

**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**)

IN THE MATTER of the hearing of submissions on the Waikato IPIs – Hamilton
CC PC12, Waipā DC PC26 and Waikato DC Variation 3

HEARING TOPIC: Response to Panel Directions dated 30 May 2023

**LEGAL SUBMISSIONS ON BEHALF OF KĀINGA ORA - HOMES
AND COMMUNITIES**

**Re IMPLICATIONS OF *SOUTHERN CROSS HEALTHCARE* HIGH COURT
DECISION**

Dated: 9 June 2023

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May it please the commissioners:

1. These submissions are made in response to directions issued by the Panel on 30 May 2023 inviting parties to make submissions on the implications, if any, of the recent High Court (“**HC**”) decision *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Incorporated*¹ (“**the HC Decision**”). Submissions were invited, “*particularly with respect to the proper relationship (and weighting) of policies 3 and 4 with the body of the NPS-UD*”.
2. Kāinga Ora was involved in the HC proceedings, as a section 301 RMA party in support of the appeal by Southern Cross Healthcare Limited against the Environment Court (“**EC**”) interim² and final³ decisions regarding proposed Plan Change 21 (“**PC21**”) to the Auckland Unitary Plan. Kāinga Ora does not consider that the HC Decision provides any novel guidance in terms of the application of Policies 3 and 4 to the three Waikato Region Intensification Planning Instruments. The HC Decision is, however, consistent with the legal submissions for Kāinga Ora presented to date on the Waikato Region IPI’s.
3. Background:
 - a. PC21 is a private plan change that seeks changes to Auckland Unitary Plan provisions to enable expansion of the Brightside Hospital in Epsom. It was upheld by Auckland Council commissioners at first instance but declined by the EC in its final decision. The NPS-UD came into force after the release of the Council decision approving PC21 but before commencement of the EC hearing.
 - b. At the commencement of the PC21 EC hearing, the presiding judge asked parties to make submissions on the implications of the NPS-UD. The EC then released its interim decision which records that the EC, “*is not required to and will not be giving effect in this case to objectives and policies in the NPS-UD that are not requiring ‘planning decisions’ at this time*”⁴.
 - c. Kāinga Ora considers that the EC’s final decision did not even give effect to those NPS-UD provisions that the EC had identified as being relevant.
 - d. Kāinga Ora argued in the HC that the EC’s determinations were contrary to the express requirement in section 75(3)(a) RMA for district plans (including the

¹ *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Incorporated* [2023] NZHC 948

² *Eden-Epsom Residential Protection Society Inc the Auckland Council* [2021] NZEnvC 82.

³ *Eden-Epsom Residential Protection Society Inc the Auckland Council* [2022] NZEnvC 60.

⁴ Interim Decision para [29].

Unitary Plan) to “give effect to” national policy statements. That view was upheld in the HC Decision.

4. The HC Decision addresses nine alleged errors of law. Only the first error of law relates to the NPS-UD. The HC recorded this issue as, “*did the Environment Court err 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?*”⁵. Key findings by the HC in that regard include the following (emphasis added):

“[83] It follows that the Council was required to amend its district plan to give effect to the NPS-UD as soon as practicable. The Environment Court, on appeal, had the same duty. The Court had to make a decision on the request for PPC 21. This meant it was, in terms of cl 4.1(1) [of the NPS-UD], practicable for the Court to amend the District Plan to give effect to the NPS-UD when making its decision (assuming, of course, PPC 21’s proposed changes gave effect to the NPS-UD). The Court’s obligation to do so was not deferred or diminished by cl 4.1(2).”

[86] ... That the NPS-UD stipulates the subpt 6 process, and that the Council was engaged in that process, did not limit the Council’s (or the Environment Court’s) obligation to give effect to the objectives and policies of the NPS-UD. Mr Allan, Counsel for Kāinga Ora, submitted that the Court had, contrary to cl 3.1, treated the obligations in pt 3 as limiting the Council’s and its obligation to give effect to the NPS-UD. I agree.

[88] 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.”

5. Those findings reinforce and are consistent with the submissions made by Kāinga Ora on Waipa PC26⁶ to the effect that:
 - a. Section 75(3)(a) RMA provides that district plans must give effect to any national policy statement, which includes the whole of the NPS-UD.

⁵ HC Decision, para [70](a).

⁶ See, for example, Kāinga Ora submissions on Waipa PC26, paras 4.2 and 4.3.

- b. That obligation applies through the IPI processes. Thus, the Councils and the Panel are required by RMA to give effect to the whole of the NPS-UD through each of the IPI's to the extent you are able (i.e.: that any amendments required to give effect to the NPS-UD provisions are within the bounds of the relevant IPI).
 - c. While Waipa PC26 was initiated (in part) to give effect to Policies 3 and 4 NPS-UD, the following provisions are both: relevant to the Panel's understanding of Policies 3 and 4; and to be given effect through the plan change. The relevant provisions are: NPS-UD Objectives 1, 2, 3, 4, 5, 6, and 8; and NPS-UD Policies 1, 2, 6, 8 and 9.
6. The HC Decision does not explicitly address the meaning of Policies 3 or 4 of the NPS-UD and applies to a very different context from that before you:
- a. PC21 was being considered by the EC prior to the introduction of PC78 to the Auckland Unitary Plan. As a consequence, the EC was considering whether and to what extent it should have regard to, let alone give effect to, the NPS-UD.
 - b. In contrast, the Waikato Region IPI's each represent the relevant Council's proposal to give effect to Policies 3–4 NPS-UD and, to the extent appropriate and possible, the balance of the NPS-UD. As the IPI's are much further along the procedural trail envisaged in the NP-UD, the issue that was of concern to the HC and was addressed in the HC Decision is not relevant to the IPI's.

Dated this 9th day of June 2023
Douglas Allan - Counsel for Kāinga Ora - Homes and Communities