WELLINGTON CITY COUNCIL

SR 471670

RESOURCE CONSENT: PROPOSAL TO ESTABLISH A COMPREHENSIVE CARE RETIREMENT VILLAGE, 26 DONALD STREET AND 37 CAMPBELL STREET, KARORI

MINUTE 7 OF INDEPENDENT HEARING PANEL

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1. This purpose of this Minute is to regarding matters associated with the Applicant's reply.

2. We received the Applicant's reply on 21 October 2022. On 28 October we received comments from Mr King regarding the Applicant's reply. Mr King had previously indicated that he would limit his comments on matters that he has raised that have not been commented on before by the Applicant. Mr King's comments are attached to this Memorandum as Appendix 1.

3. Having reviewed Mr King's comments we are satisfied that they do not raise any new matters such that a further right of reply should be given to the Applicant. However, before we formally direct on this point, and the closure of the hearing, we ask the Applicant to confirm its position regarding Mr King's further comments.

DATED this 31st day of October 2022

Helen Atkins
Chair – Independent Hearings Panel

For and on behalf of:
Commissioner Angela Jones
Commissioner DJ McMahon

APPENDIX 1

28 October 2022

COMMENTS ON RYMAN'S REPLY

These comments are limited, as per my agreement with the Chair concerning natural justice, to remarks made by Ryman in its final Reply that comment on matters that I raised which it had not commented on before.

I am not writing this in the best of health so I may not cover every point that could be covered. It could also be that I do not express myself as clearly as possible. Nor do I necessarily elaborate on each point as much as may be ideal.

Para 11

Ryman says: "It is submitted that the Karori Residents Association submission can be taken into account by the Panel and should not be 'read down' in any way."

It is incorrect to imply that I suggested that the Residents Association's submission should be read down. If any inference is to be made from my submission, it is that the submission should not be read up; the Residents Association is not a representative organisation as Ryman suggested – it provides Commissioners with the (hopefully) majority view of its membership (of which no details are provided), not the majority view of people in Karori.

Paras 23 - 27

Ryman says: "None of the submitters have raised information that credibly calls into question the experts' conclusions." Respectfully, this is incorrect. I raised credible evidence as to the credibility of planners', urban designers' and visual effects experts' evidence and Ryman has provided no evidence to rebut that evidence here beyond mere assertion.

As per my evidence (on a matter in which I have expertise) there is simply no methodology or application of a methodology in regard to key aspects of experts' evidence by which a reasonable person could conclude that the relevant experts had demonstrated in regard to, for example, shading that effects were more than minor or not. In saying this I accept absolutely that there will be a qualitative element to some expert judgements; what matters is that a reasonable person can understand how the qualitative judgement is reached. As one Council expert said their judgement ultimately boiled down to 'experience'. This is quite simply inadequate.

Para 29

With respect to the use of the term 'repugnant' or 'opposed to' the Chair specifically told me that those were not the appropriate terms for the relevant test under limb 2. Ryman assert that they are according to case law. If Commissioners determine Ryman are correct, then the law needs to be tested on this matter, as (as per my evidence) this cannot be the appropriate interpretation of the test. If it is, then nonetheless, as per my evidence as I recall it, the Proposed Village is repugnant to and opposed to the Operative Plan (see next section for further elaboration).

Para 33

Ryman says: "Mr King addressed the second limb of the gateway test directly. He referred to Section 1.6.3 of the Operative Plan and the objective to "maintain and enhance the amenity values of the City" and suggested the application is contrary to this direction. Section 1.6.3 identifies that the listed objectives are a summary of the objectives applying to each area of the City and are provided for information purposes only. Mr King did not provide any analysis of the specific objectives and

policies applying to the Outer Residential Area. It is submitted that the more comprehensive approach undertaken by the expert planners, Mr Richard Turner and Ms Brownlie, in relation to the second limb of the gateway test should be preferred over the very limited analysis provided by Mr King."

Again with respect this is a misrepresentation of my evidence. I agree section 1.6.3 of the Operative Plan is provided for information purposes only. I did not say (as I recall) that this objective was determinative. This does not mean, however, that the *effect* of Section 1.6.3, rather than Section 1.6.3 itself, may not legitimately be considered as a means of understanding the overall logic or thrust of the Objectives and Policies of the Operative Plan (accepting for this purpose only, consistent with Ryman's own submission, that the appropriate test is the overall thrust of the Objectives and Policies and not compliance or otherwise with each specific Objective and Policy).

I do not repeat my interpretation of the Objectives and Policies of the Plan here (an analysis which, as per the quote above, Ryman falsely says I did not make). I simply say that in the light of 1.6.3 the thrust of the Plan is to maintain residential amenity, that the Council has turned its mind to the question of intensification, and that the Council has set limits upon that. Anything beyond that is contrary to and, indeed, repugnant to the Plan.

As Commissioners are aware, due to my disability I was not able to prepare adequately for my oral submission and it was necessary to speak off the cuff, as it were. I do not purport, therefore, that my interpretation of the Plan is definitive nor that every word I said in my submission was gospel. My essential point was that critical thinking skills were key to understanding the overall thrust of the Objectives and Policies. As per my evidence, no expert made any attempt to interpret the overall thrust of the Plan in a way consistent with critical thinking skills such that a reasonable person could rely upon their evidence. I recommend that the Panel seek expert advice from a logician on this matter.

Para 54

Ryman says: "The activity status that applies to the application is preserved as at the time the application is lodged. In all other respects, the planning framework that the Panel must consider is the framework that exists at the time of your decision. Given this clear legal position, no 'rule of law' issue exists here, as was suggested by one submitter."

Again, with respect, a rule of law issue does exist, as per my evidence. The reference Ryman provides (RMA s88A (2)) refers only to section 104 (1) (b) of the RMA and not to section 104D. Consequently, under rule of law principles the Proposed Plan is not to be considered in applying the second limb of the 104D test. This is a critical matter of law and accords with natural justice as submitters had no opportunity to submit on the Proposed Plan when submissions were due.

Para 84

Ryman says that I am incorrect in stating that a lower bar was set by Ryman's experts in regard to windfall sites (this was also the case with Council experts). I respectfully suggest Commissioners read their application and Council's experts again on this matter. It is clear that this was the case as the phrase 'in light of its windfall site status' or the like was used frequently by experts. Windfall status was therefore critical to their methodology and its application (particularly given the very vague methodology used by the experts) and resulted in a lowering of the bar. What they deemed minor in that context cannot, therefore, be minor when the lowering of the bar is removed as a consideration.

Para 120-128

Ryman asserts in relation to submissions made by me regarding non-discrimination against disabled people that 'particular sensitivities' should not be taken into account, pointing to relevant case law. With respect, disabled people constitute one quarter of the population and are not people with particular sensitivities (indeed, it is insulting to refer to them as such). Consequently, any 'objective' test of effects must incorporate impacts on disabled people.

I note that Ryman's makes no comment on the Bill of Rights issue I raised; this speaks volumes and I therefore consider myself at liberty to comment on this 'non-comment.' The Bill of Rights is fundamental to New Zealand law and its application; I suggest that the Panel seek specialist legal advice on this issue, as to err in such a matter is to err seriously.

Para 132

Ryman states: "It is noted that Mr Burns and Ms Brownlie adopted different methodologies for assessing shading effects, but reached almost identical conclusions. Ms Brownlie also provided a detailed explanation of her methodology in her reply presentation. As a result, the Commissioners can be more confident that, even if there were issues with the methodology applied by one of those experts (which it is submitted there is not), the conclusions are reliable."

I comment on this comment because it is in effect a response to my questions about the robustness of the methodologies and their application of various experts. With respect, the comment is a logical error; if there is an error with one methodology, this is no reason to conclude that there is not an error with the other methodology or its application. In essence, my point remains unchallenged: there is no coherent methodology adopted by or applied coherently by Mr Burns or Ms Brownlie which enables one to follow a trail of logic leading to the conclusion that an effect is more than minor or not; that they both reach the same conclusion can, therefore, have no weight whatsoever. It is also just untrue to say that Ms Brownlie gave a 'detailed explanation' of her methodology, let alone its application, in her reply presentation. Again I emphasise, as per my evidence, that this is a matter in which I have the expertise necessary to make such a judgement.

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Ryman states: "Mr King raised concerns about privacy / overlooking effects, including the "feeling of being overlooked". It is noted that fears of submitters can only be given weight if they are reasonably based on real risk.

I recognise that Ryman changed its proposal during the hearing and that that reduces, but does not eliminate, the *actual* risk of being overlooked (which, of course, generates a *feeling* of being overlooked). The 'render' of our property Ryman refers to in this paragraph is taken from the least offensive position within the property, which happens to be the least relevant position when considering privacy and overlook.

Without having checked the transcript I also wonder if this is a potential situation where my need to speak off the cuff impacted on the precision of my words. I am reasonably sure that if I was referring to 'feelings' what would have been in my mind would have primarily been the sense of overbearing and dominance (rather than privacy).

Conclusion

This opportunity to reply to Ryman's Reply highlights the natural justice deficiencies of the standard hearing process. Ryman has made a number of comments on my oral submissions which are new to

Commissioners and which I would usually have no opportunity to comment on. I am grateful to Commissioners for the opportunity to so comment.

As a result of this opportunity, I have been able to identify for Commissioners actual and potential errors made by Ryman in regard to the law and its application. I have also been able to highlight to Commissioners that Ryman have provided no meaningful evidence, beyond assertion, that expert opinion in regard to key matters in this case can be relied upon; this is in contrast to my expert evidence on this matter. Consequently, my conclusion in my written and oral submission stands: the application does not meet the legal tests for approval under section 84D.

David King
Independent Public Policy Analyst
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