

**BEFORE A PANEL OF INDEPENDENT HEARING COMMISSIONERS IN THE  
WAIKATO REGION**

**I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHEKE WAIKATO**

**UNDER** the Resource Management Act 1991 (RMA)

**AND**

**IN THE MATTER** of Proposed Variation 3 to the Waikato Proposed  
District Plan (PDP)

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**LEGAL SUBMISSIONS ON BEHALF OF WAIKATO DISTRICT COUNCIL ON THE  
SOUTHERN CROSS DECISION**

**8 June 2023**

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## INTRODUCTION

1. On 27 April 2023 the High Court issued the decision *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society & Ors* [2023] NZHC 948 (“*Southern Cross* decision”). The Independent Hearings Panel for Variation 3 has identified the case as having potential implications for the consideration of Intensification Planning Instruments (IPIs) under the RMA.
2. Counsel who appeared or were present at the Strategic Hearing of Variation 3 have been provided an opportunity to file written legal submissions on the relevance of the *Southern Cross* decision, in particular 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”).<sup>1</sup>

## THE *SOUTHERN CROSS* DECISION

3. The High Court’s decision in *Southern Cross* arises out of appeals on Private Plan Change 21 to the Auckland Unitary Plan (“PPC21”). PPC21 sought to rezone properties in Gillies Avenue, Epsom, for the purpose of extending the *Southern Cross* Brightside Hospital.<sup>2</sup> Independent Commissioners on behalf of Auckland Council decided to approve PPC21. That decision was appealed to the Environment Court by the Eden-Epsom Residential Protection Society Inc.
4. After the Society’s appeal was lodged, but before the Environment Court heard the appeal, the NPS-UD 2020 came into force. The NPS-UD was notably different to the previous NPS on Urban Development Capacity, and specifically introduced the intensification policies (Policies 3, 4 and 5). A number of objectives and policies in the NPS-UD refer to

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<sup>1</sup> Panel Direction #15.

<sup>2</sup> At [1].

‘planning decisions’ and others direct local authorities to provide for specific outcomes in their district and regional planning documents.

5. The NPS-UD includes two parts on the application of the NPS-UD and timing for implementation. Under Part 1, Clause 1.3 (1) the NPS-UD applies to all Tier 1, 2 and 3 local authorities – subclause (a), and to planning decisions made by any local authority that affect an urban environment – subclause (b).
6. Part 4 relates to timeframes for implementing the NPS-UD. Under Clause 4.1 (1) there is a general obligation for Tier 1, 2 and 3 local authorities to amend their district plans to give effect to the NPS-UD as soon as practicable. Under Clause 4.1 (2) deadlines are provided for the implementation of specific parts of the NPS-UD. It is clearly envisaged that implementation will occur in a staged manner.<sup>3</sup>
7. The Environment Court in *Southern Cross* decided that it was only required to consider whether PPC21 gave effect to the parts of the NPS-UD that referred to ‘planning decisions’, and not the objectives and policies that directed the Auckland Council to enable specific outcomes.<sup>4</sup> This finding was despite the fact that the entire NPS-UD was operative and that under section 75(3)(a) of the RMA a district plan (including a change) must give effect to any national policy statement.
8. On appeal to the High Court, the appellant claimed that the Environment Court had made an error of law in deciding to only apply part of the NPS-UD. The appellant argued that the Environment Court was required to give effect to the NPS-UD as a whole.<sup>5</sup>

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<sup>3</sup> For example, the carparking amendments had to be completed within 18 months of commencement of the NPS-UD, and the HBA for housing and business land completed to inform the 2024 long-term plan.

<sup>4</sup> At [13].

<sup>5</sup> At [72].

9. The High Court agreed and concluded that the Environment Court's finding was an error of law for the following reasons:
- (a) Part 1.3(1)(a) applied the NPS-UD to Auckland Council, as a tier 1 local authority regardless of the type of decision it was making;<sup>6</sup>
  - (b) There was no need for the Environment Court to consider whether PPC21 was a "planning decision" under Part 1.3(1)(b), that inquiry was irrelevant;<sup>7</sup>
  - (c) In terms of timing, Auckland Council was required by Part 4.1(1) to amend its district plan to give effect to the NPS-UD as soon as practicable. The effect of the deadlines in Part 4.1(2) is to add a two-year outer limit for complying with certain policies, but it does not defer or diminish the Council's obligation under Part 4.1(1);<sup>8</sup> and
  - (d) The Council's general obligation to give effect to the NPS-UD is confirmed in clause 3.1 "...nothing in this part limits the general obligation under the Act to give effect to those objectives and policies".<sup>9</sup>
10. For these reasons the High Court concluded that the Environment Court should have considered the extent to which PPC21's proposed changes to the district plan would give effect to all the provisions of the NPS-UD.<sup>10</sup>

### **IMPLICATIONS FOR VARIATION 3**

11. We submit that the *Southern Cross* decision confirms that the Panel should consider the extent to which Variation 3's proposed changes to

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<sup>6</sup> At [80].

<sup>7</sup> Ibid.

<sup>8</sup> At [82].

<sup>9</sup> At [86].

<sup>10</sup> At [88].

the Waikato Proposed District Plan would give effect to all the provisions of the NPS-UD.

12. This principle applies even though Variation 3 is an IPI and not a traditional Schedule 1 Council led plan change or a private plan change. The key difference between an IPI and other plan changes (or variations) is that the origin of an IPI is a legislative requirement to incorporate the MDRS and give effect to Policies 3 and 5. It is worth noting that the 20 August 2022 date that applied to an IPI, was the date already set out in Clause 4.1 of the NPS-UD as the 'outer limit' for the relevant councils to give effect to the intensification policies.
13. The legal framework applicable to Variation 3 was set out in Appendix A of the Joint Legal Submissions of Counsel for the Councils for the Joint Opening Hearing dated 8 February 2023. That Appendix records the obligation in section 75(3) to give effect to any national policy statement.
14. In relation to the hierarchy of planning documents in the RMA, the only difference for an IPI is that the requirement to incorporate the MDRS into a relevant residential zone applies irrespective of any inconsistent objective or policy in a regional policy statement.<sup>11</sup>
15. It is important to note however that the requirement for the Panel to consider the extent to which Variation 3's proposed changes to the proposed district plan would give effect to all the provisions of the NPS-UD cannot lawfully widen the scope of an IPI under section 80E. The scope of Variation 3 is still limited to incorporating the MDRS and giving effect to Policies 3 and 4.
16. Ultimately, while the scope or origin of Variation 3 is narrow, the Panel must ensure that, within that scope, Variation 3 gives effect to the NPS-UD, and all other national policy statements. As with many of the higher

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<sup>11</sup> RMA section 77G(8).

order documents, there may be parts of the NPS-UD that are simply not relevant to the Panel's consideration.<sup>12</sup>

### **APPLYING *SOUTHERN CROSS* TO VARIATION 3 IN PRACTICE**

17. The Panel has asked for specific comment on the proper relationship (and weighting) of policies 3 and 4 with the body of the NPS-UD. In our submission no additional weighting should be applied to policies 3 and 4 when making recommendations on Variation 3. Whilst policies 3 and 4 will likely be the most relevant provisions of the NPS-UD and therefore the focus of evidence and legal submissions,<sup>13</sup> those policies should not be given any additional weight.
18. In practice, where the Panel has two or more options before it that equally give effect to Policies 3 and 4, the Panel should prefer the option that best gives effect to all the provisions of the NPS-UD, any other relevant National Policy Statement and the Regional Policy Statement.
19. The requirement to give effect to the NPS-UD does not give the Panel the ability to recommend provisions in Variation 3 that are outside the scope of section 80E. An amendment suggested by a submitter that might give effect to another provision of the NPS-UD but is not required to give effect to Policies 3 and 4, or to incorporate the MDRS, will still be ultra vires. The Panel must comply with section 80G and must not use the IPI for any purpose other than the uses specified in section 80E.

### **DIRECTIONS AND INTERIM GUIDANCE FROM THE PANEL TO DATE**

20. The Panel has issued two directions on scope relating to Variation 3<sup>14</sup> and has issued Interim Guidance on the Urban Fringe qualifying matter.<sup>15</sup> We

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<sup>12</sup> Such as Policy 11 on carparking.

<sup>13</sup> As these two policies are set out in Section 80E, and other policies of relevance to a Tier 1 local authority are specifically referred to in the RMA.

<sup>14</sup> Hearing Panel Direction #11 on inclusionary zoning and affordable housing and Hearing Panel Direction #12 on zoning submissions.

<sup>15</sup> Dated 14 March 2023.

submit that those directions and the interim guidance are consistent with the *Southern Cross* decision and do not need to be revisited by the Panel.

## CONCLUSION

21. The *Southern Cross* decision confirms that the Panel should consider whether Variation 3's proposed changes to the Waikato Proposed District Plan would give effect to all of the relevant provisions of the NPS-UD, to the extent possible within the scope of section 80E. This approach is consistent with the legal submissions presented on behalf of Waikato District Council at the Joint Opening Hearing.
22. Legal submissions on behalf of the Council for the Substantive Hearing, due to commence on 26 July 2023, will discuss the *Southern Cross* decision with reference to the Council's section 42A Report and evidence before the Panel.

Signed this 8<sup>th</sup> day of June 2023



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