

Before the Independent Hearings Panel  
Hutt City Council

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*under:* the Resource Management Act 1991

*in the matter of:* Submissions and further submissions in relation to Plan  
Change 56 to the City of Lower Hutt District Plan

*and:* **Retirement Villages Association of New Zealand  
Incorporated**  
(Submitter 211)

*and:* **Ryman Healthcare Limited**  
(Submitter 204)

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

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

**INTRODUCTION**

- 1 These legal submissions are provided on behalf of the Retirement Villages Association of New Zealand (*RVA*) and Ryman Healthcare Limited (*Ryman*) in relation to Plan Change 56 (*PC56*) to the City of Lower Hutt District Plan (*Plan, District Plan*). They address questions from the Panel at the hearing of the *RVA* and *Ryman's* submissions on 19 April 2023. The Panel directed that *Ryman* and the *RVA* provide:
  - 1.1 Supplementary planning evidence that:
    - (a) Sets out the detailed relief for the commercial zones, namely the Commercial Centre Activity Area (*CCAA*), Petone Commercial Activity Area (*PCAA*) and the Suburban Mixed Use Activity Area (*SMUAA*);
    - (b) Updates the residential zone provisions sought by the *RVA* and *Ryman* to address questions from the Panel including relating to the proposed 'density' policy<sup>1</sup> and the cumulative effects of breaches of density standards<sup>2</sup>;
    - (c) Provides specific relief in relation to financial contributions to address the concerns raised in Mr Akehurst's evidence and to reflect the evidence he and Dr Mitchell gave at the hearing as to the risks of removing the proposed changes from *PC56*;
    - (d) Expands on the section 32AA analysis that was provided in Dr Mitchell's evidence to include additional matters not covered in the earlier analysis;
  - 1.2 Legal submissions addressing the scope to include the updated relief in the commercial zones in *PC56*; and
- 2 The supplementary evidence and proposed amendments to the commercial, residential and financial contributions provisions mentioned above are filed herewith. We submit that these provisions are the most appropriate way to achieve the statutory requirements.

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<sup>1</sup> Appendix B, Policy-Px.

<sup>2</sup> Appendix B, Rule 4F 4.1.7 and Rule 4G 4.1.7.

3 On the matter of legal scope for the commercial zone provisions, we submit that:

3.1 The proposed provisions contained within the supplementary evidence are within the scope of the original submissions lodged by Ryman and the RVA on PC56. They are either relief specifically requested or derived from the existing provisions of the Plan, as outlined by Dr Mitchell; and

3.2 If there is any doubt on the above, the proposed changes are related to matters identified by the Panel during the hearing process. They are thus within the Panel's powers and jurisdiction to make recommendations on.<sup>3</sup>

4 We note that we provided legal submissions to the Panel submitting that the RVA and Ryman's submissions are "on" PC56 (18 April 2023). We do not repeat those submissions here. We simply highlight that the commercial zone provisions being sought relate directly to the need to give effect to Policy 3 of the NPSUD. The changes enable intensification of housing activities in and around centres. They are thus within the scope of section 80E, RMA.

**The relief sought is within the scope of the original submissions**

5 The caselaw on whether relief sought is within the scope of a submission is relatively settled.

6 *Re Otago Regional Council*<sup>4</sup> provides a useful summary of the key authorities and the process to address the question as to whether relief sought is within the scope of original submissions. In that case, the Court stated that:<sup>5</sup>

It is not unusual for relief to be amended in response to evidence called by other parties and its testing during a hearing. Even so, any proposed amendments must remain within the general scope of the notified plan change or the original submissions on the plan change or somewhere in between.

7 The Court also went on to note:<sup>6</sup>

...the question about whether the submission is on or about the plan change will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions. It is important to keep in mind that the court cannot permit the plan change

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<sup>3</sup> Section 99, Resource Management Act 1991.

<sup>4</sup> *Re Otago Regional Council* [2021] NZEnvC 164.

<sup>5</sup> Annexure 2, at [16].

<sup>6</sup> Annexure 2, at [21].

to be appreciably changed without a real opportunity for participation by those who are potentially affected.

- 8 As highlighted by Dr Mitchell, the RVA and Ryman are seeking amended relief in response to “testing” of their relief in their original submissions (and evidence) during the hearing.
- 9 Further, as he also states, the new relief sought has either been taken directly from PC56 or from the RVA and Ryman’s submissions. The amendments seek to make the enabling provisions sought in the submissions more restrictive. In that sense, the changes are “somewhere in between” the original submission and PC56. The amended relief is a refinement of the provisions in Ryman and the RVA’s original submissions in which they sought a package of planning provisions to apply in the CCAA, PCAA and SMUAA. Accordingly, Ryman and the RVA do not consider that there is any lost opportunity for participation on these matters by those who are potentially affected.
- 10 The *Otago Regional Council* case also refers to the High Court case of *Albany North Landowners v Auckland Council*<sup>7</sup> case, which addressed scope questions under a similar legislative regime as here. In that case, the Court characterised the “orthodox” scope test as whether an amendment was “reasonably and fairly” raised in the course of submissions on a plan change. The Court found that this question should be approached in a realistic workable fashion, including taking into account the whole package of relief detailed in each submission.<sup>8</sup> It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed.<sup>9</sup>
- 11 As discussed earlier in these submissions, the updated provisions in Dr Mitchell’s supplementary evidence provide a more refined and comprehensive package of provisions for retirement villages. They also better integrate into the existing plan provisions and enhance the effects management of the regime. The new provisions are thus foreseeable changes taking into account the whole package of relief sought.
- 12 In addition, it is also noted that the RVA submission<sup>10</sup> states that the RVA seeks “any alternative or consequential relief to address the matters addressed in this submission”. The provisions in the supplementary evidence can also be viewed as alternative relief to

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<sup>7</sup> *Albany North Landowners v Auckland Council* [2016] NZHC 138.

<sup>8</sup> At [115].

<sup>9</sup> Ibid.

<sup>10</sup> RVA submission, at [140.3].

address the matters raised in the RVA's submission, in light of the Panel's questioning.

**Alternatively, the proposed changes are related to matters identified by the Panel during the hearing process**

- 13 Although it is submitted not to be needed to look further, we note that clause 99 of Schedule 1 specifies the Panel's powers to make recommendations on PC56. As has been highlighted, the usual First Schedule, RMA legal tests on the scope of submissions has been varied by the Enabling Housing Act. Clause 99 states:

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

*(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... [emphasis added]*

- 14 The relief sought by Ryman and the RVA in the supplementary evidence directly responds to matters identified by the Panel in the hearing. The provisions are also still "reasonably and fairly" raised in the course of submissions on PC56. The changes sought are thus within the scope of the Panel's powers.

**CONCLUSION**

- 15 The proposed provisions contained within the supplementary evidence (lodged herewith) are within the scope of the original submissions lodged by Ryman and the RVA on PC56.
- 16 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 / Alice Hall**

Counsel for Ryman and the RVA

28 April 2023