

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 2)

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

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

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

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Reference: Luke Hinchey (luke.hinchey@chapmantripp.com)
Marika Williams (marika.williams@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 2 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*) in relation to Hearing Stream 2 – Part 3 Residential Zones and Residential Design Guide (*Hearing Stream 2*) to the Wellington City Proposed District Plan (*Proposed Plan*).
- 2 Ryman’s and the RVA’s legal submissions on Hearing Stream 1 broadly covered the growing ageing population in Wellington City in need of specialist housing and care options. As outlined in Professor Ngaire Kerse’s evidence, between now and 2050, the population aged 65+ in Wellington City is forecasted to double.¹ Retirement villages will play a significant role in housing and caring for this demographic. Retirement Villages provide appropriate accommodation and care that caters to the different needs of older people compared to other age groups.
- 3 The efficient and effective provision of suitable housing for this demographic is highly dependent on a fit for purpose planning regime for retirement villages in the residential zones of the Proposed Plan. As Ryman’s and the RVA’s opening legal submissions set out, the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (*Enabling Housing Act*) represents a significant opportunity to address consenting challenges faced by the retirement sector. Addressing these challenges will ultimately accelerate housing intensification for the ageing population, in line with the expectations of both the Enabling Housing Act and the National Policy Statement on Urban Development 2020 (*NPSUD*).
- 4 At present, the residential zone provisions do not adequately provide for retirement villages and other forms of housing for older people in Wellington City. While some policies and rules are provided for retirement villages, separate from other residential uses, they are ultimately insufficiently clear and substantially overregulate the design of retirement villages.
- 5 In particular, the Proposed Plan seeks to update Wellington City’s 15 design guides, including the Residential Design Guide (*Design Guide*). The Design Guide is submitted to be highly inconsistent with the Medium Density Residential Standards (*MDRS*) and the wider purpose of the NPSUD and Enabling Housing Act. It imposes a disproportionate consenting burden on developments not meeting permitted activity status. Ultimately, the Design Guide goes well

¹ Stats NZ Population Projections.

beyond the legislative and policy directions and accordingly 'over-regulates' housing intensification.

- 6 Further, in terms of the question of allocation, the retirement village provisions are currently confusingly split across the Intensification Planning Instrument (*IPi*) and the Part One Schedule One process. We submit that the consideration of those provisions through two separate processes will lead to conflicts, overlaps, inconsistencies and ultimately implementation issues. Retirement villages are a form of residential use fitting in the 'four or more' residential units category. Provisions for retirement villages in the residential zone squarely fall under section 80E of the Enabling Housing Act in that they support or are consequential on the MDRS. The full suite of provisions that enable their development will support the acceleration of housing intensification, consistent with the purpose of the Intensification Streamlined Planning Process (*ISPP*). They are 'on the ISP'. It is therefore both important and legally necessary that the Plan's retirement village provisions are processed under the ISPP.
- 7 Overall, it is submitted that the provisions covered under Hearing Stream 2, as they relate to Ryman's and the RVA's submissions, do not appropriately give effect to the NPSUD by failing to provide for the specific housing needs of the ageing population. And, for the same reason, the Hearing Stream 2 provisions are inconsistent with the direction set out by the Enabling Housing Act. Specifically, the residential zones and the Design Guide fail to acknowledge:
 - 7.1 the unique internal amenity needs of retirement villages, their functional and operational requirements and the significant social and economic benefits they generate for Wellington City's society and economy; and
 - 7.2 the need for greater choice of retirement living options in appropriate locations to meet the needs of Wellington City's rapidly ageing population.
- 8 The RVA's and Ryman's evidence addresses these matters in further detail:
 - 8.1 **Ms Maggie Owens** provides corporate evidence for the RVA and addresses retirement village industry characteristics, demographic information, health and wellbeing needs of older people and the important role that retirement villages play in providing appropriate housing and care options;
 - 8.2 **Mr Matthew Brown** provides corporate evidence for Ryman, highlighting his experience with planning and building retirement villages and the desperate need for more of them;

- 8.3 **Professor Ngaire Kerse** provides gerontology evidence addressing the demography and needs of the ageing population; and
 - 8.4 **Dr Philip Mitchell** addresses planning matters and comments on the section 42A Officer's report (*Officer's Report*).
- 9 The particular provisions that the RVA's and Ryman's submissions on Hearing Stream 2 relate to are:
- 9.1 The High Density Residential Zone and the Medium Density Residential Zone; and
 - 9.2 The Residential Design Guide.

SCOPE OF SUBMISSIONS

- 10 These submissions:
- 10.1 provide a summary of the legal framework relevant to the IPI, including the Enabling Housing Act and the NPSUD;
 - 10.2 comment on the key themes of Hearing Stream 2 at issue; and
 - 10.3 set out Ryman's and the RVA's overall position and requested relief.

LEGAL FRAMEWORK

Enabling Housing Act

- 11 The primary purpose of the Enabling Housing Act and an overview of the legislative framework was set out in Ryman's and the RVA's opening legal submissions for Hearing Stream 1. We do not repeat that wider context here. However, it is important to restate for the purposes of considering the Hearing Stream 2 provisions the overarching legislative and policy purposes of the Enabling Housing Act:
- 11.1 Addressing New Zealand's housing crisis;
 - 11.2 Accelerating housing supply; and
 - 11.3 Removing planning restrictions.
- 12 These purposes, the parties respectfully reiterate, should resonate heavily in the Panel's considerations through the ISPP, and through the current Hearing Stream 2 process.

Preparing and changing district plans under the RMA

- 13 To the extent not modified by the ISPP, many of the usual Schedule 1 requirements for preparing and changing district plans under the RMA apply, and a section 32 report must be prepared.²
- 14 In that context, as part of the usual legal framework, case law has established a presumption that where the purpose of the RMA and objectives and policies "*can be met by a less restrictive regime that regime should be adopted*".³ The Environment Court also confirmed that the RMA is "*not drafted on the basis that activities are only allowed where they are justified: rather, the Act proceeds on the basis that land use activities are only restricted where that is necessary*".⁴
- 15 Case law on the RMA plan change process has also established there is no legal presumption that proposals advanced by the Council are to be preferred to the alternatives being promoted by other participants in the process.⁵ If other means are raised by reasonably cogent evidence then the decision-maker should look at the further possibilities.⁶
- 16 These concepts are particularly relevant here. The statutory and policy intent in this process is to enable intensification and reduce planning restrictions. And, the Panel has reasonably broad discretions and wider scope available in making recommendations as to what the final IPI should contain.⁷

NPSUD

- 17 The IPI must "*give effect*" to Policy 3 of the NPSUD. The Supreme Court has established that the requirement to "*give effect to*" means to "*implement*"; "*it is a strong directive, creating a firm obligation on the part of those subject to it*".⁸
- 18 As noted, the clear intention of the Enabling Housing Act is to bring forward the intensification enabled by the NPSUD. The MDRS

² Eg, section 80B, clause 95 of the First Schedule, RMA.

³ *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* C153/2004 at [56]; followed by *Long Bay – Okura Great Park Society Incorporated v North Shore City Council* [2010] NZEnvC 319 at [79]. In 2017 the Environment Court confirmed that this remains the correct approach following amendments to section 32 of the Act in *Royal Forest and Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [59].

⁴ *Royal Forest and Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [78].

⁵ *Federated Farmers of New Zealand Inc v Bay of Plenty Regional Council* [2019] NZEnvC 136 at [41].

⁶ *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55 at [64].

⁷ Clause 96, First Schedule, RMA.

⁸ *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [77].

themselves reflect the wider NPSUD policy direction. It is submitted therefore that Hearing Stream 2 must take guidance and be read in light of the NPSUD as a whole, beyond just Policy 3. It is also perhaps trite to observe that any provisions that do not give effect to the NPSUD would most likely also be inconsistent with the Enabling Housing Act requirements. It is submitted that the wider NPSUD context thus provides a useful 'check and balance' to the specific mandatory requirements under that Act and the implementation of any discretionary aspects.

19 Particularly relevant objectives and policies of the NPSUD are outlined in Dr Mitchell's evidence. In addition, Ryman and the RVA submit that the IPI should be guided by the following key themes:

19.1 the NPSUD is intended to be enabling of development;

19.2 the NPSUD seeks to enable well-functioning environments and a variety of homes for *all* people and communities; and

19.3 urban environments are expected to change over time and planning regimes should be responsive to that change.

20 These themes are addressed in more detail below.

The NPSUD is intended to be enabling of development

21 The enabling nature of the NPSUD is set out by the Ministry for the Environment and the Ministry of Housing and Urban Development in their final decisions report on the NPSUD.⁹ In their report, the ministries state that:¹⁰

The NPS-UD will enable growth by requiring councils to provide development capacity to meet the diverse demands of communities, address overly restrictive rules and encourage well-functioning urban environments.

22 The final decisions report also states that the NPSUD "*is intended to help improve housing affordability by removing unnecessary restrictions to development and improving responsiveness to growth in the planning system*" (emphasis added).¹¹

23 The Environment Court, in relation to the NPSUD's predecessor, the National Policy Statement on Urban Development Capacity 2016 (NPSUDC), held that the intention of that NPS is to be primarily enabling. That NPS was designed, "*to provide opportunities,*

⁹ The report includes the Ministers' final decisions on the NPSUD, and was published in accordance with s 52(3)(b) of the RMA.

¹⁰ MfE and HUD, "Recommendations and decisions report on the National Policy Statement on Urban Development" (Wellington, 2020), page 17.

¹¹ Ibid, page 85.

*choices, variety and flexibility in relation to the supply of land for housing and business”.*¹²

- 24 The objectives of the NPSUDC that the Court was referring to in making that statement (Objectives QA1 to QA3) contain similar terminology and concepts to the NPSUD (eg, Objectives 1, 3 and 4 and Policies 1 and 3). Therefore the Court’s guidance continues to have relevance.
- 25 However, it is submitted the NPSUD goes further. It is intended to be more enabling of development than its predecessor. It, *“builds on many of the existing requirements for greater development capacity ...has a wider focus and adds significant new and directive content”.*¹³
- 26 The enabling intent of the NPSUD has been addressed in the likes of the *Middle Hill Ltd v Auckland Council*¹⁴ case, where the Environment Court stated that:

[33] ... The NPS-UD has the broad objective of ensuring that New Zealand's towns and cities are well-functioning urban environments that meet the changing needs of New Zealand's diverse communities. Its emphasis is to direct local authorities to enable greater land supply and ensure that planning is responsive to changes in demand, while seeking to ensure that new development capacity enabled by councils is of a form and in locations that meet the diverse needs of communities and encourage well-functioning, liveable urban environments. It also requires councils to remove overly restrictive rules that affect urban development outcomes in New Zealand cities...

- 27 The statement from the Court speaks to many elements of the RVA and Ryman’s position in this process:
- 27.1 *Meeting the changing needs of New Zealand's diverse communities* – Wellington’s population is changing in that it is ageing. The specialist housing needs of the ageing community need to be appropriately met to ensure well-functioning urban environments.
- 27.2 Local authorities are “directed’ to enable greater land supply and ensure that planning is responsive to changes in demand – this is not a choice.
- 27.3 Development capacity needs to be enabled in forms and in locations that meet the diverse needs of communities –

¹² *Bunnings Limited v Queenstown Lakes District Council* [2019] NZEnvC 59 at [39].

¹³ MfE and HUD, “Recommendations and decisions report on the National Policy Statement on Urban Development” (Wellington, 2020), page 16.

¹⁴ *Middle Hill Ltd v Auckland Council* [2022] NZEnvC 162.

people want to stay in the communities where they currently live as they age, particularly well-established residential and mixed use commercial "locations". An increasing number of people want to live in retirement villages, because they provide for their amenity and care needs as they grow older. Such "forms" of development should therefore be enabled to meet the needs of the community. This includes enabling greater the intensification opportunities on larger sites, which are often required by retirement villages given their scale.

27.4 *Overly restrictive rules that affect urban development outcomes must be removed.* The urban design guide is a key issue in this case. It is overly restrictive and must be removed. We address this matter in more detail below.

Well-functioning urban environments

28 The NPSUD seeks to provide for well-functioning urban environments that:

28.1 Enable all people and communities to provide for their wellbeing, health and safety.¹⁵ To the RVA and Ryman, achieving this wellbeing objective in relation to older persons within our community means providing for the specific housing and care needs of those people.

28.2 Enable a "*variety of homes*" to meet the "*needs ... of different households*",¹⁶ which it is submitted cannot be achieved without expressing what the variety and needs of different households is.

28.3 Enable "*more people*" to live in areas that are in or near a centre zone, well-serviced by public transport, and where there is high demand for housing.¹⁷

Urban environments are expected to change over time. Plans need to be responsive

29 Urban environments, including their amenity values are recognised as, "*developing and changing over time in response to the diverse and changing needs of people, communities, and future generations*".¹⁸

30 Further, the NPSUD recognises that amenity values can differ among people and communities, and also recognises that changes can be made via increased and varied housing densities and types,

¹⁵ National Policy Statement on Urban Development 2020, Objective 1.

¹⁶ Policy 1.

¹⁷ Objective 3.

¹⁸ Objective 4.

noting that changes are not, of themselves, an adverse effect.¹⁹ Plans may provide for change that alters the present amenity of some, and improves the amenity of other people and communities.

- 31 To address the above, the NPSUD, introduces “responsive” planning provisions (among other provisions). Objective 6(c) requires local authority decisions on urban development to be “responsive, particularly in relation to proposals that would supply significant development capacity”.
- 32 In addition, Policy 8 of the NPSUD requires local authority decisions affecting urban environments to be “responsive” to changes to plans that add significantly to development capacity, even if they are out of sequence or are unanticipated by the relevant planning documents.
- 33 These provisions send a clear signal that councils need to be sufficiently agile and responsive, and to take account of unanticipated opportunities. Adopting a restrictive and unresponsive approach does not align with the NPSUD’s direction.

Relevance to RVA and Ryman submission

- 34 The extent to which the NPSUD and Enabling Housing provisions are appropriately achieved through Hearing Stream 2 are addressed in detail by Dr Mitchell. We also address particular aspects further in these submissions.

HEARING STREAM 2

- 35 In their submissions on Hearing Stream 2, Ryman and the RVA seek a more enabling and responsive planning framework for retirement villages in the relevant zones included in the Proposed Plan. They also seek greater alignment between the mandatory MDRS and the Proposed Plan provisions. Ryman and the RVA are supportive of limited aspects of the Reporting Officer’s position. For example, the Officer acknowledges that amendments to the notification provisions are required to give effect to the MDRS,²⁰ and agrees that certain standards should not apply to retirement villages.²¹
- 36 These submissions do not comment on each individual submission point made by Ryman and the RVA, as this analysis is covered in more detail in Dr Mitchell’s evidence. Dr Mitchell provides an overall planning evaluation of the respective appropriateness of the Council’s versus the RVA and Ryman’s regime for retirement

¹⁹ Policy 6.

²⁰ Paragraph 564 - Section 42A Report: Stream 2 - Part 3, Medium Density Residential Zone and Paragraph 436 - Section 42A Report: Stream 2 - Part 2, High Density Residential Zone.

²¹ Paragraph 415 – Section 42A Report: Stream 2 – Part 2, High Density Residential Zone.

villages. He addresses particular aspects on the Design Guide for retirement villages and the need for greater policy recognition of the intensification opportunities of larger sites.²²

37 We primarily address two key issues:

37.1 The application of the Design Guide to retirement villages;²³
and

37.2 The allocation of retirement village-related provisions to the IPI and the Part One Schedule One process.

Design Guide

Inconsistent with Policy 5 of the MDRS

38 Both the multi-unit housing provisions and the retirement village provisions (MRZ-P7 and HRZ-P7) currently require a development to demonstrate it fulfils the intent of the Residential Design Guide. The Officer acknowledges Kāinga Ora's argument for seeking that the Design Guide be removed from the multi-unit housing provisions (MRZ-P6 and HRZ-P6) and made a non-statutory tool, "especially as this relates to providing for housing."²⁴ But, the Officer declines to make any amendments to the provisions on the basis that a non-statutory approach will not be sufficiently directive.

39 In this context, Policy 5 of the MDRS (MRZ-P5, HRZ-P5 in the Proposed Plan) is submitted to be of particular relevance. It states:

Provide for developments not meeting permitted activity status, while encouraging high-quality developments.

40 Ryman and the RVA submit that the use of "provide" and "encouraging", based off their plain and ordinary meaning, are broadly enabling concepts. The parties submit this reading is consistent with the wider purpose of the Enabling Housing Act, to accelerate the provision of housing and remove overly restrictive planning provisions. By comparison, for the reasons outlined below, the parties consider the Design Guide is inconsistent with Policy 5. It creates a disproportionate restriction on multi-unit housing when compared to permitted housing activities, which have no controls on design. It also establishes an overly restrictive consenting burden on non-permitted developments.

²² Statement of Evidence Dr P Mitchell at [13], [31], [37-40], and [42]. See also Statement of Evidence M Brown, at [21], [65] and [69] and Statement of Evidence M Owens, at [89]-[95].

²³ As also outlined in Mr Brown's and Ms Owens' Statements of Evidence.

²⁴ Paragraph 226 Section 42A Report: Stream 2 – Part 2, High Density Residential Zone.

- Ordinary meaning*
- 41 There is no definition of “provide” or “encouraging” in the Enabling Housing Act. The plain and ordinary meaning of “provide” is to “make available for use”. “Encourage” is to “allow, promote or assist (an activity or situation)”.²⁵
- 42 Ryman and the RVA submit the Design Guide both fails to make “available for use” non-permitted development and to “allow, promote or assist” high-quality development.
- 43 The Plan refers to the Design Guide by requiring retirement villages to “fulfil the intent of the Residential Design Guide”.²⁶ The Design Guide itself is 40 pages long. It contains 137 guidelines against which developments must be assessed. The Design Guide includes a ‘rating’ system using 3, 2 or 1 dots to describe either “essential to all proposed development”, “applying to most proposals” or “can support a proposal”.²⁷ Guidance rated with three dots must be applied to all proposed development.²⁸ There are 70 guidance items that are rated as 3 dots or “essential”.
- 44 Ryman and the RVA do not dispute that Council can include provisions that allow, promote or assist high quality development. But, they submit that including 70 guidance items that *must* be complied with stretches well beyond the concept of “encouraging”. It is therefore inconsistent with Policy 5.
- 45 In addition to the 70 guidelines rated three dots, there are 67 two and one dot rated guidelines. A proposal that does not meet a two dot guideline ‘may’ require the applicant to justify or revise its design. These guidelines in many places are both onerous and vague, and include a large degree of subjectivity (Dr Mitchell points out some examples in his evidence). Non-permitted developments, such as retirement villages (being ‘four-or-more developments’), will need to undertake a complex assessment process to ensure the guidelines are met. Even where an applicant thinks it meets the guidelines, there is a substantial risk that the consenting authority will disagree and require the design to be revised or justified, or possibly declined. This is both costly and inefficient, and ultimately strains the meaning of ‘providing’ for non-permitted developments.
- Language of the Enabling Housing Act*
- 46 This plain meaning of “providing for” and “encouraging” is consistent with the wider text of the MDRS. Objectives 1 and 2 of the MDRS require a well-functioning urban environment that enables *all* people and communities to provide for their wellbeing, and relevant

²⁵ Oxford English Dictionary.

²⁶ MRZ-P7 and HRZ-P7.

²⁷ Wellington City Council, Design Guide Residential, page 5.

²⁸ Ibid.

residential zones that provide for a *variety of housing types and sizes*. Objectives 1 and 2 are partly given effect to through UFD-O6 and UFD-O7, although we note are not consistent with the drafting of the Enabling Housing Act (particularly UFD-O7, which introduces a number of additional requirements). It follows that the Enabling Housing Act intended to enable developments not meeting the permitted activity standards, in order to provide a variety of homes for all sections of the community.

- 47 It would also be inconsistent with this intention to read “encourage” high-quality design as a very restrictive requirement that must be fulfilled before the development can be allowed. To do so would ultimately *reduce* housing variety, given the strong disincentives to undertake developments that require assessment against the Design Guide.

Purpose of the legislation

- 48 Taking a purposive approach,²⁹ Ryman and the RVA submit their interpretation of Policy 5 is consistent with the wider context of the Enabling Housing Act and therefore the NPSUD. The parties previously outlined this context in their opening legal submissions on Hearing Stream 1 and do not repeat it in full here. However, we respectfully reiterate what we submit are the overarching legislative purposes of the IPI:

48.1 **Addressing New Zealand’s housing crisis:** this is the primary purpose of the ISPP process. Cabinet said this instrument was needed as *“the intensification enabled by the NPSUD 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 and the NPSUD ahead of the Government’s resource management reforms.”*³⁰

48.2 **Removing restrictive planning rules:** Enabling housing acceleration is a key outcome of the ISPP, which can be achieved through *“removing restrictive planning rules,”*³¹ both through the mandatory and discretionary aspects of the IPI.³²

- 49 Policy 5 must also be read within this wider context. While the RVA and Ryman do not dispute high-quality development should be encouraged, ultimately, the purpose of the legislation is about accelerating consenting processes and removing planning restrictions to address New Zealand’s housing crisis. Requiring

²⁹ *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]

³⁰ Cabinet Legislation Committee LEG-21-MIN-0154 (Cabinet Minute), at [2-3].

³¹ At [4].

³² Section 80E, RMA.

development to meet the intention of the guidelines in the Design Guide is inconsistent with this purpose.

MFE Design Guide

- 50 The positive and enabling intent of Policy 5 can be understood further by reference to the Ministry for the Environment National medium density design guide (*MFE Guide*).³³ The MFE Guide is non-statutory; it sets out 'advice' on how to achieve well-functioning and high-quality housing that is well integrated into its neighbourhood.³⁴ It explicitly states it does not prescribe mandatory design requirements, which is reflected in the language used throughout the document, for example:

"consider the local climate conditions...This can improve residents' comfort and help save energy" (emphasis added).³⁵

- 51 The MFE Guide is intended to help encourage "high-quality housing" through four design principles and a further six design themes which provide further detail. In total there are 46 key design elements, making it much shorter than the Design Guide. Overall, it "allows, promotes or assists" high quality development, but it does not require it. Counsel submits the MFE Guide provides clear guidance on what it means to "encourage" high quality development under Policy 5. The Design Guide goes well beyond this level of direction on high-quality development.

Design Guide not suitable for retirement villages

- 52 The Officer recognises that retirement villages are different from standard residential developments. But they consider the retirement villages policy proposed by Ryman and the RVA will not ensure development are of a high-quality design that are integrated and compatible with the built form anticipated for the zone. They say that the policy is framed in such a way to 'elevate' the needs of a retirement village above achieving the outcomes sought for the zone.
- 53 With respect, the Officer misunderstands Ryman's and the RVA's proposed approach. As explained by Dr Mitchell, the regime proposed by the RVA and Ryman is largely aligned with the planning approach for other residential developments involving four or more dwellings. It has some necessary nuances for internal amenity controls which better reflect onsite needs. All MDRS density controls that apply to manage external effects would also apply to retirement villages. The regime also does not seek to exclude any other plan controls that manage the likes of noise and hours of operation. It also does not seek to exclude retirement villages from ensuring developments are of a high-quality design, in that the matters of

³³ Ministry for the Environment, May 2022.

³⁴ Ministry for the Environment National medium density design guide, page 3.

³⁵ National medium density design guide, 1F.

discretion will require that matter to be addressed, albeit in a narrower and more proportionate way.

- 54 However, as Mr Brown, Professor Kerse and Ms Owens have set out, retirement villages are a housing typology that provide specialist care for a particularly vulnerable demographic. This makes retirement villages necessarily different to other residential typologies to cater for the specialist day-to-day needs of residents. The Design Guide is not specific to retirement villages. It reflects design principles relevant to standard residential development that are not fit-for-purpose for retirement villages.
- 55 The regime that Ryman and the RVA have proposed is therefore designed to take into account the different functional and operational needs of retirement villages, but still encourage high quality design as proposed by Policy 5.

Allocation of provisions between the ISP and First Schedule process

- 56 The IPIs and ISPP are an important means to address the national housing shortage, with the ISPP intended to meaningfully accelerate the usual plan change process. It is respectfully submitted that this overarching purpose of addressing the housing crisis, accelerating housing supply and removing planning restrictions should be in the front of the Panel’s mind in making recommendations on allocation, as should Cabinet’s characterisation of the Enabling Housing Act as:³⁶

...removing restrictive planning rules to rapidly accelerate the supply of housing by creating a streamlined planning process that... enables the intensification outcomes anticipated from the National Policy Statement on Urban Development 2020 to be achieved earlier...

- 57 In its primary submission, the RVA sought changes to the allocation of the retirement village-related provisions in the Medium Density Residential Zone and the High Density Residential Zone. The RVA and Ryman sought, and still seek, that all retirement village-related provisions are included in the IPI.
- 58 This is in part because it would be highly inefficient for different retirement village-related provisions to apply at different times, through two separate processes. The operative plan needs to provide a comprehensive retirement village-specific objective, policy and rule framework, which can be implemented as soon as the ISPP is complete. The consideration of the retirement village-related provisions through two separate processes, particularly given the IPI process will conclude much sooner than the Schedule One process, will lead to implementation issues if related provisions are still under consideration.

³⁶ Cabinet Legislation Committee LEG-21-MIN-0154 (Cabinet Minute), at 4.

59 By way of example, the Council exercised its discretion under section 80E to include provisions relevant to the retirement villages in the IPI, including restricted discretionary status for construction of a retirement village (MRZ-R14) and building height control 2 for a retirement village (MRZ-S2). However, the corresponding activity status for land use for a retirement village (MRZ-R8) and retirement village specific policy (MRZ-P7) are currently allocated to the Schedule One process. The problem with having relevant provisions so divided was identified by the Officer:³⁷

With respect to the Retirement Villages Association [350] I agree that having provisions for an activity being split across two plan making processes is not efficient. My view is that a broader application of s80E so as not to split building and land use rules for the same activity across two planning processes would have been preferable, but that was not the decision made by Council.

60 As acknowledged in the legal advice received by the Panel, and the Panel's subsequent Minute 12,³⁸ the Council's allocation of provisions to either the IPI or Proposed Plan does not limit the Panel's ability to make recommendations, this is both on the content of the Plan, and whether that content falls within the IPI or not. Accordingly, Ryman and the RVA now seek that all residential provisions relating to retirement villages form part of the Panel's recommendation to the Council as part of the IPI.

61 The full list of provisions Ryman and the RVA are seeking to be included in the IPI are addressed in Dr Mitchell's evidence. Ryman and the RVA submit these provisions meet the requirements of the Enabling Housing Act for inclusion in the IPI, as set out further below.

Statutory provisions

62 The Enabling Housing Act doesn't purport to provide a fully comprehensive set of provisions addressing all housing circumstances, which is unsurprising given it was a rapidly prepared amendment. By way of example:

62.1 No matters of discretion are provided for the (mandatory) restricted activity status for residential activities that do not comply with the MDRS.³⁹

62.2 Section 80E(2) anticipates that a housing development would require a wider package of consents for that activity (eg district-wide matters, earthworks and infrastructure).

³⁷ Hearing Stream 1 - Section 42a Report – Part 1 plan wide matters and strategic direction, at [82].

³⁸ Minute 12: ISPP Allocation Issues (4).

³⁹ Resource Management Act 1991, schedule 3A, clause 4.

- 63 We submit that there is a clear intention that Councils and Panels would need to supplement the MDRS with provisions relevant to the local context and needs. The key section that delineates what provisions can be part of the IPI is section 80E:

80E Meaning of intensification planning instrument

...

(b) that may also amend or include the following provisions:

...

(iii) related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on—

(A) the MDRS; or

(B) policies 3, 4, and 5 of the NPS-UD, as applicable.

- 64 “Related provisions” is a relatively wide concept provided they ‘support’ or are ‘consequential’ on the MDRS or Policy 3 in this case. Relevant dictionary definitions are:⁴⁰

Support: give help or countenance to, back up; second, further.

Consequential: following as a result or consequence.

- 65 It is worth noting that the allowance for ‘related provisions’ was added at the select committee stage of the Enabling Housing legislation making process. The committee characterised the provisions as enabling changes to provisions that are ‘complementary’ to the MDRS and NPSUD.⁴¹
- 66 The regime proposed by the RVA and Ryman includes retirement village objectives and policies, rules, notification provisions and activity classifications specific to retirement villages. All these types of provisions are directly referenced in section 80E(b)(iii).⁴² The regime also incorporates the MDRS and applies, essentially, the same provisions that the Council applies, but with additional detail to align with the retirement village context.⁴³
- 67 The retirement village rule and policy framework sought by the RVA, is clearly supportive in that it adapts the MDRS provisions to apply more specifically to a particular type of housing development for which the full MDRS requirements are unsuited. The MDRS density controls would have undesirable outcomes when applied internally to a retirement village development designed to work holistically. The outcomes of the MDRS are thus supported through the adaptation of these provisions.

⁴⁰ The New Zealand Oxford Dictionary, Oxford University Press, reprinted 2008.

⁴¹ Resource Management (Enabling Housing Supply And Other Matters) Amendment Bill Environment Select Committee Report, pages 4 and 7.

⁴² RVA submission, paragraphs 119-123 and 127-128.

⁴³ See also RVA submission, paragraphs 117-118.

68 Similarly, the framework sought can be considered consequential to the MDRS and Policy 3. The MDRS provide specifically for intensification of a subset of residential developments, being permitted "residential units". If the outcomes of the Plan are to be aligned, further changes are required to the rules and policies applying to other forms of residential development. This approach will ensure these developments are also enabled, through a consistent approach that is compatible with MDRS-compliant developments.

69 Further, the objectives, policies, rules, notification provisions and activity classifications that the RVA and Ryman seek are in line with those proposed by the Council in the notified version as related provisions. The differences are at the details level rather than being structurally different.

Enabling greater development

70 The RVA and Ryman further submit that aspects of the relief sought could also be incorporated as part of the IPI via section 77H. Section 77H allows provisions to be included that enable a greater level of development. The modified internal amenity control provisions for retirement villages and the proposed definition of "retirement unit" can be included in this category. They enable a greater level of development by either "*omitting 1 or more of the density standards set out in Part 2 of Schedule 3A*". Or, they are "*rules that regulate the same effect as a density standard set out in Part 2 of Schedule 3A, but that are more lenient than provided for by the MDRS.*"

Case law on scope

71 The relief sought is also submitted to be within scope based on the general principles established by case law as to either a submission is 'on' a plan change.⁴⁴ A submission can only fairly be regarded as "on" a plan change if it is addressed to the extent to which the variation changes the pre-existing status quo.⁴⁵ Relevant considerations are:

71.1 If the effect of the submission would be to amend a planning instrument without a real opportunity for participation by those potentially affected, this is a powerful consideration

⁴⁴ The leading authorities on when a submission is "on" a plan change are the High Court decisions in *Clearwater Resort Limited v Christchurch City Council* (HC, Christchurch, William Young J, 14/3/2003), *Option 5 Inc v Marlborough District Council* (HC, Blenheim, Ronald Young J, 28/9/2009) and *Palmerston North City Council v Motor Machinists* (HC, Palmerston North, Kos J, 31 May 2013). The High Court authorities have been applied in a number of cases by the Environment Court which are also instructive when considering scope matters.

⁴⁵ *Clearwater Resort Limited v Christchurch City Council*.

against any argument that the submission is truly “on” the variation.⁴⁶

- 71.2 A submission raises matters that should have been addressed in the section 32 evaluation and report.⁴⁷
 - 71.3 A submission seeks a new management regime for a particular resource (such as a particular lot) when the plan change did not propose to alter the management regime in the operative plan.⁴⁸
- 72 In the unique context before the Panel where the IPI has been incorporated as part of a full district plan review, there is little room to consider the changes sought by the RVA and Ryman are not ‘on’ the IPI (and/or the Proposed Plan) as:
- 72.1 The entire Proposed Plan was publicly notified, and RVA and Ryman’s submissions and further submissions were publically available.
 - 72.2 The section 32 report addresses the policy structure supporting, and the rule framework applying, to multi-unit housing retirement villages and the rule framework in residential areas applying to retirement villages.⁴⁹
 - 72.3 The Proposed Plan introduced an entirely new management regime for all activities in residential zones.
- 73 To the extent it could be disputed aspects of the RVA and Ryman’s submission could be ‘on’ the IPI (and instead were on the parts of the Proposed Plan), it is noted that:
- 73.1 Ryman and the RVA’s (publicly available) submission specifically sought that a comprehensive retirement village-specific framework be applied through the ISPP.⁵⁰
 - 73.2 The IPI as notified provided for construction of retirement villages as a restricted discretionary activity (MRZ-R14), relevant supporting provisions and applicable objectives and policies could be expected to be part of the same instrument.

⁴⁶ Ibid.

⁴⁷ *Palmerston North City Council v Motor Machinists*.

⁴⁸ Ibid.

⁴⁹ Section 32 Evaluation Report, Part 2: High Density and Medium Density Residential Zones, at pages 27 and 28.

⁵⁰ RVA submission, paragraph 69.

- 73.3 The outcomes sought by Ryman and the RVA are not fundamentally 'new or novel', but are a different application of existing provisions and controls to retirement villages.
- 74 Accordingly, Ryman and the RVA can see no barrier to their retirement village provisions forming part of the Panel's recommendation on the IPI.
- Clear and efficient consenting requirements**
- 75 In their submissions, Ryman and the RVA seek a more enabling and responsive planning framework in the relevant residential and commercial / mixed use zones. It is noted that this regime was developed by industry experts to reflect the overall experience with consenting, building and operating retirement villages across New Zealand. The specific functional and operational needs of retirement villages are set out in the RVA and Ryman's evidence.
- 76 As explained by Dr Mitchell, the regime proposed by the RVA and Ryman is largely aligned with the planning approach for other residential developments involving four or more dwellings. It has some necessary nuances for internal amenity controls which better reflect onsite needs. All MDRS density controls that apply to manage external effects would also apply to retirement villages. The regime also does not seek to exclude any other Plan controls that manage the likes of noise and hours of operation.
- 77 The policy and rule framework proposed by Ryman and the RVA ensures appropriate and proportionate assessment and management of effects of the buildings and structures associated with retirement villages.
- 78 Overall, the framework is tailored to:
- 78.1 recognise the positive benefits of retirement villages;
 - 78.2 focus effects assessments on exceedances of relevant standards, effects on the safety of adjacent streets or public open spaces, and effects arising from the quality of the interface between the village and adjacent streets or public open spaces to reflect the policy framework within the Enabling Housing Act. A degree of control over longer buildings is also acknowledged as appropriate; and
 - 78.3 enable the efficient use of larger sites and the functional and operational needs of retirement villages to be taken into account when assessing effects.
- 79 It is submitted that this approach is more appropriate than the Officer's approach for the reasons outlined and in the evidence of the RVA and Ryman.

CONCLUSION

- 80 The RVA and Ryman submit that the Hearing Stream 2 provisions must ensure that the Proposed Plan specifically and appropriately provides for, and enables retirement villages in all relevant residential zones. Appropriate provision for retirement villages will meet Enabling Housing Act requirements, give effect to the NPSUD, and respond to the significant health and wellbeing issues created by the current retirement housing and care crisis.
- 81 When compared to the Council’s proposed provisions, Ryman and the RVA’s approach involves reasonably practicable options to achieve the objectives of the Proposed Plan that are:
- 81.1 more effective and efficient;
 - 81.2 less restrictive, but with appropriate controls as necessary to manage adverse effects; and
 - 81.3 the most appropriate way to achieve the purpose of the RMA (which in this context is informed by the purposes of the NPSUD and the Enabling Housing Act).
- 82 Accordingly, 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 / Marika Williams

Counsel for Ryman and the RVA

24 February 2023