

BEFORE THE HEARING PANEL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Proposed Plan Change 26 to the Operative Waipā District Plan

**LEGAL SUBMISSIONS OF COUNSEL FOR WAIPĀ DISTRICT COUNCIL ON THE
SOUTHERN CROSS DECISION
Dated 9 June 2023**

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Introduction

1. On 30 May 2023 the Independent Hearing Panel (the **Panel**) issued Direction #15 in respect of Plan Change 26 to the Waipā District Plan (**PC26**). Direction #15 refers to the recent decision of the High Court in *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Inc*¹ (the **Southern Cross decision**). The Panel has provided an opportunity for counsel who appeared or were present at the strategic hearing on PC26 (and the other Waikato IPIs) to make submissions regarding the implications of the *Southern Cross* decision, 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 (**NPS-UD**).
2. These legal submissions are made on behalf of Waipā District Council (the **Council**) in accordance with paragraph 3(a) of Direction #15. As the hearing has been held on PC26, and the filing of closing submissions on behalf of the Council completed, the Council respectfully requests an opportunity to reply to submissions made by other parties under paragraph 3(a).

The *Southern Cross* decision

3. The *Southern Cross* decision arises out of appeals on Private Plan Change 21 to the Auckland Unitary Plan which sought to rezone properties in Gillies Avenue, Epsom, for the purpose of extending the Brightside Hospital (**PPC21**).² PPC21 was approved by a panel of commissioners on behalf of Auckland Council but was appealed to the Environment Court by the Eden Epsom Residential Protection Society Incorporated.
4. Before the appeal was heard, the NPS-UD came into force on 20 August 2020.

¹ [2023] NZHC 948.

² Ibid at paragraph 1.

5. The Environment Court allowed the appeal and declined to approve PPC21. As part of its decision, the Environment Court held that it was not required to give effect to objectives and policies of the NPS-UD that are not requiring “planning decisions” at this time.³ The proponent of PPC21 appealed this decision to the High Court.
6. The first error of law considered by the High Court in the *Southern Cross* decision was that this finding of the Environment Court was incorrect, and that the Environment Court was required to give effect to the NPS-UD as a whole.⁴
7. The High Court concluded that the Environment Court’s finding was incorrect for the following reasons:
 - (a) In terms of the scope of the NPS-UD’s application: Clause 1.3(1)(a) applied the NPS-UD to the Auckland Council, as a tier 1 local authority, without the need to refer to “planning decisions” in clause 1.3(1)(b).⁵
 - (b) In terms of the temporal scope of the NPS-UD: the Auckland Council was required by clause 4.1(1) to amend the Auckland Unitary Plan to give effect to the NPS-UD as soon as practicable. The effect of clause 4.1(2) is to add a two-year outer limit for complying with certain policies, but it does not defer or diminish the Auckland Council’s obligation under clause 4.1(1).⁶
 - (c) The Auckland Council’s general obligation to give effect to the NPS-UD is confirmed in clause 3.1.⁷
8. For these reasons the High Court concluded that the Environment Court should have considered the extent to which PPC21’s proposed changes to

³ Ibid at paragraph 13.

⁴ Ibid at paragraph 72.

⁵ Ibid at paragraphs 76 to 80.

⁶ Ibid at paragraphs 81 to 84.

⁷ Ibid at paragraphs 85 to 87.

the Auckland Unitary Plan would give effect to all the provisions of the NPS-UD:⁸

For these reasons, I respectfully conclude that the Environment Court erred in holding 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. In considering the request for PPC 21, the Environment Court should have considered the extent to which PPC 21’s proposed changes to the district plan would give effect to all the provisions of the NPS-UD.

Implications for PC26

9. Counsel submits that the *Southern Cross* decision confirms that the Panel should consider the extent to which PC26’s proposed changes to the Waipā District Plan (District Plan) would give effect to all the provisions of the NPS-UD.

10. This approach is consistent with the approach taken in the legal submissions and evidence on behalf of the Waipā District Council at the strategic opening hearing of the Waikato IPIs and at the substantive hearing of PC26. In particular:
 - (a) Appendix A of the Joint Legal Submissions of Counsel for the Councils for the Joint Opening Hearing dated 8 February 2023 recorded the obligation in section 75(3) to give effect to any national policy statement.
 - (b) The section 32 report and the section 42A report for PC26 identify and consider the relevant objectives and policies of the NPS-UD.⁹
 - (c) Further evidence regarding whether PC26 gives effect to the wider objectives and policies of the NPS-UD was provided in the evidence of Mr Quickfall on behalf of the Council.¹⁰

⁸ Ibid at paragraph 88.

⁹ Paragraphs 3.5.80 to 3.5.86 of the Section 32 report; section 7.3 of the Section 42A report.

¹⁰ Paragraphs 25 to 27 of the Statement of Evidence of Tony Quickfall dated 20 December 2022; Rebuttal Statement of Evidence of Tony Quickfall dated 19 April 2023.

11. However, counsel submits that the *Southern Cross* decision does not have any implications for the scope of PC26. In particular:
- (a) The scope of an Intensification Planning Instrument (IPI) is set out in section 80E of the Resource Management Act 1991; section 80G(1)(b) prevents an IPI from being used for any other purpose.
 - (b) In particular, section 80E(1)(a)(ii)(A) requires an IPI to include provisions which give effect to Policies 3 and 4 of the NPS-UD.
 - (c) The proposed changes to the District Plan that are proposed to give effect to Policies 3 and 4 of the NPS-UD must be considered by the Panel against the Council's wider obligations to:¹¹
 - (i) Give effect to any national policy statement, national planning standard and operative regional policy statement;
 - (ii) Have regard to any proposed regional policy statement, relevant management plans and strategies under other Acts; and
 - (iii) Take into account any relevant planning document recognised by an iwi authority.
12. This means that, in practice, where the Panel has been asked to consider more than one set of proposed changes to give effect to Policy 3 of the NPS-UD, it must consider the extent to which those proposed changes give effect to the relevant objectives and policies of the relevant national policy statements, regional policy statement, and other planning documents.
13. However, counsel submits that the converse is not correct: evidence that a proposed change would give effect to an objective or policy of a national policy statement does not mean that it falls within the scope of an IPI under section 80E, if it is not required to give effect to Policies 3 and 4 of the NPS-UD (or another subsection of section 80E).

¹¹ As set out in full in Appendix A to the Joint Legal Submissions for the Councils for the Joint Opening Hearing dated 8 February 2023.

14. In summary, while all of the objectives and policies of the NPS-UD have the same legal weight in the Panel's assessment of PC26, only Policies 3 and 4 are relevant to the scope of PC26.

Conclusion

15. The *Southern Cross* decision confirms that the Panel should consider whether PC26's proposed changes to the District Plan would give effect to all the relevant provisions of the NPS-UD. This approach is consistent with the legal submissions and evidence presented on behalf of Waipā District Council at the strategic opening hearing and the substantive hearing of PC26.
16. As the hearing has been held on PC26 and closing submissions have been filed, counsel requests an opportunity to file legal submissions in reply to any legal submissions by other parties under paragraph 3(a) of Direction #15.

Signed this 9th day of June 2023



W J Embling
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