BEFORE THE HEARINGS PANEL

IN THE MATTER OF	the Resource Management Act 1991
AND	
IN THE MATTER OF	of Proposed Plan Change 12 to the Operative Hamilton City District Plan (submitter 154), Proposed Plan Change 26 to the Operative Waipā District Plan (submitter 55), and Variation 3 to the Proposed Waikato District Plan (submitter 30)

LEGAL SUBMISSIONS ON BEHALF OF ARA POUTAMA AOTEAROA, DEPARTMENT OF CORRECTIONS

Dated: 9 June 2023

GREENWOOD ROCHE
LAWYERS
CHRISTCHURCH
Solicitor: Rachel Murdoch
(rmurdoch@greenwoodroche.com)

Submitter's Solicitor
Kettlewell House
Level 3, 680 Colombo Street
P O Box 139
Christchurch
Phone: 03 353 0574

MAY IT PLEASE THE PANEL

1 INTRODUCTION

1.1 These legal submissions are made on behalf of Ara Poutama Aotearoa the Department of Corrections (**Ara Poutama**).[1]

1.2 These submissions respond to the invitation from the Panel to address the potential implications of the recent High Court decision in *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Inc*[2] (***Eden Epsom***) for the Intensification Planning Instruments (**IPIs**) for district councils in the Waikato region, "*particularly with respect to the proper relationship (and weighting) of policies 3 and 4 with the body of the* [National Policy Statement on Urban Development 2020] (**NPS-UD**)".[3]

1.3 For the reasons set out below, it is considered that the High Court's findings are directly relevant to the Panel's recommendations on the Hamilton, Waikato and Waipā IPIs. Of particular relevance to Ara Poutama's submissions, the Court's findings will also inform the Panel's recommendations on what do (and do not) constitute related provisions which "*support or are consequential on*" the MDRS and policies 3 – 5, as applicable.[4]

2 *EDEN EPSOM* - HIGH COURT DECISION

2.1 The High Court's decision in *Eden Epsom* concerned an appeal of interim and final decisions made by the Environment Court on a private plan change request to the Unitary Plan (**PPC21**).

2.2 Of particular issue in that appeal was the Environment Court's approach to implementing the NPS-UD, and specifically:

(a) its finding that it was not required to give effect to objectives and policies in the NPS-UD that were not requiring "planning decisions" at that time; and

---

1 Counsel for Ara Poutama was present at the strategic hearing.
2 *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948.
3 Refer Independent Hearing Panel HCC PC12 Direction 12, Waipā DC PC26 Direction 15 and Waikato DC Direction 15, at para 2.
4 RMA, section 80E(1)(b)(iii).

(b) its failure to consider how PPC21 would give effect to those objectives and policies that were requiring planning decisions.

2.3 The appellant considered these aspects of the Court's decision to be errors of law.

2.4 Before turning to those points of appeal, the High Court considered:

(a) the hierarchy of planning documents under the Resource Management Act 1991 (**RMA**), and the requirement for lower order plans (regional policy statements, regional plans and district plans) to "give effect to" national policy statements;[5]

(b) the procedure which applies to privately initiated requests to change district plans, including the requirement for the change to be accompanied by an evaluation report which examines, *inter alia,* the extent to which the objectives of the proposed change are the most appropriate way to achieve the purpose of the RMA;[6]

(c) the substantive requirements in sections 74 and 75 of the RMA which govern consideration of those requests by the territorial authority (or the Environment Court on appeal), being:[7]

> *"74(1) A territorial authority must prepare and change its district plan in accordance with—*
>
> *…*
>
> *(ea) a national policy statement, a New Zealand coastal policy statement, and a national planning standard;*
>
> *…*
> *75(3) A district plan must give effect to—*
> *(a) any national policy statement"*

2.5 In that context, the High Court reviewed the specific provisions of the NPS-UD and determined that the Environment Court's approach to implementing its provisions was unlawful. In particular, it found that:

---

5 *Eden Epsom,* above n 2, at [18] – [21] and was adapted from the Supreme Court's overview in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [10]–[14].

6 *Eden Epsom,* above n 2, at [22] – [24].

7 *Eden Epsom,* above n 2, at [25] – [27].

(a) the NPS-UD applied to Auckland Council (and therefore to the Environment Court) as a Tier 1 authority;[8]

(b) as a proposed change to the Unitary Plan, PPC21 provided a practicable opportunity for the Council (and therefore the Environment Court) to implement the NPS-UD through those provisions. That obligation was not deferred or diminished by the separate implementation timeframes in the NPS-UD;[9] and

(c) while the NPS-UD lists certain things that a Tier 1 authority must do to give effect to certain policies (including policies 3 and 4),[10] that list is clearly stated to be "non-exhaustive" and therefore does not limit the Council (or the Court's) general obligation to give effect to the NPS-UD as a whole.[11]

2.6 For those reasons, the High Court found that the Environment Court erred in its approach to the NPS-UD. It held that in considering that plan change request, "*the Environment Court should have considered the extent to which its proposed changes to the district plan would give effect to all provisions of the NPS-UD*" (emphasis added).[12]

3 RELEVANCE FOR INTENSIFICATION PLANNING INSTRUMENTS

3.1 In my submission, the findings of the High Court in *Eden Epsom* apply to the Panel's recommendations (and subsequent territorial authority decisions) on the IPIs to the effect that in making those recommendations (and decisions):

(a) it is required to give effect to all objectives and policies of the NPS-UD; and

(b) it must consider the extent to which the provisions of the IPIs give effect to all provisions of the NPS-UD.

3.2 *Eden Epsom* concerned a private plan change request which was progressed through a standard Schedule 1 process.

---

8 *Eden Epsom,* above n 2, at [79].
9 *Eden Epsom,* above n 2, at [83].
10 NPS-UD, subpart 6.
11 *Eden Epsom,* above n 2, at [85] and [86].
12 *Eden Epsom,* above n 2, at [88].

3.3 By comparison, an IPI is subject to a separate, bespoke process in the RMA, known as the Intensification Streamlined Planning Process.[13] Unlike other plan changes, the scope of an IPI is prescribed in the RMA under section 80E. In particular, it must incorporate the medium density residential standards and, in the case of Tier 1 authorities, it must give effect to policies 3 and 4 of the NPS-UD. It may also amend or include a suite of other provisions, including "*related provisions … that support or are consequential on the MDRS or policies 3, 4 and 5 of the NPS-UD, as applicable*".[14]

3.4 In my submission however, neither the bespoke process nor its prescribed content serves to distinguish an IPI from the requirement for it, as a change or variation to a district plan, to give effect to the NPS-UD. As noted above, an IPI is defined in the RMA as "*a change to a district plan or a variation to a proposed district plan*".[15] It is also included in the RMA definition of "change":[16]

> "***Change means**: a change proposed by a local authority to a policy statement or plan under clause 2 of Schedule 1, including an IPI notified in accordance with section 80F(1) or (2) …"*

3.5 Further, while the ISPP is a bespoke process with separate functions for the Panel (making recommendations on an IPI) and the territorial authority (determining whether to accept or reject those recommendations), it does not impose a separate decision-making framework for the performance of those functions.

3.6 An IPI, even when it is processed under an ISPP, is still a "*change to a district plan".* As such, the "*substantive requirements*" for those decisions (using the language of the High Court) remain as set out in sections 74 and 75 of the RMA.[17] They include the requirement for district plans to give effect to national policy statements, and for territorial authorities to give effect to those documents when changing their district plans. Put simply, there is nothing in the RMA or in the NPS-UD to suggest that the requirement to comply with those obligations is altered or diminished by the ISPP for an IPI.

---

13 RMA, section 77G(3) and 80F(3).
14 RMA, section 80E(1)(b)(iii).
15 RMA, section 80E(1).9
16 RMA, section 43AA.
17 *Eden Epsom,* above n 2, at [25].

3.7 To that end, in accordance with *Eden Epsom,* the IPIs for Waikato must give effect to all provisions of the NPS-UD and, as part of its recommending role, the Panel is obliged to consider the extent to which the provisions of those IPIs do that.

3.8 As prescribed mandatory elements of an IPI, provisions which give effect to policies 3 – 4 should satisfy the NPS-UD directives as they relate to intensification. Increasing building heights and enabling more people to live and operate in appropriate areas is undoubtedly the primary function of an IPI. However, *Eden Epsom* confirms that implementation of those directives cannot be divorced from the other objectives of the NPS-UD, which include:

> *"**Objective 1**: New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.*
>
> *…*
>
> ***Objective 3:** Regional policy statements and district plans enable more people to live in, and more businesses and community services to be located in, areas of an urban environment in which one or more of the following apply: the area is in or near a centre zone or other area with many employment opportunities the area is well-serviced by existing or planned public transport there is high demand for housing or for business land in the area, relative to other areas within the urban environment."*
>
> *(emphasis added.)*

3.9 Neither the RMA, nor the NPS-UD, contemplates intensification in isolation from realising well-functioning urban environments. One must support the other. In performing its functions under the RMA, the Panel is obliged to consider the extent to which that is achieved through the provisions of an IPI, and where appropriate, make recommendations to realise that outcome.

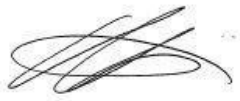
3.10 To that end, in my submission, the inclusion of "*related provisions ...that support or are consequential on the MDRS or policies 3 - 5, as applicable"* within the scope of an IPI is an essential mechanism for ensuring that that change gives effect to all objectives and policies of the NPS-UD.

3.11 The approach taken by Ara Poutama to IPIs throughout the country is that the supporting or consequential function of those "related

provisions" is to ensure that intensification enabled through the MDRS and implementation of policies 3 – 5 will achieve the broader objectives of the NPS-UD, including a well-functioning urban environment. That is the basis for its relief, and in my submission, the High Court's decision in *Eden Epsom* supports that approach.

3.12 Ara Poutama would like to thank the Panel for the opportunity to make submissions on this matter. Counsel is available to answer any questions on these submissions.

DATED this 9th day of June 2023



R A Murdoch
Counsel for Ara Poutama Aotearoa, the Department of Corrections