

Before the Independent Hearings Panel
Waipā District Council

under: the Resource Management Act 1991 (RMA)

in the matter of: Submissions and further submissions in relation to
Proposed Plan Change 26 to the Waipā District Plan

and: **Retirement Villages Association of New Zealand
Incorporated**
(Submitter 73)

and: **Ryman Healthcare Limited**
(Submitter 70)

Legal submissions – Session 3: Financial Contributions on behalf
of the **Retirement Villages Association of New Zealand
Incorporated** and **Ryman Healthcare Limited**

Dated: 15 September 2023

Reference: Luke Hinchey (luke.hinchey@chapmantripp.com)
Nicola de Wit (nicola.dewit@chapmantripp.com)

chapmantripp.com
T +64 9 357 9000
F +64 9 357 9099

PO Box 2206
Auckland 1140
New Zealand

Auckland
Wellington
Christchurch



LEGAL SUBMISSIONS – SESSION 3: FINANCIAL CONTRIBUTIONS ON BEHALF OF THE RETIREMENT VILLAGES ASSOCIATION OF NEW ZEALAND INCORPORATED AND RYMAN HEALTHCARE LIMITED

Introduction

- 1 This Panel has previously heard legal submissions presented on behalf of the Retirement Villages Association of New Zealand (*RVA*) and Ryman Healthcare Limited (*Ryman*) in relation to Proposed Plan Change 26 (*PC26*) to the Waipā District Plan (*District Plan*).¹
- 2 These legal submissions address the financial contributions provisions within PC26. They cover:
 - 2.1 The legislative context for financial contributions;
 - 2.2 The issues with the financial contributions regime in PC26, particularly in relation to the lower demand profile of retirement villages and the uncertainty as to the contributions operators would be required to pay; and
 - 2.3 The potential for double dipping between the dual financial and development contributions regimes.
- 3 In summary, it is submitted that PC26 must:
 - 3.1 Provide certainty as to the financial contributions that will be charged, and not retain significant discretion for Council;
 - 3.2 Only charge financial contributions that are proportionate to the demand created by retirement villages;
 - 3.3 Only charge financial contributions that are directly connected to the effects of retirement villages and where there is transparency as to the projects that will be funded; and
 - 3.4 Not result in 'double dipping'.
- 4 In order to meet these requirements, it is submitted that PC26 should be amended as set out in the **Appendix**.
- 5 The RVA and Ryman have filed economic evidence prepared by Mr Gregory Akehurst in relation to financial contributions. A joint witness statement from economists has also been lodged, dated 14 September 2023.
- 6 The evidence of Ms Maggie Owens, Mr Matthew Brown and Ms Ngaire Kerse presented at Session 2 addressed the characteristics of

¹ Legal Submissions dated 21 April 2023.

retirement villages and their residents, and is also relevant to financial contributions.

Legislative context

Resource Management Act

- 7 The RMA is not a funding mechanism. Financial contributions are imposed as conditions. Therefore, conditions must be focussed on the management of the specific effects of a proposal.²
- 8 Section 77E³ of the RMA provides that a local authority may make a rule requiring a financial contribution 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.
- 9 Given that section 77E is a relatively new provision there is a lack of caselaw on its application. However, it is submitted that the same principles from prior cases continue to apply. The longer history of financial contributions is submitted to be a helpful source of guidance in this context.
- 10 Section 108 of the RMA states that a financial contribution 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.⁴ Section 108(10) did not change under the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021, and thus caselaw on its application is submitted to remain relevant.

² RMA, s108AA. *Newbury DC v International Synthetic Rubber Co Ltd* [1980] 1 All ER 731 (HL).

³ Inserted into the RMA pursuant to the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021.

⁴ RMA, s108(10).

- 11 The courts have found that a financial contribution policy can contain a level of discretion.⁵ However, caselaw also warns against the risks of overly discretionary regimes:⁶

...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...

- 12 These warnings are also echoed in *South Port New Zealand Limited*. In that case, the Court established that even where the plan provides a general purpose for a financial contribution, there must still be "*sufficient particularity*" on how a financial contribution is to be determined.⁷ Open-ended discretions have the potential to result in perverse, unforeseeable or inconsistent outcomes.⁸ At the very least, what is required is a method by which a financial contribution can be determined, which may be broadly descriptive or narrowly prescriptive.⁹

Local Government Act 2002

- 13 The Local Government Act 2002 (*LGA*) contains further requirements 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. The experts for the Council and for the RVA/Ryman both agree that it is appropriate for LGA principles to guide financial contributions calculations.¹⁰
- 14 The purpose of funding and financial policies is to provide "*predictability and certainty*" about sources and the level of

⁵ *Retro Developments Ltd v Auckland City Council* CA161/02, 25 February 2003.

⁶ *Auckland City Council v Retro Developments Ltd* HC Auckland AP127/01, 22 July 2002, at [29].

⁷ *South Port New Zealand Limited v Southland Regional Council* C91/2002, 26 July 2002, at [17] and [25].

⁸ At [22].

⁹ At [23] and [28].

¹⁰ Joint Witness Statement – Economics (Financial Contributions), dated 14 September 2023, paragraph 2.1 (b).

funding.¹¹ Section 106 in particular requires that financial contribution policies:¹²

- 14.1 Identify separately each activity for which a financial contribution will be required;
 - 14.2 For each activity, specify the total amount of funding to be sought by a financial contribution; and
 - 14.3 State the proportion of the total cost of capital expenditure that will be funded by financial contributions.
- 15 The LGA also contains the legislative framework applying to development contributions. Most relevantly, it bars a territorial authority from requiring development contributions if it has imposed a financial contributions condition in relation to the same development for the same purpose.¹³

Issues with the PC26 financial contributions provisions

- 16 The Waipā financial contributions regime is intended to ensure that adverse environmental effects are “*funded from the development... that has or will affect the [District’s] infrastructure or that has generated or will generate additional demand*”.¹⁴
- 17 The evidence of Mr Akehurst establishes that the financial contributions charges proposed in PC26 are significantly disproportionate to the demand created by retirement villages and their residents.¹⁵ This lower demand arises from the unique characteristics of retirement villages and their residents, including the age of residents, their frailty and lack of mobility and the on-site amenities provided within retirement villages.¹⁶ The Joint Witness Statement records that Mr McIlrath (economic expert for Council) agrees that “[r]etirement villages have unique attributes and demand profiles that need to be reflected when calculating FCs”.¹⁷
- 18 On the basis of that evidence, it is submitted that PC26 must be amended to ensure the financial contributions charged for

¹¹ Section 102(1) and (2)(d), LGA.

¹² Section 106(2)(d), LGA.

¹³ LGA, s200.

¹⁴ Objective 4.2.

¹⁵ Evidence of Mr G Akehurst, paragraphs 54-56.

¹⁶ Evidence of Ms Owens, at paragraphs 43, 50, 97. Evidence of Mr Brown, at paragraphs 11, 29-32 and 36. Evidence of N Kerse, paragraphs 43-61.

¹⁷ Joint Witness Statement – Economics (Financial Contributions), dated 14 September 2023, paragraph 2.1(e).

retirement villages are proportionate to the demand they create. Without such amendments, the required connection between the adverse effects of the activity and the condition will not be present when financial contributions are required.

- 19 The Section 42A Report says it is not necessary to make those amendments because *“if a development such as a retirement village has a differing set of attributes, based on its general use or if on-site solutions have been provided that will lessen the effects of the development ... then this should be reflected when calculating the financial contributions payable by that development”*.¹⁸ The Council Officer refers to the formula that has been proposed by Mr McIlrath. However, that formula does not provide clarity over the financial contributions that will be charged. Rather, it allows for a case-by-case assessment of a ‘discount factor’ for each development.¹⁹
- 20 A case-by-case assessment gives the Council a very broad discretion to impose financial contributions, and therefore has the potential to result in significant inequity and unfairness. This discretion does not align with the statutory requirements outlined earlier in these submissions. Retirement village operators will not be able to read the District Plan and be assured that they will be fairly charged for their development. Therefore, there is a real risk that developers will be overcharged. The lack of certainty means the prospect of litigation on financial contribution conditions will be high. This situation casts strong doubt on the legitimacy of the financial contribution provisions.
- 21 Mr Akehurst and Mr McIlrath disagree about the level of detail to include in the District Plan. Mr Akehurst considers the inclusion of specific ratios will *“giv[e] certainty to developers and supports an efficient decision-making process”*. Mr McIlrath prefers a case-by-case approach.²⁰
- 22 The rebuttal evidence of Mr McIlrath says the case-by-case approach provides flexibility, and is consistent with the approach Mr Akehurst recommends for stormwater.²¹ However, stormwater management works can vary significantly from village to village. For example, some villages provide large on-site retention ponds, whereas others do not. The characteristics of retirement villages that relate to demand for reserves, transport and water/wastewater

¹⁸ Section 42A Report, paragraph 10.9.5.

¹⁹ Evidence of Mr G Akehurst, paragraphs 25-27.

²⁰ Joint Witness Statement – Economics (Financial Contributions), dated 14 September 2023, paragraph 3.1.

²¹ Rebuttal evidence of L McIlrath, paragraph 10.

are consistent on average (acknowledging some 'unders and overs'). Accordingly, it is submitted that certainty is more appropriate than flexibility in relation to financial contributions for these matters.

23 At present, a fundamental problem with case-by-case assessments is that there is no base technical information. A developer will therefore find it very difficult to establish that their demand is much lower than the expected demand that the contribution is expected to cover. A particularly problematic category is parks reserves and street trees. It is difficult to establish a lower use of reserves when there is no technical information supporting the average use of those reserves by residents.

24 It is therefore submitted that amendments are required to provide retirement village-specific discount factors within PC26 itself. Mr Akehurst has set out these factors within his evidence.²²

Residential amenity

25 The Section 42A Report explains the purpose of the residential amenity financial contributions as follows (emphasis added):²³

... Ms McElrea outlines that **intensification has potential to create several adverse effects in respect to the functionality and amenity of parks and reserves and street trees** including but not limited to:

- loss of natural character as well as a loss of the viewshafts to and from the Waikato River and Karāpiro Stream.
- loss of amenity and usable space as a result of visual dominance of adjoining buildings and increased overland flows from adjoining developments.
- restrictions on activities and development on parks and reserves as a result of reverse sensitivities.
- negative impacts on the health of large specimen trees within reserves and streets.

The additional growth that will occur overtime will be expected to have good urban design outcomes, however, **inevitably the growth will result in less private open space for recreation and fewer large mature trees. The public sphere, including the streetscape, will therefore become increasingly important.** The development

²² Evidence of Mr G Akehurst, page 7, Figure 1.

²³ Section 42A Report, paragraph 10.5.8.

contribution framework for parks and reserves only caters for planned capital expenditure projects to respond to growth in greenfield locations. Financial contributions can be used for growth not planned for or covered by the development contribution framework within existing urban areas, or infill development and additional growth not planned for in greenfield locations. **The residential amenity financial contribution will therefore be used to fund 'urban' parks, which are currently not funded by the development contribution regime.**

- 26 The following paragraphs address the various lines of reasoning within this extract in turn.
- 27 The Council Officer suggests that financial contributions are required to mitigate the direct effects of development on parks and reserves (such as visual dominance). However, the potential for these effects to arise as a result of a retirement village will be considered through the resource consent process²⁴, and can be managed through the design of development. For example, one of the proposed matters of discretion for retirement villages is "*[t]he effects arising from the quality of the interface between the retirement village and adjacent streets or public open spaces*". It is therefore submitted that imposing financial contributions charges for these matters is likely to result in over-regulation. Financial contributions should only be charged where PC26 does not provide a process to ensure the relevant effects are mitigated in the normal way.
- 28 The Council Officer also says that intensification will 'inevitably' result in less private open space. However, it is submitted that enabling more intensive development will, in some cases, allow more open spaces to be retained (compared to in-fill development). In this respect, the Section 42A Report fails to acknowledge the evidence of Ms Owens and Mr Brown as to the large landscape and open spaces that retirement villages provide.²⁵ It also does not respond to the evidence of Mr Akehurst on the very limited extent to which retirement village residents use public open spaces.²⁶
- 29 Finally, the Council Officer notes that the residential amenity financial contribution will fund urban parks that are not covered by

²⁴ It is acknowledged that the RVA and Ryman have sought permitted activity status for the land use component of retirement villages. However, this activity status will not apply to the construction of a new retirement village. The purpose of the activity status is rather to make it clear that retirement villages are anticipated activities in the relevant zones.

²⁵ Evidence of Ms Owens, at paragraph 97. Evidence of Mr Brown, at paragraphs 31 and 36.

²⁶ Evidence of Mr G Akehurst, paragraphs 53-60.

the development contribution regime. As Mr Akehurst notes, there is no clarity provided as to how these financial contributions will be used. A robust assessment of the need for those works generated by growth is lacking.²⁷ This lack of robust assessment is evident in Mr McIlrath's statement. For example, he states that "*a series of example projects*" were identified by Council to create an annual budget for which residential amenity financial contributions would be required.²⁸ There is a lack of transparency in relation to the projects that the contributions are intended to fund and the costs of those projects. This lack of transparency directly conflicts with the LGA principles noted earlier.

- 30 The rebuttal evidence of Mr McIlrath says this lack of transparency is due to the "*unplanned nature of intensification*" requiring Council to be responsive to growth.²⁹ The complexity is acknowledged, but that does not remove the need for transparency where Council intends to collect money for a particular purpose.
- 31 For all of these reasons, it is submitted that the residential amenity financial contributions should not be imposed on retirement villages. If the Panel considers such a charge is appropriate, it is submitted that it should be reduced to an amount that is proportionate to the demand created by retirement villages, as set out in Mr Akehurst's evidence.³⁰

Te Ture Whaimana

- 32 The Section 42A Report explains that the purpose of the Te Ture Whaimana financial contributions is "*to give effect to Te Ture Whaimana*".³¹ The contributions are intended to be used for a variety of projects relating to ecological, water quality, public access and cultural matters.³²
- 33 As for residential amenity financial contributions, the Council has identified 'example projects'³³ only. So there is a lack of transparency as to the actual projects the contributions might fund. Mr Akehurst considers the Council has not identified projects "*that relate to the effects of future development ... so charging FCs for*

²⁷ Evidence of Mr G Akehurst, paragraphs 51-52.

²⁸ Evidence of L McIlrath, paragraphs 6.6 and 7.5 and Appendix 2.

²⁹ Rebuttal evidence of L McIlrath, paragraph 21.

³⁰ Evidence of Mr G Akehurst, paragraph 66.1.

³¹ Section 42A Report, paragraph 10.6.1.

³² Section 42A Report, paragraph 10.6.4.

³³ Evidence of L McIlrath, Appendix 2.

them is not possible".³⁴ Mr McIlrath takes the view that modelling of Te Ture Whaimana financial contributions will require assumptions in the context of unplanned growth.³⁵ But, he has not responded to Mr Akehurst's evidence identifying that even the project examples do not appear to relate to the effects of future development. The projects are designed to address existing issues.

- 34 The legislative framework outlined above does not provide for financial contributions to be charged to give effect to national policy statements, such as Te Ture Whaimana. Financial contributions must be directly connected to the adverse effects of an activity. It is submitted that the evidence for Council does not identify a direct connection between the effects of new development and the projects for which the Te Ture Whaimana financial contributions are intended to be used.
- 35 The Te Ture Whaimana financial contributions also address matters that are within the remit of the regional council³⁶ (such as water quality) or are covered by parts of the District Plan outside the scope of PC26 (such as cultural sites³⁷). In many cases, retirement villages will be required to obtain regional or district consents if they impact these matters (eg for stormwater discharges). The effects of those activities will be required to be mitigated, in the normal way, through conditions on those consents. As for the residential amenity financial contributions above, it is submitted that imposing financial contributions charges for these matters is likely to result in over-regulation.
- 36 As identified in the evidence of Mr Akehurst, the projects should be funded by rates if the Council cannot produce evidence that they relate *"to addressing the additional negative effects of new housing across Waipa District"*.³⁸
- 37 As for residential amenity above, the rebuttal evidence of Mr McIlrath says the *"unplanned nature of intensification"* means it is complicated to attribute costs to growth and existing households.³⁹ The complexities are acknowledged, but the Council does not appear to have taken into account the fact that new developments will

³⁴ Joint Witness Statement – Economics (Financial Contributions), dated 14 September 2023, paragraph 3.4.

³⁵ Joint Witness Statement – Economics (Financial Contributions), dated 14 September 2023, paragraph 3.6.

³⁶ RMA, s30.

³⁷ Waipa District Plan, Section 22.

³⁸ Evidence of Mr G Akehurst, paragraph 45.

³⁹ Rebuttal evidence of L McIlrath, paragraph 17.

generally be expected to mitigate effects through the consenting process. Whereas existing development in many cases will not have done so. As already submitted, imposing financial contributions in this context appears to be over-regulation of and unrelated to new development.

Double dipping

- 38 The interface between financial contributions charged under the RMA and the development contributions regime in the LGA creates a risk of double dipping. This overlap has traditionally resulted in retirement village operators being significantly overcharged, for their much lower demand on public infrastructure than typical housing.
- 39 Unfortunately, the LGA and RMA regimes are unhelpfully disconnected. This means that retirement village operators are often faced with councils leveraging community facilities and infrastructure 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.
- 40 The Joint Witness Statement records that both Mr Akehurst and Mr McIlrath agree that “[c]are needs to be taken during implementation to avoid overlaps between FCs and DCs”.⁴⁰
- 41 As Mr Akehurst notes, the significant overlap between the scope of financial contributions as proposed in PC26 and Waipa Development Contributions Policy means there is a real potential for double dipping to occur in this District.⁴¹
- 42 It is acknowledged that the provisions in Chapter 18 contain a number of references to financial contributions being required for works not otherwise funded by development contributions.⁴² However, it is very difficult for a developer to work out whether it is being charged twice. This difficulty is particularly pronounced given the lack of transparency in relation to the projects the Council intends to apply financial contributions to. The Council is effectively saying ‘trust us’ to developers.
- 43 It is submitted that it is necessary to address the overlapping coverage of the financial contributions and development

⁴⁰ Joint Witness Statement – Economics (Financial Contributions), dated 14 September 2023, paragraph 2.2(c).

⁴¹ Evidence of Mr G Akehurst, paragraphs 61-63.

⁴² For examples, 18.5.1.6.

contributions policies to ensure operators are not put to the cost of challenging 'double dipping' charges.

Conclusion

- 44 For all the reasons set out above, it is submitted that PC26 should be amended as set out in the Appendix.

Luke Hinchey and Nicola de Wit

Counsel for Ryman and the RVA

15 September 2023

**APPENDIX – AMENDMENTS TO FINANCIAL CONTRIBUTIONS
CHAPTER**

Section 18 – Financial Contributions

<p>Explanatory Text</p> <p>Text that has been deleted is shown in strikethrough.</p> <p>Text that has been added is shown as <u>underlined</u>.</p> <p>Consequential renumbering may occur throughout.</p> <p>Text that is not underlined or struck through is original text from the operative <u>Waipā</u> District Plan and will be carried over as currently drafted.</p> <p>Additional changes in response to submissions are shown in <u>blue underlined</u> or strikethrough with the relevant submission point following e.g. (1.1).</p> <p>Ryman <u>RVA changes in yellow underline and strike-out</u></p>

...

18.1.2 2.2 Financial contributions ~~achieving the Plan's objectives and~~ are distinct from, and in addition to, Council's Development Contributions Policy (DCP), ~~which and~~ provides Council with an alternative method to obtain contributions to fund infrastructure manage effects (32.15) required as a result of growth. Under section 200 of the Local Government Act, the Council cannot collect financial contributions for the same development and for the same purpose as a development contribution (and vice versa). Financial contributions are assessed, calculated, and directly related to the effects of subdivision and development of land. Either Where financial contributions will be used on their own, or to supplement development contributions will not be used for the same purpose where the development contributions are insufficient to fully avoid, remedy, mitigate or compensate for the adverse effects of the activity. Table 18.1 below sets out the application of both development and financial contributions.

...

18.1.3 2.3 ~~The general purpose of In this Plan, financial contributions are used for the following reasons:~~ (a) To to (32.15) recover from developers and/or applicants a fair, proportionate and reasonable contribution, in the form of money, or land, or a combination of both money and land, which:

- (i) (a) Avoids, remedies, or mitigates adverse effects of the proposed activity on the environment (accounting for any other mitigation proposed and the cumulative effects from other developments), or ensures positive effects (accounting for any positive effects of the proposal) on the environment to offset any adverse effects (79.291), including but not limited to, effects associated with:
- (i) Three waters/transport network connections (32.15) Three waters connections, network improvements or capacity upgrades when a development is located outside of Councils reticulated service area(s) and seeks to connect; subject to Council;

...

18.4.2.5A When calculating and determining Financial Contributions under this Plan, the Council must ensure that the matters addressed by such Financial Contributions are distinct from and do not overlap with, any Development Contributions imposed under the Local Government Act 2002 and meet the other requirements of section 200 of that Act.

18.3.2.3 ~~4.2.67 (32.15)~~ Ensuring that the amount of financial contribution required **fairly and** reasonably reflects the **proportionate** cost of avoiding, remedying or mitigating the adverse effects, or the **proportionate** cost of ensuring positive effects on the environment to offset ~~any (79.291)~~ adverse effects of the activity (accounting for any other avoidance, remediation or mitigation proposed or other positive effects) and the cumulative effects from other developments).

18.4.2.7A Recognise that the costs for council services and infrastructure associated with retirement villages are expected to be substantially less than those from typical multi-unit developments, on a per unit basis, due to the age and mobility of older residents, onsite amenities and operational efficiencies. The discount factors or other demand assumptions to apply to retirement villages for all financial contributions (compared typical dwelling) are as follows:

FC Category	Independent Units	Assisted Living/ Care/ Memory Units
Residential Amenity - Parks, Reserves, Open Spaces, Public Amenity, Streetscape improvements and other social infrastructure	0.05	0.01
Traffic and Transport	0.27	0.24
Water/ Wastewater	0.40	0.37
Stormwater	based on onsite offsetting/design	
Te Ture Whaimana	Zero FCs	

...

18.5.2.3 ~~For each additional bedroom at the site created by the development, a fixed financial contribution of \$400.00 shall be required. The financial contribution collected for residential amenity shall be based on the following calculation to a maximum amount of \$1,300 per dwelling:~~

$$\text{Financial contribution charge} = (\text{FC} * \text{n}) * \text{F}$$

where:

$$\text{FC} = \frac{\text{financial contribution per dwelling } (\$1,300)}{\text{number of new dwellings}}$$

F = discount factor to account for development specific attributes or the value of other contributions for the same purpose (32.15)

Primary relief unless a robust assessment of Residential amenity is undertaken: Retirement villages will not be charged Residential amenity financial contributions.

...

18.5.2.7 ~~For each additional bedroom at the site created by the development, a fixed financial contribution of \$400.00 shall be required. The financial contribution collected for Te Ture Whaimana shall be based on the following calculation to a maximum amount of \$1,500 per dwelling:~~

$$\text{Financial contribution charge} = (\text{FC} * \text{n}) * \text{F}$$

where:

$$\text{FC} = \frac{\text{financial contribution per dwelling } (\$1,500)}{\text{number of new dwellings}}$$

F = discount factor to account for development specific attributes or the value of other contributions for the same purpose (32.15)

Retirement villages will not be charged Te Ture Whaimana financial contributions.