

Before the Independent Hearings Panel
Wellington City Council

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

In the matter of: Submissions and further submissions in relation to the proposed Wellington District Plan (Hearing Stream 1)

and: **Ryman Healthcare Limited**
Submitter ID: 346 and FS 128

and: **Retirement Villages Association of New Zealand Incorporated**
Submitter ID: 350 and FS 126

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

Dated: 16 February 2023

Reference: Luke Hinchey (luke.hinchey@chapmantripp.com)
Hadleigh Pedler (hadleigh.pedler@chapmantripp.com)

chapmantripp.com
T +64 9 357 9000
F +64 9 357 9099

PO Box 2206
Auckland 1140
New Zealand

Auckland
Wellington
Christchurch



**LEGAL SUBMISSIONS FOR HEARING STREAM 1 ON BEHALF OF THE
RETIREMENT VILLAGES ASSOCIATION OF NEW ZEALAND
INCORPORATED AND RYMAN HEALTHCARE LIMITED**

Introduction

- 1 These legal submissions are lodged jointly on behalf of the Retirement Villages Association of New Zealand Incorporated (*RVA*) and Ryman Healthcare Limited (*Ryman*). Both parties have made submissions on the Wellington City Proposed District Plan (*Proposed Plan*).
- 2 Wellington is one of the fastest growing cities in the country. The ageing population is a big part of that growth. However, the shortfall of appropriate retirement housing and care capacity to cater for that population is already at a crisis point. Delays and uncertainty caused by Resource Management Act 1991 (*RMA*) processes are a major contributor.
- 3 Ryman and the RVA thus seek to ensure the Proposed Plan recognises the needs of Wellington’s aging population, through a comprehensive and fit for purpose planning regime to support acceleration of retirement housing intensification. The relief adopts the key features of the Medium Density Residential Standards (*MDRS*), as appropriately modified to address the unique features of retirement villages.
- 4 The importance of the present process to the retirement sector has led to RVA’s members adopting a combined approach, putting their collective experience together to seek the same (or at least very similar) relief in all other Tier 1 Council’s District Plans. The need for much greater national consistency to address the housing needs of older members of our communities cannot be overstated.¹
- 5 At present, the Proposed Plan does not adequately provide for retirement village development in Wellington. The proposed provisions go some way to recognise retirement villages as a separate activity category, but the regime is not fit for purpose. Other aspects of the plan go beyond the legislative and policy directives and accordingly ‘over-regulate’ development.
- 6 Accordingly, these legal submissions provide overall ‘scene setting’ on the retirement sector case. We address at a high level, the intensification expectations of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (*Enabling Housing Act*) and National Policy Statement on Urban Development 2020 (*NPSUD*). We also provide background to Ryman and the RVA, and address plan-wide definitions and strategic matters as raised in

¹ Statement of evidence of Dr Philip Hunter Mitchell, dated 10 February 2023, at [15].

the Hearing Stream 1 Public Notice (supporting the planning evidence of **Dr Philip Mitchell** on key issues).² We also note the RVA and Ryman position on the classification of topics between the Intensification Streamlined Planning Process (ISPP) and the Schedule 1 process was outlined in submissions lodged 15 February 2023, and is addressed as relevant to the Hearing Stream 1 process below.

LEGISLATIVE OVERVIEW

“New Zealand is facing a housing crisis and increasing the housing supply is one of the key actions the Government can take to improve housing affordability.”³

- 7 An outline of the purpose and function of the ISPP and NPSUD was provided as part of Ryman and the RVA’s legal submissions on classification.⁴
- 8 As noted, the primary purpose of the present ISPP is to address New Zealand’s housing crisis. The RVA and Ryman consider that retirement housing is having its own unique crisis. Demand for retirement village accommodation is outstripping supply as more of our ageing population wish to live in retirement villages that provide purpose-built accommodation and care.
- 9 The ISPP has a narrow focus. It seeks to expedite the implementation of the NPSUD. Cabinet has said these instruments are needed because: ⁵

The National Policy Statement on Urban Development 2020 (NPS-UD) is a powerful tool for improving housing supply in our highest growth areas”. And, “the intensification enabled by the NPS-UD needs to be brought forward and strengthened given the seriousness of the housing crisis and this can be done by amending the Resource Management Act 1991 (RMA) and the NPS-UD ahead of the Government’s resource management reforms.”

- 10 A key outcome of the process is to enable housing acceleration by, “removing restrictive planning rules”.⁶ These restrictions are to be removed via mandatory requirements:

² Statement of evidence of Dr Mitchell.

³ Cabinet Legislation Committee LEG-21-MIN-0154 (*Cabinet Minute*), at 1.

⁴ Legal submissions on behalf of Ryman and the RVA, dated 15 February 2023.

⁵ Paragraphs 2-3, *Cabinet Minute*.

⁶ Paragraph 4, *Cabinet Minute*.

- 10.1 "To incorporate", the new "medium density residential standards" (MDRS) as default standards, in "Every relevant residential zone;⁷ and
- 10.2 To "give effect to" policy 3, NPSUD.
- 11 In addition to these mandatory obligations, there are a range of other options for councils to enable housing acceleration including by:
 - 11.1 establishing new residential zones or amending existing residential zones;⁸
 - 11.2 including additional objectives and policies, to provide for matters of discretion to support the MDRS;⁹
 - 11.3 providing more lenient density provisions.¹⁰
- 12 Councils can also impose restrictions that are less enabling of development - "qualifying matters" - but only where they meet the strict tests outlined.¹¹
- 13 Housing acceleration is also intended to be enabled by the ISPP process itself. This process materially alters the usual traditional schedule 1, RMA process, particularly in terms of:
 - 13.1 Substantially reduced timeframes;¹²
 - 13.2 No appeal rights on the merits;¹³ and
 - 13.3 Wider legal scope for decision-making.¹⁴
- 14 It will be seen that this process is not about going through the usual motions of a schedule 1 plan making process. And, it is not about providing the 'bare minimum' to respond to the various legislative steps. Rather, the task ahead is a very important one. The IPIs and

⁷ Section 77G(1), RMA.

⁸ Section 77G(4).

⁹ Section 77G(5)(b) and see also the wider terms used section 80E(b)(iii).

¹⁰ Section 77H.

¹¹ Sections 77I-77L.

¹² Under section 80F, tier 1 councils were required to notify IPIs by 20 August 2022. Under the ISPP the usual timeframes for plan changes are compressed and the decision making process is altered.

¹³ There are no appeals against IPIs that go through the ISPP, aside from judicial review (section 107 and 108). The new process will allow for submissions, further submissions, a hearing and then recommendations by an Independent Panel of experts to Council (section 99). If the Council disagrees with any of the recommendations of the Independent Panel, the Minister for the Environment will make a determination (section 105).

¹⁴ Clause 99 of Schedule 1, Enabling Housing Act.

the ISPP are a means to solve an important national housing issue. Counsel respectfully submits that the above overarching legislative purposes - addressing New Zealand's housing crisis, accelerating housing supply, and removing planning restrictions - should therefore resonate heavily in all of your decision-making through the ISPP.

- 15 Careful consideration will of course also need to be given to the wording used in the various RMA sections and in the MDRS provisions themselves. The Panel will need to operate within those terms. But, applying the usual "purposive approach" the overriding purpose of ISPs and the ISPP needs to remain a clear and separate focus.¹⁵

HOUSING PROVISION FOR THE AGEING POPULATION

Background to the RVA and Ryman

- 16 The RVA is a voluntary industry organisation that represents the interests of the owners, developers and managers of registered retirement villages throughout New Zealand. Today, the RVA has 407 member villages throughout New Zealand, with approximately 38,520 units that are home to around 50,000 older New Zealanders.
- 17 The RVA's members include all five publicly-listed companies (Ryman Healthcare, Summerset Group, Arvida Group, Oceania Healthcare, and Radius Residential Care Ltd), other corporate groups (such as Metlifecare and Bupa Healthcare), independent operators, and not-for profit operators (such as community trusts, and religious and welfare organisations).
- 18 Ryman is New Zealand's leading retirement village operator. Ryman was established in Christchurch in 1984 and now operates 38 retirement villages across New Zealand. Ryman villages provide homes for more than 13,200 elderly residents and employ over 6,700 people. It has five villages in operation in the Wellington region. Ryman is committed to providing the elderly residents of Wellington with modern and top-quality accommodation, care and amenities.

RMA challenges

- 19 RVA members are heavy users of RMA processes. Members rely on resource consents to authorise much needed retirement developments, and to provide for ongoing operational needs for villages and other developments. However, as the RVA submission outlines, the RMA has caused a number of major challenges.¹⁶

¹⁵ See *Auckland Council v Teddy and Friends Limited* [2022] NZEnvC 128, at [27], when considering the dicta of the Supreme Court *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36 at [22].

¹⁶ RVA Submission, see pages 11-19.

20 To address these issues and to assist the ISPP Panels, the RVA members have aligned their interests and are working together to achieve national consistency across the ISPPs. This approach reflects the importance of these processes and the significant impact they have on operators.

21 Furthermore, the RVA, its members and their independent planners, technical specialists and legal representatives bring their considerable collective experience of planning, consenting, building and operating new villages and healthcare facilities under the RMA system to the Proposed Plan (and plan changes generally across the country).

Ageing population and retirement housing and care crisis

22 The proportion of older people compared to the rest of the population is increasing. In Wellington City, Statistics New Zealand estimates that 8,690 people were aged over 75 in 2018. By 2048, this number is forecast to almost triple to 25,920.¹⁷

23 The growing ageing population is facing a significant shortage in appropriate accommodation and care options. The demand for quality living options is significantly higher than the current supply. The supply is decreasing due to closures of older style small and poor quality aged care homes, which are usually conversions of old houses. Retirement villages play a significant part in housing and caring for older people in New Zealand. They provide appropriate accommodation and care for a vulnerable sector of our community with different housing and care needs compared to the rest of the population.

24 As noted by Dr Mitchell, it is challenging to find sites for the development of new retirement villages that are both of a suitable size, and close to prospective residents' families and communities.¹⁸

Key outcomes sought by Ryman and the RVA

25 The Proposed Plan represents a major opportunity to better enable the provision of a diverse range of retirement housing and care options. The key outcomes sought by the RVA and Ryman that will contribute to addressing the ageing population and retirement housing and care crisis discussed above are:

25.1 The appropriate translation of the MDRS from the Enabling Housing Act into the Proposed Plan and amendments to the Proposed Plan to address inconsistencies with the MDRS;

25.2 A retirement village-specific planning framework that adopts the key features of the MDRS as appropriately modified;

¹⁷ Statistics New Zealand, Subnational Population Estimates at 30 June 2021 (provisional).

¹⁸ Statement of evidence of Dr Mitchell, at [18].

25.3 Recognition of retirement villages as a residential activity but acknowledging their unique internal amenity needs, functional and operational requirements and the significant positive social and economic benefits they generate for the City's residents; and

25.4 Provision of retirement villages in all appropriate zones.

'CLASSIFICATION' OF HEARING STREAM 1 PROVISIONS

- 26 As noted in the RVA's and Ryman's submissions on scope matters,¹⁹ Ryman and the RVA consider that the allocation of plan provisions as 'ISPP' or 'Schedule 1' in the notified Proposed Plan does not restrain the Panel's ability to make recommendations on the Intensification Planning Instrument (*IPI*) and decisions on non-IPI components of the Proposed Plan. Whether a specific change is able to be made to either IPI or non-IPI provisions is a question of *scope*. Questions of scope are best resolved by considering the parties' submissions (including legal submissions and evidence) as part of the substantive hearing processes.²⁰
- 27 At the time of preparing these submissions, the Panel is yet to make a decision on the classification issue, or set out its approach to resolving the relevant content of the IPI and non-IPI provisions of the Proposed Plan. Ryman and the RVA consider that the proper 'classification' of the provisions that are part of Hearing Stream 1 should be considered and determined at a later date. This can be done either as part of the Panel's consideration of the provisions as they will be applied to matters raised in other Hearing Streams, or in accordance with any ruling the Panel makes on classification.
- 28 We note in support of this submission that the appropriate allocation of definitions between the ISPP and Schedule 1 processes will become clearer in later hearings when it can be seen how the definitions apply. Definitions and their scope within the IPI and non-IPI provisions of the Proposed Plan cannot be considered in isolation.

PART 1 INTRODUCTION AND GENERAL PROVISIONS

- 29 Dr Mitchell addresses the definitions relevant to Ryman and the RVA in his evidence. These submissions touch on one key issue raised by the section 42A report - whether retirement villages can be treated as a 'residential activity'. This issue comes up in the context of the definition of 'Health Care Facility'.

¹⁹ Legal submissions on behalf of Ryman and the RVA, dated 15 February 2023, at [5].

²⁰ Ibid, at [23].

- 30 The section 42A report agrees with Ryman and the RVA that 'retirement villages' are to be expressly excluded from the definition of 'Health Care Facility'. However, the section 42A report disagrees with retirement villages being treated as a residential activity given the additional facilities that are often provided within retirement villages.²¹ As discussed by Dr Mitchell²², the definition of 'retirement village' within the Proposed Plan and National Planning Standard (NPS) make it clear that retirement villages are residential, and that any related facilities are ancillary to this residential purpose.
- 31 This position has also been confirmed by the High Court who found that a retirement village met the definition of being 'residential accommodation'. The classification of retirement village as residential, was not altered by ancillary factors such as the residents having the benefit of care givers or the village operating on a commercial basis.²³

PART 2 DISTRICT WIDE MATTERS – STRATEGIC DIRECTION

- 32 Dr Mitchell's evidence provides detailed comments and reasoning for the changes Ryman and the RVA are seeking to the Strategic Direction section of the Proposed Plan. We briefly address matters of drafting certainty and statutory compliance, which it is submitted the Panel will need to be alert to in considering Dr Mitchell's and other evidence. Further detailed legal submissions on these matters will be addressed in later topics.
- 33 The Strategic Direction objectives operate at a high level providing broad policy guidance on the implementation of the Proposed Plan. This broad application of objectives makes it all the more important that the wording of the objectives is as clear and certain as possible (while recognising that aspects will be particularised in the lower order provisions).
- 34 As discussed in Dr Mitchell's evidence, aspects of the provisions are currently vague and uncertain. For example, directions such as '*...integrates natural processes that provide opportunities for carbon storage, natural hazard risk reduction and support climate change adaptation.*' are, respectfully, unclear and uncertain and could be the subject of varying interpretations and application.²⁴
- 35 It is submitted that vague language resulting in different interpretations in different contexts will not make for effective plan

²¹ Section 42A report, paragraphs 587 and 590.

²² Statement of evidence of Dr Mitchell, at [35-60].

²³ *Hawkesbury Avenue, Somme Street and Browns Road Residents Association Inc v Merivale Retirement Village Ltd*, AP 139/98 (Christchurch), 3 July 1998 at pages 21-22.

²⁴ Statement of evidence of Dr Mitchell, at [52-55].

provisions. Dr Mitchell's proposals to improve policy clarity should be preferred in that context.

- 36 Dr Mitchell also makes a further important point in a number of cases, that the strategic framework should align (as required by the statutory directions) with the Enabling Housing Act, its MDRS and the higher order requirements of the NPSUD. That is particularly so where the strategic framework directly links to the lower order provisions which also respond to the statutory and policy requirements. The changes Dr Mitchell proposes which better align with the statutory and policy requirements should be preferred.

CONCLUSION

- 37 Ryman and the RVA respectfully seek that the Panel recommends, and the Council accepts, the proposals put forward by Dr Mitchell on behalf of Ryman and the RVA.

Luke Hinchey

Counsel for Ryman and the RVA
16 February 2023