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DATE 22 June 2023

Simon Pilkinton -
Waste Management

BEFORE THE HEARING PANEL

IN THE MATTER

of the Resource Management Act 1991 ("RMA")

AND

IN THE MATTER

on Proposed Change 6 (National Policy Statement
for Urban Development) ("PC6") to the Bay of Plenty
Regional Policy Statement ("RPS")

LEGAL SUBMISSIONS
ON BEHALF OF WASTE MANAGEMENT NZ LIMITED

21 JUNE 2023

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MAY IT PLEASE THE HEARING PANEL:**1. SUMMARY**

- 1.1 These submissions on behalf of Waste Management NZ Limited ("**Waste Management**") address one change proposed by PC6 to the RPS.
- 1.2 Waste Management is New Zealand's leading waste services company. The content and subsequent application of PC6 through the regional and district planning framework is critical to Waste Management.¹ Waste Management relies on robust planning provisions to protect and enable the regionally significant infrastructure that it develops and operates, for the benefit of the region's communities.
- 1.3 Waste Management opposes PC6, insofar as the proposed changes to the RPS will result in adverse effects on Waste Management and its essential waste infrastructure and operations in the region. In particular, Waste Management opposes the proposed Policy UG 22B(e), which relevantly directs that planning decisions provide for Te Tiriti o Waitangi principles by "Protecting marae and papakāinga from incompatible uses or development and reverse sensitivity effects".
- 1.4 Waste Management agrees that a Te Tiriti provision in the RPS is appropriate. However, an appropriate Te Tiriti provision requires a proper and robust evaluation under the RMA.
- 1.5 In this instance, the Regional Council has failed to properly assess proposed Policy UG 22B under s 32 RMA. A potential outcome if the Policy is confirmed in the RPS, is that it then directs prohibited activity statuses for essential infrastructure including Waste Management's Oil Recovery Site that may have effects on Whareroa Marae. The significant costs to the region of that outcome have not been identified and assessed under s 32.
- 1.6 The Panel is required to undertake its own s 32 evaluation of PC6.² However in our submission, the Panel cannot through this hearing process remedy the significant and multiple failings of the Regional Council to undertake a proper evaluation of Policy UG 22B. In short, the essential baseline assessment has not been done, and we submit the Panel cannot remedy that fundamental

¹ The facilities and essential services Waste Management provides in the region are described in more detail in Mr Jefferis' evidence at section 2.

² RMA, s 32AA.

failing through its own process. The most appropriate outcome, we respectfully submit, is that proposed Policy UG 22B(e) is not confirmed.

2. LEGAL FRAMEWORK

2.1 The Panel will be familiar with the legal framework for assessing PC6 and the proposed changes to the RPS.

2.2 The purpose of an RPS is to:³

...achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.

2.3 Regional and district plans must "give effect to" the relevant RPS.⁴ The Supreme Court's decision in *New Zealand King Salmon* will be very familiar to the Panel, but to reiterate the statutory direction to "give effect to" is a strong one.⁵ Further, words such as "protect" and "avoid" in the RPS provisions must, in being given effect to by lower-order planning documents, be given their ordinary meaning.⁶

2.4 This means if an RPS directs that a resource be protected, the lower-order plans must faithfully give effect to that direction, including by prohibiting activities that may have adverse effects on the protected resource. It is for this reason, we say, that any proposed change to the RPS to protect an identified resource must be robustly assessed.

Specific requirements

2.5 Section 61 RMA sets out the matters the Panel must consider in making any change to the RPS. This includes Part 2 RMA and the obligations under s 32.⁷

2.6 In terms of Part 2, Counsel acknowledge ss 6(e), 7(a) and 8 RMA are, as the Privy Council said in *McGuire v Hastings District Council*, "strong directions" to be borne in mind at every stage of the planning process.⁸

³ RMA, s 59.

⁴ RMA, ss 65(6) and 73(4).

⁵ *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [77] and [80].

⁶ *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [96].

⁷ RMA, s 61(1).

⁸ *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [21].

- 2.7 But importantly, any RPS must accord with Part 2 as a whole,⁹ including the requirements in s 5(2)(c) to provide for economic and social, as well as cultural, well-being. That is, at the RPS level, the assessment is necessarily a balanced one in terms of Part 2. The obligation under s 8 RMA is also to "take into account" the principles of Te Tiriti – there is no obligation to "give effect to" or "apply" those principles in the resource management planning context.
- 2.8 In contrast, at the regional or district-plan level the obligation is to "give effect to" the RPS and other higher-order planning documents,¹⁰ on the terms expressed in those documents. There is also the assumption at that stage of the planning process, that Part 2 would already have been appropriately given effect to through the RPS itself.¹¹
- 2.9 As to the s 32 test, the Panel will be familiar with this, but the essential requirement is an assessment of the efficiency and effectiveness of the proposed provisions (here proposed Policy UG 22B), with reference to the costs and benefits flowing from the effects anticipated from its implementation.¹² That is, while the RMA's statutory sustainable management purpose remains the touchstone, the costs and benefits of any proposed change to an RPS must also be considered. The level of detail required in that assessment must correspond to the scale and significance of the effects that are anticipated from the implementation of the proposed change.¹³

3. PC6 AND THE NPS-UD

- 3.1 PC6 seeks to implement the NPS-UD. The NPS-UD provides policy direction to support well-functioning urban environments and to provide sufficient development capacity for housing and business use.¹⁴ In short, its primary purpose is to direct regional and local authorities to bring online greater housing and urban development capacity within their jurisdictions.
- 3.2 In terms of the RPS, any change must be in accordance with the NPS-UD (and other national policy statements).¹⁵ We acknowledge the NPS-UD, consistent

⁹ RMA, s 61(1)(b).

¹⁰ RMA, ss 67 and 75.

¹¹ *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [85].

¹² RMA, ss 32(1)(b)(ii) and 32(2).

¹³ RMA, s 32(1)(c).

¹⁴ NPS-UD, including Objective 1 and Policy 1.

¹⁵ RMA, s 61(1)(da).

with s 8 RMA, requires planning decisions¹⁶ relating to urban environments to "take into account" the principles of Te Tiriti.¹⁷ However, in our submission, it is critical to recognise that this is already the existing requirement under the RMA (and has been the requirement since the RMA was enacted). We accept there is greater emphasis on ss6(e), 7(a) and 8 in resource management decision-making than there has been previously, but the NPS-UD has not made any fundamental changes as to the requirement for the RPS to take into account the principles of Te Tiriti.

4. POLICY UG 22B

4.1 PC6 proposes to amend Policy UG 22B – which currently relates to enabling papakāinga¹⁸ – to (our emphasis):

Ensure planning decisions provide for te Tiriti o Waitangi principles by:

- (a) Enabling Māori to develop their land, including but not papakāinga housing, marae and community facilities;
- (b) Providing for tikanga Māori and opportunities for Māori involvement in Council's decision-making processes, including the preparation of RMA planning documents and Future Development Strategies;
- (c) Enabling early and ongoing engagement with iwi, hapū and affected Māori land trusts;
- (d) Identifying and protecting culturally significant areas and view shafts;
- (e) **Protecting marae and papakāinga from incompatible uses or development and reverse sensitivity effects;** and
- (f) Demonstrating how Māori values and aspirations identified during consultation in (c) have been recognised and provided for.

¹⁶ Including decisions on a regional policy statement or proposed regional policy statement, NPS-UD, clause 1.4.

¹⁷ NPS-UD, Objective 5.

¹⁸ Existing Policy UG 22B provides: "Outside existing urban areas and the urban limits shown on Maps 5 to 15 (Appendix E), papakāinga including marae-based housing shall be provided for."

- 4.2 The explanation for the proposed amendments to Policy UG 22B includes reference to industrial activity undertaken around marae that have existed for decades.¹⁹
- 4.3 Waste Management acknowledges its neighbours in the Bay of Plenty, including the Whareroa Marae. Mr Jefferis will explain the work Waste Management is doing to ensure it continuously improves its operations and internalises its potential effects on its neighbours as far as practicable.²⁰
- 4.4 As noted in its submission, Waste Management wished to work with all interested parties in relation to proposed Policy UG 22B,²¹ such that any final Policy does not unduly impact lawful existing industrial activities in proximity to the Marae. However, no amendments to the proposed Policy UG 22B have been proposed by the Regional Council.
- 4.5 The fundamental issue from Waste Management's perspective remains that the Regional Council has not properly or adequately assessed Policy UG 22B(e), as required under the RMA.
- 4.6 In particular, the s 32 report does not identify and assess the costs to the region where essential and regionally significant activities that are already lawfully established,²² including Waste Management's Oil Recovery Site, are subsequently made prohibited activities or otherwise substantially constrained due to the need to protect Whareroa Marae from potential adverse effects.²³ There is no assessment of the impacts on economic growth or employment if Policy UG 22B(e) is confirmed as proposed.²⁴ Waste Management's Oil Recovery Site provides an essential service to the Port of Tauranga,²⁵ and in that respect is locationally constrained. There has been no express acknowledgment of this, or any assessment of the costs under s 32 on existing facilities located near the Port, from the implementation of Policy UG 22B(e).
- 4.7 Similarly, the s 32 report does not attempt to quantify the above costs to the region in any way.²⁶ In our submission, these costs are, to a significant degree, capable of quantification through expert assessment. But no such assessment has been undertaken by the Regional Council. It is not for Waste

¹⁹ Proposed Change 6 (NPS-UD) to the Bay of Plenty Regional Policy Statement, p 34.

²⁰ EIC of James Jefferis at section 3.

²¹ Submission on behalf of Waste Management (6 September 2022) at [12].

²² Section 32 Report, at p 60 – 61.

²³ EIC of James Jefferis at [2.9] – [2.10].

²⁴ Section 32 Report, at p 61 – 62.

²⁵ EIC of James Jefferis at [2.2].

²⁶ Section 32 Report, at p 60 – 62.

Management, as a submitter, to undertake this assessment on its own – rather, it is for the Regional Council to justify its proposed plan change and support it with the necessary economic assessments required under s 32.

- 4.8 The Regional Council has also failed to evaluate the use of the word "protect" in the context of its proposed Policy UB 22(e). "Protect" is a strongly directive term – it will leave subsequent decision-makers on regional and district planning processes with little choice but to implement prohibited activity statuses for activities in proximity to marae and papakāinga, where those activities are deemed "incompatible". A careful and robust assessment is particularly important when strongly directive language is proposed for an RPS.
- 4.9 In addition, the Regional Council has not provided any evaluation of what may be a development or use that is "incompatible" with marae and papakāinga, such that the protection required under the proposed Policy is engaged. The Panel and Waste Management therefore have no basis to understand the potential costs and effects of implementation of the Policy, both to Waste Management specifically and on a regional scale. This is a particular issue in the context of cultural resources such as marae and papakāinga, given the case law is clear that it is for tangata whenua to identify the potential effects of activities on their resources and values.²⁷
- 4.10 Section 32 also requires an assessment of proposed Policy UG 22B(e) against the objectives of the RPS, including the existing RPS objectives.²⁸ The evaluation of options states that the proposed amended Policy UG 22B is consistent with RPS objectives.²⁹ However, proposed Policy UG 22B has not been specifically evaluated against the RPS' infrastructure objectives.³⁰ That is, there is no analysis as to how proposed Policy UG 22B is to be reconciled with other RPS provisions that seek to enable infrastructure. The Panel therefore cannot examine, as required under s 32(1)(b), whether proposed Policy UG 22B is the most appropriate way to achieve the RPS' objectives including those relating to infrastructure.
- 4.11 The Council's response to the concerns raised by Waste Management in its submission is also inadequate. In summary, the Council's position is that

²⁷ *SKP Incorporated v Auckland Council* [2018] NZEnvC 81 at [147].

²⁸ RMA, ss 32(1) and 32(3).

²⁹ Section 32 Report, p 62.

³⁰ For example, RPS, Objective 6: "Provide for the social, economic, cultural and environmental benefits of, and the use and development of nationally and regionally significant infrastructure and renewable energy".

proposed Policy UG 22B does not require any amendment, because "existing use rights" are dealt with elsewhere in the RMA.³¹ Existing use rights do not assist in the context of infrastructure and industrial activities which require regional discharge consents – if a discharge from an existing facility subsequently becomes a prohibited activity, then upon expiry of existing regional consents the relevant discharge (and therefore almost certainly the activity itself) must cease.³² That is the potential outcome of proposed Policy UG 22B(e) which the Regional Council has completely failed to acknowledge, let alone properly assess.

5. RELIEF SOUGHT

5.1 The Panel is required to undertake a further evaluation of PC6 and Policy UG 22B under s 32AA.³³

5.2 In our submission, the Panel will not be able to remedy the substantial failings of the Council in evaluating proposed Policy UG 22B(e). There are significant evidential and assessment gaps, as outlined above. Accordingly, we respectfully submit that the s 32 obligations cannot be discharged with reference to proposed Policy UG 22B(e), meaning this aspect of PC6 cannot be approved.

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³¹ Section 32AA Report, at section 3.3, p 4.

³² RMA, s 20A.

³³ RMA, Schedule 1, clause 10(2)(ab).