

Before the Independent Hearings Panel
Waikato, Waipā and Hamilton

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

in the matter of: submissions and further submissions in relation to Plan Change 12 to the Hamilton City Plan, Plan Change 26 to the Waipā District Plan and Variation 3 to the Proposed Waikato District Plan

and: **Ryman Healthcare Limited**

and: **Retirement Villages Association of New Zealand Incorporated**

Legal submissions for **Ryman Healthcare Limited** and the **Retirement Villages Association of New Zealand Incorporated** in response to Direction 15

Dated: 9 June 2023

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**LEGAL SUBMISSIONS FOR RYMAN HEALTHCARE LIMITED
AND THE RETIREMENT VILLAGES ASSOCIATION OF NEW
ZEALAND INCORPORATED IN RESPONSE TO DIRECTION 15**

- 1 These legal submissions respond to Direction 15 from the Independent Hearing Panel inviting counsel to file written submissions on the relevance of the High Court decision *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948 (*Southern Cross decision*).
- Southern Cross decision supports RVA/Ryman legal submissions on NPSUD relevance**
- 2 The *Southern Cross* decision provides additional support for the legal submissions made by the Retirement Villages Association of New Zealand (*RVA*)¹ and Ryman Healthcare Limited (*Ryman*)² for the Joint Opening Hearing and Waipā District Plan Change 26 (*PC26*) Hearing. In those hearings, we submitted that the National Policy Statement for Urban Development 2020 (*NPSUD*) as a whole is relevant to the Panel’s decision. The decision means you cannot consider the NPSUD as being restricted to Policies 3 and 4 or give those provisions greater weight than other provisions of the NPSUD.
 - 3 The legal submissions for the Joint Opening Hearing stated that:

[12] It will be seen that this [IPI] process is not about going through the usual motions of a schedule 1 plan making process. And, it is not about providing the ‘bare minimum’ to respond to the various legislative steps. Rather, the task ahead is a very important one. The IPIs and the ISPP are a means to solve an important national housing issue. Counsel respectfully submits that the above overarching legislative purposes - addressing New Zealand’s housing crisis, accelerating housing supply, and removing planning restrictions - should therefore resonate heavily in all of your decision-making through the ISPP.
 - 4 Further submissions on the relevance of the NPSUD were made in paragraphs 15-26, 31-33, 35-45 and 84-90 of the legal submissions for the PC26 Hearing. Mr John Kyle’s planning evidence also highlighted particularly relevant provisions of the NPSUD in support of the provisions proposed by Ryman and the RVA.

¹ Waikato – Submitter 107; Waipā – Submitter 73; and Hamilton – Submitter 330.

² Waikato – Submitter 108; Waipā – Submitter 70; and Hamilton – Submitter 294.

Application of the *Southern Cross* decision to Intensification Planning Instruments

- 5 The *Southern Cross* decision considered whether a private plan change was required to give effect to the NPSUD as a whole or could “*pick and choose*” the extent to which it would give effect to the NPSUD.³ The High Court determined that the decision-maker must consider the extent to which the private plan change would give effect to all of the provisions of the NPSUD.⁴ The reasons for this determination were:
- 5.1 The requirement for a district plan to give effect to any national policy statement: RMA, s75(3)(a).⁵
- 5.2 The NPSUD applies to all local authorities that have all or part of an urban environment within their district/region, not just to planning decisions: NPSUD, clause 1.3.⁶
- 5.3 The NPSUD requires local authorities to give effect to its provisions as soon as practicable, with a two-year deadline for complying with certain policies: NPSUD, clause 4.1.⁷
- 6 The High Court’s reasons are all applicable to Intensification Planning Instruments (*IPI*). However, IPIs are subject to additional provisions to those considered in the *Southern Cross* decision. Most relevantly, the scope of an IPI is legislatively confined through section 80E of the Resource Management Act 1991 (*RMA*).
- 7 Nevertheless, section 80E does not override the general requirement for a district plan to give effect to the NPSUD. An IPI must implement the MDRS and give effect to Policies 3 and 4 of the NPSUD (mandatory provisions), but section 80E does not confine an IPI to these matters. An IPI may also (among other things) “*amend or include... related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on— (A) the MDRS; or (B) policies 3, 4, and 5 of the NPS-UD, as applicable*” (discretionary provisions).⁸
- 8 As submitted at paragraph 86 of the legal submissions for the PC26 Hearing, any ‘related provisions’ are within scope provided they are

³ *Southern Cross* decision, paragraph 72.

⁴ *Southern Cross* decision, paragraph 88.

⁵ *Southern Cross* decision, paragraph 74.

⁶ *Southern Cross* decision, paragraphs 78 and 80.

⁷ *Southern Cross* decision, paragraphs 82-83.

⁸ RMA, s80E(1).

necessary to either enable or, as appropriate, restrict housing intensification activities. The *Southern Cross* decision supports the submission already made that the NPSUD as a whole must inform the development of 'related provisions'.

- 9 In addition, it is submitted that the NPSUD as a whole informs how to give effect to Policies 3 and 4 within a particular planning document. For example, as per normal planning practice, the NPSUD objectives must inform the interpretation of policies.
- 10 Accordingly, it is submitted that the *Southern Cross* decision supports a broad approach to the consideration of the NPSUD in your decision making. That is, unless expressly outside the scope of the IPI (which it is submitted is relatively wide in term of enabling housing intensification), the IPI must give effect to the NPSUD as a whole in this process because it is practicable to do so. The Panel must therefore consider the NPSUD as a whole when making its determinations on the mandatory provisions and the discretionary provisions.
- 11 Finally, it is submitted that it is not necessary or appropriate for the Panel to give greater weight to Policies 3 and 4 than other NPSUD provisions. The RMA provisions relating to IPIs and the Intensification Streamlined Planning Process amend the wording of the NPSUD provisions in one respect only and do not elevate Policies 3 and 4.⁹ The remainder of the provisions set out a process to expediate the implementation of the NPSUD – focused on, but not limited to, the medium density residential standards and Policies 3 and 4. Policies 3 and 4 are not inconsistent with the other provisions of the NPSUD (being the approach to achieve the broader intensification goals, as reflected in the statutory background) and therefore there is no conflict requiring a weighting exercise.
- 12 Counsel notes that the hearings for the Hamilton and Waikato IPIs are upcoming and these legal submissions may be developed in relation to the specific submission points relevant to those IPIs.

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9 June 2023

⁹ RMA, s77S.