IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2021] NZEnvC 082

IN THE MATTER OF	an appeal under clause 14(1) of Schedule 1 of the Resource Management Act 1991 against a decision on Proposed Plan Change 21 to the Auckland Unitary Plan
BETWEEN	EDEN-EPSOM RESIDENTIAL PROTECTION SOCIETY INCORPORATED (ENV-2020-AKL-079) Appellant
AND	AUCKLAND COUNCIL Respondent
AND	SOUTHERN CROSS HOSPITALS LIMITED Requestor
AND	KAINGA ORA – HOMES AND COMMUNITIES s274 Party
AND	TUPUNA MAUNGA O TAMAKI MAKAURAU AUTHORITY s274 Party

Court:	Alternate Environment Judge L J Newhook Environment Commissioner R M Bartlett Environment Commissioner J Baines
Hearing:	8 June 2021
Appearances:	M Savage and R Enright for the Society B Tree, S de Groot and C Woodward for Requestor

D Hartley for Auckland Council
C Kirman for Kāinga Ora

Date of Decision: 9 June 2021

Date of Issue: 15 JUN 2021

RECORD OF ORAL DECISION OF THE ENVIRONMENT COURT ON PRELIMIMARY QUESTIONS ABOUT RELEVANCE OF NPS-UD TO THE PROPOSED PLAN CHANGE

Introduction

[1] The Society had appealed a decision of a majority of independent hearing commissioners approving Proposed Private Plan Change 21 ("PPC21") to the Auckland Unitary Plan ("AUP") operative in part. The plan change was to enable expansion and intensification of development of an existing private hospital at 3 Brightside Road Epsom, including onto 3 adjoining residential lots on Gillies Avenue purchased by the requestor.

[2] At the start of the substantive appeal hearing on 8 June 2021, the Court placed 5 questions of law before the parties, the first two of which it advised should be the subject of submissions by the parties at the outset, and perhaps an urgent decision of the Court, against the possibility it could inform the relevance (or not) of some topics in the substantive enquiry.

[3] The two questions orally advised by the Court were:

a) Does the NPS-UD apply yet? It is operative, but does it drive PPC21; are we required to move ahead of decision-making by the Council on implementation of directive and urgent policies?

b) If it does drive PPC21 how and in what ways would it drive it?

[4] The NPS-UD was gazetted on 20 July 2020 and became operative on 20 August. It effectively replaced the 2016 NPS on Urban Design Capacity.

[5] It is common ground that Auckland Council is a "Tier 1" local authority, therefore having the greatest obligations of the 3 tiers under the new instrument.

[6] Clause 1.3 is titled "Application" and subclause (b) provides that "[the NPS applies to] planning decisions by any local authority that affect an urban environment".

[7] The site owned by Southern Cross in Epsom is an urban environment.

[8] The question arises as to whether a decision on the merits of a private plan change on appeal under clause 29(7) of Schedule 1 RMA is a "planning decision".

[9] The term "planning decision" is defined to the relevant extent in the NPS-UD as meaning a decision on:

> ...
>
> (c) a district plan or proposed district plan
>
> ...

[10] "Proposed district plan" is not defined in the NPS-UD. It is relevant therefore to consider relevant definitions in the RMA, under which the NPS was promulgated.

[11] "District Plan" is defined in s 43AA RMA as (summarised) meaning an operative plan including operative changes.

[12] PPC 21 is not an operative plan change because it is under challenge in this appeal.

[13] "Proposed plan" is however defined in s 43AAC RMA in the following terms:

> 43AAC Meaning of proposed plan
>
> (1) In this Act, unless the context otherwise requires, *proposed plan*—
>
> (a) means a proposed plan, a variation to a proposed plan or change, or a change to a plan proposed by a local authority that has been notified under clause 5 of Schedule 1 or given limited notification under clause 5A of that schedule, but has not become operative in terms of

clause 20 of that schedule; and

(b) includes a proposed plan or a change to a plan proposed by a person under Part 2 of Schedule 1 that has been adopted by the local authority under clause 25(2)(a) of Schedule 1.

(2) Subsection (1) is subject to section 86B and clause 10(5) of Schedule 1.

[14] It is not apparent to us that here are any contexts or policy underpinnings for a proposed change not adopted by a council, not to be regarded in the context of the NPS-UD as being the subject of "planning decisions".

[15] There is a hint that there is no such contextual difference in literature issued about the NPS-UD by the Ministry for the Environment and Ministry of Housing. Those documents do not however state the law but are limited to providing views from the Executive as to why the National Instrument has been promulgated and to what effect in the view of the Executive.

[16] Perhaps confusingly, there is a definition of "change" in s 43AA RMA as meaning a change proposed by a local authority under clause 2 of Schedule 1 RMA and a change proposed by a person under clause 21 of Schedule 1.

[17] The term "plan change" is found in clause 3.8 in Subpart 2 "Responsive Planning" of the NPS-UD and reads:

3.8 Unanticipated or out-of-sequence developments

(1) This clause applies to a plan change that provides significant development capacity that is not otherwise enabled in a plan or is not in sequence with planned land release.

(2) Every local authority must have particular regard to the development capacity provided by the plan change if that development capacity:

(a) would contribute to a well-functioning urban environment; and

(b) is well-connected along transport corridors;

(c)and meets the criteria set under subclause (3); and

(3) Every regional council must include criteria in its regional policy statement for determining what plan changes will be treated, for the purpose of implementing Policy 8, as adding significantly to development capacity.

[18] From that clause it may be found that some provisions of the national instrument may be considered in a "planning decision" on the merits of a requested plan change including on appeal to the Environment Court.

[19] The question must then be asked "which provisions" [of the instrument]?

[20] It is appropriate to interrogate Part 2 of the NPS ("Objectives and Policies"). The reference to "planning decisions" among the eight Objectives and 11 Policies is quite limited, being found in only Objectives 2, 5, and 7, and Policies 1 and 6.

[21] Objective 3 and Policy 3 of the NPS attain significant focus in evidence called by Southern Cross.[1]

[22] Objective 3 provides:

> **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:
>
> (a) the area is in or near a centre zone or other area with many employment opportunities
>
> (b) the area is well-serviced by existing or planned public transport
>
> (c) there is high demand for housing or for business land in the area, relative to other areas within the urban environment.

[23] Policy 3 provides:

> **Policy 3:** In relation to tier 1 urban environments, regional policy statements and district plans enable:
>
> (a) in city centre zones, building heights and density of urban form to realise as much development capacity as possible, to maximise benefits of intensification; and
>
> (b) in metropolitan centre zones, building heights and density of urban form to reflect demand for housing and business use in those locations, and in all cases building heights of at least 6 storeys; and

[1] There was a dispute between the appellant and Southern Cross as to whether certain of the latter's witnesses relied on them. We do not need to do more for present purposes than come to our conclusion in about there being "significant focus" on them.

(c) building heights of least 6 storeys within at least a walkable catchment of the following:

(i) existing and planned rapid transit stops

(ii) the edge of city centre zones

(iii) the edge of metropolitan centre zones; and

(d) in all other locations in the tier 1 urban environment, building heights and density of urban form commensurate with the greater of:

(i) the level of accessibility by existing or planned active or public transport to a range of commercial activities and community services; or

(ii) relative demand for housing and business use in that location.

[24] Neither Objective 3 nor Policy 3 employs the term "planning decision(s)".

[25] Part 4 of the NPS ("Timing") is important. Concerning Policies 3 and 4, to the relevant extent it provides as follows:

4.1 Timeframes for implementation

(1) Every tier 1, 2, and 3 local authority must amend its regional policy statement or district plan to give effect to the provisions of this National Policy Statement as soon as practicable

(2) In addition, local authorities must comply with specific policies of this National Policy Statement in accordance with the following table:

Local authority	**Subject**	**National Policy Statement**	**By when**
Tier 1 only	Intensification	Policies 3 and 4 (see Part 3 subpart 6)	Not later than 2 years after commencement date

[26] Evidence and submissions for the council, unchallenged on this aspect, advise that the council is busy with "workstreams" on these (and other) matters that must inform community consultation and the promulgation of plan changes to the AUP

under Schedule 1 RMA. The timing for promulgation under Part 4 is no later than 20 August 2022. That time has of course not yet been reached.

[27] These steps will be logically accomplished under Subpart 6 "Intensification in Tier 1 urban environments", which requires very precise activity by the local authority (which we were told is happening in these workstreams) of identifying, by location, the building heights and densities required by Policy 3 – with information about these things to be publicly disseminated when notification of the plan changes occurs. Again, these things are yet to occur.

[28] Counsel referred us to two High Court decisions, *Horticulture NZ v Manawatu-Wanganui Regional Council*[2] and *Hawke's Bay and Eastern Fish and Game Councils v Hawke's Bay Regional Council*[3], while conceding that the nascent instruments discussed in those cases were not necessarily worded the same as relevant provisions before us. We have not attempted to compare the several instruments and have preferred to undertake a first principles analysis of the NPS-UD and relevant RMA provisions.

Conclusion

[29] The Court holds that it 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.

[30] We acknowledge the promulgation and operative status of the NPS overall but cannot pre-judge, let alone pre-empt, Schedule 1 processes yet to be undertaken by the Council in implementation of it.

[31] Costs are reserved.

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[2] [2013] NZHC 2492, (2013) 17 ELRNZ 652
[3] [2015] NZHC 3191

For the Court:

L J Newhook
Alternate Environment Judge