Commission for Financial Literacy and Retirement Income

Summary of Submissions

received by the Retirement Commissioner
in November 2011
on proposed variations to the
Retirement Villages Code of Practice 2008

Published March 2012

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Summary of Submissions

Introduction

As Retirement Commissioner, I am required under sections 90(4) and 90 of the Retirement Villages Act 2003 to seek submissions on the three sets of proposed variations to the Code of Practice 2008 I have received. I am then required to make recommendations to the Minister for Building and Construction on the proposed variations.

About this document

This paper reports on the main part of my consultation process. My office has also undertaken consultation meetings with key sector groups.

The summaries below set out the main comments made in the 151 submissions I received over the period October–November 2011 on the three proposed sets of variations to the Code of Practice 2008. They provide an overview of the submissions and set out the key points made.

The summaries of the submissions are organised by the issue to which they relate:

- Repayment of capital sum should a village be destroyed and not rebuilt
- Insurance arrangements
- Payments and charges due to the resident on termination or end of occupation

About the process

A consultation document was produced with the Department of Building and Housing and sent out to the sector on 6 October 2011. Public notice of the consultation process on the three variations was gazetted on 6 October 2011.

Part one of the consultation document sought submissions to the Retirement Commissioner. The format of the consultation document asked the same set of questions about each variation. This gave some structure to the analysis but it is important to recognise this was not designed as a survey and the responses should not be given the statistical validity of a survey. What the submissions do give though is a strong sense of the importance of particular issues to those in the retirement village sector. The process I intend to follow from now is to use all the information gathered to inform my recommendations and to talk with the Minister about my recommendations in March 2012.

History of the issue

Five retirement villages sustained damage in the Canterbury earthquakes. Three of these were subsequently confirmed as being in the red zone. They have closed and cannot be rebuilt on that land. This required the termination of the occupation right agreements for 194 affected units under the no-fault exit provisions. The residents from those units had to find alternative accommodation.

The Canterbury earthquake experience has led to questioning of the adequacy of the Code of Practice in such situations. Just over three and a half thousand village residents were sufficiently concerned to petition the Government on changes to the Code of Practice 2008 over this issue.

The Retirement Villages Code of Practice 2008 was issued by the Minister for Building and Construction. The Code sets out the minimum requirements that operators of retirement villages must meet, or ensure are met, to fulfil their legal obligations under the Retirement Villages Act 2003.

I received three sets of proposed variations to the Code. They were from the:

- Association of Residents of Retirement Villages, Auckland Region (ARRV)
- Retirement Villages Association (an association of retirement village operators) (RVA)
- Department of Building and Housing (DBH)

The proposed variations to the 2008 code concern the termination of an occupation right agreement in an event such as an earthquake where the unit or village is required to be rebuilt or the Occupation Right Agreement (ORA) terminated.

Nature of the issue

The proposed variations are an attempt to address issues which have the following salient features:

- Complexity of the insurance provisions
- Both an immediate and a long-term response could be needed (e.g. interim changes to the Code in the short-term)
- Cannot be resolved effectively without further information, e.g. the need for ongoing input on insurance issues as they are resolved in the Canterbury earthquakes situation

Constraints

The constraints in this exercise were the:

- Short time available to develop the consultation document and provide information on the likely impacts of the proposed variations
- Gaps in technical information necessary for recommendations to be made by the Retirement Commissioner
- Unavailability of information on some insurance issues, e.g. the extent to which there are insurance products available to meet residents' and operators needs
- Nature of a written consultation process, which being a largely a one-way flow of views, limits the potential for making cross-submission comparisons.

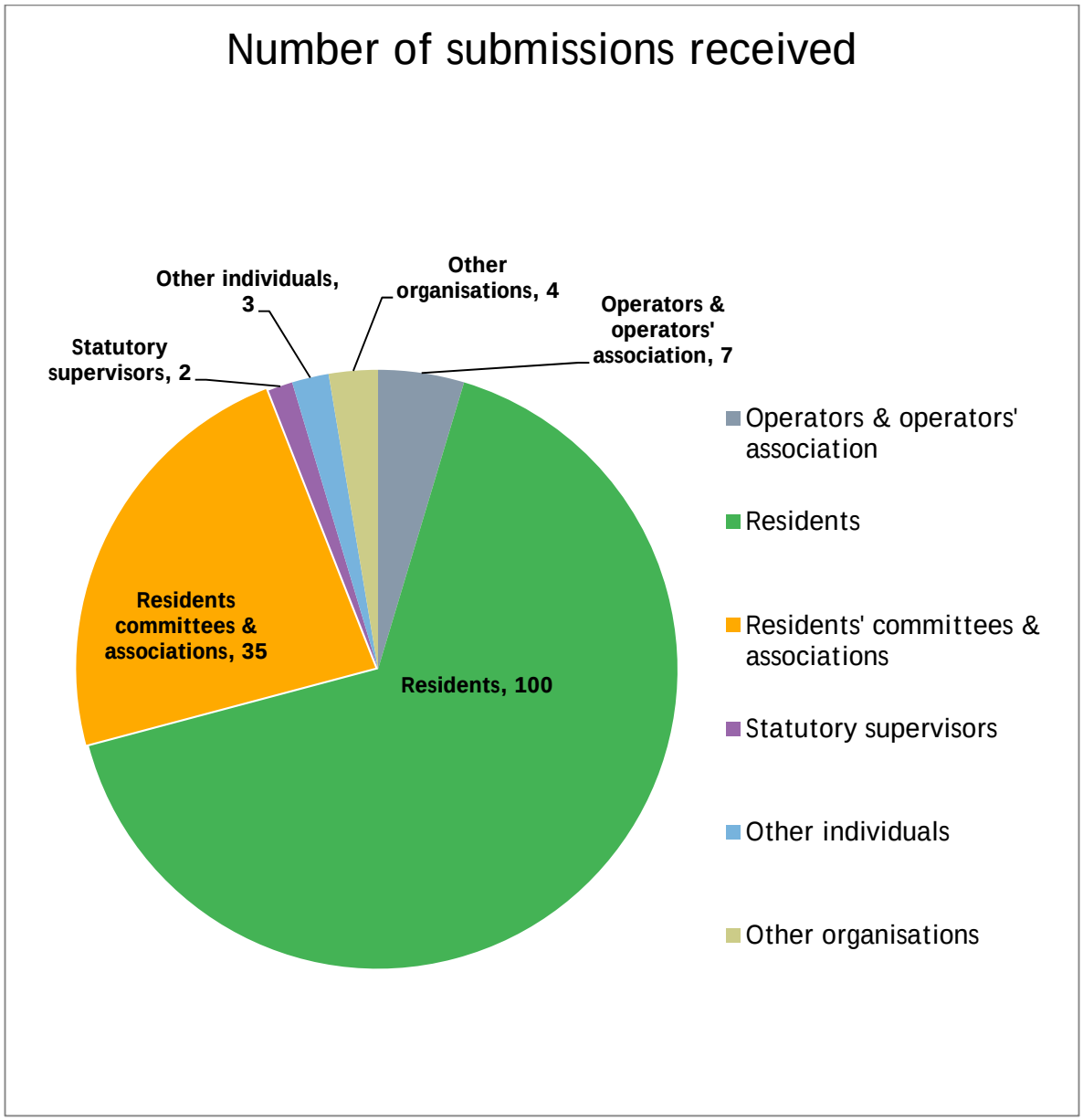
Number of submissions received

The submission process was a joint one run by the Department of Building and Housing and the Retirement Commission. A separate and independent analysis was undertaken by each organisation. In part one of the consultation document the Retirement Commissioner sought views on the three proposed variations. Part two asked a set of questions from the Department of Building and Housing on their variation.

The submissions received numbered 151 and were made up as follows:

No.	Responses from...
100	Individual residents
32 (2800+ residents)	Residents' groups /committees/body corporate representatives Twenty of these residents' committees/groups stated the number of residents their submission represented and many included all those resident's signatures on their submission. These twenty submissions represented 2,787 residents in total.
3	Regional resident associations representing a large number of villages
7	Operators and the operators' association
2	Community law centres
1	Combined submission from the national bodies of Grey Power and Age Concern
1	A Grey Power regional group
2	Statutory supervisors (includes the Trustees Corporation Association)
3	Other individuals
151	**TOTAL**

This pie chart shows the breakdown of submissions received.



Overview of submission content

As each submission can represent either an individual, a committee, an association or an organisation representing a number of people, this summary does not include statistics on how many submissions supported or did not support particular variations. Rather, this summary aims to represent the range and weight of views expressed, and where relevant, notes the common concerns of particular types of submitters.

Some features of the submissions were:

- With respect to the issue of repayment after termination of an ORA in a no-fault situation there were a number who supported all three variations. Few submitters supported only one of the variations and made no qualifying comments.
- Only a small number of operators made individual submissions, as many were represented by the RVA submission. The RVA clearly supported their own variation but also made a number of wording suggestions on the DBH variations should the DBH approach be preferred.
- The number of wording changes proposed to sub clauses in the variations meant there were many submitters who supported the bulk of a variation, apart from the wording of one or two sub clauses. Also, hybrid variations were common, with some submitters supporting a particular variation but with the addition of wording from another variation. There were a number of submitters who said they supported a particular variation only in part and/or who didn't find any of the variations satisfactory.

There were several submissions which provided substantial rewording of clauses which could usefully be referred to if the clauses are redrafted. The themes or issues are reported in this summary, but for reasons of space they are not all fully reprinted here. The Retirement Commissioner is able to provide copies of the more comprehensive documents on request.

Common themes

Commonly occurring key themes arising from the submissions were:

- the need for a working group on insurance issues to examine options and ensure feasibility
- the need for an interim response, e.g. the inclusion of Variation 1 into the Code
- the need for the role of statutory supervisors to be strengthened and clarified
- that the variations all had merit in parts and there was common ground on the importance of effective disclosure and the need for clear wording in the Code.

Repayment of capital sum should a village be destroyed and not rebuilt

All three parties proposed variations to the clauses specifying the payment to residents when their occupation right agreement is terminated in a no-fault exit situation and their unit will not be rebuilt. The ARRV-(Auckland region) variation addresses this in clause 22 - *Fire and Accidental damage*. The RVA and DBH propose the issue is dealt with by additional sub clauses to clause 47 *Grounds for termination of the unit is damaged or destroyed through no-fault.*

Variation 1, Issue 1, Clause 22(7)(c): Repair or reinstatement of property

Proposed by Association of Residents of Retirement Villages (Auckland region)

This table shows the alternative clause 22(7) (c) proposed by the ARRV (Auckland).

Current wording	**Proposed wording**
Clause 22 Fire and accidental damage	**Clause 22 Fire and accidental damage**
Repair or reinstatement of property 22(7) The occupation right agreement for a residential unit that is owned by an operator must: a) provide that, except in certain specified circumstances (if any), if the unit is damaged or destroyed the operator must fully repair or replace it as soon as practicable b) state the circumstances (if any) when a unit that is damaged or destroyed may not be full repaired or replaced c) state the procedure to be followed if the unit is not to be fully repaired or replaced if it is damaged or destroyed	**22.7 Repair or reinstatement of property** 22(7) The occupation right agreement for a residential unit that is owned by an operator must: a) No change b) No change c) *state that if the residential unit cannot be replaced following an insurable event, that upon termination of the occupation right agreement, the resident will receive:* i. *the full insurance proceeds paid to the operator for that residential unit*

Current wording	Proposed wording
Clause 22 Fire and accidental damage	**Clause 22 Fire and accidental damage**
	OR ii. the original capital sum paid by the resident for the right to occupy whichever is the greater, without any capital or other deductions normally made on the termination of the occupation right agreement.

Responses in support of the variation

Of those who supported the variation, many made a comment regarding their support. The key themes were:

- It gives certainty, clarity, and peace of mind.
- It is fair.
- It provides financial protection.
- It meets the financial need of residents to be re-housed in a similar home.
- It gives financial flexibility and security.
- It maintains the capital value of the unit.
- It provides protection if insurance was insufficient.

Comments

Some comments were conditional or on additional aspects:

- The variation is only a temporary measure to provide protection.
- The role of the statutory supervisor is important.
- Would support the variation if it was combined with variation 2 (RVA).

Concerns

Concerns about insurance aspects were:

- Want replacement insurance
- May only be indemnity value
- Cost
- Could be a delay in payment, e.g. due to legal proceedings.

Amongst those supporting or only partially supporting this variation, the following concerns were expressed about maintaining the value of the capital sum paid by residents:

- Needs adjustment for inflation
- As the full insurance proceeds will only be the indemnity value of the "bricks and mortar" in addition there should be a share of any compensation paid for the land.

- If the licence to occupy had been purchased some years ago then the repayment of the capital sum will not reflect the value today due to inflation.
- The proposal only addresses the amount to be paid. Clause (c) i) appears to equate the residents' entitlement to the cost of rebuilding a unit - not the cost of acquiring an ORA in an alternative village (which may be more or less than the cost of rebuilding). Sub clauses (i) and (ii) may still leave the resident short of sufficient capital if the operators insurances are indemnity only.

Suggestions for improvement

Of those who supported the variation but proposed additional or alternative wording, the suggestions for improvement included:

- Specifying a time frame for the repayment
- Removing the term 'insured event' to make it wider and include other 'Acts of God' events
- Including land compensation monies
- Specifying how overall monies are distributed
- Inflation-proofing by using the building index to maintain capital value
- Putting in clause 47 of the Code of Practice – Grounds for termination
- Not basing the amount to be paid on insurance but on full market value (GV)
- Specifying that full replacement insurance be held
- Including the option to relocate.

Accommodation replacement to same value

Several submissions commented the variation was not the perfect solution because it might still not make accommodation replacement to the same value possible. It was good in that it provided for an absolute minimum of the original capital sum or for residents to benefit from insurance payout which would protect long term residents. However,

> *"At the same time, we acknowledge that it is not a perfect solution. More consideration needs to be given to how best to insure the residents' occupation right agreement so as to provide sufficient funds to purchase an equivalent agreement in the event of a no-fault exit. We recommend that the change to clause 22 (7) (c) proposed by the Association of Residents of Retirement Villages (Auckland region) be adopted as a stop-gap measure to bolster consumer protection while insurance issues receive the attention they require." (Grey Power/Age Concern)*

Additional wording

The Grey Power/Age Concern submission proposed some additional wording and restructuring to all three of the clauses in the variations. They were concerned to see the resident's role in

the decision making process enhanced, and for consumer protection to be enhanced by emphasising the outcome for residents rather than stating the process.

They supported the ARRV Auckland variation as being urgently required and being given priority over all the other issues covered in the consultation document.

> *"The ARRV wording ensures that, as an absolute minimum, residents would be repaid their full capital sum (no deferred management fee deducted) in a no-fault exit situation. It also allows residents to benefit if the insurance payout exceeds their capital sum - this provides added protection for long-term residents whose capital sum no longer bears any relation to market value. We regard this as a fair and sensible minimum standard."*

Other concerns

Others were concerned that:

- By itself, this variation simply places the resident's need ahead of the operator's need and may leave the operator unable to develop elsewhere
- No one should profit from an event, all monies should be distributed equitably between all parties. There should be a strong incentive to rebuild units.

One resident had no specific response to the variation but gave the example of their village policy, which is effectively that proposed by Variation 1, and commented on how this has been clearly explained to them.

In supporting their variation the ARRV (Auckland region) made the point that they saw it as a short-term solution for an immediate problem. In the long term they wanted the Code fully reviewed. They supported the re-instatement of the original clause from the 2006 Code, and proposed that profession assistance and a working group from across the sector be used for resolving the wider issues.

Responses not supporting the variation

Reasons

Of those who didn't support the variation, those residents, residents committees and associations, and a Grey Power regional committee who gave a reason said:

- It doesn't provide a market value replacement
- Older contracts don't reflect current value
- Doesn't fully preserve rights of residents. Not outcome orientated, i.e. to re-house residents in equivalent housing at no cost to resident
- There will be increased costs to residents.

Concerns

The majority of comments were around insurance issues. Concerns expressed included:

- Want full replacement insurance specified and held
- Too time consuming and difficult to apportion insurance monies
- The insurance clause is about the cost of rebuilding the unit not the cost of an ORA in an alternative village
- Where a village has indemnity insurance only, it will be insufficient to replace residents capital
- There should be a share of any compensation paid for the land
- Variation 1 is very basic, with no recognition of the current issues around insurance, etc.

Objectives

Others expressed their objective:

- It is essential that residents' units be insured by operators at replacement or current market value to maintain value for long term residents
- Must strive for provision for reimbursement of replacement value or current market value
- The insurance clause is about the cost of rebuilding the unit not the cost of purchasing an ORA in an alternative village.

Some were concerned about the effect on residents versus operators and did not fully support the variation because it did not provide the cost of a replacement ORA in another village, might leave insufficient capital for residents, and puts residents needs ahead of the operators.

> *"By itself, this provision simply places the residents need ahead of the operators need and may leave the operator unable to develop elsewhere."*

The operators' association RVA did not support residents receiving the full insurance proceeds paid to the operator. One operator did not support this variation because:

> *"private operators would not be able to receive 100% of ORA contract amounts from an insurance company. They only receive an amount per a valuer's certificate. The land component is not insurable. Then how does an operator pay back their bank loans and receive any funds themselves?"*

Another operator said it lacked fairness to both parties.

Statutory supervisors reasons for opposing the variation

The statutory supervisors represented by the TCA did not support the variation "*Payment of the full insurance proceeds ignores the operator's interest in the residential unit. This area will require input from the insurance industry, as it is unclear whether an operator can*

obtain insurance to cover their potential profit in an occupation right agreement" and suggested

> *"There may be room for some proportion of the difference between the insurance value and the original capital sum paid to be available to be paid in recognition of the termination of an occupation right agreement."*

Wording suggestions

Wording suggestions by those who didn't support the variation included:

- Change wording of full insurance proceeds to "*Full replacement insurance proceeds*".
- Clause 22 (7) (c) (ii) should say "*Market value paid to the resident, after independent valuation, whichever is the greater, without any capital or other deductions normally made on the termination of the ORA*"
- Reference to insurance should be removed and be replaced with full market value at the time of the last valuation *plus any compensation received for the land appropriate to the residential unit."*
- "*adjusted by changes in the building cost index since the original capital sum was paid*"
- One operator said clause 22 (7) (c) i) would involve the valuer putting an individual value for each unit's replacement of the building only.

Other comments

Other comments were that:

- There is no point in changing the Code of Practice unless a resident is fully protected and can buy another home, at current market value. "*What do you do with all these elderly people who have lost their home through a no-fault exit provision - some don't have family, some families don't want their care.*"
- No party should profit from an incident that leads to a no-fault exit situation. The operator will receive the windfall payment of insurance (which the residents have effectively paid the premium for through the village fees) plus any compensation for the land. These payments should be distributed equitably between all parties. "*Residents do after all buy a licence to occupy for life and the best result would be for the units to be rebuilt and the code should have a strong incentive to achieve this*."
- The large corporate operators could absorb the above loss, but private operators could not. "*If the private operator paid out all the insurance proceeds there would be no funds over to compensate the business loss. The operator would be left a valueless piece of land that cannot be built on. How is this fair and viable for a private operator*?"

RVA reasons for opposing the variation

The RVA opposed the variation because:

- Distinguishing individual unit payments, especially when they are part of an apartment block housing a rest home, hospital and common areas, will be a very difficult exercise to do fairly and is likely to lead to endless debates about the correct amount of payment to resident
- The original capital sum is a fixed amount, and not being open to dispute, is the fairest and simplest way to proceed,
- There is a real risk that banks would not fund retirement villages because they would not know the level of the first charge to the statutory supervisor (i.e. the insurance payments due to residents under this model) which would be a moving target.

One operator had no view on the variation providing resident-owned houses are not included.

Variation 2, Issue 1, Clause 47(3): Grounds for termination

Proposed by Retirement Villages Association

This table shows the alternative clause 47(3) proposed by the RVA concerning grounds for termination if the unit is damaged or destroyed through no-fault.

Current wording	Proposed wording
Clause 47 Grounds for termination if the unit is damaged or destroyed through no-fault	**Clause 47 Grounds for termination if the unit is damaged or destroyed through no-fault**
	New sub clause: 47(3) If the residential unit is not to be replaced following an insured event within a time that is reasonable in the circumstances, upon termination of the occupation right agreement, the resident will receive back the full capital sum that they paid to the operator for their occupation rights to that residential unit, without any deduction for deferred management or exit fees (the 'fixed deduction' as defined in this Code) normally made under the occupation right agreement upon termination and repayment. The payment to the resident by the operator in this event shall be made no later than five working days after <u>all</u> insurance monies for land (if applicable) and buildings in respect of the insured event have been paid to the operator and / or the statutory supervisor, or within five working days from the date on which sufficient insurance monies have been received by the operator, if sooner. For the avoidance of doubt, any due but unpaid service or weekly fees in respect of the residential unit up to the date of the insured event or any other monies owing to the operator are entitled to be collected by the operator at the time of repaying the resident their full capital sum.

Support for variation 2

Many of those supporting variation 2 issue 1 also supported variation 1**.** Their comments indicate they saw this variation as building on variation 1, or as an additional clause to that proposed in variation one. They were positive about the additional specification of timing of payout, the payment of weekly fees, and that it gave clarification and certainty.

> *"Yes, it amplifies Variation 1 and gives some indication as to when the capital sum will be paid out."*

Of those who supported the RVA variation and did not support variation 1, one resident preferred that the amount was predetermined.

Others were concerned about the timing of the payment, and questioned what the words 'reasonable time' really meant and felt it may cause uncertainty. Another wanted the reference to 'land' deleted as didn't think it was relevant to an ORA.

Suggested wordings

Other suggested wordings were in effect suggesting an entirely different basis for the variation:

- "*Delete the above from 47(3) "the resident will receive back the full capital sum …" and replace with "the resident will receive back the full insurance proceeds paid to the operator for that residential unit less 5% admin costs (of the capital sum)". Delete monies "for land" and make it just "for buildings*".
- the addition of "*The capital sum repaid should be adjusted for movements in the construction cost index."*

Response from RVA

In support of their variation the RVA made a number of points:

- The ownership of each unit within a village is a "hybrid" form of ownership, and is quite different from freehold ownership with the operator retaining the underlying freehold or "reversionary" interest in the unit. The insurance payout covers both interests and in their view should be split between the resident and operator, by repaying the original capital sum to the resident with the balance to go to the operator as compensation for its loss
- That by offering to repay the full capital sum without deduction the operator takes on some of the financial risk because at this stage the deferred management fee (DMF) is not covered by insurance and there is no indication that it will be.
- The RVA acknowledged that operators could forego their own margin and equity to ensure residents are properly looked after should a village be destroyed and not rebuilt, and that their proposals do not impose additional obligations on either party which would be

impossible to meet following a catastrophe, but would be adequate for any lesser situation.

One submission wanted a clause to cover unit title holders so that the repayment of capital sum to residents would be a prior charge on the insurance proceeds.

Responses in partial support

Comments from those submitters who only partially supported the variation were:

- This proposal only addresses the amount to be paid in terms of original purchase price and thus may fall short of providing the cost of repurchasing an ORA elsewhere. "*As such, it is a partial solution only. While this may indicate what a free market may offer, its shortcomings for protecting the resident are readily apparent.*"
- The TCA supported the variation in part with the following amendments:
  - The clause should be amended to provide that payment should be made to the statutory supervisor (if there is one) as the residents' representative, or if not to the operator.
  - Payment within five working days from the date on which sufficient insurance monies have been received may not be sufficient time to ensure proper payment is made to each resident. We suggest that payment should be made as soon as practicable after the date on which sufficient insurance monies have been received;
  - The following words to be added after the final words of the RVA clause 47 (3) "...*unless operator provides temporary accommodation*."
- The TCA further commented that the statutory supervisor, as an interested party to the contract of insurance, must be consulted if after an insurable event there is the prospect that the unit(s) is/are damaged beyond repair, to ensure the interests of the residents are protected.
- One operator supported part of the variation, but his proposed wording suggested a completely new variation:
  "*Delete the above from 47(3) "the resident will receive back the full capital sum …" and replace with "the resident will receive back the full insurance proceeds paid to the operator for that residential unit less 5% admin costs (of the capital sum)". Delete monies "for land" and make it just "for buildings*"."
- Another operator said that the only income the operator makes is the 5% amortised each year per unit (for use of the village) to a maximum of 25%. In the event of termination through "no fault" of either resident or operator, the variation is good for the resident but impossible for the operator to get a return on investment, and it is totally unfair that the residents get paid in full and the operator is sent broke.

- A residents' group proposed additional wording to ensure a greater role for the resident and statutory supervisor in the ORA termination process, but also wanted the either/or payment option of the ARRV variation included.

Responses not supporting the variation

An operator who didn't support the variation said:

> *"We still have difficulty in accepting the proposition that, in a situation where a village is totally destroyed and not rebuilt, paying residents only receive their "original capital sum" (without contracted deductions) is equitable. A long-time resident would, in our view, be unfairly treated by this proposal. Our Trust (and, no doubt, others) fully insure our properties, allowing the opportunity for a resident to utilise the insurance proceeds for the purchase of an alternative dwelling. "Original cost" in our view would, in many instances, bear little relation to "replacement value".* Their view was that *"...fairness dictates that residents should get a fair termination payment and all residents should be treated in a like manner....".*
>
> *"Consequently we support a termination payment to residents based on insurance proceeds received if it is not possible to rebuild a unit or village. ...the Code of Practice already has safeguards in place to ensure a village is adequately insured. We propose the following clause:*
>
> *In the event that an Occupation Right Agreement is terminated following an insured event, the Resident shall be entitled to the payment of the insurance moneys in relation to the property received by the Operator without any deduction of the capital or any other deduction payable by the Resident, and such payment shall be made within 5 days of the Operator's receipt of these insurance moneys. If the ORA of the other residents of the village have been terminated as a result of the same insured event, the insurance moneys in relation to the property and relating to the event received by the operator shall be shared between the Resident and all such residents on a pro-rata basis according to the indemnity value of their unit."*

Other comments not supporting the variation were:

- "*Strongly object. All other matters and subjects raised including matters of insurance should be the subject of discussion between residents and operators. They still require a lot of clarification and discussion to achieve finality.*" (One residents' committee).
- That the capital sum paid is unlikely to enable him/her to be able to rehouse to a similar standard. This suggestion gives only minimal protection and we regard it as totally unacceptable.

- That it is not outcome orientated, i.e. to rehouse residents in equivalent housing at no cost to the resident
- The variation is too wordy
- That it should be mandatory for the operator to repair or replace any unit damaged or destroyed, unless there is a legal impediment, e.g. the Christchurch red zone.
- That it does not cover the case where the building is privately owned and not the property of the operator. "*As our contract gives us the right to sell at market value, it stands to reason therefore that we should receive that full replacement value of the insurance in the event of total destruction*."

There were several residents committees who "*strongly objected to the variation regarding issue 1*".

A suggestion to improve the clause was to add that the "operator and resident must agree" and that clause 47 (3) is good, provided the resident has a choice in the termination of ORA. One operator disagreed with the logic of the variation.

> *"Surely payment of the original capital sum is "revisiting the past" as it takes no account of either current market conditions or replacement costs and also that ….even if insurance proceeds did not cover the original entry payment (certainly a possibility in a major downturn in the property market) there could be no argument that residents are being treated fairly if they receive payment in full of the insurance proceeds. Property values move up and down with cycles in the economy and in the property market. Residents pay an insurance premium as part of their weekly fee, thus justifying a call on insurance proceeds rather than "cost". The payment to the resident would be clearly "affordable" as the risk is insured.*
>
> *Allowing the operator to pocket the difference between "cost" and "insurance proceeds" is difficult to justify, given that the resident pays the cost of the insurance in his/her weekly fee."*

This submitter supported a variation which had a termination payment to residents, based on insurance proceeds received, if it was not possible to rebuild a unit or village. Their view was that the RVA variation based on "*original capital cost…..is a minimum position and that, should any operator wish to make more advantageous arrangement for their residents, they are at liberty to do so. The priority seems to be on ensuring there are sufficient safeguards in place to protect their investment. Their justification for this is that without such an assurance the sector will risk being unable to attract new investors".*

This submission was the only one to note the risk that this variation may not be affordable to operators.

> *"We feel the proposed Clause 47 (3) that provides returns to residents of their original purchase price is unfair to residents and potentially not affordable for operators. A requirement to repay the purchase price could result in payments to many residents that may be greater than the available insurance proceeds. This would place a smaller operator that has possibly had all its assets destroyed being required by law to repay residents amounts that they do not have and that exceeds the insurance proceeds available. This is clearly an impossible situation and is where small operators differ significantly from larger ones that will still have significant income producing assets in other locations to meet any shortfalls."*

A further issue was raised in a Community Law Centre submission questioning the right of the operator to deduct "*any other monies owing to the operator*" (clause 47(3)).

They suggested wording to clarify and provide evidence of any debt of the resident, and also questioned whether "*monies paid via building replacement insurance should be applied to debt other than that associated with structures. Normally such insurance payments are directly applied to that provision of a new residence, and not utilised for clearing old debt*."

From a resident committee*: "The choice to refund entry payments and the cancellation of agreements could be an easy way to solve one set of financial problems but its potential to severely impact on some of our long term residents and leave them without the wherewithal to look after themselves when they had expected to have protection at this most vulnerable time of their lives is a situation which gives the committee cause for very serious concern."*

Variation 3, Issue 2, Clause 47: Termination of occupation rights agreements

Proposed by Department of Building and Housing

This variation from the Department of Building and Housing concerned the termination of occupation rights agreements, including transferring to a new unit. They proposed a number of changes to clause 47 (Variation 3, Issue 2 in the consultation document) that aim to clarify the process and specify the minimum requirements of what must be in the ORA, and specifically how the sums due to a resident would be calculated on termination.

Current wording	**Proposed wording**
Clause 47 Grounds for termination if the unit is damaged or destroyed through no-fault	**Clause 47 Grounds for termination if the unit is damaged or destroyed through no-fault**
47 (1) The operator and resident may agree to terminate the occupation right agreement if the resident's unit or the retirement village is destroyed or damaged beyond repair in specified circumstances set out in the occupation right agreement. For example, it may be that repair or reinstatement of the unit is not practicable because of the extent of the damage or destruction and because: a) the necessary building consents cannot be obtained b) the insurance money needed to repair or replace the unit cannot be obtained or is not enough to replace the property damaged or destroyed.	47(1) The occupation right agreement must: a) provide that, except in certain specified circumstances (if any), if the unit is damaged or destroyed the operator must fully repair or replace it as soon as practicable b) state the circumstances (if any) when a unit that is damaged or destroyed may not be fully repaired or replaced c) state the procedure to be followed if the unit is damaged or destroyed and one or more of the circumstances referred to in clause 47(1)(b) of this Code of Practice apply d) state other matters which are relevant if the unit is damaged or destroyed and one or more of the circumstances referred to in clause 47(1)(b) of this Code of Practice apply.
47(2) The operator must consult the resident to decide whether it is practicable to repair or replace the unit. The, the operator must follow up in writing, setting out their decisions. Through this process, both parties can work out an agreement to end the contract	47(2) The procedure referred to in clause 47(1)(c) of this Code of Practice must provide as a minimum that: a) the operator must consult the resident to decide whether it is practicable to repair or replace the unit b) after consultation, the operator must

Current wording	Proposed wording
Clause 47 Grounds for termination if the unit is damaged or destroyed through no-fault	**Clause 47 Grounds for termination if the unit is damaged or destroyed through no-fault**
	follow up in writing, setting out the decision on whether the unit will be repaired or replaced c) if the operate decides that it is practicable to repair or replace the unit, then the operator will fully repair or replace the unit as soon as practicable d) if the operator decides that it is not practicable to fully repair or replace the unit, that the occupation right agreement is terminated. 47(3) The other relevant matters referred to in clause 47(1)(d) of this Code of Practice must include as a minimum: a) if the occupation right agreement is terminated, how the sums due to the resident on termination (if any) will be calculated b) the timeframes for: i. consultation ii. notifying the resident of the operator's decision iii. payment of any sums due to the resident on termination c) whether any replacement unit may be constructed on a different site d) whether in these circumstances the resident has the option to: i. transfer to another unit in the same retirement village ii. transfer to another unit in a different retirement village whether there are any costs to the resident for transferring to another unit. 47(4) Where a replacement unit may be constructed on a different site, or the resident has the option to transfer to another unit in a different retirement village, then in each case

Current wording	Proposed wording
Clause 47 Grounds for termination if the unit is damaged or destroyed through no-fault	**Clause 47 Grounds for termination if the unit is damaged or destroyed through no-fault**
	the substituted unit must be within 50 kilometres of the current unit (measured as a straight line distance between the two locations). 47(5) If the resident does not accept an option to transfer to another unit in a different retirement village, or a proposal to construct the replacement unit on a different site, then the occupation right agreement is terminated. An occupation right agreement terminated in this way must be treated the same as a termination under clause 47(2)(d) of this Code of Practice.

Responses

Of those submissions supporting variation 3 (clause 47, issue 2) there were only a small number who supported the full wording of the variation in preference to variations 1 and variation 2 on the same issue.

As could be expected, with so much new wording proposed in clause 47, there was often support for only parts of the variation and numerous proposed additions or replacements.

The two most common sub-clauses that comments were made about were 47(3)(a) and 47(4). A difficulty in analysing this variation was that many who said they supported it, in fact in their comments or proposed wording, opposed one or more clauses, and in particular the key clause of 47(3)(a). A common response was to propose inserting variation 1 as an alternative to sub clause 47(3)(a). Different wording and suggestions about the 50km proposal in clause 47(4) were also typical. The same was true for those who had said they didn't support the variation or supported it only in part. Similar clauses were not supported, typically 47(3)(a) and 47(4). Where comments in submissions were of a similar nature, regardless of whether they said they supported or didn't support the overall variation to the clause, they are reported together against that specific sub clause.

Responses in support of the variation

Firstly there were a number of general comments indicating a level of support for the additional clarification that was in this variation. Those who supported the entire variation made comments such as:

- Removes ambiguity

- Gives security
- Involves the resident more
- Maintains the same rights.

A village residents' committee endorsed the DBH variation as they thought it was the "*fairest proposal giving fair balance to both the residents and the operators."*

Clause 47(1)

There were few specific comments on this clause and only one proposed new wording:

- 47 (1) The occupation right agreement must:
- Provide that "*if building consents are obtainable and insurance recovered is adequate the operator will fully repair or replace the unit as soon as practicable*".
- "*As soon as practicable*" was seen as non-specific. It would be preferable if the operator was required "*to repair or replace*" and to provide temporary accommodation. One submitter wanted sub clause 47 (1) (b) deleted and for repair or replacement to be made mandatory.

Clause 47(2)

There were concerns over:

- Not specifying a timeframe
- What consultation meant: "*but leaves the decision in the hands of the operator. I believe it should be either a mutual decision or at least there should be ability to appeal and reference to an arbitrator.*"
- That the resident should have more say in the process and in terminating the ORA, particularly if a unit title holder
- The use of the words "*as soon as practicable*" being vague and unenforceable, where they really wanted that the operator be required "*to repair or replace*".
- "*That ownership of the property and buildings remains the operators. Consequently, any decision about what to do with them remains the owners to make, along with input from the insurer, the funder and, on occasion, the local authority (for resource consent, for example). It is certainly not the residents' decision although obviously they are affected by the outcome."(*RVA)
- One submitter wanted this clause to allow for temporary accommodation and a replacement unit as first options prior to termination (rather than as options stated after termination)

Clause 47(3)

There were a number of submissions which, while supporting other sub clauses, did not support the variation to clause 47(3) (a). Most typically there were suggestions to:

- Replace it with by wording to ensure a payout of full market value
- Replace the sub clause with the wording of variation 1 (ARRV)
- Strongly recommend that variation 1 should be inserted here
- Change to protect the "*accommodation asset*" of residents
- Include a timeframe
- Allow for temporary accommodation and a replacement unit as first options prior to termination (rather than as options stated after termination)
- Add a definition of payout if ORA terminated
- Stipulate full current market value refund with no deductions

Specific replacement wording supported by several submitters was: "*the sum due to the resident on termination is to be the current market cost of acquiring a replacement occupational right agreement from a third party on reasonably equivalent terms in an alternative reasonably equivalent village*."

The RVA's preference was for residents to be paid their original capital sum without deductions, but it was comfortable with the DBH proposal that this be a matter of disclosure only.

Clause 47(4)

This clause specified the location of the replacement village or unit. A number of submissions thought 50kms was too far:

- Suggest 25kms,
- Is excessive and should be only 1 kilometre, and if not within that distance the resident has the right to opt out under the no-fault provisions.
- Not practicable in some instances
- Too large, and shouldn't be specified at all
- Perhaps the limit should be 15km to enable local family support to continue and that the 50km limit proposed could be up to 100km round trip for family providing regular support.
- Is not practicable to state a distance – "*50K from Levin could be Masterton and 50K from Wellington could be in the South Island.*" Clause 47(4) should be reworded as follows: "*47 (4) where a replacement unit may be constructed on a different site, or the resident has the option to transfer to another unit in a different retirement village then in each case the substitute unit must be at a location acceptable to the resident*."

That wording and several others were concerned:

- About residents' role in accepting any new arrangement and in negotiating any difficulties
- That reconstruction must be in an area suitable for elderly people. Access to shops and other support facilities must be readily available.

There was a proposal to delete the clause by the RVA, as "*as if an operator decides to rebuild a village, there would be very real constraints around what might or might not be possible strongly oppose the inclusion of any arbitrary distance from the original village any replacement must be".*

Clause 47(5)

Some concerns by a statutory supervisor and an operator as to how this will work in practice were that:

- While we have no issue with the proposed new wording of clauses 47(4) and 47(5) "*however this is a disclosure issue to ensure that residents are aware that if they opt to terminate their licence in those circumstances, the operator may, or will not be in a position to pay out the termination proceeds until they rebuild the village and then on-sell the occupation right agreement. This may be a period of 2 - 3 years*."
- The variation as it stands limits the operator's flexibility to negotiate agreeable outcomes in the case of transfers and that if a resident declines a transfer option the termination should be with deductions.

The RVA wanted the repayment terms in this clause to be a matter of disclosure as per clause 47(3)(a). Their specific point was that if a resident decides not to move to another village, regardless of distance from the original site, it is essential that the ORA be treated as a normal termination which is not a termination under clause 47(2)(d).The effect of their proposal would be to delete the last sentence in the proposed DBH clause 47(5).

Other comments not supporting the variation

In summarising, those who said they only supported the DBH clause 47 variation in part, or who said they didn't support it, their concerns were typically around the key clause 47(3)(a) and the 50km proposal in clause 47(4). Common comments were to support the variation but with changes to 47(3) - "*insert variation 1*" being a typical comment, and to make suggestions around the 50 km proposal in clause 47(4) which many thought was too large or shouldn't be specified at all.

Other submissions thought the outcomes sought (clarity of process and allowance for no-fault exit) appear to be achieved by the wording of the proposed clause 47, apart from 47(3)a). A residents' association favoured the DBH variation which "*added clarity where needed, and is*

specific", with the exception of clause 47(3)a which they wanted changed to protect the "*accommodation asset*" of residents.

Those who didn't support the variation to clause 47 said:

- Doesn't fully preserve residents' rights and rehouse them
- Market processes are insufficient
- The wording is not an improvement in clarity and how would the meanings of words like 'reasonable' or 'adequate' be established? Also there was concern that consultation is used but with '*no requirement that the consultor give consideration to the views of the consultees'*.
- Clauses concerning process belong in clause 22(on insurance).

Some submitters disagreed with DBH's approach in their wording of sub clause 47(3) that the code is a minimum standard, (that ORAs can prescribe more favourable conditions than the code, and the code should avoid over prescribing solutions). Their arguments were:

> *"While commercial freedom and market conditions might be considered ok for determining some of the matters in sub cl 3 (namely 3 c) -3) e), letting the market rule in relation to 3 a) and 3 b) is more problematic because market processes will not provide the certainty of protection that residents require.*
>
> *The payment of anything less than the cost of acquiring an equivalent replacement ORA in equivalent facilities in a reasonable timeframe will potentially severely disadvantage many residents who may not have the assets to enable them to purchase again.*
>
> *Many residents, because of their age, infirmity , pressing need etc, will not be in a position at the time of going into an ORA to research, select between and negotiate on a range of market options on this type of 'fine print' which deals with a relatively remote possibility, even with the benefit of legal advice."*

Some submitters took the opposite view to those who approved of the clarity and detail of the clause:

- Generally agreed but if too much detail is required the extent and type of loss may not be known or definable in advance so certainty will not be possible. They recommended a more general wording. "*Disclosure is the key and having the statutory supervisor overseeing the rights and interests of the residents*."
- Another only supported in part sub clause 47(3) "*I am not happy that it leaves open to the RV to decide what sum (if any) will be due to the resident and what timeframes should apply if the ORA is terminated because of the unit being damaged or destroyed. I am less concerned that it leaves open to the RV to decide what transfer options a resident may*

have in those circumstances. I support in part only Sub clause (4) as it provides protection against forced resettlement at too great a distance (as I believe a 50 km radius as suggested is unreasonable)."

The Trustees Corporation Association submission, in not fully supporting clause 47, made the comment:

"The Department of Building and Housing proposal anticipates a degree of explanation that prior to the recent Canterbury experience may not have been anticipated. We believe that the DBH wording of clause 47 (1) may be too restrictive to adequately provide for unforeseen circumstances. It is, in any event, an operator's decision as to whether to rebuild or not."

The particular situation of retirement village residents was noted by some submitters:

- "*The payment of anything less than the cost of acquiring an equivalent replacement ORA in equivalent facilities in a reasonable timeframe will potentially severely disadvantage residents many of whom may not have the assets to enable them to purchase again on the open market. The vulnerability of residents as a general demographic may militate against a fair balancing of market forces and party needs in the way terms of ORAs develop*."
- "*The concern against over prescribing solutions should not be permitted to inhibit development of a solution that provides proper asset protection for residents. Indeed, better options for solution may be available as part of the code's minimum standards than individuals may be able to negotiate for themselves in the open market*."

The RVA's position with respect to clause 47(3)(a-e) was that it preferred its own variation.

"The Association's preference is for residents to be paid their original capital sum without deductions, but we are comfortable with the DBH proposal that this be a matter of disclosure only.'

"Clause 47 (3) (c) will also depend on the insurer's position on rebuilding."

The RVA didn't support sub clause 47(4) as:

"The decision to rebuild a village on the original site or any other is not necessarily the operator's to make…. As a result we strongly oppose the inclusion of any arbitrary distance from the original village any replacement must be'.

"If an operator decides to rebuild a village, there will be very real constraints around what might or might not be possible. It is essential that the operator has the

flexibility to rebuild and to offer a resident the opportunity to move to the rebuilt village"

The RVA suggested words such as 'practicable' used throughout these sub-clauses were redundant. Their general comment on clause 47 was that:

"it is important to note that any move away from the status quo represents a financial risk to operators because they are (at this stage) unable to insure for the Deferred Management Fee portion of the original capital sum. This position is unlikely to change in the foreseeable future. As a result any legislative change should be made with caution.

It is also noted that some operators already contract a non-fault termination with a full repayment of the resident's original capital sum and others even go further and offer a market value payment of their unit. They have done this for various reasons which they have assessed and are unique to the operator. We would strongly oppose any attempt to impose a higher standard of compliance across the industry as a whole.

The Association stresses that it is essential that an operator has the discretion to replace or not a unit (or village) in a non-catastrophic situation.

The Age Concern/Grey Power submission supported the "*move to provide more detail in the Code about the process for deciding whether the unit will be repaired or replaced. However, we do not think this belongs in Clause 47, which deals with grounds for termination."* They proposed DBH's clause 47(2) should go in clause 22(7) making clause 47 true to its title as it would only deal with grounds for termination of the ORA and not the process for deciding whether the agreement be terminated.

Insurance arrangements

Variation 2, Issue 2, Clause (22.3): Insurance cover disclosure

Proposed by the Retirement Villages Association

The RVA proposed additional wording to sub clause 22(3)(a) adding the requirement for the operator to disclose to the resident whether or not it has insurances such as business interruption, temporary accommodation, and liability insurance.

Current wording	**Proposed wording**
Clause 22 Fire and accidental damage	**Clause 22 Fire and accidental damage**
22(3) Where operators are responsible for the insurance, they a) may include business interruption, temporary accommodation insurance, and adequate liability insurances. b) must inform the resident what cover is provided in circumstances where the operator is unable to obtain full reinstatement insurance	22(3) Where operators are responsible for the insurance, they a) may include business interruption, temporary accommodation insurance and adequate liability insurances *and the operator must disclose to the resident whether or not it has any such insurances* b) must inform the resident what cover is provided in circumstances where the operator is unable to obtain full reinstatement insurance

Responses in support of the variation

The comments of those fully supporting the variation were often endorsements of the principles of disclosure, which they saw it as part of ensuring a good relationship between resident and operator. Supporting comments included:

- Right to know need to know/be fully aware
- Want full disclosure, full information
- Important to know before a resident signs their ORA
- Clarity, transparency
- Provides greater security, is watertight
- Should be normal practice, communication is key and in plain English
- Knowing which party is responsible makes for better agreement, information is important for mutual trust
- Openness and honesty

- Fairness
- Clear communication
- Will ensure cover is not paid for twice, e.g. temporary accommodation
- Need good insurance company
- Covers more than just earthquakes or natural disasters
- Better aligns the Code with regulations on disclosure
- Important to have full insurance cover
- Needed because the various contents policies vary greatly in such matters as temporary accommodation and public liability cover.

Concerns

Staffing stability

In other comments there was concern about the staff of a village:

- Disclosure that a retirement village has business interruption insurance not only reassures staff that they have some certainty over their jobs, it means that they do not become stressed about their income while also helping stressed residents in an emergency situation
- Business interruption insurance further reassures residents that the people who work for the retirement village, and with whom they have formed a relationship of trust, will be there to help them during the transition phase in the event of a disaster similar to the Canterbury earthquake.

Other issues

Those who only supported the variation in part had comments on issues such as:

- Some insurances being optional
- Prefer DBH wording with mandatory business interruption insurance
- Taking out of such insurances remains optional and the information to be disclosed appear very limited - residents may not be informed of the amount of cover held nor have adequate means of deciding whether the cover taken is sufficient
- *22(3)(a)* Make those types of insurance specified compulsory-i.e. business interruption, temporary accommodation and liability insurances by changing *may to must*.(This was a commonly proposed wording).

Responsibility for some insurance types

- Temporary accommodation insurance must be resident's responsibility.
- Do not believe that any policy excess should be passed on to residents but concede that this may be a necessary economic consideration in which case residents should be consulted prior to renewal.

Amount of information and monitoring of quality of insurances

- What structures and checks are there to ensure that the operators do disclose and act according to legal requirements? Who does this? The statutory supervisor cannot cover all villages adequately to ensure proper practice by all operators.
- A concern about the insurance company's rating/soundness
- The residents deserve to have available for inspection at all times a certificate of insurance detailing the provisions of the policies taken out as it is only in this way that residents can be assured that the operator is fulfilling his responsibilities and can assess the need for any additional cover. The statutory supervisor is not in a position to assess an individual resident's insurance needs.

The timing of disclosure

- Want it mandatory for an operator to supply a copy of the village insurance policy to an intending resident's solicitor before the ORA is signed so the resident knows and understands the risks. It is too late once the resident has parted with money to buy the ORA.
- The timeframe for the disclosure needs clarifying.

Responses not supporting the variation

Those who didn't support the variation typically said it was because taking out of such insurances remained optional, and also that the information to be disclosed was limited. The clause doesn't tell residents the amount of cover held nor is there adequate means of deciding whether the cover taken is sufficient. Reasons for not supporting the variation were:

- "*Without more, this change does nothing to address the risk to residents of the 'accommodation replacement gap' that may arise in circumstances of termination for destruction by no fault as residents cannot insure for replacement in the way that property owners can."*
- While the proposed changes are good they do not guarantee the interests of the occupant are fully preserved

To ensure full protection cover for village residents such insurances to be made mandatory. The wording proposed was:

"*Clause 54 (2) That the operator be required to carry sufficient insurance to cover the total loss of outgoing fees when a village is damaged or destroying through no fault of the resident."*

One operator commenting on the RVA statement around insurance valuations said: "*We agree that there might need to be clearer definitions in insurance policies. However, given the ongoing turnover of licenses that occurs in apartments etc and the need to assign a value to these as they occur, it is erroneous to state that assigning values to these areas is a "a very difficult exercise to do fairly*".

There were submitters who didn't support this variation because they wanted to see a more prescriptive clause:

- The clause needs to be more prescriptive to cover resident owned units and to ensure there is full insurance with no loopholes
- How much detail is not specified "so that "*yes, I have insurance*" or "*no, I don't*" would suffice to meet this proposed addition to Clause 22 (3)"
- That the current wording of 'adequate' is not definitive and the ambiguity leaves room for interpretation in the future
- Clause needs to have "*all insurances related to villages approved by a reputable and competent insurance agency*"
- Needs to have "*disclosure of the actual terms and conditions of the insurance cover to occupants, if asked in writing. The directors should sign personal guarantees warranting that such insurances fully preserve the interests of the occupants*"

Others wanted the clause to make holding the insurances mandatory:

> *"…it should be obligatory to have comprehensive replacement insurance i.e. replacement insurance, business interruption insurance, temporary accommodation insurance, and adequate liability insurance. To ensure that adequate funds are available to repair or replace the unit, the operator must take out comprehensive insurance, including replacement insurance, business interruption insurance, liability insurance, etc. All insurance valuations shall be prepared by a registered valuer"*

Unit ownership tenure and ORAs vary in the sector and insurance arrangements vary accordingly. A resident whose contract gives them the right to sell their unit at market value, said it stood to reason therefore *"that we should receive that full replacement value of the insurance in the event of total destruction"* but felt the clause *"left a very gray area when decisions that has to be made during a time of adversity, should the area be condemned. The operator should be also covered with a loss of profit insurance which would and should satisfy his position, and the full payment of the insurance money should be earmarked for the building owner"* (in this case the resident).

Some submitters said they preferred the DBH variation wording to the same clause but still supported the principle of disclosure in this variation.

A statutory supervisor wanted to see any amendments made to the Code to include the need for operators to adequately disclose their insurance position to existing and intending residents, including any obligations that that may place on residents. They wanted residents to be able to reasonably and clearly ascertain their current financial obligations and future position following an insured event. They sought clarity in legislation such that meaningful supervision following an insured event can be a practical reality. From experience they believe that:

> *'it is in the residents interests for the statutory supervisor to be required to be a party to discussions and negotiations with insurers, and for operators to communicate with the statutory supervisor on a regular basis throughout the period between the insured event and any settlement - the statutory supervisor should be noted on the village insurance policies as an 'interested party' so there is at least a contractual basis for this request to be included in the legislation."*

The importance of full disclosure was described by one resident's committee:

> *" insurance is something, which has serious consequences, Hardly ever are residents fully aware of all the details of such a contract, particularly when there are changes in the existing contract or when, for good economic reason, the Insurance Company changes. Changes are urgently required in this area and the management of a Retirement Village should not only be made aware in writing of its Obligation to the Resident, but any changes should be made in writing to the Resident, when they occur. It happens only too often that these problems only surface when urgent action is needed, when major rebuilding restorations or removal from the village have to occur."*

Of those who wanted the insurance issues to have more work done on them, one submission stated:

> *"All other matters and subjects raised, including matters of insurance, should be the subject of discussion between residents and operators. They still require a lot of clarification and discussion to achieve finality. A review of such is urgently required. The residents do not support any variations proposed by the Retirement Villages Association."*

While this variation proposed no change to the existing sub clause 22(8) on temporary accommodation there were a number of comments, similar to those on the DBH variation on this clause, about wanting to make it mandatory for the operator to provide temporary accommodation or facilities, by obtaining insurance to provide similar temporary accommodation until such time as the damaged villa, apartment or property has been repaired or replaced.

With respect to unit title retirement villages, a comment was that there should be a distinction between unit titles held by the operator and those held by the resident. It was also mentioned that any variation should fit well with the Unit Titles Act, which already has significant disclosure requirements.

Variation 3, Issue 1, Clause 22: Insurance cover and temporary accommodation

Proposed by Department of Building and Housing

This variation is to clause 22 of the Code of Practice and concerns the insurance arrangements within retirement villages. There are eight clauses and the proposed changes are in italics.

Current wording	**Proposed wording**
	Clause 22(1-8) existing clause 22(7)9a-c) varied and shifted to clause 47
22(1) In this clause a reference to an operator includes a body corporate where the retirement village is a unit title development.	
Insurance cover 22(2) The operator must take out and keep in force a comprehensive insurance policy, or must ensure that a policy is taken out and kept in force. The policy must cover accidental physical loss or damage to retirement village property, including residential units that are owned by residents. The policy must be for full replacement to the satisfaction of the statutory supervisor (if there is one).	**Insurance cover** *22(1) The operator must take out and keep in force insurance policies which provide adequate coverage for the retirement village, or must ensure that the insurance policies are taken out and kept in force, to the satisfaction of the Statutory Supervisor (if there is one). Where the retirement village is a unit title development, one or more of the policies may be taken out and kept in force by the body corporate.*
22(3) Where operators are responsible for the insurance, they - may include business interruption, temporary accommodation insurance, and adequate liability insurances - must inform the resident what cover is provided in circumstances where the operator is unable to obtain full reinstatement insurance.	*22(2) The insurance policies must:* a) *cover fire and accidental physical loss or damage to retirement village property (including all amenities and utilities within the retirement village boundary and units subject to occupation right agreements) and any residential units that are owned by residents, for full replacement* b) *provide business interruption insurance to the operator to cover loss of income from the retirement village for a minimum of 18 months* c) *provide adequate liability insurances* d) *meet any other insurance required by law.*

Current wording	Proposed wording
	Clause 22(1-8) existing clause 22(7)9a-c) varied and shifted to clause 47
	22(3) The operator must ensure that the insurance valuation of the retirement village property is updated at least every two years. Indemnity insurance is permitted if full replacement insurance is not available. The operator must inform the residents what cover is provided in circumstances where the operator is unable to obtain full replacement insurance.
22(4) Insurance policies must state the: a) responsibilities and liabilities each of the operator, residents, and statutory supervisor (if there is one), as the insured parties b) dollar amount of the excess an operator has to pay if a claim is made c) any exclusions of insurance cover for the insurance policy.	22(4) The insurance policies must state the: a) responsibilities and liabilities each of the operator, residents, and statutory supervisor (if there is one), as the insured parties b) dollar amount of the excess an operator has to pay if a claim is made c) any exclusions of insurance cover for the insurance policy.
22(5) The operator's insurance policies must: a) be clear about the operator's and the resident's responsibilities for insuring the contents of the residential unit. The policy must reflect what is written in the occupation right agreement and include and capital improvements or additional fittings provided by the resident b) be available for residents to view on request.	*22(5) The operator's insurance policies must:* a) *reflect what is written in the occupation right agreement and include any capital improvements or additional fixtures and fittings provided by the resident.* b) be available for residents to view at the *annual general meeting of residents*, and on request.
22(6) Operators must inform the residents whether they pass on the excess payments to the resident.	*22(6)* Operators must inform the residents whether *or not* they pass on *any insurance policy excess amount* to the resident. *22(7) The resident is responsible for insuring the contents of the residential unit, and may (but is not required to) take out any contents insurance policy they consider appropriate.*

Current wording	Proposed wording
	Clause 22(1-8) existing clause 22(7)9a-c) varied and shifted to clause 47
Repair or reinstatement of property 22(7) The occupation right agreement for a residential unit that is owned by an operator must: a) provide that, except in certain specified circumstances (if any), if the unit is damaged or destroyed the operator must fully repair or replace it as soon as practicable b) state the circumstances (if any) when a unit that is damaged or destroyed may not be full repaired or replaced c) state the procedure to be followed if the unit is not to be fully repaired or replaced if it is damaged or destroyed	*Repair or reinstatement of property* *[DELETED] – see clause 47*
Temporary accommodation 22(8) The operator must inform residents in the occupation right agreement whether they will provide temporary accommodation or facilities while a residential unit or facility is being repaired or replaced after an insured event.	**Temporary accommodation** 22(8) The operator must inform residents in the occupation right agreement: a) whether the operator will provide temporary accommodation or facilities while a residential unit or facility is being repaired or replaced after an insured event. b) *how the cost of the temporary accommodation or facilities will be met* c) *how soon after the insured event the temporary accommodation or facilities will become available.* *22(9) Regardless of whether or not the operator will provide temporary accommodation or facilities, the resident may (but is not required to) take out their own insurance policy providing for temporary accommodation or facilities.*

Responses supporting the variation

A number of those who said they supported the variation also included comments about particular clauses they didn't support.

Support for the changes was largely around the additional comprehensiveness of the wording and that it:

- Improves disclosure to residents
- Gives peace of mind
- Provides certainty
- Is clear about responsibilities
- Is more comprehensive
- Is fair to both parties
- Is more definitive in terms of the operator's responsibility.

Submitters particularly supported business interruption insurance being mandatory.

Common concerns

Of those supporting the variation, and those supporting it only partially, some specific common concerns were around:

Clause 22(1) (original)

- No reason given for deletion (so clause not supported)
- A clear distinction needs to be made between unit title villages where the unit titles are held by the operator versus those where the unit title is in the name of the resident.

Clause 22(1) (new)

No definition of "adequate" (comment mentioned frequently), the clause is both vague and subjective,

- Preferred the original wording of this clause
- Needs requirement for the statutory supervisor to check insurances at stated intervals
- The requirement that the statutory supervisor is satisfied with the insurance cover could be expanded to include the words "*satisfied the residents' interests are protected with the independent advice of an insurance professional if needed."*
- The RVA, who prefer the existing clause, an amendment to read…. provide adequate *full replacement coverage for material damage* for the village,
- The RVA also proposed specific wording for units owned by the residents….. "*Where residents own their own unit in a non unit title development, one or more policies may be taken out and kept in force by the residents."*

- Concern that statutory supervisors may not have the necessary knowledge to verify the appropriateness and adequacy of the insurance, and the need to improve monitoring.

Clause 22(2)

- Business interruption insurance should be mandatory to enable an operator to operate while rebuilding the village. This cover should be for a period of no less than 18 months to 2 years (TCA)
- Parts (b & c) not supported - Business interruption and liability insurance are business expenses and residents should not have any financial responsibility for these (several submissions)
- Insurance needs to be with a large and highly rated company
- This extra insurance should be in the joint names of the operator and residents, for their respective benefits.

Clause 22(3)

- Indemnity insurance was opposed, as it disadvantages resident in rehousing
- Cover should be on "comprehensive" basis.
- Anything less than full replacement insurance should not be an option.
- Only full cover should be accepted and the Government become the insurer of last resort. No indemnity insurance.
- Two year review sensible
- "*Insurers require insurance valuation for full replacement to be updated annually. The operator must insure for full replacement insurance. If the operator cannot obtain this insurance it can only be due to the operator not being creditworthy. Indemnity insurance is inadequate and should not be permitted. It should be a requirement for the registration of operators that they provide replacement insurance*."

Clause 22(5)

- 22(5) (a) not supported. Fittings supplied by resident should be insured by the resident.
- Do not support 22 (5)(b) Rather operators must make full details available to purchaser of ORA before signing entry contract
- 22(5)b should remain unchanged
- Copies of the operator's insurance policies should be available to the residents at all times not just at the annual meeting
- Clause 22(5)(b) - we do not necessarily support the DBH's clause that the insurance policy be available for residents to view at the annual general meeting of residents; as long as residents are informed that the insurance details are available to be viewed at any time.

Clause 22(6) excess has to be reasonable

Clause 22(8)

- Should also be mandatory for the operator's policy to include temporary accommodation following an insurable event.
- Be amended with the word "*must*" -the operator must provide temporary accommodation or facilities while a residential unit is provided or their unit is replaced and that this accommodation cost be met by insurance.
- The operator should be required to provide temporary accommodation and take out the necessary insurance cover. It is therefore unnecessary for the resident to take out insurance for temporary accommodation.
- For peace of mind the family of elderly residents, who may live some distance away, should be able to readily access this information.
- Resolutions must be prompt and fair so that residents can quickly rebuild and get on with enjoying their lives in their own homes.
- Want to see temporary accommodation and a replacement unit specified as first options prior to termination, and the payout on termination DBH clause(47) variation inserted here.
- The proposed DBH wording for clause 22 (8) is too prescriptive and imposes requirements on an operator that may be impossible to specify prior to an insured event or fulfil following an insured event.
- Consideration should be given as to whether the period of cover for temporary accommodation cover should mirror the period of cover of business interruption insurance
- The minimum acceptable standard of temporary accommodation needs to be defined relative to the standard enjoyed by the occupant.

General comment made by several committees

"We strongly believe that the insurance cover needs a total and very detailed investigation by a "working group" comprising representatives from all interested parties, before we and everyone else should be asked to comment on anything other than the immediate pro tem insurance protection of any natural disaster, and that this is urgently requested. This is because our variation proposal indicated that temporary protection should be installed subject to a complete review of the situation.

And another similar -I believe the Insurance Cover needs more investigation from all interested parties before comments are asked for. The immediate insurance protection of a natural disaster is urgent.

We agree it is probably helpful to include a reminder re contents insurance but care must be taken that there is no double insurance (i.e resident and operator have similar risks covered) which runs the risk of neither policy being paid out. We understand that if the operator and resident hold temporary accommodation cover under their respective policies, neither insurance company would be willing to pay out first. Clarification is required from insurers if this is in fact the situation. In addition, residents may be paying twice for temporary accommodation cover if they are paying under their own contents policy and contributing towards the operators insurances as well." (TCA)

Other insurance comments

- There are no matters related to the Code of Practice 2008 which are uninsurable. Consequently the phrase "an insurable event" should be removed throughout.
- Certain items such as insurance are to be "*to the satisfaction of the statutory supervisor (if there is one*)." These items need to be checked, and the statutory supervisor may seem to be the appropriate person. However, the statutory supervisor is paid by the operator and therefore cannot be expected to be unbiased, and may not even exist. It is very desirable that an independent person or body be appointed who can be expected to be unbiased and can cover the situations where there is no statutory supervisor.
- Liability insurance: The principal liability is to cover residents and members of the public and their possessions who/which may suffer damage due to the incidents which cause the need for rebuilding or renovation. The need to cover all other third parties listed is controversial. Why should it cover professional negligence when professionals will be insured against under their professional liability insurance? This applies to the other parties listed.
- Generally speaking I would support making minimum insurance requirements mandatory but with full disclosure so the resident can take out supplementary insurance as required. If it is not possible for an operator to obtain replacement insurance then the resident should have the option to terminate the licence to occupy under the same conditions as a no fault event.
- A submitter who supported this variation as more comprehensive than RVA variation, noted how this affected their village, which is a unit title village that is changing to a licence to occupy tenure as each unit became available.

Several submissions thought the proposed variation should go further in protecting residents:

"The focus of the currently proposed minimum insurance arrangements appears to be to protect the assets and business operations of the operator, presumably to thereby

enhance its ability to meet its contractual obligations to residents in circumstances of termination for destruction by no fault. This approach fails to recognise that residents have an 'accommodation asset' (namely an ORA) that itself needs protection for continuity of operation in circumstances of termination for destruction by no fault."

They wanted to see a broadening of the outcomes sought to include a focus on the needs of the resident, and not just the needs of the operator, in the circumstance of termination for destruction by no fault.

"As events in Christchurch have revealed, a right to receive back a sum related to purchase price rather than replacement cost of their accommodation asset is likely to leave many residents unable to repurchase."

Assessment of insurance adequacy will require more 'hands on' knowledge than proposing residents or their legal advisers can be expected to bring to the assessment process….And how wasteful of time and cost if every intending resident has to second guess the statutory supervisor's certificate in order to feel they have properly conducted due diligence on the question of insurance. I believe Clause 22(1) needs rewording to provide a better fence at the top

They propose insurance that would address this might best be given by imposing an obligation on operators to pay out a certain minimum sum related to replacement cost of an equivalent ORA and to take out liability or business interruption insurance to cover the extra amount the operators find themselves having to pay out in this circumstance. Such insurance should have to be taken in the joint names of the operator and residents for their respective benefit, so that the funds can be identified in a separate fund on receipt.

This is set out in some proposed additional wording to clause 22(2):

"(bb) provide liability/business interruption insurance to the operator (but noting the interests of residents for the time being and the operator) to cover the difference between the capital sum otherwise due to the resident on a standard termination of the ORA and the sum the operator is obliged to pay in circumstances of termination of the ORA for destruction by no fault." (several submissions)

This same group of submissions sought as a first outcome "*to ensure adequate insurance is taken out by all parties, covering all appropriate risks, so that operators are able to rebuild a damaged or destroyed unit or village or are able to pay out their residents if or when an occupation right agreement is terminated*." They noted that whether the wording of clause 22 is adequate to achieve this is problematic.

The majority of those who said they supported the variation in part, was that they did not support the proposed clause 22(2) particularly (b) and (c). Permitting indemnity insurance in clause 22(3) was also commonly not supported.

Several submissions proposed more work on insurance issues by a working group.

A submission from a statutory supervisor wanted to see the role of the statutory supervisor made clear:

> *"it is in the residents interests for the statutory supervisor to be required to be a party to discussions and negotiation with insurers, and for operators to communicate with the statutory supervisor on a regular basis throughout the period between the insured event and any settlement - the statutory supervisor should be noted on the village insurance policies as an 'interested party' so there is at least a contractual basis for this request to be included in the legislation".*

They also wanted to see that operators adequately disclosure their insurance position to existing and intending residents, and communicate any obligations that that may place on residents.

> *"Residents must reasonably and clearly be able to ascertain their current financial obligations, and future position, following an insured event, ..Supervisors need to have clarity in legislation such that meaningful supervision following an insured event can be a practical reality."*

Responses not in support of the variation

The comments of those who said they didn't support the DBH variation to clause 22 were:

- The operator must be made to disclose the wording of their insurance policy before a resident commits to buy. "*Some villages do not disclose their insurance policies to an intending resident. Our village did not to us*."
- Did not agree any insurance excess should be passed on to a resident
- Wanted full disclosure of the actual terms and conditions of the insurance cover to occupants, if asked for in writing
- Imposed additional insurance and will/may impose additional costs on residents
- Strongly opposed indemnity insurance being permitted
- The directors (operators) should sign personal guarantees warranting that such insurances fully preserve the interests of the occupants
- Clause 22 (8) changes are good but they do not guarantee the interests of the occupant are fully preserved, e.g. where the price of buying into an equivalent property in another village is considerably higher than the insurance proceeds or the original capital sum.

- The village should be required to take out temporary accommodation insurance that would provide temporary accommodation of an acceptable standard
- Residents should be advised frequently of the current valuation
- Doesn't address a fundamental issue – the restoration of the protection of residents' interests as in the previous Code of Practice
- Clause 22(9) not supported as is outside the scope of the Code.
- The RVA wanted the current clause 22 (8) to be retained unchanged or to say how the cost of the temporary accommodation or facilities will be met, if any are provided; and suggested 22 (c) was meaningless. "*The Christchurch experience shows that it is impossible to predict when – or if – any temporary accommodation can be provided."*

Several general comments as to why the variation was not supported related to the process:

- The process of consulting on these variations "*is far too complex and far too important to be finalised by a "submission review" and should be covered in a total review of the Code. The residents do not support any of the recommendations of the DBH*."
- The insurance cover needs more investigation from all interested parties before comments are asked for, and that the immediate insurance protection of a natural disaster is urgent.

An individual with insurance experience said of business interruption insurance that the:

- Operator should be required to provide no less than 18 months cover
- That cover should be extended to include "Denial of access" and "Local authority" clauses
- It is appropriate to indicate monetary or "time or sub limit" excess/limitation clauses
- Some technical settlement issues have arisen from the earthquakes and the implications need to be understood by the Retirement Commissioner.

Response from RVA

The RVA did not support the DBH changes to clause 22 although made a number of wording suggestions if it was to be changed. Their concerns expressed around insurance were detailed in their discussion paper and included:

- The cost their members advise that insurance premiums have increased and the excess has risen
- That the DBH clause 22(1) amendments are only practical if operators are able to obtain increased insurance cover and this is an issue in Christchurch currently. They noted that some Christchurch villages may be unable to comply with any insurance changes for the foreseeable future.
- A proposed additional sentence to address the problem of residents who own their own unit (for example, cross lease developments) where the only interest the operator may have in the unit is the right to buy the unit back.

- That they don't support clause 22 (2) (a – d) –"Increasing *operators' insurance obligations is reactive rather than dealing with the real issue (i.e. payments to residents should a village be destroyed and not rebuilt) and confuses an operator's right to make prudent business decisions with a desire to protect residents' interests*".
- That the degree of insurance cover is based on each operator's appetite for risk and their ability to self-insure and they want to keep that flexibility, and that residents are protected because the arrangements are disclosed.
- "*Business interruption insurance (BII) is complex particularly so for operators who combine care facilities etc on the site. "Is designed to protect the operator's business interests rather than the residents' interests and will be designed accordingly. Making it mandatory is unnecessary interference in a prudent business decision.*"
- That imposing additional insurance requirements will also impose additional and unnecessary costs on residents, with an example given of one operator who said they would include a further cost to administer.
- Concerning residents' insurance (sub-clause a) that if they own their own units, residents are likely to want to continue their own insurance arrangements and would oppose paying twice for insurance arranged by themselves and by the operator. They noted that double-insuring property may result in both policies being cancelled so that neither the operator nor the resident is covered.
- That requiring operators to "*add BII and any other insurances will not enable them to rebuild after an insured event because they do not relate to an operators' ability to do that".*
- Concerning Clause 22(3) –they did not support the Code of Practice making village valuations mandatory, but noted that insurance companies require valuations. Also statutory supervisors are required to have a process to satisfy themselves that the replacement cover is adequate and that this would include an ability to ascertain the village's value. In addition, director liability means directors must act in good faith to obtain a fair value for insurance.
- That they have been working with members around valuations and argue that the Association's best practice guide on valuations is a more effective way to make sure insurance risks are met.
- With respect to clause 22(7) they did not support changes, as making contents insurance optional for residents would negate the provisions in those ORA which require it. Also there is also a possibility that residents may not appreciate the risk of either having double insurance or none and fail to arrange any cover if the operator does not require it in the ORA.

- Clause 22 (8) – The RVA did not support as they think the current clause is sufficient in providing information for them "*to make a meaningful comparison of different operators' approaches to the provision of temporary insurance*."

Combined response from Age Concern and Grey Power

The combined Age Concern/Grey Power submission did not support DBH's variation to clause 22. They believe that insurance cover requires more thought before changes are made to the code. "*There is little point in imposing requirements that the operators cannot meet, or that will cost residents the earth in extra weekly fees*." In particular they oppose the use of terms such as 'adequate' and 'satisfactory' saying such terms are meaningless and have no place in a legal document unless they are clearly defined.

They comment that questions such as: *"how much cover?", "what type of cover?", "how big an excess is allowed?" "how are costs to be divided between operator and residents and/or between residents?"* need careful consideration. They support the arguments presented by other residents and individuals (e.g. David Gibson) as a summary of the issues. They highlight the need to recognise the risk to residents of an 'accommodation replacement gap' that may arise in circumstances of termination for destruction by no fault and that residents cannot insure for replacement the way property owners can.

They recommend that the Retirement Commissioner and DBH convene a working group consisting of insurance industry representatives, retirement village residents, operators and other relevant representatives to determine desired, realistic and affordable outcomes for operators and residents, and decide how best to achieve them.

Their submission wanted a significantly changed clause 22 with the inclusion of DBH's clauses 47(4) and 47(5) in clause 22(7).

They proposed specific wording changes to a number of sub clauses. In particular they did not support business interruption insurance being mandatory for operators or that the costs of holding it be passed on to residents. They supported full replacement insurance only in clause 22(3). Disclosure to residents of any changes to policies was wanted in clause 22(5)(a).

Their view on the current clause 22(8) of the code is that it does no more than require operators to indicate whether or not temporary accommodation is provided and that the changes proposed in the consultation document do not significantly improve consumer protection relating to temporary accommodation. They did not support the DBH proposed clause 22(9).

> *"We consider that temporary accommodation must be offered by the operator. It must be provided in a timely fashion and for as long as is required. It must also be suitable for an older person. The question of payment needs to be tackled in conjunction with other insurance matters. We are acutely aware that as the operators insurance costs*

increase so do the residents fees. We also know that some residents hold household contents policies which provide a certain period of temporary accommodation - they may wish to partially opt out of the operators insurance. "

Payments and charges due to the resident on termination or end of occupation

Both the RVA and DBH proposed variations to this clause seek to clarify the charges in a standard exit and a no-fault exit situation. The variations also seek to clarify the amortisation of fixed deductions during the period when a village is being rebuilt.

- The DBH variation proposed changes to sub clauses 54(1) (2) (3) (4) and (5).
- The RVA variation proposes changes to sub clauses 54(3) and 54(7).

Variation 3, Issue 3, Clauses 54(1) (2): Payments and charges

Proposed by Department of Building and Housing

This variation proposed changes to sub clauses 54(1) (2) (3) (4) and (5).

Current wording	**Proposed wording**
Clause 54: Payments due to the resident on termination or end of occupation	*Clause 54: Payments and charges on termination, end of occupation or where a unit has been damaged or destroyed*
Charges for personal services 54(1) The operator must stop charging a resident for personal services on the date the resident stops living permanently in the residential unit.	**Charges for personal services** 54(1) The operator must stop charging a resident for personal services: a) *while the resident is not living in the residential unit, because it has been damaged or destroyed through no fault of the resident* b) on the date the resident stops living permanently in the residential unit.
Continuing charges for outgoings 54(2) the operator must reduce by at least 50 percent the outgoings charged to the former resident if no new occupation right agreement has been entered into for a former resident's unit by the later of: a) six months after the termination date, or b) b) the date the former resident stops living in the residential unity and	**Continuing charges for outgoings** 54(2) The operator must reduce by at least 50 percent the outgoings charged to: a) *a resident who is not living in the residential unit, because it has been damaged or destroyed through no fault of the resident* b) the former resident if no new occupation right agreement has been entered into for a former resident's unit by the later of:

Current wording	Proposed wording
Clause 54: Payments due to the resident on termination or end of occupation	*Clause 54: Payments and charges on termination, end of occupation or where a unit has been damaged or destroyed*
removes all their possessions	i. six months after the termination date, or ii. the date the former resident stops living in the residential unity and removes all their possessions.

Responses in support of the variation

Clause 54(1) Charges for personal services

This clause was supported and no alternative wording was given or any opposing comments made.

Clause 54(2) Continuing charges for outgoings

Many who otherwise supported changes to clause 54 were opposed to this part:

- Several responded "*Why should residents pay village outgoings fee at full or at 50% when they are, after a no-fault disaster, not occupying a unit on site? Especially so if they have to rent off-site*."
- Some of the support was dependant on who was providing the alternative accommodation.
- "*54(2) not supported. No charges should be made for outgoings if the resident is not provided with alternate accommodation within the village*".
- "*If a resident is forced to move out of the unit he/she occupies, the fixed charges should be terminated when the resident moves out. Also suggest provision for a Disputes Tribunal*."

In support a resident said "*it protects the interests of the Resident involved and at 50% is a fair deduction rate"* and "*Essentially agree with this variation with the exception of clause 54 (2) (a). If the operator has re-homed the resident at no cost to the resident charges should continue.*"

Responses not in support of the variation

Comments from those who didn't support the variation were that:

- They did not support there being any charge to a resident who is unable to live in the residential unit because it has been damaged or destroyed through no fault of the resident.
- The operator's business insurance should cover this
- Clause 54(2)(a) should not apply if the resident has contributed to business interruption insurance and has their own temporary accommodation insurance.
- I prefer the changes proposed by the Retirement Villages Association.
- Clause 54(2)(a). "*Why should a resident still pay 50% of outgoings if their unit has been damaged or destroyed through no fault of the resident. The operator should claim from their business interruption insurance in this case and not the resident, for lost 'outgoings' income.*"
- The 50 per cent is arbitrary. "*at least 50 per cent*" should be deleted and substituted with "*based on calculations*"
- No charges should be made for outgoings if the resident is not provided with alternate accommodation within the village (this was a common comment).

Proposed rewording

It was difficult to classify some responses as their support depended on a number of variables, e.g. on whether alternative accommodation was provided and the costs. Some submitters said they were confused by the proposed change.

Proposed wording was suggested by a residents association:

> *"54 (2) the operator must cease charging the outgoings to:*
> *a) a resident who is not living in their residential unit, because it has been damaged or destroyed through no fault of the resident unless an acceptable alternative unit is provided."*

Other proposed wording by residents:
"That the operator be required to carry sufficient insurance to cover the total loss of outgoing fees when a village is damaged or destroyed through no fault of the resident and 'that there be no charges for any unit damaged through no fault of occupier'. The purpose is to ensure that fixed deductions must cease at the time of the damage".

> *"Where a unit is unable to be occupied through no fault of the resident then all charges should cease immediately."*

Another submission stated:
"*Essentially agree with this variation with the exception of clause 54 (2) (a). If the operator has re-homed the resident at no cost to the resident charges should continue."*

The RVA's position on clause 54(2)(a) is that *"all charges should stop from the date of the insured event, unless the resident is re-homed at the operator's expense because this is fair and reasonable. Consequently, we do not support the proposed clause and want the Association's proposed wording be used*."

Variation 2, Issue 3, Clause 54(3): Continued charges for village outgoings

Proposed by Retirement Villages Association

In the consultation document a new sub clause 54(3) proposes that overheads, such as rates, be covered by the operator's business interruption insurance when a village is uninhabitable after an insured event. Payment of weekly fees by residents would cease except where the operator provides temporary accommodation.

Current wording	Proposed wording
	Additional clause 54(3) (Existing clauses 54(3) to 54(6) to be renumbered)
	Continuing charges for outgoings 54 (3) If a unit or village is damaged or destroyed following an insured event so as to make the residential unit uninhabitable, the weekly fees should cease from the date of the insured event, unless the operator provides temporary accommodation.

Common responses

Most submissions were in support of this clause. A number gave no response.

The common responses in support were that it was 'fair' and 'just' for charges to stop, but some were concerned that the new accommodation needs to be acceptable to resident. The resident should have a choice whether to accept temporary accommodation. One thought it fair as charges such as rates would be covered by the operator's business interruption insurance.

Suggested re-wording by Age Concern /Grey Power supported the intent of the RVA new clause 54(3) but repositioning it within the Code as a new clause 22(9).

> *…the weekly fees must cease from the date of the damage or destruction unless the resident accepts temporary accommodation paid for by the operator.*

That 'should' be changed to 'must' was also mentioned in other submissions.

Responses not in support of the variation

The concerns of those who didn't support the variation to clause 54(3) were that

- Fees at the alternative accommodation needed to be affordable
- Residents should provide their own temporary accommodation insurance
- The operator should be required to provide temporary accommodation.

Some comments were received about the existing clause 54(2) but which we were not consulting on.

Other comments

Two of those who didn't give a clear yes/no response to the variation commented that the effects on unit title villages may be different and would depend on whether they had business interruption insurance, for example

> *"In the event that the village is uninhabitable many of the outgoings will reduce e.g. staff wages (gardening), maintenance programme etc. The remaining charges such as rates can either be shared through the normal body corporate process of cost recovery or paid by some of the insurance. For such an unlikely event our residents would prefer to pay when required rather than in advance through insurance premium."(Operator)*

A residents' committee was of the "*opinion that other matters and subjects raised - including matters of insurance - should be the subject of discussion between residents, operators and the Statutory Supervisors to reach agreement. These matters are of a far reaching nature and as stated in the RVA's own submission, still require a lot of clarification and discussion to achieve finality.*"

Variation 3, Issue 3, Clause 54(3)(4)(5)(6): Fixed deductions

Proposed by Department of Building and Housing

The Department of Building and Housing sought changes to ensure residents and operators have a common understanding of the charges that accrue in standard exit and no- fault exit situations. (Note: Fixed deductions are also known as a facilities fee, village contribution, or deferred management fee).

Current wording	**Proposed wording**
Clause 54 payments due to the resident on termination of occupation	**Clause 54 payments due to the resident on termination of occupation**
Fixed deductions 54(3) Fixed deduction clauses only apply to contracts entered into after 25 September 2006. 54(4) The fixed deduction must not accrue past the date on which the resident is paid the amount payable to them on termination of the agreement.	**Fixed deductions** *54(3) The fixed deduction must not accrue past the date on which the resident moves out of a residential unit that has been damaged or destroyed through no fault of the resident, if the operator has decided, or subsequently decides, that it is not practicable to repair or replace the unit. [Clause 47(2)(b) of this Code of Practice]* 54(4) *Clauses 54(5) and 54(6) of this Code of Practice only apply to contracts entered into after 25 September 2006.*
54(5) Details of fixed deductions must be set out in the disclosure statement.	*54(5) The fixed deduction must not accrue past the earlier of:* a) *the date on which the resident moves out of the unit that has been damaged or destroyed through no fault of the resident, if the operator has decided, or subsequently decides, that it is not practicable to repair or replace the unit* b) *the date on which the resident is paid the amount payable to them on termination of the occupation right agreement.* 54(6) Details of fixed deductions must be set out in the disclosure statement.
Payment after sale or disposal of the residential unit by the operator 54(6) If an occupation right agreement allows the	**Payment after sale or disposal of the residential unit by the operator** 54(7) If an occupation right agreement allows the

Current wording	Proposed wording
Clause 54 payments due to the resident on termination of occupation	**Clause 54 payments due to the resident on termination of occupation**
operator to sell or dispose of the former resident's unit, the operator must pay all money owing to the former resident no later than five working days after the date the operator receives payment in full from the new resident.	operator to sell or dispose of the former resident's unit, the operator must pay all money owing to the former resident no later than five working days after the date the operator receives payment in full from the new resident

Responses in support of the variation

Those supporting the variations to sub-clauses 54(3)-54(5) typically made no specific comment.

> *"Yes I support these changes as they appear unobjectionable to residents and appear to establish a fair regime inter parties."*

Some suggested re-wording included the resident in the decision to rebuild or repair:

> *"Clause 54(3) …..if the operator and resident have decided, or subsequently decide….or replace the unit "*

Those not supporting this sub clause raised the same issue:

> *"54 (3) No. The decision is not for the operator."*

Comments were:

> *"Clauses 54 (3)and (5) not supported. Too vague."*

> *'Clauses 54 (3) and 54 (5) (a) The fixed deduction should cease on the date that the resident moves out irrespective of the operators decision. If the operator decides to repair or replace the unit there should be no fixed deduction until the resident can move back in."*

Two comments on clause 54(4) were:

> *"We recommend that the opportunity be taken to delete 54 (4) from the code as we are not aware of any deferred management arrangements that extend beyond 5 years".*

> *"54(4) Is this relevant? Are not aware of any amortisation that runs for more than five years? Hence Sept 2006 to Sept 2011."*

There was little comment on changes proposed to sub clause 54(5).There were some similar comments relating to clause 54(3) on the role of the resident and the operator in making the decision to repair or rebuild. Several suggested wordings were to improve readability only.

Responses not supporting the variation

Those not supporting clause 54(5)(a) suggested deleting the last phrase, i.e. from "if" to "unit" as they didn't support the wording specifying the operator's role in making the decision. This view was typical of several residents' committees, who provided specific comments on each sub clause in the variation. They didn't support clause 54(5)(a) but did support clause 54(5)(b).

One suggestion for clause 54(5)(b) was to add at the end of the clause "*if the resident agrees to termination*".

Variation 2, Issue 4, Clause 54(7): Amortisation of the deferred management fee

Proposed by Retirement Villages Association

This variation (variation 2 issue 4 in the discussion document) was proposed by the RVA to clarify the situation of the fixed deduction (DMF) during the period after an insured event and while the village is being rebuilt.

Current wording	Proposed wording
	Clause 54.7 New clause
	Continuing charges if a unit or village is damaged or destroyed following an insured event *Following an insured event and the unit or village is uninhabitable requiring the resident to move to other accommodation not provided by the operator, the accrual or amortisation of the fixed deduction must be suspended until the resident can be accommodated again in the unit or in a replacement unit. Both the operator and the resident must agree to the reinstatement of the DMF.*

Responses in support of the variation

The few comments made by those supporting this variation included the need to clarify that it only deals with the situation where the operator is going to rebuild. With clause 54(7) some were concerned about the accommodation being of a similar standard. They supported the operator and resident having to agree on the reinstatement of the fixed deduction as this was an opportunity to ensure the new unit was acceptable. Another was concerned about the situation where parties could not agree.

One submission wanted to see this new clause added in to clause 22 as it didn't belong under the heading of "payments due to the resident on termination or end of occupation". Their suggested wording also replaces the term 'insured event' with

> *Cl 22 (10) If, following damage or destruction the unit or village is rendered uninhabitable requiring the resident to move to other accommodation and this accommodation is not provided by the operator,.....*

Responses not supporting the variation

Of those not supporting the variation to clause 54(7) one residents' association said it was because of the lack of specificity as to what they might be agreeing about – and wanted to ensure the residents were clear about the level and timing of the fixed deduction amortisation. Another submission wanted provision by the operator of temporary accommodation to be mandatory.

"Searching for new accommodation would be beyond the capabilities of many retirees in retirement villages."

A residents' committee who did not support the variation said "*The residents do not support any of the variations proposed by the DBH*."

A community law centre comment agreed with the wording suggested by the Retirement Villages Association in relation to 54(7). However, they believed that there should also be the option to have a "no-fault" termination to the occupancy agreement if a replacement unit is not up to an agreed "similar" standard as the damaged or destroyed unit.

Issues outside the scope of the three variations

A number of comments in the group of similar submissions received from D Gibson, the Waikato ARRV and others, concerned wider issues than those addressed in the specific variations. Particularly in respect of insurances there were concerns about:

- Whether statutory supervisors in general have the necessary insurance knowledge and professional approach to verify the appropriateness, and adequacy of a retirement village's insurances.
- Whether the availability of independent advice is an adequate protection with respect to insurance cover
- Whether the current or proposed regime provides adequate checks and balance for residents and intending residents "*who may be vulnerable to errant operators, deficient statutory supervisors and inadequate insurance policy terms*."
- The remedies available to residents if insurance cover subsequently proves woefully inadequate
- The lack of court cases on retirement villages and the small number of disputes submitted to the Retirement Commissioner "*bear evidence that the concept of the Code of Practice being enforceable as a contract is problematic for consumer protection for this sector. Residents as a group are unlike a commercial entity with financial resources and manpower and will power to take such actions. Such remedies are like an ambulance at the bottom of the cliff.*"

These submitters proposed a certification process to ensure retirement village ORAs were compliant with the minimum standards of the code in respect of their insurance arrangements. Assessing and certifying the adequacy of the insurances held by an operator was proposed. Such certificates should be filed with the statutory supervisor.

A query was also raised about monies in a village's maintenance fund and what would happen to that money if a village was not rebuilt after a no-fault event.

Appendix A: List of Submitters

Submissions on the Retirement Commissioner's proposals

ID no	Name	Organisation
RC001	Daphne Stevens	Kensington Court
RC002	Anonymous	Chatsford Lifestyle Village
RC003	Derrick Gee	
RC004	Mary Buckthought and 185 residents	Carmel Country Estate
RC005	Margaret Jocelyn Wine….	Chatsford Lifestyle Village
RC006	J (Ian) Hutton	Metlifecare Coastal Villas Residents Committee
RC007	Douglas and Adurey Leybourne	The Selwyn Foundation
RC008	Kenneth Harry Miles	Lady Allum Village
RC009	Lady Allum Village - Residents	Lady Allum Village
RC010	Heather May Campbell	Chatsford Lifestyle Village
RC011	Joan Ellen Wright	Chatsford Lifestyle Village
RC012	J C Mathieson	Chatsford Lifestyle Village
RC013	Huia and Ngaire Ockwell	Chatsford Lifestyle Village
RC014	Prema Devadatta	Acre Court Retirement Village
RC015	Michael Lough	
RC016	Wendy Huston	Kapiti Retirement Trust
RC017	B R Biancone	Chatsford Lifestyle Village
RC018	W R Burton	Chatsford Lifestyle Village
RC019	Residents	Te Puke Country Lodge
RC020	Jean Louisa Hodges	Silverstream Lifestyle Retirement Village Committee
RC021	B & M Pearce	Mary Doyle Village
RC022	Mary Doyle Lifecare Trust Residents Committee	Mary Doyle Lifecare Trust
RC023	Elizabeth Jones	BUPA at Tararu, Thames
RC024	Rosemary Russell (plus 3 other residents who do not wish to be named)	St Lukes Village
RC025	Jim Deeley	Omokuroa Country Estate

ID no	Name	Organisation
RC026	Carole and Robin Wilson	Maygrove Village
RC027	Barry Wood (& 387 residents)	Waitakere Gardens Resident's Association
RC028	G Duindam	Acre Court Retirement Village
RC029	J L Munro	Cedar Manor Retirement Village
RC030	57 residents	The Avenues
RC031	32 residents	Redwood Retirement Village
RC032	Charles Brown	Vision Dannemora
RC033	Barbara Jackson	Peninsula Club Resdent Association
RC034	Peggy Spencer	Metlifecare Retirement Village
RC035	Peter Shuttleworth	
RC036	O F O'Neill and A Campbell	Snedden Village
RC037	J G Porteous	Settlers
RC039	Micheal J Gaseltine	Knightsbridge Village
RC040	Grace S Hollander	
RC041	Patricia A Robb	Copper Beech Apartments
RC042	Peter Orpin	Covenant Trustee Services Ltd
RC043DBH09	Kenneth G Page	Roundhay Retirement Village
RC044DBH14	Association of Residents of Retirement Villages (Auckland Region) (Bill Atkinson).	ARRV Auckland - Northbridge Residents Association - Daphne Rickman - Ons Dorp - Corrie Van der Hulst - Metlife Care Pakuranga - Helen Paton
RC045	Graeme N Robinson	Silverstream Lifestyle Village
RC046	Denise Lormans	Southland Community Law Centre
RC047	Winifred Mary Gee	
RC048	Lilias R Johnson	Chatsford Lifestyle Village
RC049	Tom and Joan Ashworth	Chatsford Lifestyle Village
RC050	Robin Tear and others	Cantabria Retirement Village Ltd
RC051	Hugh Miller	Bayswater Village Residents Association Inc.
RC052	Raewyn Wootton	Maygrove Village Residents Association
RC053	Ken Hayman	The Avenues
RC054	Trevor Daniell	Kapiti Coast Grey Power Association

ID no	Name	Organisation
RC055	John Edmonds	Richmond Villas Lifestyle Village
RC056	Glenn Jetta Barclay	Selwyn Heights Retirement Village
RC057 & DBH07	Natalie Smith	Dunedin Community Law Centre
RC058	Judith Carolyn Sherbourne and others	Mt Eden Gardens Boutique Retirement Village
RC059	Val Horne	Selwyn Village Independent Residents Society Inc.
RC060	Heather D Beatson	Greenview Park Retirement Village
RC061	Illegible	Epsom Village
RC062	Warwick Smith	
RC063	Margaret Barr	Chatsford Lifestyle Village
RC064	Michael and Alie Greeve	Chatsford Lifestyle Village
RC065	Rosa Marshall	Chatsford Lifestyle Village
RC066	Doreen MacKay	Chatsford Lifestyle Village
RC067	Lorraine Fox	Chatsford Lifestyle Village
RC068	Rose Renwick	Chatsford Lifestyle Village
RC069	Ian Renwick	Chatsford Lifestyle Village
RC070	Genevieve Grant	Chatsford Lifestyle Village
RC071	Gavin and Jessie Shields	Chatsford Lifestyle Village
RC072	Edgar R Bagley	Chatsford Lifestyle Village
RC073	Aileen Labes	Chatsford Lifestyle Village
RC074	Alison Barnes	Chatsford Lifestyle Village
RC075	Lois Hendry	Chatsford Lifestyle Village
RC076	J & M Peacock	Chatsford Lifestyle Village
RC077	Phyllis Whiteford	Chatsford Lifestyle Village
RC078	no name	Chatsford Lifestyle Village
RC079	Siny Teyen	Chatsford Lifestyle Village
RC080	Paul Armfelt	Chatsford Lifestyle Village
RC081	Sally Armfelt and Denise May Armfelt	Chatsford Lifestyle Village
RC082	J Winwood	Chatsford Lifestyle Village
RC083	Jan S Tunnage	Chatsford Lifestyle Village
RC084	Shirley Corbishley	Chatsford Lifestyle Village

ID no	Name	Organisation
RC085	Trish Turnbull	Chatsford Lifestyle Village
RC086	Phyllis Nichol	Chatsford Lifestyle Village
RC087	Charles Barrye Irvine	Chatsford Lifestyle Village
RC088	Robert Cameron	Chatsford Lifestyle Village
RC089	Helen Miller	Chatsford Lifestyle Village
RC090	Kathleen Turner	Chatsford Lifestyle Village
RC091	Margaret Peattie	Chatsford Lifestyle Village
RC092	Hocking	Chatsford Lifestyle Village
RC093	Marilyn Annan	Chatsford Lifestyle Village
RC094	Valda Jopson	Chatsford Lifestyle Village
RC095	DJ and IJ Broadbent	Chatsford Lifestyle Village
RC096	Yolande McLeod	Chatsford Lifestyle Village
RC097	June Smith	Chatsford Lifestyle Village
RC098	Esme Moore	Chatsford Lifestyle Village
RC099	Doreen Caparn	Chatsford Lifestyle Village
RC100	Graham and Lesley Stuart	Chatsford Lifestyle Village
RC101	Mary Gourlay	Chatsford Lifestyle Village
RC102	M Bennetts	Chatsford Lifestyle Village
RC103	Barbara White	Chatsford Lifestyle Village
RC104	Norma Mears	Chatsford Lifestyle Village
RC105	no name	Chatsford Lifestyle Village
RC106	Russell and Letty Divers	Chatsford Lifestyle Village
RC107	Glenn Jetta Barclay	Selwyn Heights Retirement Village
RC108	Patrick Meffan	Roundhay Retirement Village
RC109	Ann Martin and Bill Atkinson	Age Concern NZ and Grey Power
RC110	K H Cunningham	
RC111	Lance Bunting	Silverstream Lifestyle Retirement Village
RC112	Jason Rowling	Carmel Country Estate Retirement Village
RC113	Lynne Abercrombie, GM Operations	Metlifecare Limited
RC114	Pamela Thomas and others	Gracelands Retirement Village
RC115	John Togneri	Chatsford Lifestyle Village
RC116	AHH and PM Johnson	Chatsford Lifestyle Village

ID no	Name	Organisation
RC117	John Barr	Chatsford Lifestyle Village
RC118	L. A. Hutchison	Chatsford Lifestyle Village
RC119	B. Hanley	Chatsford Lifestyle Village
RC120	Iris Bartlett	Chatsford Lifestyle Village
RC121	Roger Watson	Chatsford Lifestyle Village
RC122	Valerie Wansink	Chatsford Lifestyle Village
RC123	Doug Christensen	Chatsford Lifestyle Village
RC124	James Peter Bodkin	Chatsford Lifestyle Village
RC125	Frances Yeoman	Chatsford Lifestyle Village
RC126	M. Donaldson	Chatsford Lifestyle Village
RC127	J. C. M. Van Alphen	Chatsford Lifestyle Village
RC128	Nancy Milne	Chatsford Lifestyle Village
RC129	Johanna and Denis Morgan	Chatsford Lifestyle Village
RC130	Billie McLeod	Chatsford Lifestyle Village
RC131	Warren and Rosemary Buchanan	Chatsford Lifestyle Village
RC132	Garry and Sue Heaton	Chatsford Lifestyle Village
RC133	J. G. van der Linden	Chatsford Lifestyle Village
RC134	Raymond and Noelene Ferris	Chatsford Lifestyle Village
RC135	R. M. King	Chatsford Lifestyle Village
RC136	Neil Inkster	Metlifecare coastal villas
RC137	Colin McKinney	Althorp Lifestyle RV
RC138	K Ramsay	Chatsford Lifestyle Village
RC139	no name	Chatsford Lifestyle Village
RC140	Maree Cooper	Chatsford Lifestyle Village
RC141	Mary Bogers	Chatsford Lifestyle Village
RC142	Noeleen Brash	Chatsford Lifestyle Village
RC143	Brewster H. Everett	Pakuranga Park Village
RC144	John Collyns	Retirement Villages Association
RC145	David Brown Douglas	Trustee Corporations Association of New Zealand Inc.
RC146	Glenys Glynn	Regency Park Estate
RC147	Tony Keedwell	Copper Crest Village Estate

ID no	Name	Organisation
RC148	Marcia Dallas Bush	Regency Park Estate
RC149	Vision Forest Lakes Residents Association	Forest Lakes
RC150 and DBH17	Imelda Corby Secretary	Association of Residents of Retirement Villages-Waikato
RC151	David Gibson	
RC152	Fay Henwood	Metlifecare Pinesong Residents committee

Glossary

Term	Meaning
ARRV	Association of Residents of Retirement Villages
BII	Business interruption insurance
the Code	the Retirement Villages Code of Practice 2008
CFLRI	Commission for Financial Literacy and Retirement Income
DBH	Department of Building and Housing
DMF	Deferred management fee
ORA	Occupation Right Agreement
RVA	Retirement Villages Association (an association of retirement village operators)
TCA	Trustees Corporation Association (an association representing some statutory supervisors)