions considered capable of requests by this IPI, our view is that the changes sought by Ara Poutama Aotearoa, and any similar requests, would not fall within the scope of amendments able to be made by PC78 to the AUP under section 80E(b)(iii) as (on the basis of the materials we have considered to date), they do not support, and are not consequential on, the MDRS or Policies 3 and 4 of the NPS-UD.

13. In respect of the relief sought by RVA/Ryman, the Auckland IHP considered that:

While we accept that the Retirement Village submissions are about residential development, and seek to provide for that activity in a different way to that proposed by PC78 (and the AUP), as outlined above in relation to the changes sought by Ara Poutama Aotearoa, it is our view that the amendments to existing provisions and new plan provisions the Retirement Village submission seeks through PC78 (and any other similar submissions) are not “related provisions” that support or are consequential on the MDRS or Policies 3 and 4 of the NPSUD.

14. Counsel acknowledges that the Interim Guidance of the Auckland IHP expresses a preliminary position prior to the hearing of submissions and evidence on Auckland Council’s IPI.
15. Unlike Auckland Council’s IPI, legal submissions and evidence have been presented on Waipā District Council’s PC26. For the reasons set out in the Opening and Closing Legal Submissions for the Council for the substantive hearing of PC26, counsel submits that the relief sought by RVA/Ryman and Ara Poutama are not related provisions that support or are consequential on the MDRS or Policies 3 and 4 of the NPS-UD, and are therefore not able to be included in PC26 under section 80E(1)(b)(iii).⁷

Signed this 14th day of June 2023



W J Embling
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⁷ Paragraphs 5.1 and 15.2 of the Opening Legal Submissions of counsel for Waipā District Council dated 21 April 2023 and Paragraphs 2.8 to 2.14 of the Closing Submissions of counsel for Waipā District Council dated 19 May 2023.