

Before the Independent Hearings Panel
Wellington City Council

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

In the matter of: Wellington City Proposed District Plan

and: Jurisdiction to alter classification of notified provisions

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

Dated: 15 February 2023

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

MAY IT PLEASE THE HEARINGS PANEL

Introduction

- 1 These submissions are filed on behalf of Ryman Healthcare Limited (*Ryman*) and the Retirement Villages Association of New Zealand Incorporated (*RVA*) in response to the Hearing Panel's minute dated 7 February 2023 (*Minute 7*).
- 2 Ryman and the RVA's submissions on the Wellington City Proposed District Plan (*Proposed Plan*) are on both 'standard' district plan provisions, and Intensification Planning Instrument (*IPI*) provisions.¹ Through this process, Ryman and the RVA generally seek a comprehensive planning regime to support acceleration of the housing intensification needs of an ageing population in Wellington City (*City*). They wish to be able to use the new provisions as soon as the Intensification Streamlined Planning Process (*ISPP*) is complete to expedite retirement housing projects.
- 3 However, the Council has classified some plan provisions relevant to retirement villages as falling within the IPI and others as falling within the normal "First Schedule process". Minute 7 directed submitters to file legal submissions on whether the Panel has the power to alter the "classification" of plan provisions.²
- 4 Council submits that the Panel does not have jurisdiction to alter the Council's classification of provisions.³ It says that its decision can only be challenged via judicial review.
- 5 Ryman and the RVA note that the Council was statutorily required by section 80H to specify (only) the mandatory provisions that are IPI provisions in the Proposed Plan. However, they submit – and it appears Council agrees⁴ – that any classification by the Council does not restrain the Panel's scope to make recommendations on the IPI and decisions on the non-IPI components of the Proposed Plan.
- 6 The Panel's scope in relation to the First Schedule process is governed by normal statutory and case law principles. The scope in relation to the ISPP is wider. Counsel submits that the question of how much wider will need to be addressed in later substantive hearings. For now, having further reflected on the implications, we

¹ That is, the submissions were on provisions that would go through the Schedule 1 process or the Intensification Streamlined Planning Process.

² Minute 7 – ISPP Allocation Issues (3), Wellington City Proposed District Plan Hearings Panel, at [8].

³ Legal submissions on behalf of Wellington City Council, 8 February 2023, at [5].

⁴ Legal submissions on behalf of Wellington City Council, 8 February 2023, at [4.11].

submit that the question of altering classification does not need to be, and should not be determined. To do so could both fetter the Panel's statutory functions and impact on the legal scope available to submitters to progress submissions as part of the ISPP or First Schedule process as they consider appropriate.

- 7 The parties therefore respectfully submit that the Panel should 'park' the classification issue, and hear the submissions and make its recommendations and decisions on submissions in accordance with its statutory powers and functions. If it considers submissions seeking changes to provisions are within the scope of the IPI despite the relevant provision not having been classified as such, the Panel is entitled to make a recommendation to that effect. How the Council then treats those recommendations vis a vis its original classification and the potential legal implications will be addressed at that time.

Purpose of IPIs and ISPP

- 8 It is important to acknowledge at the outset that the primary purpose of IPIs and the ISPP is to address New Zealand's housing crisis. As stated by the government in support of legislative reform for housing, "*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.*"⁵
- 9 To address this pressing national need, the IPIs and ISPP are intended to expedite the implementation of the National Policy Statement on Urban Development (*NPSUD*) and put in place new mandatory medium density residential standards (*MDRS*). As Cabinet has said, this expedition is needed because the "*NPS-UD is a powerful tool for improving housing supply in our highest growth areas*".
- 10 The ISPP in particular is intended to enable the acceleration of housing projects. It does so by materially altering the traditional First Schedule, RMA process, particularly through:
 - 10.1 substantially reduced timeframes;⁶
 - 10.2 no appeal rights on the merits;⁷ and

⁵ Cabinet Legislation Committee LEG-21-MIN-0154 (*Cabinet Minute*), at 1.

⁶ 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.

⁷ There are no appeals against IPIs that go through the ISPP, aside from judicial review (Clauses 107 and 108 of Schedule 1). The new process will allow for submissions, further submissions, a hearing and then recommendations by an Independent Panel of experts to Council (Clause 99). If the Council disagrees with any of the recommendations of the Independent Panel, the Minister for the Environment will make a determination (Clause 105).

10.3 wider legal scope for decision-making.⁸

- 11 Counsel respectfully submits that this wider context and statutory intent to expedite changes to implement the NPSUD should remain at the front of the Panel’s mind throughout the ISPP. It is also germane to the present issue and will need to be carefully weighed alongside the relevant statutory provisions. The RVA and Ryman are particularly concerned that retirement village-related provisions if kept in - two separate processes – will lead to conflicts, overlaps, inconsistencies and ultimately delays. This outcome would slow down and not accelerate the provision of retirement villages in Wellington.

No need to allocate provisions at this point

- 12 Ryman and the RVA consider that reclassifying plan provisions between the ISPP and First Schedule processes at this point in the process:
- 12.1 would not be consistent with the Panel’s function or powers,
- 12.2 is unnecessary as it is a question of scope, and
- 12.3 would potentially place an inappropriate fetter on the Panel’s discretion.

The Panel’s statutory powers

- 13 The Panel’s jurisdiction is determined by statutory provisions. The RMA as amended by the Resource Management (Enabling Housing Supply and other matters) Amendment Act 2021 (*EHA*) does not provide the Panel with explicit powers regarding the “classification” of planning provisions between an ISPP and First Schedule process. The statutory provisions do not anticipate an IPI being progressed as part of wider plan review, and the obligation on the Council under section 80H is only to show provisions that incorporate, or are replaced by, the MDRS density standards and objectives and policies.
- 14 However, the Panel must provide a recommendation on the IPI, and a decision on the non-IPI provisions, in accordance with the obligations and powers in:
- 14.1 Clause 99 of Schedule 1 which requires the Panel to make recommendations on the IPI which must relate to a matter identified during the hearing, but are not limited to the scope of submissions:

99 Independent hearings panel must make recommendations to territorial authority on intensification planning instrument

⁸ Clause 99 of Schedule 1.

(1) An independent hearings panel must make recommendations to a specified territorial authority on the IPI.

(2) The recommendations made by the independent hearings panel—

(a) must be related to a matter identified by the panel or any other person during the hearing; but

(b) are not limited to being within the scope of submissions made on the IPI...

14.2 Clause 10 of Schedule 1 which provides the scope of the Panel's powers to make a decision on the non-IPI provisions, in accordance with the instrument of delegation:⁹

10 Decisions on provisions and matters raised in submissions

(1) A local authority must give a decision on the provisions and matters raised in submissions, whether or not a hearing is held on the proposed policy statement or plan concerned.

- 15 The Panel's overarching function in relation to both the IPI and the non-IPI provisions is the same – to determine the provisions that best give effect to the statutory directions, having regard to mandatory considerations. It is necessary but trite to observe that in carrying out this function the Panel may amend, remove or add provisions to either the IPI or non-IPI parts of the Proposed Plan, provided those changes are within 'scope'.
- 16 In the 'standard' plan change process, a council's notification of a plan change represents the starting point of a panel's consideration. Notified provisions may be amended, removed or added during the process, provided such amendments are within the scope of the notified provisions, submissions and further submissions.¹⁰ Ryman and the RVA consider the same scope inquiry applies to both IPI and non-IPI provisions of the Proposed Plan, noting that the scope of the ISPP is not limited to submissions, but includes matters identified by the panel or any other person during the hearing.
- 17 The Council's legal submissions set out the view that revisiting the Council's allocation decision would be inappropriate.¹¹ On the RVA and Ryman's interpretation of the Panel's powers, this issue does not arise. Amendments to IPI and non-IPI provisions are not a

⁹ Legal submissions on behalf of Wellington City Council Minute 6: Allocation of Topics, 8 February 2023. Paragraph 4.2 notes counsel's understanding that the instrument of delegation provides the Panel with "any necessary delegation to hear submissions and make recommendations to the Council on the Proposed District Plan".

¹⁰ As observed in *Environmental Defence Society Inc v Otorohanga District Council* [2014] NZEnvC 70, at [7].

¹¹ Legal submissions on behalf of Wellington City Council Minute 6: Allocation of Topics, 8 February 2023, at [4.4].

'review' of the correctness of the Council's decision, but the refinement of provisions through the statutory hearing process, with the validity of the Panel's final recommendation or decision determined by reference to the statutory provisions and whether the recommendation and decision are within scope.

- 18 Ryman and the RVA agree with Council that allocation of plan provisions as "P1 Sch1" ('First Schedule') or "ISPP" in the notified Proposed Plan was a judgement call for the expert planners based on their interpretation of 80E.¹² However, Ryman and the RVA consider that responsibility was discharged at the time of notification and this labelling exercise should not limit the outcome of the Panel's hearing and determination process.

The issue is a question of scope

- 19 The issue of whether new provisions can legitimately form part of the Panel's recommendation on the IPI under clause 99 of Schedule 1, or the Panel's decision on the non-IPI provisions under clause 10 of Schedule 1, is a question of *scope*. If a (new) provision proposed by a submitter to be part of the IPI can be shown to meet the requirements of s80E, and is within scope (ie either notified or raised at a hearing), then the Panel should be able to make a recommendation to include the provision under clause 99.

- 20 The Panel cannot and should not be precluded from including a provision as part of its recommendation on the IPI because the Council notified the provision, or a similar provision, as part of the non-IPI provisions for which it anticipated a First Schedule process. Instead, it is submitted that the ISPP's legislative purpose requires the opposite assumption.

- 21 It is common for issues of scope to arise in a plan change, and to be resolved by the panel after consideration of the provisions (including submissions, legal submissions and evidence on those provisions). Ryman and the RVA consider the same approach is required here.

- 22 Although hearing panels often consider scope matters as preliminary procedural matters, that timing is not a legislative requirement. In fact, the compressed timeframe for the ISPP indicates that a practical approach is required for scope matters. Questions of scope require consideration of the facts, evidence, and detailed consideration of the provisions. With the compressed timeframes applying to the ISPP it is submitted that it is appropriate for the Panel to consider matters of scope simultaneously with its substantive deliberations. There would be no questions of natural justice in such a situation.

¹² Legal submissions on behalf of Wellington City Council Minute 6: Allocation of Topics, 8 February 2023, at [3.8].

23 Consistent with the Panel's previous intention,¹³ Ryman and the RVA consider it would be considerably more efficient to resolve any scope issues as part of the relevant substantive hearing stream.

Should not fetter the Panel's determinative process

24 A determinative allocation of provisions to the ISPP or First Schedule process at this early stage could lead to perverse outcomes. The likely result of 'allocating' a provision as a non-IPI provision is that the Panel will then consider it is unable to include such a provision as part of its recommendation on the IPI (and vice versa).

25 Such an outcome would, respectfully, be an inappropriate fettering of the Panel's statutory powers. Such predetermination would also cause issues of natural justice as changes to provisions sought by submitters may be determined without appropriate consideration of scope.

SPECIFIC PROVISIONS

26 In accordance with the above reasoning, Ryman and the RVA note that, the parties will be seeking additional provisions as part of the Panel's recommendations on the IPI.

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15 February 2023

¹³ Minute 7 – ISPP Allocation Issues (3), Wellington City Proposed District Plan Hearings Panel, at [4-5].