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

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CLOSING LEGAL SUBMISSIONS OF COUNSEL FOR WAIPĀ DISTRICT COUNCIL FOR FINANCIAL CONTRIBUTIONS HEARING
Dated 18 October 2023

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1. INTRODUCTION

1.1 These Closing Legal Submissions are submitted on behalf of Waipā District Council (**the Council**) in respect of Section 18: Financial Contributions of Proposed Plan Change 26 to the Operative Waipā District Plan (**PC26**), following the hearing on 20 September 2023.

1.2 These submissions respond to the submissions and evidence of the Retirement Villages Association and Ryman Healthcare Limited (**RVA/Ryman**) and Waikato Tainui, and to the questions of the Hearing Panel (**Panel**) arising during the hearing.

1.3 An Addendum (2) to the Council's Section 42A report was submitted to the Panel on 13 October 2023 (**s42A reply**). The Appendices to the s42A reply contain proposed amendments to PC26.

2. RVA/RYMAN

2.1 There are a number of matters I wish to clarify in response to the legal submissions and evidence of RVA/Ryman.

2.2 Section 77E and section 108(10) of the Resource Management Act 1991 (**the Act**) require the District Plan to identify:

(a) The purpose for which the financial contribution is required; and

(b) How the level of the financial contribution will be determined.

The purpose of the financial contribution

2.3 The Court in *South Port v Southland Regional Council*[1] considered both of these aspects of section 108(10). In respect of subsection (a), the Court considered that the purposes for which the financial contribution is required should be specified with "sufficient particularity".[2] This statement at

[1] C91/2000.
[2] Ibid, at para [17].

paragraph 17 of the decision relates to the purposes of the financial contribution, rather than how it is to be determined, as suggested in paragraph 12 of the Legal Submissions for RVA/Ryman.

2.4 Paragraph 34 of the legal submissions for RVA/Ryman suggests that the legislative framework does not provide for financial contributions to be charged to give effect to national policy statements, such as Te Ture Whaimana. I submit that there is no basis for restricting the "purposes" in section 77E in this way. As set out in the summary statement of Ms Needham, the financial contribution provisions of PC26 are proposed to give effect to the NPS-UD, the NPS-IB and Te Ture Whaimana. In particular, where adverse effects of intensification cannot be fully avoided, remedied or mitigated on site, the financial contributions will enable positive effects on the environment to offset the adverse effects.

2.5 As stated by the Environment Court in *Turvey v Rodney District Council*:[3]

> The existence of an appreciable nexus between the levying of financial contributions, and the purposes for which contributions are sought, really seals the interconnection or relationship between notions of causation, environmental effects and outcomes, and benefit derived.

2.6 In particular, the evidence of Mr Akehurst appears to be suggesting that retirement villages should not be required to pay the Te Ture Whaimana financial contribution, as the projects are designed to address existing issues.[4] I submit that this approach is contrary to the vision and objectives of Te Ture Whaimana, and the confirmation by the Environment Court that

[3] (2004) 10 ELRNZ 63 at para [130].
[4] Paragraph 45 of the Statement of Evidence of Mr Akehurst dated 24 August 2023.

Te Ture Whaimana requires a proportionate contribution to the betterment of the rivers and catchments.[5]

How the level of the financial contribution will be determined

2.7 In respect of subsection (b), the Court in *South Port* concluded that the plan must in some way, either broadly descriptive or narrowly prescriptive specify the method (in a non-technical sense) in which a financial contribution can be determined.[6] It is subsection (b) that was considered by the Court of Appeal in *Retro Developments Ltd v Auckland Council*.[7] While warning against the risk of overly discretionary regimes, the Court of Appeal concluded that:[8]

> We conclude, having regard to the guides to meaning we have discussed, that the provisions in a proposed plan as to determination of the level of financial contributions may be in a broadly discretionary method or in a narrowly pre-descriptive rule but they cannot be left in a policy.

2.8 In respect of PC26, I submit that the proposed provisions satisfy the requirements of section 77E by:

(a) Specifying the purposes for the financial contributions with sufficient particularity to identify the adverse effects that may be required to be offset by financial contributions; and

(b) Providing a method which contains a maximum contribution, but retains discretion to the Council to discount the financial contribution having regard to the adverse effects of the proposed development, and the extent to which those effects are already managed on-site.

[5] *Puke Coal Ltd v Waikato District Council* [2014] NZEnvC 223 at paragraph [92}.
[6] Ibid at 1, at paragraph 23.
[7] [2003] NZRMA 360; referred to in paragraph 11 of the Legal Submissions for RVA/Ryman.
[8] Ibid at 7, at paragraph [21].

2.9 The methodology in PC26 will be considered further in section 4 of these submissions, in response to questions of the Panel.

Evidence of demand characteristics of retirement villages

2.10 As discussed in paragraphs 5.13 and 5.14 of my opening legal submissions, I submit that consideration of the appropriate discount to be applied to a specific development proposal is a matter for consideration by Council at the time a building consent or resource consent application is made, and is not a matter for consideration by the Panel as part of this hearing.

2.11 Paragraph 17 of the legal submissions for RVA/Ryman claims that the "*evidence of Mr Akehurst establishes that the financial contributions charges proposed in PC26 are significantly disproportionate to the demand created by retirement villages and their residents*." The evidence refers to paragraphs 54 to 56 of Mr Akehurst's evidence which provides broad assertions regarding the age of residents, their mobility, and the types of amenities provided on site. From these general statements, Mr Akehurst has reached the conclusion that all retirement villages should pay only 5% of the residential amenity financial contribution. This calculation is based on a review of a very small sample of retirement villages, and the transferability of those ratios to the Waipā context is unknown. I submit that, even if the Panel considers it appropriate to predetermine the discount that should apply to retirement villages, there is insufficient evidence before you to support the discount requested.

Proposed amendments to PC26 to address "double dipping"

2.12 While acknowledging that the provisions in Section 18 already contain a number of references to financial contributions being required for works not otherwise funded by development contributions[9], the legal submissions for RVA/Ryman include, in the Appendix, a number of suggested amendments

[9] Paragraph 42 of the Legal Submissions for RVA/Ryman.

to PC26 to specifically refer to section 200 of the Local Government Act 2002 (**LGA**). These amendments were not contained in Mr Akehurst's evidence.

2.13 I submit that the additional amendments are unnecessary and inappropriate for the following reasons:

(a) Section 200 of the LGA provides that development contributions must not be required for matters that are already addressed by other funding mechanisms; this statutory obligation relates principally to development contributions, and has been sufficiently recognised in Section 18. In particular, it is not appropriate to include compliance with section 200 of the LGA as a policy in the District Plan.

(b) While the LGA principles relating to charges being fair, equitable and proportionate are appropriate guidelines for developing a methodology for financial contributions, it would be inappropriate for these provisions to be reflected in the District Plan. As observed by the Environment Court in *Remarkables Park Ltd v Queenstown Lakes District Council*:[10]

> Despite the relationships between the LGA and the RMA, a council should not confuse its jurisdiction in respect of the LGA and its "equitable" methodology, with its powers under the RMA. It is beyond a council's powers to use the LGA principles in district plans under the RMA.

Scope to consider existing financial contributions

2.14 At paragraph 4.3 of my opening legal submissions, I submitted that the parts of the submissions of RVA/Ryman which seek to amend the existing financial contributions in PC26 are out of scope of PC26.

2.15 In verbal legal submissions for RVA/Ryman it was suggested that a more expansive approach should be taken to scope and that the issue is whether

[10] C161/2003 at paragraph [39].

the management regime for residential development, including retirement villages, has changed.

2.16 I retain my submission that this part of the RVA/Ryman submission is out of scope. There is no mandatory requirement on Council to change its financial contributions in its IPI which would justify a more liberal approach of the tests in *Clearwater*. Instead, I submit that the *Clearwater* tests are not met as:

(a) The notified PC26 and supporting section 32 report identified the specific changes proposed to Section 18 and, in respect of the existing financial contributions, specifically stated that: "The formula for calculating financial contributions remains unchanged."[11]

(b) Any changes in the methodology for requiring financial contributions relating to three waters, road corridor services and heavy vehicles potentially affects a large number of developers across the Waipā District. Any changes to these provisions would require expert economic advice, extensive consultation and review, which has not formed part of PC26. This is reflected by the relatively small number of submitters on the financial contribution provisions of PC26.

2.17 In the event that the Panel finds the RVA/Ryman submission to be within scope of PC26, the Council's s42A reply considers that there is no need to amend the formula for existing financial contributions as they already enable assessment of the demand characteristics of the particular development.[12]

3. WAIKATO TAINUI

3.1 Submissions were presented by Te Makarini Mapu on behalf of Waikato Tainui during the hearing. The submissions confirmed that Waikato Tainui

[11] Paragraph 1.7 of the Section 32 Report for PC26.
[12] Section 1.3 of the s42A reply.

largely supports PC26, including the financial contributions provisions, but seeks an ongoing partnership with Council regarding the administration of the financial contribution for Te Ture Whaimana. As shown in the evidence of Mr Quickfall, the Council is committed to ongoing discussions with Waikato Tainui, and this is specifically recorded in the "advice note" forming part of PC26.

4. QUERIES FROM THE PANEL

4.1 During the hearing the Panel raised a number of questions regarding the proposed financial contributions including:

(a) Whether the financial contributions should apply to permitted activities or whether there are other mechanisms that may more efficiently achieve the objectives; and

(b) In respect of the proposed methodology for the new financial contributions:

(i) Whether the maximum amount per dwelling should be specified; and

(ii) Whether more guidance should be provided on how the discount will be applied.

4.2 In addition, the Panel raised some specific queries regarding the wording of provisions in Section 18.

4.3 In respect of the National Policy Statement for Indigenous Biodiversity (**NPS-IB**), the Panel queried whether, in light of the decision of the Supreme Court in *Port Otago Ltd v Environmental Defence Society*[13], any conflicts between

[13] [2023] NZSC 112.

the NPS-IB and the National Policy Statement for Urban Development (**NPS-UD**) need to be specifically addressed in PC26.

Background to financial contributions

4.4 Before considering the methods that may be used to obtain financial contributions for permitted activities, it is helpful to clarify by way of background that:

(a) It is for the Council to determine the proportion of its expenditure that it seeks to fund from development contributions, financial contributions or other sources of funding (such as rates). This information forms part of the Council's Development Contributions Policy.[14]

(b) The Councill must not require a development contribution where the same reserve, network infrastructure or community infrastructure has been provided by a financial contribution or other funding method.[15]

(c) The Council must use the financial contribution in reasonable accordance with the purposes for which it was received.[16]

(d) The Council must refund any financial contribution paid where the development does not proceed and the resource consent lapses, or is cancelled or surrendered.[17]

[14] Sections 102 and 106 of the LGA.
[15] Section 200 of the LGA.
[16] Section 111 of the Act.
[17] Section 110 of the Act.

4.5 While there is no specific obligation in the Act requiring Council to regularly report on the use of financial contributions, Mr Coutts has confirmed that this information will form part of the Council's quarterly growth reports.

Financial contributions for permitted activities

4.6 In response to the Panel's queries, the Council's s42A reply has considered the alternatives to requiring financial contributions for permitted activities.[18] I note at the outset that no submitter has opposed the requirement that financial contributions be required for permitted activities, and a number of submitters have supported these provisions of PC26.

4.7 Indeed, the Resource Management (Enabling Housing Supply and other Matters) Amendment Act 2021 extended financial contributions to permitted activities to specifically recognise that the medium density residential standards (**MDRS**) would enable a significant increase in residential development within existing centres for which no additional reserves, network infrastructure or community infrastructure has been planned.[19]

4.8 The assessment in the Council's s42A reply clearly shows that the option proposed in PC26, which extends financial contributions to permitted activities, is the only option that will achieve the objectives of Section 18 that developers pay for the adverse effects of unplanned additional infrastructure. In contrast, continuing to require financial contributions only

[18] Section 1.2 and Table 1 of the s42A reply.

[19] The Explanatory note of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill provides:

> *Enabling amendment or inclusion of financial contributions provisions*
> This Bill clarifies that a local authority may amend its plan to require that financial contributions are charged for permitted activities. Relevant territorial authorities may amend or include new financial contributions policies in their district plans through the ISPP. This will support relevant territorial authorities with the cost of development infrastructure that may be required to incorporate the MDRS.

as conditions of consent will unfairly result in only some developers being required to pay financial contributions.

4.9 Once financial contributions apply to permitted activities, there will be a consent pathway if the performance standard is not met, regardless of whether this pathway is specifically provided for in the district plan. Where not provided for, this is likely to fall to a non complying activity which may result in a more lengthy and potentially costly consent process. To avoid this result, PC26 proposes to apply a restricted discretionary consent process which will enable consideration of financial contributions:

(a) Within specifically identified matters of discretion; and

(b) Without public or limited notification.[20]

4.10 In our submission, applying financial contributions to permitted activities, and providing a narrowly defined consent pathway for any exceptions, is the most efficient and effective method of achieving the objectives of Section 18.

Whether the methodology should specify a maximum amount

4.11 PC26 proposes a formula for determining financial contributions, as well as a maximum amount payable per dwelling, both to provide certainty and to ensure that the contribution can be discounted where appropriate on a case by case basis.

4.12 The Panel queried whether specifying the maximum amount in the district plan would constrain the Council in the long term, as any changes would require a plan change under Schedule 1 of the Act. The Panel queried

[20] Paragraphs 1.4.1 and 1.4.2 of the s42A reply.

whether another method (such as specifying the maximum in an external document) could be more efficient and effective in the long term.

4.13 The Council's section 42A reply has assessed the following methods that could be used for the new financial contributions in Section 18:[21]

(a) Including a formula and a maximum, as proposed in PC26;

(b) Including a formula, with the maximum in an external document such as the annual plan;

(c) Including a formula only; or

(d) Including a formula and a maximum, with the latter to be adjusted by inflation.

4.14 These methods have been considered in detail, both by the Council's section 42A authors, and by the Council in terms of the workability of the provisions. The Council proposes to retain a formula and a maximum amount in PC26, as currently proposed. While including the maximum amount may limit the frequency of review, it is considered to provide the most certainty for both applicants and the Council.

Providing guidance regarding application of the discount

4.15 The Panel queried whether the "discount factor" forming part of the formula for the new financial contributions should be defined, or whether more guidance should be provided regarding how it will be applied.

4.16 The Council supports the inclusion of a definition, and new rules which identify the circumstances in which a discount will be considered. These are set out in paragraph 1.4.4 and 1.4.5 of the s42A reply. These provisions will provide guidance to applicants and to the Council's planners regarding the application of the formula to specific development proposals. In addition,

[21] Section 1.3 and Table 2 of the s42A reply.

the Council proposes to develop an internal standard operating procedure to provide further consistency and transparency to the process.

Refund of financial contributions

4.17 During the hearing the Panel asked whether there is a statutory obligation on Council to refund financial contributions in the event that the development does not proceed.

4.18 As noted in paragraph 4.4(d) above, section 110 of the Act provides for a refund of cash or a return of land in certain circumstances. However, section 110 applies to conditions of consent, and has not been amended to apply to financial contributions payable by permitted activities. As a result, the Council proposes to include a new rule in Section 18 which provides for this refund, in the same way as section 110 of the Act.[22]

Reference to cumulative effects

4.19 The Panel queried whether Section 18 should refer specifically to "cumulative effects" or whether reference to "effects" is sufficient, given the broad definition of "effects" in section 3 of the Act.

4.20 While I acknowledge that reference to "effects" will include "cumulative effects", I submit that specific reference to cumulative effects should be retained in this case. As recognised in the *South Port* case, Section 18 should identify the purposes of the financial contributions with "sufficient particularity" rather than in general terms.

4.21 While other provisions of the district plan address specific adverse effects of development such as transport and three waters, the proposed financial contributions address the indirect effects that will result from a cumulative increase in residential development at a density and scale not previously

[22] Paragraph 1.4.6 of the s42A reply.

anticipated in the existing urban centres. As recognised by the Environment Court in *Wensley Developments Ltd v Queenstown Lakes District Council*:[23]

> As I understand the place of financial contributions in the RMA they are to compensate for remoter effects where the exact degree of causation and effect is not known. Accordingly the Act empowers a contribution determined in the manner described in the plan so that difficult questions of proof of the relationship between the proposal and the (potential) actual effects, and of the scale of the effects, do not have to be assessed with impossible accuracy.

Specific wording amendments

4.22 Additional wording amendments discussed during the course of the hearing are addressed in the s42A reply, including amendments to reduce any unnecessary repetition within Section 18.[24]

Response to *Port Otago* decision

4.23 The final matter does not relate solely to Section 18, but to the application of the NPS-IB to the whole of PC26.

4.24 During the hearing the Panel queried whether, following the decision of the Supreme Court in *Port Otago Ltd v Environmental Defence Society*[25], any conflict between the NPS-UD and the NPS-IB should be specifically addressed in PC26.

4.25 On this issue, the Supreme Court stated that:[26]

> We accept Port Otago's submission that reconciliation of any conflict between the NZCPS avoidance policies and the ports policy should be dealt with at the regional policy statement and plan level as far as possible. This means those considering particular projects will have as much information as possible to allow them to assess whether it may be worth applying for consent and, if so, what matters should be the subject of focus in any application. Equally, decision-makers at the consent level

[23] C133/2004 at para [37]. See also *Alexandra District Flood Action Society Inc v Otago Regional Council* C102/2005 at para [250].
[24] Paragraphs 1.4.7 to 1.4.18 of the s42A reply.
[25] Ibid at 13.
[26] Ibid at 13, at para [72].

> will have as much guidance as possible on methods for addressing conflicts between policies.

4.26 In this case the NPS-UD, and sections 77I and 77O of the RMA, specifically address the potential for conflict between providing for housing capacity and protecting significant indigenous vegetation and habitats of indigenous fauna, by enabling the modification of the MDRS and Policy 3 to accommodate qualifying matters. This conflict has been specifically recognised and addressed in the objectives, policies and rules of PC26, as described in the s42A reply.[27]

Signed this 18th day of October 2023

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W J Embling
Counsel for Waipā District Council

[27] Section 1.7 of the s42A reply.