

TABLED DOCUMENT NO. 4
DATE 21 June 2023
Barbara Mead

BEFORE THE HEARINGS PANEL

UNDER **the Resource Management Act 1991**

IN THE MATTER of Proposed Change 6 to the Bay of Plenty
Regional Policy Statement

**LEGAL SUBMISSIONS ON BEHALF OF BALLANCE AGRI-NUTRIENTS
LIMITED**

20 JUNE 2023

Sharp Tudhope Lawyers

Solicitor Acting: B D Mead
Partner responsible: R Hoare
152 Devonport Road
Tauranga, 3110
Phone: 07 578 2149
Email: Barbaram@st.co.nz

MAY IT PLEASE THE HEARING PANEL:

1. INTRODUCTION

- 1.1 These submissions are made on behalf of Ballance Agri-Nutrients Limited (**Ballance**) on Proposed Change (**Change 6**) to the Bay of Plenty Regional Policy Statement (**BOPRPS**).
- 1.2 Ballance largely supports Change 6 and supports urban growth and ongoing economic development within the Bay of Plenty Region. Ballance has made submissions on a discrete selection of matters that are important to ensure that the BOPRPS remains:
 - (a) a planning instrument prepared in accordance with the higher order planning instruments and therefore intra vires;
 - (b) appropriately recognises existing, lawful activities as envisaged by the RMA; and
 - (c) is clear and workable in practice.
- 1.3 The submissions of Ballance are in summary:
 - (a) Change 6 is a Schedule 1 process to incorporate the National Policy Statement for Urban Development 2020 (**NPS UD**) however the present version UG 22B (including as amended following receipt of further submissions) is not in accordance with the NPS UD and is therefore ultra vires.
 - (b) The present draft UG 22 B NPS UD is not in accordance with Part 2 of the Resource Management Act 1991 (**RMA**).
 - (c) The present draft UG 22B creates a priority for reverse sensitivity interests which is not provided for within the NPS UD or the RMA and therefore is ultra vires.
 - (d) There are operative provisions within the BOPRPS which provide for the matters within UG 22B which are out of scope of Change 6.

1.4 As such Ballance seeks the following relief:

- (a) Policy UG 22B should be amended to substitute the word 'provide for' from the opening sentence with the phrase '*take into account*'.
- (b) Amendment to subclause (a) to remove the words "*but not limited to*" and "*and community facilities*".
- (c) Amendment to subclause (d) to add at the end of the sentence "*geographically connected to papakaianga*".
- (d) Amendment to subclause (e) to remove the word "marae" and adding after 'papakaianga' the phrase "*within Existing Urban Areas and Greenfield Development*".
- (e) Amendment to subclause (f) to insert "*by the relevant local authority*" after the word 'Demonstrating'.

2. EVIDENCE TO BE PRESENTED

2.1 Ballance has lodged a Statement of Evidence by Mr Dominic Adams, Environmental Manager at Ballance. Mr Adams has provided a background on Ballance's interests in the Bay of Plenty Region and in particular within Tauranga. Mr Adams has also explained the approach taken by Ballance when managing land use compatibility and the likely impact upon Ballance should the relief sought not be granted.

2.2 Ballance is a farmer-owned co-operative that leads the manufacturing, supply and application of fertiliser in New Zealand. The head office for Ballance is located in Tauranga beside its Mount Maunganui manufacturing plant (**Tauranga Site**). This strategic infrastructure and these operations are situated within an intensively built environment with competing land use, coastal environment and culturally significant resources. The immediate neighbours to the Tauranga Site include main transportation routes, the port, industrial activities, local marae and historically important landscapes.

- 2.3 Ballance is a key economic driver for the region and a large local employer. Nationally they hold an important role in the economy and in providing leadership in preserving and enhancing soil health and highly productive land through agri-science led manufacturing and application of fertiliser.

3. LEGAL SUBMISSIONS – GENERAL

- 3.1 Section 55 of the RMA provides the process for a local authority to recognise a new National Policy Statement. There are only two ways to do so:
- (a) Amendment without utilising the Schedule 1 process where the national policy statement directs so¹; or
 - (b) Amendment utilising the Schedule 1 process².
- 3.2 The importance of adherence to Schedule 1 is repeated in respect of proposed changes to a regional policy statement by repetition of the requirement throughout the RMA³.
- 3.3 Schedule 1 is a prescriptive process, utilising clear and direct language to ensure a consistent, uniform process is applied⁴. Of particular importance is adherence to the requirements for public notification of a proposed change⁵. Public notice is required to ensure adequate transparency and opportunity is provided to interested persons as required by the principle of natural justice⁶.
- 3.4 Clause 5 also confirms that the decision of whether to proceed with a proposed change must have *particular regard* to the s32 report prepared in respect of the change⁷.
- 3.5 Thereafter the submission process, further submission process, s42A report and s32AA report process enable participation and

¹ Ss55(2) and (2A), RMA

² Ss55(2B) and (2C), RMA

³ Ss60 and 64, RMA

⁴ Cl 2, Schedule 1, RMA

⁵ Cl 5, Schedule 1, RMA

⁶ *Petersen v Napier CC* [2003] NZRMA 145(EnvC), *Creswick Valley Residents Assn Inc v Wellington CC* [2012] NZHC 644

⁷ Cl5(1)(a) Schedule 1, RMA

assessment of the proposed change to take place prior to the hearing of the proposed change⁸. Each step being a building block of assessment and refinement but limited by the initial scope of the change by way of s55. In respect of Change 6, that scope is limited to the implementation of the NPS UD.

- 3.6 Section 61 of the RMA requires a regional council to prepare and change its regional policy statement *in accordance* with:
- (a) its functions under s30⁹;
 - (b) Part 2¹⁰;
 - (c) its obligation to prepare an evaluation report under s32 and to which it is to have particular regard¹¹;
 - (d) a national policy statement, the New Zealand Coastal Policy Statement, and a national planning standard¹²; and
 - (e) any regulations¹³.
- 3.7 In addition, s61(2) sets out those matters that the regional Council *shall have regard* to, which in the context of Change 6 is limited to any management plans and strategies prepared under other Acts¹⁴. This would include any relevant planning document recognised by an iwi authority.
- 3.8 The Courts have confirmed *in accordance with* as used in s61 of the RMA, requires the proposed change to apply the meaning of the words in the higher order documents at a regional level. They note this may or may not include the use of the actual words from the higher order planning documents but nevertheless does require the actual meaning of the words is carried through¹⁵.

⁸ Cl 6 to 8B of Schedule 1 and sections 32, 32A, 32AA and 42A of the RMA.

⁹ S61(1)(a), RMA

¹⁰ S61(1)(b), RMA

¹¹ Ss61(1)(c) and (d), RMA

¹² S61(1)(da), RMA

¹³ S61(1)(e) RMA

¹⁴ S61(2)(a)(i)

¹⁵ Wairoa River Canal Partnership v Auckland RC [2010] NZEnvC 309, (2010) 16 ELRNZ 152

- 3.9 The meaning of *in accordance with*, in respect of proposed policy change, was examined in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*¹⁶. The Court found that a regional policy statement would be *in accordance with* a national policy statement if it *gave effect* to the national policy statement¹⁷ as it is required to do so by s67 of the RMA¹⁸. In coming to this position, the Court recognised that the process of developing the New Zealand Coastal Policy statement required consultation and s32 report which made it unlikely that Parliament intended local authorities to step outside of the higher order document when implementing a change in its regional policy statement¹⁹.
- 3.10 In summary therefore, the position of the Bay of Plenty Regional Council in the context of Change 6 is a constrained one. Change 6 has been triggered by the introduction of the NPS UD which requires the objectives and policies of the NPS UD to be implemented within the BOPRPS by way of a carefully prescribed process. The scope of proposed change is limited to:
- (a) The implementation of the NPS UD requirements (as recognised in Council's Public Notice issued in respect of Plan Change 6).²⁰
 - (b) The requirements of Schedule 1. and must be carried out via Schedule 1. Further the scope is to give effect to the NPS UD both in terms of the scope of the objectives and policies but also in terms of the meaning of the words used in those objectives and policies.

4. **LEGAL SUBMISSION ONE - UG 22B is not in accordance with the NPS UD and is therefore ultra vires**

Development of NPS UD

¹⁶ [2014] NZSC 38

¹⁷ [2014] NZSC 38 at [85]

¹⁸ S67(3)(a) RMA

¹⁹ [2014] NZSC 38 at [86]

²⁰ Public Notice, Proposed Change 6 (NPS-UD) to the Bay of Plenty Regional Policy Statement 9 August 2023.

- 4.1 The NPS UD was developed in accordance with statutory requirements²¹, to address the struggle of cities to keep up with growth as evidenced in reduced housing affordability which was considered caused in part by *“....our planning system under the [RMA], which is inhibiting competition and responsiveness in our land markets while also failing to protect what needs protection. Zone provision, the cumulative impact of rules, and lengthy appeal process can hinder intensification and expansion in areas where it would otherwise contribute to a well-functioning urban environment.”*²²
- 4.2 Within its discussion document Ministry of Housing and Urban Development (**MHUD**) and Ministry for Environment (**MFE**) explained its proposal to amend the NPS UD 2016 to emphasise the existing obligations on local authorities under the RMA to consult with iwi and hapu, which would be extended to include Future Development Strategies (**FDSs**)²³.
- 4.3 The preferred option of the MHUD and MFE was to replace the 2016 national policy statement with the NPS UD which would encapsulate the following improvements:
- (a) Improve the data and strategic planning requirements; and
 - (b) Provide new direction on outcomes which will include reference to²⁴:
 - (i) well-functioning urban environments;
 - (ii) amenity;
 - (iii) climate Change;
 - (iv) housing affordability; and
 - (v) te Tiriti o Waitangi.

²¹ SS45 to 55, RMA

²² *Regulatory Impact Statement: National Policy Statement on Urban Development*, p1

²³ *Planning for Successful Cities A discussion document on a proposed National Policy Statement on Urban Development*, MHUD, MFE, p49, 52 and 53

²⁴ *Regulatory Impact Statement: National Policy Statement on Urban Development*, p1

- 4.4 With respect to te Tiriti o Waitangi, the Regulatory Impact Statement noted that the draft provisions were considered too narrow to achieve the policy intent. Accordingly, a new objective and policy was included (Objective 5 and Policy 9) which the statement summarised as *“a requirement for councils to understand Māori housing demand and how well this demand is being met. This information will ensure councils understand and provide for Māori housing demand in their FDS and any relevant planning process.”*²⁵
- 4.5 The s32A Report in respect of the relevance of objective 5 identified it was borne out of Part 2, Section (5)(2), s7A(a), s7(aa) and s8 of the RMA. In particular ensuring that *“cultural well-being of Iwi is recognised during urban development through opportunities for Māori involvement in decision-making and participation in the preparation of RMA planning documents and Future Development Strategies”*.²⁶ Objective 5 being useful as it *“clearly states the expectations on local authorities to ensure Iwi are engaged with and participate in decisions on urban development, as appropriate to reflect the principles of the Treaty.”*²⁷
- 4.6 Thereafter the recommendation carried forward to modify the initial draft NPS UD was threefold²⁸:
- (a) *“Provide specific direction to local authorities on taking into account the principles of the Treaty in urban planning.”*
 - (b) *“Increase the scope of matters to be taken into account by local authorities to enable Māori to identify a desired future state for the urban environment instead of just providing for a reaction to current state.”*
 - (c) *“Require local authorities, in carrying out the HBA, to assess how Māori housing demand is being met.”*

²⁵ Regulatory Impact Statement: National Policy Statement on Urban Development, p29

²⁶ National Policy Statement for Urban Development: Section 32 Evaluation Report, prepared by BECA Ltd, March 2020, p24, 82 and Table 19.

²⁷ National Policy Statement for Urban Development: Section 32 Evaluation Report, prepared by BECA Ltd, March 2020, p24, 82 and Table 19.

²⁸ Recommendations and Decisions Report on the National Policy Statement on Urban Development, Ministry for Environment, July 2020, p 12

- 4.7 The recommendations in respect of the objectives and policies were promoted as ensuring Māori values were anchored in decisions made on RPSs, regional and district plans and strategies effecting the urban environment. In particular the recommendation noted these policies as appropriate as they enabled all Māori to participate, given the provisions apply to *“both tangata whenua and Māori who do not hold mana whenua over the urban environment in which the live”*.²⁹
- 4.8 The recommendation also concluded that the NPS UD proposals aimed to strengthen and raise Māori values and interests, and elevate the principles of Te Tiriti by way of³⁰:
- (a) Policy 1(a)(ii) and Objective 1 which were more inclusive;
 - (b) Policy 3 by providing flexibility around directive intensification at Council level.
 - (c) Policy 9 by *“direction to councils on what ‘taking into account’ the principles of Te Tiriti (as required by section 8 of the RMA) looks like in an urban environment, which includes operating consistent with the relevant settlement acts”*.
 - (d) Generally:
 - (i) Highlighting local authority engagement requirements with iwi and hapu.
 - (ii) Describing hapu and iwi values and aspirations for the urban environment in Strategic planning through FDS.
 - (iii) Assessing how well housing demands of Māori are being met through HBAs.
- 4.9 As a result of the above process the NPS UD includes the following provisions which should be interpreted in light of the above development process:

²⁹ Recommendations and Decisions Report on the National Policy Statement on Urban Development, Ministry for Environment, July 2020, p 76 to 77

³⁰ Recommendations and Decisions Report on the National Policy Statement on Urban Development, Ministry for Environment, July 2020, p 79, 80

Objective 5: *Planning decisions relating to urban environments, and FDSs, take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).*

Policy 1: *Planning decisions contribute to the well-functioning urban environments, which are urban environments that, as a minimum:*

- (a) *have or enable a variety of homes that:....*
 - (ii) *enable Māori to express their cultural traditions and norms;...*

Policy 9: *Local authorities, in taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) in relation to the urban environment, must:*

- (a) *involve hapu and iwi in the preparation of RMA planning documents and any FDSs by undertaking effective consultation that is early, meaningful and, as far as practicable, in accordance with the tikanga Māori; and*
- (b) *when preparing RMA planning documents and FDSs, take into account the values and aspirations of hapu and iwi for urban development; and*
- (c) *provide opportunities in appropriate circumstances for Māori involvement in decision-making on resource consents, designations, heritage orders, and water conservation orders, including in relation to sites of significant to Māori and issues of cultural significance; and*
- (d) *operate in a way that is consistent with iwi participation legislation.*

4.10 Part 3 of the NPS UD addresses implementation of the objectives and goals. It requires:

- (a) *for the inclusion of values and aspirations for the urban environment of Māori and tangata whenua for development*

within every FDS³¹ and requires consultation with relevant hapu and iwi when preparing an FDS³².

- (b) The analysis for every HBA must include an assessment of the current and likely future demand for housing by Māori.³³

4.11 The various guides produced by the Ministry for Environment have consistently addressed both the scope of matters to be included and the degree of obligation contained in Objective 5 and Policy 8³⁴:

- (a) “take into account”; and
- (b) to implement and fulfil these by local authority consultation in respect of urban housing through FDSs and HBA.

Change 6

4.12 Turning to Change 6, the s32 Report recorded the proposed deletion of UG 22B (then *Providing for Papakainga*) and replacing it with the proposed UG 22B (to be called *Te Tiriti o Waitangi Principles*) in order to comply with objective 5 and policy 9 to ensure *planning decisions relating to urban environments take into account Te Tiriti o Waitangi principles*³⁵.

4.13 The s32 report recommended replacing UG22B with a new policy to implement Object 5 and Policy 9 and to link that new policy with operative Policy IW 1B RPS³⁶ with the intention to broaden the policy beyond Papakainga³⁷ which enlarges the scope of matters beyond the NPS UD.

³¹ NPS UD 3.14

³² NPS UD 3.15

³³ NPS UD 3.23

³⁴ *National Planning Standards*, MFE, September 2020, p 10, *Understanding and implementing intensification provisions for the National Policy Statement on Urban Development*, MFE and MHUD, September 2020, p *National Policy Statement on Urban Development 2020 Taking into account the principles of the Treaty of Waitangi*, MFE p1 and 2, *National Policy Statement on Urban Development 2020 Introductory Guide*, MFE, p 7 and 10

³⁵ *S32 Report*, Bay of Plenty Regional Council, p8, 11

³⁶ *S32 Report*, Bay of Plenty Regional Council, p 25

³⁷ *S32 Report*, Bay of Plenty Regional Council, p 27

4.14 The s42A writer acknowledges the requirement of Objective 5 was to *take into account* the principles of the Treaty of Waitangi and that this phrase imposes a requirement which is of a different degree to that imposed by 'provide for'. She however recommends that the Panel should step beyond the scope of the NPS UD wording to enable the uplift regardless³⁸:

- (a) To revert to 'take into account' would *"weaken Policy UG 22B ...rather than 'provide' for Te Tiriti of Waitangi principles"*.³⁹
- (b) *"Referencing 'take into account' within UG22 B of the RPS does not provide enough emphasis on local authority requirement to give effect to Policy 9 of the NPS UD specifically as it relates to the requirement for meaningful consultation."*
- (c) *"The requirement to take into account a policy direction involves demonstrating the directive has been acknowledged and understood with discretion to dismiss." The requirement to 'provide for' the specific directives in Policy UG 22B carries stronger weight and obligations on decision makers."*
- (d) *Staff consider that the text of Policy UG 22B: 'ensuring planning decisions provide for Te Tiriti o Waitangi principles...' more effectively address the requirements of NPS UD Objective 5 and Policy 9 appropriately".*

4.15 The s42A writer also recognises the scope of NPS Policy 9 was more limited than UG 22B, in that the scope of Policy 9 was limited to⁴⁰:

'.... local authorities must:

- a) involve hapu and iwi in the preparation of RMA planning documents and any FDSs by undertaking effective*

³⁸ 2022 – Proposed Change 6 Staff Recommendations on Provisions with Submissions and Further Submissions, p 106

³⁹ 2022 – Proposed Change 6 staff Recommendations on Provisions with Submissions and Further Submissions, p 106

⁴⁰ 2022 – Proposed Change 6 staff Recommendations on Provisions with Submissions and Further Submissions, p 106

consultation that is early, meaningful and, as far as practicable, in accordance with tikanga Māori; and

- b) when preparing RMA planning documents and FDSs, take into account the values and aspirations of hapu and iwi for urban development; and*
- c) provide opportunities in appropriate circumstances for Māori involvement in decision-making on resource consents, designations, heritage orders, and water conservation orders, including in relation to sites of significance to Māori and issues of cultural significance; and*
- d) operate in a way that is consistent with iwi participation legislation’.*

4.16 Elsewhere the s42A writer supports the uplift in the opening sentence of policy UG 22B to ‘provide for’ on the basis of te Tiriti o Waitangi principle of active protection. She considers the principle requires Council to take ‘positive steps’⁴¹ to which we agree however we note the Court have :

- (a) considered the principle of active protection requires positive steps that will at times oblige Councils to initiate, facilitate, and monitor consultation process⁴²; and
- (b) the positive steps required fall short of ‘to provide for’ and the further active protection when applied by way of section 8 of the RMA does not create an obligation equivalent to ‘recognise and provide’ nor equivalent to ‘have particular regard to’⁴³.

4.17 The Courts have also found that deliberative use of such wording when drafting must be intentional, that is, if Parliament requires ‘actual provision’ to be made for any matter, it says so in the words ‘recognise and provide for’. In contrast where it elects to use the words ‘take into account’ the obligation is not intended to be higher

⁴¹ Overview report on submissions, 6 June 2023, p 12

⁴² *Sea-Tow Ltd v Auckland Regional Council* (1993) 1B ELRNZ 66.

⁴³ *Waikanae Christian Holiday Park v Kapiti Coast District Council* 27/10/04, Mackenzie J, HC Wellington CIV02003-485-1764.

than an obligation to consider the particular factor in making a decision, to weigh it up with the other relevant factors, and to give it whatever weight is appropriate in the circumstances⁴⁴.

- 4.18 Accordingly, Parliament intended, after an extensive assessment and consultation, and statutory prescribed process specific to the development of National Policy Statements, to specifically draft NPS UD Objective 5 and Policy 9 to impose the obligation at this level.
- 4.19 The s42A writer has in contrast considered the threshold insufficient to address the issues she has identified and seeks to impose a more strenuous obligation on both Council and applicants through UG 22B. The question of whether her assessment and position has merit is respectfully not one for the Panel to determine as the Panel (as is Council) are statutorily bound by the RMA, Schedule 1 process and ratio of *King Salmon*, to recommend changes which are in accordance with and limited to the scope and meaning of those contained within the NPS UD.

5. LEGAL SUBMISSION TWO - UG 22B is not in accordance with Part 2 of the RMA and is therefore ultra vires

- 5.1 We respectfully refer the Panel to paragraphs 3.1 to 3.10 above and in particular paragraph 3.9 in respect of the mandatory requirement that any change to a regional policy statement must be in accordance with the higher order planning documents.
- 5.2 Further we note the matters of interpretation and uplift in obligation raised in paragraphs 4.8 and 4.9 apply equally when considering policy UG 22B against the requirement of s8 of the RMA.
- 5.3 Neither the s32, s42 nor s32AA report/assessments assess the affect of UG 22B as currently drafted in respect of Part 2 as it relates to the community and economic wellbeing of the community as a whole. The uplift proposed to 'provide for' when applied to subclause (d) and (e) for example would likely result in established,

⁴⁴ *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC), *Te Korowai o Ngaruahine Trust v Hiringa Energy Ltd* [2022] NZHC 2810 at [183].

lawful activities that cannot ensure provision of those matters, being unable to continue at point of replacement consent nor unable to make variations to their operations to improve the economic efficiencies, ensure their longevity or improve/mitigate effects and risks of climate change without the ability to properly assess the application in accordance with the planning hierarchy.

- 5.4 This result must necessarily arise as District Plans and Regional Plans give effect to the Regional Policy Statement⁴⁵ and will necessarily carry through the restriction. We submit this would not be accordance with Part 2 given the careful wording of Part 2 and the purpose contained in s5 to enable the community as a whole to provide for is social, economic, cultural wellbeing and for their health and safety. We accept that it may well be that any such renewal or variation is not granted even if the relief sought by Ballance is granted by the Panel, however the request will be assessed under the recognised and established framework of Part 2 carried properly through the subordinate planning documents and captured in the more detailed regional and district plans.
- 5.5 The s42A writer references the above as the intended outcome of the drafting of UG22 B and considers that that a baseline argument would address the concerns raised by Ballance and other submitters⁴⁶.
- 5.6 Further the s42A writer seemingly considered this outcome as grounds for maintaining the current drafting of UG 22B:

(a) *"Policy UG 22B aims to protect against incompatible uses or development and reverse sensitivity effects, and the explanation statement recognises that industrial development undertaken around marae that have existed for decades have compromised culturally significant view shafts and the enjoyment of normal cultural activities. Policy UG 22B seeks to avoid these outcomes form occurring."*⁴⁷

⁴⁵ Ss67 and 75, RMA

⁴⁶ 2022 – Proposed Change 6 Staff Recommendations on Provisions with Submissions and further Submissions, 5 June 2023, p 107.

⁴⁷ Overview report on submissions, 6 June 2023, p 12

- (b) *The appropriateness of continuation of existing activities proposed to operate outside their existing use rights, will need to be assessed against this policy. Taking into account the principle of active protection, in staff's view, means that Marae and Papakainga need to be better protected against further encroachment and adverse effects. Staff do not consider it necessary to refer to existing use rights or existing lawful activities as such activities are afforded protection when operating within their lawful parameters⁴⁸.*
- (c) *Under Policy UG 22B if existing industrial activities propose to operate outside their existing use rights or in breach of a resource consent or regional or district planning rule, a concerted effort will be needed to demonstrate how marae or Papakainga will be protected from further reverse sensitivity effects.⁴⁹*

5.7 The use of both an 'existing environment' or 'permitted baseline' in response to the above is not a reliable nor appropriate tool to address the risk raised. These principles may not be applied or may not be applied appropriately at point of consent decision making and neither do they support the intended strategic, 'top down' policy direction that is implicit in the RMA planning document hierarchy which is intended to provide clarity.⁵⁰

6. **LEGAL SUBMISSION THREE - UG 22B creates a priority of reverse sensitivity interests which is not provided for within the NPS UD or the RMA and therefore is ultra vires**

6.1 With respect to reverse sensitivity the s42A report writer notes that definition of 'reverse sensitivity' within the BOPRS which is generally

⁴⁸ Overview report on submissions, 6 June 2023, p 12

⁴⁹ 2022 – Proposed Change 6 Staff Recommendations on Provisions with Submissions and Further Submissions, p 3

⁵⁰ *Environmental defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38; Overly vague or uncertain provisions risk serving no planning purpose because of their uncertainty (eg. *Orica Mining Services New Zealand Ltd v Franklin District Council* ENVCL Wellington W032/09, 5 May 2009 at [61] and [62] or they may risk being declared void (eg. *Murray v Tasman District Council* W58/94, 13 July 1994 (PT)). Provisions of planning documents must be certain so that they can be easily interpreted by those administering the documents and by users of those documents (*Sandstad v Cheyne Developments Ltd* (1986) 11 NZTPA 2560 (CA) AT 8.

applicable to any established and lawful activity. She also refers to the following operative policies which she considers address reverse sensitivity for existing activities⁵¹ as raised by Ballance:

- (a) Policy UG 20B: Managing reverse sensitivity effects on rural production activities and infrastructure in rural areas.
- (b) Policy EI 7B: Managing the effects of infrastructure development and use.
- (c) Policy AQ 1A: Discouraging reverse sensitivity effects associated with odours, chemicals and particulates.
- (d) Policy EI 3B: Protecting nationally and regionally significant infrastructure.

- 6.2 None of the above policies address the issue raised by Ballance and the other submitters, that is, the recognition of reverse sensitivity effects of development or variations of activities in urban areas with respect to established commercial or industrial activities.
- 6.3 The NPS UD does address reverse sensitivity specifically.
- 6.4 The matter becomes a live issue however as a result of the current drafting of UG 22B which makes specific provision for reverse sensitivity of marae and papakainga which would apply in both a rural and urban context and further creates an uplift in obligation by use of 'provide for'.
- 6.5 The effect of this drafting is to create a hierarchy of reverse sensitivity which was not envisaged by the NPS UD and therefore is out of scope of Change 6 and has not been assessed by way of the s32, s42 nor s32AA assessments/reports in respect of the implications of imposing such a hierarchy on the community as a whole.
- 6.6 If the Panel is minded to grant the relief sought for the reasons the status quo would remain. Marae and Papakainga may rely upon the

⁵¹ 2022 – Proposed Change 6 Staff Recommendations on Provisions with submissions and Further Submissions, p 3

existing definition, the following operative policies and any statutorily recognised iwi planning documents:

- (a) Policy IW 2B: Recognising matters of significance to Māori.
- (b) Policy IW 3B: Recognising the Treaty in the exercise of functions and powers under the Act.
- (c) Policy IW 4B: Taking into account iwi and hapu resource management plans.
- (d) Policy IW 5B Adverse effects on matters of significance to Māori
- (e) IW 1B: Enabling development of multiple-owned Māori land (in particular subclause (b): *'Enables Māori to develop papakainga, marae and associated community facilities or housing and, where necessary, shall activity protect these and associated customary activities from the adverse effects of subdivision, use and development, in the vicinity of a marae'*).
- (f) Policy IW 6B: Encouraging tangata whenua to identify measures to avoid, remedy or mitigate adverse cultural effects.
- (g) Policy IW 8D: Encouraging the development of iwi and hapu resource management plans.
- (h) Policy MN 1B: Recognise and provide for matters of national importance.
- (i) Policy MN 8B: Managing effects of subdivision, use and development.
- (j) Policy UG 20B: Managing reverse sensitivity effects on rural production activities and infrastructure in rural areas.
- (k) Policy EI 7B: Managing the effects of infrastructure development and use.
- (l) Policy AQ 1A: Discouraging reverse sensitivity effects associated with odours, chemicals and particulates.

- (m) Policy EI 3B: Protecting nationally and regionally significant infrastructure.
- (n) Section 17, RMA.
- (o) S127, RMA.

7. LEGAL SUBMISSION FOUR – The BOPRS operative provisions presently provide for the matters within UG22B which are out of scope of Change 6

- 7.1 The s42A writer has also recognised the existing operative policies in the BOPRPS (which are not subject to Change 6) address the matters raised by her in support of adopting the higher threshold of ‘provide for’, stating “*Collectively these provisions [IW 2B, IW 5B, MN 1B and MN 8B [and 22UG B] can be relied on to give effect to Policy 9 of the NPS UD....*⁵².”
- 7.2 Accordingly, we respectfully submit that should the Panel consider it appropriate to grant the relief sought by Ballance, these policies will remain in place, as they are, operative and giving effect to Part 2 and now the NPS UD Objective 5 and Policy 9.

8. RELIEF SOUGHT

- 8.1 Accordingly, Ballance respectfully seek the following relief be granted:
- (a) Policy UG 22B should be amended to substitute the words ‘provide for’ from the opening sentence with the phrase ‘*take into account*’.
 - (b) Amendment to (a) to remove the words “*but not limited to*” and “*and community facilities*”.
 - (c) Amendment to (d) to add at the end of the sentence “*geographically connected to papakaianga*”.

⁵² Overview report on submissions, 6 June 2023, p 10

- (d) Amendment to (e) to remove the word "marae" and adding after 'papakaianga' the phrase "*within Existing Urban Areas and Greenfield Development*".
- (e) Amendment to (f) to insert "*by the relevant local authority*" after the word 'Demonstrating'.
- (f) In the event the Panel is not minded to grant the relief sought above, Ballance respectfully submit amendment of Policy UG 22B should be amended to substitute the words 'provide for' from the opening sentence with the phrase '*take into account*' a minimum to address the concerns raised in these submissions.

9. CONCLUSION

9.1 Ballance largely supports Change 6 subject to a discrete selection of amendments that ensure the Bay of Plenty Regional Policy statement is:

- (a) intra vires;
- (b) appropriately recognises existing, lawful activities; and
- (c) is clear and workable in practice.

DATED this day 20th day of June 2023



.....
Barbara Mead / Richard Hoare

Counsel for Ballance Agri-Nutrients Limited