Before the Independent Hearings Panel
Waikato, Waipā and Hamilton

under: Resource Management Act 1991 (*RMA*)

in the matter of: Consideration of out-of-scope submissions on Plan Change 26 (Residential Zone Intensification) to the Waipā District Plan

by: **Retirement Villages Association of New Zealand Incorporated**
Submitter ID: 73

and by: **Ryman Healthcare Limited**
Submitter ID: 70

Submissions on behalf of the Retirement Villages Association of New Zealand Incorporated and Ryman Healthcare Limited in reply to the Waipā District Council's legal submissions on scope

Dated: 3 March 2023

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SUBMISSIONS ON BEHALF OF THE RETIREMENT VILLAGES ASSOCIATION AND RYMAN HEALTHCARE IN REPLY TO THE WAIPĀ DISTRICT COUNCIL'S LEGAL SUBMISSIONS ON SCOPE

MAY IT PLEASE THE PANEL:

INTRODUCTION

1 These submissions are made on behalf of the Retirement Villages Association of New Zealand Incorporated (*RVA*)[1] and Ryman Healthcare Limited (*Ryman*)[2] in reply to matters raised by the Waipā District Council (*Council*) in their legal submissions on scope, dated 24 February 2023 (*Council's Legal Submissions*).

2 The Panel has not issued directions seeking submitters to reply to the Council's Legal Submissions, but we understand the Panel does not object to this reply.[3]

3 In summary, the RVA and Ryman submit that:

3.1 The RMA does not specifically empower the Panel to strike out submissions. The Panel has a recommendatory, as opposed to a decision-making, role and therefore the powers under s41D are not "applicable" in this case.

3.2 Regardless of whether the Panel has the jurisdiction to strike out submissions, the Council has failed to establish that the use of s41D is warranted. Further, striking out submissions at this early stage of the process can lead to perverse outcomes and raise significant natural justice issues.

3.3 The Council's 'orthodox', albeit narrower, approach to addressing scope matters is not appropriate in the context of an intensification planning instrument (*IPI*). Instead, scope matters should be assessed having regard to a wide range of considerations, including the Panel's broad powers to issue recommendations, the scope and purpose of the IPI, and the overall purpose of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (*Enabling Housing Act*).

3.4 Regardless of whether the 'usual' legal scope tests apply, the IPI process does not warrant taking a different approach in respect of the 'discretionary' elements of an IPI. The IPI represents the starting point - 'discretionary' elements can be amended, removed or added during the process. In this regard, the IPI process is not dissimilar to 'standard' plan

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1 Submitter 73 on Plan Change 26.

2 Submitter 70 on Plan Change 26.

3 Email from Steve Rice, dated 27 February 2023.

change processes. It is therefore unclear why the Council submits that the usual legal principles concerning scope matters do not apply to the 'discretionary' elements of an IPI.

4 Overall, the Council has not made out the use of section 41D.

THE RVA'S AND RYMAN'S REPLY

Panel's role under the ISPP

5 The Council submits that s41D(2) of the RMA specifically empowers the Panel to make a direction under s41D before the hearing.[4] However, in making this assertion, the Council has failed to consider the Panel's role under the the intensification streamlined planning process (*ISPP*).

6 The Panel has a recommendatory role, as opposed to a decision-making role. Clause 96 of Schedule 1 of the RMA provides that a specified territorial authority must establish an independent hearings panel to "make recommendations, after the hearing of submissions is concluded" (emphasis added).[5] Similarly, clause 99 requires panels to "make recommendations".[6] Further, the powers of the Panel under s41D are not open-ended, but qualified by the phrase "[t]o the extent applicable" in clause 98(1) of Schedule 1.[7] We submit that the power to strike out submissions is not "applicable" as the Panel does not have a decision-making role under the ISPP.

7 We therefore do not agree that s41D(2) specifically empowers the Panel to strike out submissions.

Use of s41D is not warranted

8 Regardless of whether the Panel has the jurisdiction to strike out submissions, the Council has not established that the use of s41D is warranted in this case. The Council itself acknowledges the equivalent power contained in s279(4) of the RMA,[8] but does not offer its view as to how this particular case meets the very high threshold to strike out submissions.

9 The Council refers to the recent case of *Paterson Pitts Limited Partnership v Dunedin City Council*[9] as an example where the Court held a submission was out of scope and struck out pursuant to

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4 Council's Legal Submissions, at [12].

5 Clause 96(1)(a)(ii), Schedule 1, RMA.

6 Clause 99(1), Schedule 1, RMA.

7 Clause 98(1), Schedule 1, RMA.

8 Council's Legal Submissions, at [11].

9 [2022] NZEnvC 234.

s41D.[10] This case can be distinguished as the case concerned an appeal challenging aspects of a variation to a district plan under the 'standard' plan change process, and therefore contains no consideration as to the particular legislative framework applicable to PC26. Further, in *Paterson* the submissions were struck out *after* the hearing, as opposed to at this early stage of the process. Moreover, the decision does not include any substantive discussion concerning the application of s41D.

10 We also note that striking submissions out at this early stage could lead to perverse outcomes. For example, if one of the matters raised in a submission is struck out before the hearing, but then raised by another party during the hearing, clause 99 of Schedule 1 enables the Panel to issue a recommendation on the matter, despite having deprived the first party of filing evidence and raising its case during the hearing. This situation raises significant natural justice concerns.

Approach to scope

11 The Council submits that the Panel must adopt a three-step approach to scope, addressing three questions[11] and noting that at this stage the Panel only needs to consider the first two questions, leaving the third question to be addressed at the time the Panel considers its recommendations.[12]

12 We do not agree with the Council's approach. The Council has adopted an orthodox (albeit narrower) approach, relevant to scope considerations under the 'standard' plan change process. As previously noted, we consider the 'usual' tests for the scope of submissions on a plan change do not apply in the same way. Clause 99 of Schedule 1 broadens the scope of the Panel's recommendatory powers, and what is "relevant" or "reasonable" in this context should be read in light of these broad powers.

13 We submit that scope matters should be assessed adopting a 'multilayered approach',[13] having regard to a wide range of considerations, including:

13.1 the purpose and scope of the IPI;

13.2 the Panel's broad recommendatory powers; and

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[10] Council's Legal Submissions, at [11].

[11] Ibid at [8].

[12] Ibid at [9].

[13] Using the same terminology used by the High Court Judge in *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [135].

13.3 the Enabling Housing Act's overall purpose to rapidly accelerate housing supply and address issues with housing choice and affordability.

14 This approach aligns with the 'holistic approach' outlined in Triple 3 Farm Limited's reply to Council.[14]

Extent of scope tests applicable

15 The Council submits that the *Clearwater* test applies to submissions made on PC26, but then notes that other Court decisions on when a submission is considered to be "on" a plan change do not apply in the same way in the context of an IPI.[15] The Council's reasoning for adopting this approach appears to be based on the Enabling Housing Act's distinction between 'mandatory' and 'discretionary' elements.[16]

16 We take issue with the Council's approach and reasoning. Under the 'standard' plan change process, most, if not all, proposed changes to a district plan are 'discretionary' as provisions can be amended, removed or added during the process. A council's notification of a plan change only represents the starting point.[17] The IPI process does not warrant taking a different approach in respect to 'discretionary' matters.

17 Simply because the Council "*did not choose to include any rezoning of Deferred Residential zoned land in Plan Change 26*",[18] does not mean rezoning requests are not within scope. In *Bluehaven Management Limited v Rotorua District Council & Bay of Plenty District Council*,[19] the Court concluded that a submission point or approach that is not expressly addressed in the section 32 analysis ought not to be considered out of scope of the plan change, if it was an option that *should* have been considered in the section 32 analysis.[20] Otherwise, a council would be able to ignore potential options for addressing the matter that is the subject of the plan change. It would prevent submitters from validly raising those options in their submissions.

18 In *Albany North Landowners v Auckland Council,*[21] Justice Whata expressly stated that he "*did not accept"* that a submission on the

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14 Reply Legal Submissions on Scope for Triple 3 Farm Limited, dated 38 February 2023.

15 Council's Legal Submissions at [18] and [19].

16 Ibid at [19].

17 As observed in *Environmental Defence Society Inc v Otorohanga District Council* [2014] NZEnvC 70, at [8]-[9].

18 Council's Legal Submissions, at [35].

19 [2016] NZEnvC 191.

20 *Bluehaven Management Limited and Rotorua District Council v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [39].

21 [2017] NZHC 138.

Proposed Auckland Unitary Plan (which was a streamlined planning process) "*is likely to be out of scope if the relief raised in the submission was not specifically addressed in the original s 32 report*".[22]

19 Justice Whata further elaborated that the section 32 report "*does not purport to fix the final frame of the instrument as a whole or an individual provision*", it is amenable to challenge, and there is no presumption that the provisions of a proposed plan are correct or appropriate on notification.[23] Overall, he concluded that the hearing panel was not constrained by the section 32 report for the purposes of establishing whether a submission was on the proposed plan.[24]

20 It is therefore unclear why the Council submits that the usual legal principles concerning scope matters do not apply to the 'discretionary' elements of an IPI. We do not consider the IPI process warrants taking the approach set out by Council.

21 In any event, as noted in earlier submissions, the RVA's and Ryman's submissions are on matters that were within the scope set out in the Council's section 32 report.[25]

CONCLUSION

22 Overall, it is submitted that the Council has not made out the use of section 41D in this case.

Luke Hinchey / **Andrea Curcio Lamas**
Counsel for the RVA and Ryman

3 March 2023

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22 At [130].

23 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [132].

24 Ibid at [134].

25 RVA's and Ryman's legal submissions, dated 17 February 2023, at [18] and [19].