Before the Independent Hearings Panel
Kāpiti Coast

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

in the matter of: Submissions and further submissions in relation to Proposed Plan Change 2: Intensification to the Kāpiti Coast District Plan

and: **Ryman Healthcare Limited**

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

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

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

INTRODUCTION

1 These legal submissions are provided on behalf of the Retirement Villages Association of New Zealand (*RVA*)[1] and Ryman Healthcare Limited (*Ryman*)[2] in relation to Proposed Plan Change 2 (*PC2*) to the Kāpiti Coast District Plan (*Plan, District Plan*).

2 Kāpiti Coast District (*District*) is already a highly attractive location for retirees in the Wellington region. Between now and 2050, the population aged 75 and over in Kāpiti Coast is forecasted to more than double. The wider region is experiencing similar ageing population growth patterns. 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 RMA processes are a major contributor.

3 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 The importance of the present intensification streamlined planning process (*ISPP*) led to the RVA's members working together to adopt a combined approach. They have drawn on their collective experience, and pulled together a team of leading industry and technical experts, to seek greater national consistency across all Tier 1 planning frameworks to address the housing needs of older members of our communities.[3] The relief sought adopts the key features of the Medium Density Residential Standards (*MDRS*), as appropriately modified to address the unique features of retirement villages.

5 At present, the District Plan provides poorly for retirement villages and other forms of housing for older people in the Kāpiti Coast District. In contrast to many other Tier 1 council plan changes, PC2

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1 Submitter 196.

2 Submitter 197.

3 See also Statement of Evidence Dr P Mitchell, at [13].

has sought to adopt a 'bare minimum' approach by largely retaining the existing Plan chapters, structure, definitions and content and adding in the new MDRS requirements (particularly with regard to the general residential zone and the higher intensity precincts for centres).

6 The RVA and Ryman acknowledge the highly challenging time pressures to notify PC2 and the recency of the Plan becoming operative as contributing factors to this approach. But unfortunately, the result is an awkward combination of now outdated management approaches to density effects sitting alongside the new, more-enabling aspects of the Enabling Housing Act and the NPSUD. This combination leads to significant policy and rule uncertainty. And, ultimately, the Plan goes well beyond the legislative and policy directives and accordingly 'over-regulates' housing intensification.

7 Housing typologies for the ageing population are a major casualty of this 'bolt on' approach. The relevant definitions are inconsistent with the National Planning Standards definitions. The rules seek to compartmentalise different aspects of retirement housing and assess them separately. The Reporting Officer supports this approach and seemingly also agrees that retirement villages as a whole are not residential activities, which is a significant misunderstanding.

8 PC2's proposed financial contribution provisions also reveal the evident time pressures of preparing PC2. The provisions essentially leave the question of how much financial contributions are to be paid by a developer to the complete discretion of the Council at the consenting stage, giving no certainty. There is no analysis of the District's infrastructure needs and the beneficiaries of that. Hence, housing developments such as retirement villages, which are low users of council services, may end up paying more than their fair share towards upgrades. The provisions also allow financial contributions to be collected for the same types of infrastructure covered by the current Kāpiti Coast Development Contributions policy, resulting in material risks of unlawful double dipping.

9 Accordingly, the Plan needs some significant adjustments to make it clear and certain for users and to move it into line with the new statutory and policy requirements.

10 Overall, it is submitted that PC2, as it relates to the RVA's and Ryman's submissions, does 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, PC2 is inconsistent with the direction set out by the Enabling Housing Act. Specifically, PC2 fails to acknowledge:

10.1 retirement villages as a residential activity;

10.2 the unique internal amenity needs of retirement villages, their functional and operational requirements and the significant social and economic benefits they generate for Kāpiti Coast's society and economy; and

10.3 the need for greater choice of retirement living options in appropriate locations to meet the needs of Kāpiti Coast's rapidly ageing population.

11 The RVA's and Ryman's evidence addresses these matters in further detail:

11.1 **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;

11.2 **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;

11.3 **Professor Ngaire Kerse** provides gerontology evidence addressing the demography and needs of the ageing population;

11.4 **Mr Gregory Akehurst** provides economic evidence addressing financial contributions and comments on the Officer's Report in this respect; and

11.5 **Dr Philip Mitchell** addresses planning matters and comments on the section 42A Officer's report (*Officer's Report*).

12 The particular provisions that the RVA's and Ryman's submissions on PC2 relate to are:

12.1 Part 1 (Introduction and General Provisions) in relation to Definitions;

12.2 Part 2 (District Wide Matters) in relation to:

(a) District Objectives;

(b) Urban and Environmental Design and Incentives;

(c) Urban Form and Development;

(d) Energy, Infrastructure and Transport; and

(e) General District Wide Matters – Financial Contributions.

12.3 Part 3 (Area Specific Matters) in relation to:

(a) General Residential Zone; and

(b) Local Centre, Metropolitan Centre and Town Centre Zones.

SCOPE OF SUBMISSIONS

13 These submissions:

13.1 provide a summary of the legal framework relevant to the intensification planning instrument (*IPI*), including the Enabling Housing Act and the NPSUD;

13.2 comment on the key themes of PC2 at issue; and

13.3 set out Ryman's and the RVA's overall position and requested relief.

LEGAL FRAMEWORK

Enabling Housing Act

14 At the outset, is important to acknowledge that the primary purpose of the ISPP is to address New Zealand's housing crisis. As stated by the Government:[4]

> 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.

15 As noted above, and expanded on in the evidence of Dr Mitchell, Mr Brown and Ms Owens, 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.

16 The ISPP has a narrow focus. It seeks to expedite the implementation of the NPSUD. As Cabinet notes, the NPSUD "*is a powerful tool for improving housing supply in our highest growth*

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[4] Cabinet Legislation Committee LEG-21-MIN-0154 (*Cabinet Minute*), at paragraph 1.

areas", and "*the intensification enabled by the NPS-UD needs to be brought forward and strengthened given the seriousness of the housing crisis*."[5]

17 A key outcome of the ISPP is to enable housing acceleration by, "*removing restrictive planning rules*".[6] These restrictions are to be removed via mandatory requirements to:

17.1 incorporate the MDRS in every relevant residential zone;[7] and

17.2 in this case, "*give effect to*" Policy 3 of the NPSUD.

18 The force of these mandatory requirements is framed at the highest level, as a "duty" placed on specified territorial authorities.[8]

19 In addition to these 'mandatory' elements, there are a range of other 'discretionary' elements that can be included in IPIs to enable housing acceleration, including:

19.1 establishing new, or amending existing, residential zones;[9]

19.2 providing additional objectives and policies, to provide for matters of discretion to support the MDRS;[10]

19.3 providing related provisions that support or are consequential on the MDRS and Policy 3;[11] and

19.4 providing more lenient density provisions.[12]

20 Councils can also impose restrictions that are less enabling of development - "qualifying matters" - but only where they meet strict tests.[13]

21 Housing acceleration is intended to be enabled by the 'non-standard' and streamlined process that the IPI is required to follow. This

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5 Cabinet Minute, at paragraphs 2-3.

6 Cabinet Minute, paragraph 4.

7 Section 77G(1), RMA.

8 Section 77G.

9 Section 77G(4).

10 Section 77G(5)(b).

11 Section 80E(iii).

12 Section 77H.

13 Sections 77I-77L.

process materially alters the usual Schedule 1, RMA process, particularly in terms of:

21.1 substantially reduced timeframes;[14]

21.2 no appeal rights on the merits;[15] and

21.3 wider legal scope for decision-making.[16]

22 Importantly, this process is not about providing the 'bare minimum' to respond to the statutory requirements. The task ahead is a very important one. The IPIs and the ISPP are a means to solve an important and national housing issue.

23 We respectfully submit that the above overarching legislative and policy purposes - addressing New Zealand's housing crisis, accelerating housing supply, and removing planning restrictions - should therefore resonate heavily in all of your considerations through the ISPP.

24 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 IPIs and the ISPP needs to remain a clear and separate focus.[17]

Preparing and changing district plans under the RMA

25 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.[18]

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[14] 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.

[15] 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).

[16] Clause 99 of Schedule 1, Enabling Housing Act.

[17] 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].

[18] Eg, section 80B, clause 95 of the First Schedule, RMA.

26 In that context, as part of the usual legal framework, caselaw 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*".[19] 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*".[20]

27 Caselaw 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.[21] If other means are raised by reasonably cogent evidence then the decision-maker should look at the further possibilities.[22]

28 These concepts remain valid here. This is particularly the case in view of the statutory and policy intent to enable intensification and reduce planning restrictions, as well as the broad discretions and wider scope available to the Panel in making recommendations.[23]

NPSUD

29 PC2 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*".[24]

30 As noted, the clear intention of the Enabling Housing Act is to bring forward the intensification enabled by the NPSUD. The MDRS themselves reflect the wider NPSUD policy direction. It is submitted therefore that PC2 must take guidance and be read in light of the NPSUD as a whole, beyond just Policy 3. It is also perhaps trite to

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[19] *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].

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

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

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

[23] Clause 96, First Schedule, RMA.

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

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.

31 Particularly relevant objectives and policies of the NPSUD are outlined in Dr Mitchell's evidence. In addition, Ryman and the RVA submit that PC2 should be guided by the following key themes:

31.1 the NPSUD is enabling of development;

31.2 the NPSUD enables well-functioning environments for *all* communities; and

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

32 These themes are addressed in more detail below.

The NPSUD is intended to be enabling of development

33 The enabling nature of the NPSUD is set out by the Ministry for the Environment (*MfE*) and the Ministry of Housing and Urban Development (*HUD*) in their final decisions report on the NPSUD.[25] In their report, MfE and HUD state that:[26]

> 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.

34 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).[27]

35 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,*

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

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

[27] Ibid, page 85.

choices, variety and flexibility in relation to the supply of land for housing and business".[28]

36 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.

37 However, 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".*[29]

38 The enabling intent of the NPSUD has been addressed in the likes of the *Middle Hill Ltd v Auckland Council*[30] 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…

Well-functioning urban environments

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

39.1 Enable <u>all</u> people and communities to provide for their wellbeing, health and safety.[31] 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.

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

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

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

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

39.2 Enable a *"variety of homes"* to meet the *"needs … of different households"*,[32] which it is submitted cannot be achieved without expressing what the variety and needs of different households is.

39.3 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.[33]

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

40 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"*.[34]

41 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, noting that changes are not, of themselves, an adverse effect.[35] Plans may provide for change that alters the present amenity of some and improves the amenity of other people and communities.

42 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".

43 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.

44 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.

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[32] Policy 1.

[33] Objective 3.

[34] Objective 4.

[35] Policy 6.

Relevance to RVA and Ryman submission

45 The extent to which the NPSUD provisions are given effect to through PC2 are addressed in detail by Dr Mitchell. We address particular aspects later in these submissions.

PC2

46 In their submissions on PC2, Ryman and the RVA seek a more enabling and responsive planning framework for retirement villages in the relevant zones included in PC2. In that respect, Ryman and the RVA are supportive of limited aspects of the Reporting Officer's position. For example, the Officer acknowledges that improved policy support for 'housing for an ageing population' is warranted.[36]

47 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 villages. He does not agree with the Council's approach that essentially rolls over the existing general residential zoning, rather than properly giving effect to the policy and statutory directions. He also addresses particular aspects on design guides for retirement villages and the need for greater policy recognition of the intensification opportunities of larger sites.[37]

48 We primarily address key misunderstandings that, with respect, mean the Reporting Officer's approach with regard to retirement villages is misguided and should be given little weight.[38]

49 In particular, the Officer fails to appreciate that:

49.1 retirement villages as a whole are a residential activity. Retirement villages have unique functional, operational and other needs, that must be addressed to ensure clear and efficient consenting requirements;

49.2 it is inappropriate to consider different aspects of retirement villages as separate 'activities' and to then bundle these activities together at consenting time. This approach is unclear and inefficient and will lead to perverse outcomes. It

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[36] Paragraph 349, Section 42A Report: Plan Change 2 - Council Officers' Planning Evidence (24 February 2023).

[37] Statement of Evidence Dr P Mitchell. See also Statement of Evidence M Brown, at [63] and Statement of Evidence M Owens, at [88-94].

[38] As also outlined in Mr Brown's and Ms Owens' Statements of Evidence.

is also contrary to the intent of the National Planning Standards. And, it results in a restrictive activity status contrary to the enabling intent of the NPSUD and Enabling Housing Act; and

49.3 financial contribution policies must be sufficiently clear and certain and supported by robust assessment methodologies in order for conditions under section 108(1)) to be lawfully imposed.

Retirement villages are a residential activity

50 The Reporting Officer does not recognise that retirement villages as a whole are a residential activity.[39] This view appears to be based on the misconception that retirement villages are a 'bundle of activities' incorporating both commercial activities (including live-in health or pastoral care) and "*retirement accommodation"*.[40] With respect, the Officer's assessment appears to be based on a lack of understanding of retirement villages.

51 As Mr Brown, Professor Kerse and Ms Owens highlight, retirement villages are the permanent residence of the residents, who consider the retirement village their 'home', no matter the level of care they need in those homes.[41] The services and recreational amenities in retirement villages are for the residents and visitors. These services and recreational amenities do not change the essential nature of retirement villages as residential activities.

52 The National Planning Standards define 'retirement village' as:[42]

> … a managed comprehensive residential complex or facilities used to provide residential accommodation for people who are retired and any spouses or partners of such people. It may also include any of the following for residents within the complex: recreation, leisure, supported residential care, welfare and medical facilities (inclusive of hospital care) and other non-residential activities.

53 The definition puts residential accommodation 'front and centre' as the primary use in a retirement village. It aligns with the wider definition in the National Planning Standards of "residential activity". Where retirement villages are a "*residential complex or facilities*

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[39] Paragraphs 328 and 329, Section 42A Report: Plan Change 2 - Council Officers' Planning Evidence (24 February 2023).

[40] Paragraphs 331 and 346.

[41] Statement of Evidence Professor N Kerse, at [36-37]. Statement of Evidence M Brown, at [47-52]. Statement of Evidence M Owens, at [19].

[42] National Planning Standards (November 2019), page 62.

used to provide residential accommodation for people…", a "residential activity" is:[43]

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

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

55 Further clues to aid that interpretation can be drawn from other definitions and the drafting conventions in the National Planning Standards. The retirement village definition contains a list of other activities for the residents without cross referring to other definitions such as "commercial activities" or "community facilities".[44] Whereas, other definitions do use this cross referencing convention.[45] We submit that this context emphasises the self-contained nature of retirement villages as a type of residential activity that also has a range of related services and amenities. Those related services and amenities are not separate uses in themselves.

56 In practice, as Ms Owens and Mr Brown point out, the services and amenities in retirement villages are designed specifically for the residents. The RVA and Ryman witnesses, including gerontologist expert Professor Kerse, highlight the many health and social factors which contribute to older people having less mobility. These factors make it important that many of the day to day needs of residents are met on site. As Professor Kerse notes, *"the care facility in the retirement village is their home and there is an emphasis on those delivering care to make it homelike and preserve the autonomy of the residents"*.[46] In Ryman villages, these amenities and services provided meet the needs of frail residents, or those with mobility restrictions, and are not available to the general public.[47]

57 The activity classification of retirement villages that provide additional services or facilities to their residents has been the

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43 Ibid.

44 Which are separately defined in the National Planning Standards.

45 For example, the definition of residential activity cross-refers to the definitions of "land" and "building(s)".

46 Statement of Evidence Professor N Kerse, at [36].

47 Statement of Evidence M Brown, at [49].

subject of rulings by the higher courts.[48] Two High Court cases have found that aspects of a retirement village that are incidental and ancillary to the residential activity (e.g. a hair salon), do not alter the overall status of retirement villages as residences.[49]

58 In the most recent case, the High Court stated:[50]

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

59 The Court also stated that the ancillary services provided by the retirement villages in that case were for residents only. They complemented the residential function of retirement villages by meeting the particular needs of older residents.[51]

60 In light of this wider context, it is difficult to conceptualise that the National Planning Standards intended retirement villages to be classified as anything other than residential activities. The terminology used to define 'residential activity' is inextricably linked to the definition of 'retirement village'. Retirement villages are essentially a subset of residential activity.

61 Further, an interpretation that retirement villages are instead a bundle of activities that require individual assessment would not align with the clear language of the definition and the facts outlined. The purpose of the National Planning Standards to provide national consistency would not be served by attempting to break down a (singular) defined activity in the National Planning Standards into component parts for separate assessment, as PC2 seeks to do. If the intention of the National Planning Standards was for individual aspects of retirement villages to be split up, the National Planning Standards definitions would have provided for this through multiple definitions.

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

49 *Hawkesbury*, at pages 21-22.

50 *Te Rūnanga o Ngāti Awa,* at [63].

51 Ibid.

62 More broadly, part of the purpose of the RMA is to enable social wellbeing and for health and safety. These purposes are partly articulated in Objective 1 of NPSUD which is for urban environments that enable 'all people' to provide for social wellbeing and health and safety. The supporting Policy 1 notes the need for planning decisions to contribute to urban environments to have or enable, as a minimum, "a variety of homes".

63 Similar concepts are articulated in the mandatory MDRS policies in PC2:

63.1 Policy GRZ-Px1 - "*Enable a variety of housing typologies…*"; and

63.2 PC2 policy GRZ-Px4 - "*Enable housing to be designed to meet the day-to-day needs of residents*."

64 This wider context also supports the view that retirement villages as a whole are a residential use and should be enabled as such. Retirement villages are a housing typology that helps provide specialist care for a particularly vulnerable demographic. Retirement villages are necessarily different to other residential typologies to cater for the specialist day-to-day needs of residents. They need to be located in a variety of residential and mixed use commercial areas to enable older people to 'age in place'.[52]

Separation of retirement village activity into separate activities to be 'bundled'

65 It follows from these submissions that the Reporting Officer's characterisation of retirement villages as a bundle of activities is fundamentally flawed. Such an approach gives rise to substantial consenting inefficiencies at one end, through to perverse and anomalous outcomes at the other.

66 The Officer's approach means different aspects of retirement villages are variously not appropriate to be provided for as a permitted or restricted discretionary activity in the General Residential Zone or Centres and Mixed Use Zones.[53] Instead, the Reporting Officer considers that the activity status of a retirement village should depend on the range of activities associated with it.[54]

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[52] Statement of Evidence M Owens, at [82-83]. Statement of Evidence of M Brown, at [11]. Statement of Evidence Professor N Kerse, at [68-75].

[53] Paragraphs 339-346, Section 42A Report: Plan Change 2 - Council Officers' Planning Evidence (24 February 2023).

[54] Paragraphs 345 and 346.

67 'Bundling' together the activities will result in the most restrictive activity status being applied to application for resource consent for a retirement village. The separation of activities within retirement villages will essentially act as a new definition of 'retirement village' – one that recognises the traditionally 'residential' aspects of a retirement village as being residential, and other aspects of retirement villages (ie cafes for residents) as being commercial.

68 The convoluted and inconsistent nature of the PC2 regime is highlighted in the Officer's Report in that although 'retirement villages' and 'retirement accommodation' are separately defined, the actual use category for retirement village accommodation falls under "supported living accommodation".[55] More than 6 residential units – which would essentially cover all modern retirement villages – is a fully discretionary activity. Aspects of a village that a council officer might (based on the section 42A analysis) consider to be general commercial activities would be "non-complying". These statuses are substantially more onerous than any other "four or more residential unit" residential activity that would benefit from restricted discretionary status and a range of presumptions that limit public and limited notification (as required by the MDRS). The Officer then goes on to highlight the different and inconsistent approaches to regulating retirement villages in other zones.[56]

69 Inevitably, in consent processes, council officers will consider that non-residential aspects of retirement villages are not appropriate for residential zones, and residential aspects are not appropriate for non-residential zones. This 'catch 22' is itself inappropriate, strongly conflicts with the enabling intent of the NPSUD and Enabling Housing Act, and emphasises the need for a singular activity status and a comprehensive set of provisions for retirement villages.

70 As noted, applying the current 'bundled' definition approach also does not align with the mandatory direction in the National Planning Standards, to use the (singular) definition of retirement village.[57] It is also inconsistent with the purpose of the National Planning Standards, to promote efficient and consistent processes,[58] as it will result in different aspects within a retirement village being considered individually. As Dr Mitchell notes, it is anticipated that this approach will result in consenting complexities and debates as

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55 Paragraphs 327-330, Section 42A Report: Plan Change 2 - Council Officers' Planning Evidence (24 February 2023).

56 Paragraphs 336-337.

57 National Planning Standard, page 54.

58 RMA, section 58B(1)(b)(iii).

to what is a retirement village, what is separately a residential unit and therefore, which suite of rules apply.[59] Mr Brown also refers to the major disincentive to investing in retirement villages in the District due to the consenting risks that this approach creates.[60]

Clear and efficient consenting requirements

71 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.

72 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.

73 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.

74 Overall, the framework is tailored to:

74.1 recognise the positive benefits of retirement villages;

74.2 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

74.3 enable the efficient use of larger sites and the functional and operational needs of retirement villages to be taken into account when assessing effects.

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[59] Statement of Evidence Dr P Mitchell, at [55].

[60] Statement of Evidence M Brown, at [19].

75 It is submitted that this approach is more appropriate than the Reporting Officer approach for the reasons outlined and in the evidence of the RVA and Ryman.

Financial contributions

Introduction

76 The Council has exercised its discretion under section 77T of the RMA to include financial contribution (*financial contribution* or *FC*) provisions as part of the IPI. The RVA and Ryman consider the proposed FC provisions to be inadequate and inappropriate. They lack a robust and clear methodology for calculating and assessing appropriate levels of financial contributions. They are highly uncertain, which will make implementation highly challenging.

77 As set out in Mr Akehurst's evidence, the financial contribution provisions under PC2 do not clarify how usage or load differences would influence the amount of FCs the Council will be seeking.[61] The provisions also do not specify a formula that might allow developers ahead of time to calculate the FCs owed for a development, and instead require individual assessments.[62]

78 In this context, it is difficult to reconcile the statements in the Council's section 32 assessment that the new provisions provide "…*clarity and certainty for applicants and the Council when determining the level of financial contribution* …",[63] against the reality of the wide discretions the provisions contain:

78.1 Policy FC-P3 states that a financial contribution "*may be required for any land use or subdivision application*…", for the broad purposes, "*to ensure positive effects on the environment are achieved to offset any adverse effects that cannot otherwise be avoided, remedied or mitigated*." The policy gives no direction on the circumstances where FCs are to be required. It does little more than restate legislative provisions.

78.2 Then, rules FC-R5(1) and (3) set out very wide discretions for the Council to determine the appropriate sum and /or land.

78.3 The reasons for the contributions in FC-Table x2 again contain wide concepts, that give neither the Council nor the developer any certainty as to actual costs or application.

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61 Statement of Evidence G Akehurst, at [15].

62 Ibid.

63 For example, pages 247 and 251, section 32 assessment.

Legislative context

79 Section 77E[64] of the RMA provides that a local authority may make a rule requiring a FC for any class of activity other than a prohibited activity. Such a rule must specify:

> (a) the purpose for which the financial contribution is required (which may include the purpose of ensuring positive effects on the environment to offset any adverse effect); and
>
> (b) how the level of the financial contribution will be determined; and
>
> (c) when the financial contribution will be required.

80 Given that section 77E is a relatively new provision there is a lack of caselaw on its application. The longer history of financial contributions is submitted to be a helpful source of guidance in this context.

81 Section 108 of the RMA states that a FC condition must be imposed in accordance with the purposes specified in the plan and the level of the contribution must be determined in the manner described in the plan.[65] Section 108(10) did not change under the Enabling Housing Act, and thus caselaw on its application is submitted to remain relevant.

82 The courts have found that a FC policy can contain a level of discretion.[66] However, caselaw also warns against the risks of overly discretionary regimes:[67]

> …There is much to be said for a policy permitting of limited discretion. Developers can read the plan and can ascertain exactly what will be required of them by way of financial contribution. Developers and the public generally can be assured that everyone is being treated alike. The risk of corruption at local body officer level is greatly reduced. The prospect of litigation which is virtually non-justiciable is significantly reduced…

83 These warnings are also echoed in *South Port New Zealand Limited* where the Court established that, even where the plan provides a general purpose for a FC, there must still be "sufficient particularity"

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[64] Inserted into the RMA pursuant to the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021.

[65] Section 108(10), RMA.

[66] *Retro Developments Ltd v Auckland City Council* CA161/02, 25 February 2003.

[67] *Auckland City Council v Retro Developments Ltd* HC Auckland AP127/01, 22 July 2002, at [29].

on how a financial contribution is to be determined.[68] Open-ended discretions have the potential to result in perverse, unforeseeable or inconsistent outcomes.[69] At the very least, what is required is a method in which a FC can be determined, which may be broadly descriptive or narrowly prescriptive.[70]

84 It is submitted that a regime that creates the risks in paragraph 82-83 above should not be allowed. Council's FC regime in PC2 has such wide discretion that it has the potential for all of these risks to apply. As drafted, developers will not be able to read the Plan and ascertain what is required of them by way of FC, there is a lack of assurance that everyone will be treated alike, and the prospect of litigation on FC conditions is almost certain.

Local Government Act provisions on financial contributions

85 The Local Government Act 2002 (*LGA*) applies further requirements on the procedures and policies that apply to funding and financial policies, including financial contributions. We submit that these provisions assist in determining whether or not the Council's approach is robust and appropriate in this case.

86 The purpose of these policies is to provide "*predictability and certainty*" about sources and the level of funding.[71] Section 106 in particular, requires that financial contribution policies:[72]

86.1 Identify separately each activity for which a FC will be required;

86.2 For each activity specify the total amount of funding to be sought by a FC; and

86.3 State the proportion of total cost of capital expenditure that will be funded by FCs.

87 We submit that the Council's approach falls short in all respects. The section 32 assessment does not clearly address these aspects. As the Council appears not to have followed the requirements of the LGA, strong doubt should be cast on the legitimacy of the FC provisions.

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68 *South Port New Zealand Limited v Southland Regional Council* C91/2002, 26 July 2002, at [17] and [25].

69 At [22].

70 At [23] and [28].

71 Section 102(1) and (2)(d), LGA.

72 Section 106(2)(d), LGA.

Overlapping contributions regimes

88 Problems resulting from unclear provisions also arise due to the interface between the RMA and the development contributions regime in the LGA. This overlap has traditionally resulted in retirement village operators being significantly overcharged, for their much lower demand on public infrastructure than typical housing.

89 Unfortunately, the LGA and RMA regimes are unhelpfully disconnected. This means that retirement village operators are often faced with councils leveraging community facilities through the RMA process, without credit being given at the development contributions payment stage. This gives rise to unfair and inequitable outcomes, disputes, and uncertainty. The significant uncertainty in the PC2 financial contributions regime is likely to exacerbate this issue in Kāpiti.

90 Council's wide discretions under PC2 in relation to financial contributions also raise the risk of 'double-dipping' where both financial contributions and development contributions are applied for the same developments. Although section 200 of the LGA is intended to manage this issue (which the Council has built into the FC provisions), as Mr Akehurst notes, there is an unclear line as to where a development contribution charge ends and where a FC charge starts. He notes this is particularly a problem given the Council's interconnected networks.[73] Accordingly, there is a material risk of the regime resulting in double dipping as well as inconsistent outcomes.

Summary

91 In considering the statutory and wider context of FCs, as provided for in the RMA, LGA and caselaw and in the RVA and Ryman's evidence, it is submitted that FC policies must:

91.1 be based on a robust assessment of loads on infrastructure, costs of new infrastructure, relative usage of activities and the amounts to be recovered from FCs as compared to other funding sources;

91.2 provide predictability and certainty on both the purpose of the FCs and how they will be determined;

91.3 not result in perverse, unforeseeable or inconsistent outcomes; and

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[73] Statement of Evidence G Akehurst, at [50-52].

91.4 not result in 'double dipping'.

92 As set out above, the provisions currently proposed for PC2 do not meet these requirements.

CONCLUSION

93 The RVA and Ryman submit that PC2 must ensure that the Kāpiti Coast District Plan specifically and appropriately provides for, and enables retirement villages in all relevant residential and commercial / mixed use 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.

94 When compared to the Council's proposed provisions, Ryman and the RVA's approach involves reasonably practicable options to achieve the objectives of PC2 that are:

94.1 more effective and efficient;

94.2 less restrictive, but with appropriate controls as necessary to manage adverse effects; and

94.3 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).

95 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.

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15 March 2023