

**BEFORE THE INDEPENDENT HEARING PANEL**

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of Proposed Plan Change 12 to the Operative Hamilton  
City District Plan

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**LEGAL SUBMISSIONS FOR HAMILTON CITY COUNCIL IN RESPECT OF PANEL  
DIRECTION #12**

**Dated 9 June 2023**

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## MAY IT PLEASE THE INDEPENDENT HEARING PANEL

### INTRODUCTION

1. These submissions are filed on behalf of Hamilton City Council (**HCC**) in response to Hearing Panel Direction #12. The Panel invites parties that attended the strategic hearing to file legal submissions addressing the potential implications of the recent High Court decision *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948 (***Southern Cross* or Decision**) on the Panel's consideration of Implementation Planning Instruments (**IPI**), including 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 submissions address the implications of *Southern Cross* in the context of Plan Change 12 (**PC12**), HCC's IPI.
3. The short point is this: In terms of the approach taken by HCC, *Southern Cross* changes nothing.

### **SOUTHERN CROSS DECISION**

4. Counsel have had the opportunity to review the legal submissions for Waikato District Council (**Waikato DC**) dated 8 June filed in response to the Panel's Minute and agree with the summary of *Southern Cross* set out in paragraphs 3 to 10 of the submissions. Accordingly, a full summary of the Decision is not repeated here.
5. The Decision affirms the requirements:
  - a) Under s 75(3)(a) of the Resource Management Act 1991 (**RMA**) that a district plan must give effect to any national policy statement; and

- b) Under s 74(1)(ea) of the RMA that a territorial authority must prepare and change its district plan in accordance with a national policy statement.
- 6. The key takeaway from the Decision in the context of an IPI is that, in making its recommendations in relation to the changes proposed by an IPI, the Hearing Panel has a statutory obligation to consider the extent to which the IPI gives effect to all national policy statements, including the NPS-UD in its entirety. That is consistent with the Joint Opening Legal Submissions of the Councils dated 8 February 2023, which acknowledge that the mandatory considerations under ss 74 and 75, as set out in paragraph 4 above, apply to an IPI<sup>1</sup>.

#### **RELATIONSHIP OF POLICIES 3 AND 4 WITH THE BODY OF THE NPS-UD**

- 7. The Panel has sought submissions on the “proper relationship (and weighting) of Policies 3 and 4 with the body of the NPS-UD.”
- 8. There is no weighting exercise to be undertaken. The issue is purely one of statutory interpretation:
  - a) Section 74(1)(ea) requires a territorial authority to prepare and change its district plan in accordance with a national policy statement;
  - b) Section 75(3)(a) requires that a district plan must give effect to any national policy statement;
  - c) Section 80F(1)(a) requires tier 1 territorial authorities to notify an IPI by 20 August 2022; and

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<sup>1</sup> See Joint Opening Legal Submissions for the Councils dated 8 February 2023, paragraph 2 and Appendix A.

- d) Section 80E(1)(a)(ii)(A) requires that an IPI must give effect to Policies 3 and 4 of the NPS-UD.
9. Pursuant to s 80E, an IPI is a 'change to a district plan'. There is no carve out of ss 74 or 75. Accordingly, the requirements of those provisions apply to an IPI. They should not be read down or interpreted differently because of the express requirement under s 80E(1)(a)(ii)(A) that the IPI must give effect to Policies 3 and 4 of the NPS-UD. That express requirement is implicit in the requirement under s 75(3)(a).
  10. It is accepted that there is 'special attention' drawn to Policies 3 and 4, but that special attention asks for nothing more than what is already required; that they be given effect to. This does not diminish the broader obligation to give effect to the entire NPS-UD.
  11. Notably, when presenting the Joint Opening Legal Submissions for the Councils in the strategic hearing, Commissioner Morrison-Shaw noted that the Amendment Act singled out Policies 3 and 4 for "special attention" and asked counsel for HCC whether that meant that the Panel should give greater weight to those policies than the rest of the policies in the NPS-UD. Rather than address the matter as a weighting issue, Counsel agreed that while the RMA singled out those policies for direct attention, the Panel nevertheless had a broad obligation to give effect to the NPS-UD in its entirety<sup>2</sup>. This broader obligation was not diminished or diluted by the special attention given to Policies 3 and 4.
  12. All of the policies and objectives of the NPS-UD must be considered and applied according to their terms. In the context of an IPI, some will have greater relevance than others. In the unlikely event that a conflict does arise between the provisions of the NPS-UD, a more directive clause will prevail over another. This approach reflects the approach in

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<sup>2</sup> Strategic Hearing 15 February 2023, see recording from 35 minutes.

*Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*<sup>3</sup> which found that apparent conflict between competing provisions can often be resolved by paying close attention to their expression (with more directive provisions generally prevailing over less directive provisions)<sup>4</sup>.

### **CONSISTENCY OF PC12 WITH *SOUTHERN CROSS***

13. PC12 gives effect to the NPS-UD, *including* Policies 3 and 4.
14. To the extent that any party contends that PC12 does not give effect to the NPS-UD (as a whole or in relation to a particular provision), HCC will respond in evidence and legal submissions as part of the substantive hearing of submissions later in the year.

### **SCOPE DETERMINATIONS**

15. Importantly, there is no basis for the Panel to revisit any<sup>9+</sup> preliminary determination it has made to date in relation to the scope of submissions<sup>5</sup>. The Panel's scope decisions are unaffected by *Southern Cross*, as they did not place reliance on any limitation to the general obligation to give effect to the NPS-UD.

### **CONCLUSION**

16. *Southern Cross* does not alter HCC's approach to PC12.
17. The IPI must give effect to NPS-UD in its entirety, including Policies 3 and 4. The nature of how the IPI gives effect to the NPS-UD requires planning

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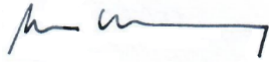
<sup>3</sup> [2014] NZSC 38.

<sup>4</sup> *Transpower New Zealand Ltd v Northland Regional Council* [2022] NZEnvC 174.

<sup>5</sup> Hearing Panel Directions #10 and #11.

judgments which will be the subject of the Panel's evaluation.

Dated 9 June 2023

A handwritten signature in blue ink, appearing to be 'L F Muldowney' or 'S K Thomas', written over a light blue rectangular background.

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**L F Muldowney / S K Thomas**  
Counsel for Hamilton City Council