Proposed Change 6 (National Policy Statement on Urban Development) to the Bay of Plenty Regional Policy Statement
Council Planner supplementary memo to the Proposed Change 6 Hearing Panel

7 July 2023

Bay of Plenty Regional Council
PO Box 364
Whakatāne 3158
New Zealand

Supplementary Council Planner Memo to the Proposed Change 6 Hearing Panel for Proposed Change 6 to the Bay of Plenty Regional Policy Statement – National Policy Statement on Urban Development ("Change 6")

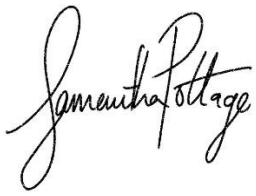
1. This memo follows my appearance as the reporting Council Planner for the Change 6 Hearings held on the 21st and 22nd of June 2023. This memo responds to the Panel's request for further information and a response to the evidence presented by submitters following adjournment after the hearing of submissions.

2. Note that the additional information provided in this memo does not change the content and recommendations contained within the Staff Overview Report and Staff Recommendations on Provisions with Submissions and Further Submissions Report unless expressly stated otherwise.

3. The intent of this memo is to address the questions and actions raised by the Panel, to provide subsequent changes to Proposed Change 6, and to provide further planning analysis. In support of this memo, please refer to the following attachments:

   Attachment 1 – King Salmon Decision

   Attachment 2 – McGuire v Hastings DC Decision.



Samantha Pottage

Urban Planner

Section 32 Analysis

1. The Panel had requested an analysis of the submissions to determine how many submitters challenged the s32 analysis.

2. No submitters directly challenged the s32 analysis in their submissions. Several included as reasons for their relief sought that the provisions do not represent the most appropriate way to achieve the objectives of the RPS, in terms of s32 of the RMA.[1] This is a standard basis on which to challenge the provisions, as opposed to a challenge to the s32 analysis itself.

3. The first time a challenge was made to the adequacy of the s32 analysis was in the legal submissions presented on behalf of Waste Management New Zealand (**WMNZ**) at the hearing. Those submissions allege that Regional Council has failed to properly assess Policy UG 22B under s32 of the RMA. The relief sought is for proposed Policy UG 22B(e) to be deleted on the basis that the s32 obligations have not been met and so its implications not adequately understood.

4. The Panel has queried whether it is possible to undertake a more robust s32 analysis based on the relief sought by submitters, and whether it is within scope to provide a further s32AA analysis.

5. If WMNZ raised their concerns with the adequacy of the s32 report in their submissions staff could have provided further detail s42A and s32AA reporting. That being said, in my opinion the potential implications of the policy, and so the level of assessment required at the RPS level, have been overstated by the submitter. It is not an inevitable outcome of the policy that the WMNZ air discharge would be prohibited in the regional plan. It is at the regional plan level, when considering the appropriate regulatory response, that the detailed economic analysis of implications would usually occur.

6. While the legal submissions suggested that the Panel needs to undertake a further assessment under s32AA, it is my understanding that a further assessment is only required for any changes that have been made to, or are proposed for, the proposal since the evaluation report for the proposal was completed.

7. The Panel may be able to direct further evidence on this issue if it felt it did not have enough information in order to make a decision. The Panel would need to provide a further opportunity for submitters to respond to this information.

8. However, this may not be necessary given I have proposed some amendments following further consideration of the concerns raised by submitters in relation to Policy UG 22B(e) and in doing so to more accurately reflect its intended effect.

[1] Fonterra (original submission number 15), and Waste Management New Zealand (original submission number 32).

9. The issues raised by the submitters centre on reverse sensitivity effects associated with rural based industries and providing for existing lawful industrial activities within proposed Policy UG 22B.

10. In response to the issue of reverse sensitivity, and as addressed within section 3.2 of the s32AA assessment, I have considered the inclusion of policy relating to reverse sensitivity effects within Change 6. The benefits and costs associated with not including further changes requested by submitters is assessed as neutral, recognising that the operative RPS already adequately considers reverse sensitivity effects. In particular, as it relates to the Fonterra submission, *Policy UG 20B: Managing reverse sensitivity effects on rural production activities and infrastructure in rural areas* adequately addresses the concerns raised by Fonterra. I also acknowledge that the operative definition for *'rural production activities'* includes processing facilities that directly service or support rural land use activities such as dairying is clearly provided for within this policy. It remains my opinion that the proposed policy is the most appropriate under s32.

11. I have reflected further on WMNZ's submission on the potential for the policy direction to result in the cessation of lawful existing industrial activities. The s32AA considers that the Act already provides for existing use rights, as such the benefits and costs associated with amending Policy UG 22B to acknowledge lawful existing industrial activities is similarly assessed as neutral.

12. This is still relevant to existing land use activities. However, I acknowledge that, as currently framed, the policy may affect the continuation of discharges associated with existing activities. The intention was to protect marae and Papakāinga from effects arising from the establishment of new activities, or expansion of existing activities, so that situations like what is being faced by Whareroa Marae do not occur in future or are not exacerbated. I consider that this intention can and should be better reflected in the policy wording. This is discussed further below.

Existing Use Rights – Waste Management New Zealand Legal Submission

13. Section 4.11 of the legal submissions by Waste Management New Zealand comments that '*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.* For context I note that Waste Management New Zealand are currently seeking to replace their expired air discharge consent as detailed in section 2.3 of the Statement of Evidence provided by Mr James Hilton Jeffries.

14. It is my opinion that it is not the intent of Policy UG 22B to inhibit any existing and lawfully established industrial activities regardless of their location and their regular operational activities. The view within section 15.5 of the staff overview report that '*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 parameters'* is still a relevant consideration.

Interpretation of the word 'incompatible'

15. The Panel has sought clarification on using the word 'incompatible'. This word is used within Policy UG 22B(e) in reference to protecting marae and Papakāinga from incompatible uses or development and reverse sensitivity effects. In the context of this policy, incompatible is understood by its normal dictionary meaning: *'(of two things)' so different in nature as to be incapable of co-existing'.* In the context of submissions, as at section 4.9 of the Waste Management New Zealand legal submission, the submitter notes that there has not been an evaluation of what may be a development or use that is 'incompatible'. The explanation statement for Policy UG 22B sets out that industrial development undertaken around marae have compromised culturally significant viewshafts and the enjoyment of normal cultural activities. From this statement, an example of two incompatible land use activities are marae and industrial activities. Staff have not found any caselaw that suggests the word 'incompatible' is problematic. The term 'incompatible' is used throughout the operative RPS both within policies and explanation statements. Examples of operative RPS provisions that use this term 'incompatible' include:

    - Policy AQ 1A: Discouraging reverse sensitivity associated with odours, chemicals and particulates
    - Policy CE 3A: Identifying the key constraints to use and development of the coastal marine area
    - Policy EI 3B: Protecting nationally and regionally significant infrastructure
    - Policy GR 4A: Protecting and managing significant geothermal features
    - Policy IW 5B: Adverse effects on matters of significance to Māori
    - Policy UG 20B: Managing reverse sensitivity effects on rural production activities and infrastructure in rural areas', Policy UG 21B 'Provision for utilisation of mineral resources
    - Policy UG 21B: Provision for utilisation of mineral resources

16. The proposed amendments to Policy UG 22B involve replacing the reference to incompatibility, meaning that this submitter concern with this language would also be addressed.

Weighting of a Policy Explanation Statement

17. The explanation text assists with informing the interpretation of objectives and policies. The intention of an explanation statement is that it should not provide direction beyond the objectives and policies it is linked to and should only provide greater explanation and context. The legal position is that explanatory text, if it is to be included in a plan at all, should accurately reflect the content of objectives, policies and other provisions in that plan. Preferably, the objectives and policies should be clear enough in their wording and intended effect to speak for themselves. Friends of Nelson Haven and Tasman Bay Inc v Tasman District Council Environment Court NZ 16 April 2018 [2018] NZEnvC 46.

How directive can an RPS Policy be

18. Case law states that "*A policy cannot be a "rule" within the special definition in the RMA, but it may nevertheless have the effect of what in ordinary speech would be a rule: Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593 and Tram Lease Ltd v Auckland Council [2015] NZEnvC 133.*

Using the term 'provided for' in preamble for Policy UG 22B

19. In response to submissions by Ballance Agri-Nutrients the Panel seek advice on the term 'provide for' in the preamble for Policy UG 22B. The main concern raised by the submitter is in reference to 'take into account' over the wording 'provide for'. At section 4 of the legal submissions presented on behalf of the submitter, their counsel suggests that Policy UG 22B is not in accordance with the NPS-UD and is therefore ultra vires.

20. I disagree. Subsidiary planning documents like the RPS are not required to parrot the exact wording of the Act. One document might 'give effect to' and not be inconsistent with another document without having to repeat it word for word. (Wairoa River Canal Partnership v Auckland Regional Council). The words "provide for" should not be considered in isolation from the remainder of the policy and its substantive effect.

21. Taking into the account the principles of te Tiriti is wide in its ambit, and the principles may have greater influence in some situations than others.

22. When looked at as a whole, the policy direction in Policy UG 22B does not go beyond the parameters of the RMA. Using the words "provide for" in the framing of the provision is of no real substantive effect. It is the directions at a) to f) of the policy that are to be implemented. Ballance has not suggested that the directions in a) to f) exceed the vires of the RPS. I am therefore unsure what the real issue is.

23. I consider the change proposed by Ballance to be unnecessary. It is the directions in a) to f) that have the important and substantive effect, and this would not change whether the policy said, "provide for" or "take into account".

Application of reverse sensitivity effects within Policy UG 22B

24. On further reflection after hearing the submissions and evidence presented by submitters, I have reconsidered the reference to reverse sensitivity effects in Policy UG 22B.

25. The RPS definition of reverse sensitivity is: '*The potential for the operation of an existing lawfully established activity to be compromised, constrained or curtailed by the more recent establishment of other activities which are sensitive to the adverse environmental effects being generated by the pre-existing activity.'* When used in the context of Policy UG 22B, as framed, it would imply that the activities occurring on sites with Marae and Papakāinga are creating an outward adverse effect that is affecting other sensitive activities. This is not actually what is meant to be addressed by the policy – rather it is the potential for other activities to affect marae and Papakāinga, which are the sensitive activities. For this reason, as well as those listed above, further changes are recommended to Policy UG 22B(e) to

provide greater clarity on its intent. These changes within the scope of submissions which challenged the policy and respond to the concerns raised by the submitters.

Supplementary Changes to Policy UG 22B

26. Changes have already been suggested to this policy, as detailed in the staff overview report, and Version 5.0 of Proposed Change 6. For reference, I include the version 5.0 change below. Text amendments recommended by staff are show in red. Text recommended to be added is underlined and text recommended to be deleted is ~~struck through.~~

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

    a) Enabling Māori to develop their land, including but not limited to papakāinga housing, community and social 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, and in appropriate circumstances decision making on resource consents, designations and heritage orders;
    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.

27. The following supplementary changes are recommended to Policy UG 22B(e) of Version 5.0 of Proposed Change 6. Supplementary changes are shown in blue text. Additions are underlined and deletions are ~~struck through~~:

Policy UG 22B: Te Tiriti o Waitangi Principles

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

(a) Enabling Māori to develop their land, including but not limited to papakāinga housing, community and social 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 and in appropriate circumstances decision making on resource consents, designations and heritage orders;

(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 adverse effects of new or expanded subdivision, use or development that constrain their continued use ~~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.

28. Based on the recommended changes to this policy, consequential changes within the final paragraph of the explanation statement are also recommended, as shown below:

    This policy also seeks to protect marae and papakāinga from adverse effects of new or expanded subdivision, use or development ~~reverse sensitivity effects generated by incompatible uses or development occurring in their proximity~~ that could constrain or inhibit cultural activities expected on a marae. Industrial development undertaken around marae that have existed for decades have compromised culturally significant viewshafts and the enjoyment of normal cultural activities. This policy seeks to avoid these outcomes from occurring in future, or from being exacerbated.

29. It is my opinion that the supplementary changes recommended to Policy UG 22B(e) provide greater clarity on its intent to protect marae and Papakāinga from new or expanded subdivision, use or development rather than those operations that are already established and continue to operate within the same parameters. If the activity was proposed to expand, it would be captured by the policy and protection would be required.

30. Given that changes are recommended to Version 5.0 of Change 6, a further s32AA evaluation is required on those recommended changes shown in blue text above. As detailed within section 3 of the section 32AA evaluation of changes report, the recommended changes have been aimed to clarify the intent and provide consistency with the National Policy Statement on Urban Development (NPS-UD). The changes recommended within this report are still consistent with that direction. As such, the further recommended changes do not substantively change the intent of Policy UG 22 in a way that would be characterised as a "different" approach from that addressed in the original evaluation report. The options proposed within sections 27 and 28 of this report is more appropriate as it provides further clarity on the intent of Policy UG 22B.

Consideration of development proposals prior to an established Future Development Strategy

31. Tier 1 and 2 urban environments are required under the NPS-UD to prepare a Future Development Strategy (FDS). Within the Bay of Plenty Region Rotorua is a Tier 2 urban environment and, Western Bay of Plenty and Tauranga City are Tier 1 urban environments. The draft Rotorua FDS has been notified and is currently open for submissions. For the Western Bay of Plenty sub-region (consisting of Tauranga City and Western Bay of Plenty) the FDS, Smart growth Joint Spatial Plan is being prepared for public notification and are expected to be released for submissions for the entire month of October. Once these strategies have been adopted, they will provide a clear direction on where urban growth is anticipated.

32. The Panel have queried the removal of western Bay of Plenty sub-region urban limits prior to the adoption of an FDS, and because of this there is risk of a 'policy vacuum'. That is an absence of adequate policy direction on the appropriate locations for urban growth in the interim. This is a relevant consideration to the application of Policy UG 7A. In my understanding, the NPS-UD sets direction for local and regional authorities independently. Subpart 5 sets out the requirements for local authorities to prepare an HBA in time to inform the next long-term plan and sets out what is required of an HBA including the housing and

business land demand and its locations for the short, medium and long term. For the western Bay of Plenty sub-region, the HBA was completed in December 2022, and in Rotorua, February 2022.

33. Regardless of an FDS being adopted prior to Change 6 becoming operative, the sequencing and anticipation of urban growth for the short, medium and long term are considered within the respective HBA.

34. The HBA referencing within Policy UG 7A is crucial to the identification of land that is anticipated for urban growth as this then shows what is not anticipated and provides an avenue for unanticipated and out of sequence developments to be considered, when meeting the relevant criteria. As detailed within subpart 5 of the NPS-UD, it is the intent that the HBA will inform the next long-term plan, which will then influence other local authority growth and infrastructure strategies as well as the FDS. These local authority strategies are listed within the explanation statement of Policy UG 7A. As detailed in the sections above, the explanation statement provides greater context and clarification to assist understanding the policy.

Implications of retaining Urban Limit Maps

35. The operative RPS Appendix E urban limits maps set for the western Bay of Plenty sub-region are proposed to be removed to be more flexible and responsive to development opportunities. The Ministry for the Environment Responsive Planning Guidance Fact Sheet states: *'a hard rural urban boundary without the ability to consider change or movement of that boundary would not meet the requirements of the responsive planning policy*.' Retaining the urban limits would mean any urban development proposals outside the urban limits would require both a district/city plan change and an RPS change would be required which is an inefficient policy approach and contrary to the NPS-UD responsive planning requirements.

What is in and out of scope for RPS Change 6

36. The Panel has requested an understanding on what is considered to be within scope for Change 6. Section 55 of the Act requires that local authorities amend a regional policy statement if a national policy statement directs it to. Within the time period of the processing of Change 6, the following national direction in addition to the NPS-UD is also being considered in some capacity:

    - Proposed National Policy Statement for Indigenous Biodiversity (NPS-IB)
    - National Policy Statement for Freshwater Management (NPS-FM)
    - National Policy Statement for Highly Productive Land (NPS-HPL)

37. As detailed within the Staff Overview Report, The NPS-IB is still under development and is yet to be gazetted. Given we do not know what the NPS-IB will say when it ultimately becomes operative, we cannot attempt to give effect or ensure consistency with it.

38. The NPS-FM is being worked through by Regional Council through the Essential Freshwater Policy Programme. Region wide NPS-FM implementation will be delivered through RPS and regional plan changes to be notified in December 2024.

39. Section 19 of the Staff Overview Report provides a detailed explanation of the consideration of the NPS-HPL. In summary, The Regional Councils Strategy and Policy Committee has resolved to progress Proposed Change 8 (NPS-HPL) to the RPS to implement the NPS-HPL requirements. I highlight here that the primary task involved with Proposed Change 8 (NPS-HPL) is to map highly productive land in the RPS. This change is in its early stages of development.

40. The similarities between these policy directions and why they are considered out of scope for Change 6 is that each will need to go through its own schedule 1 process (or in the case of the NPS-FM the Freshwater Planning Process). Each direction requires different tasks for implementation and the ability to consult and submit on their application to the RPS and regional plans.

41. Additionally, the limited scope decided for Change 6 to solely give effect to the NPS-UD was identified on all relevant documents. People would not have anticipated further amendments to widen the policy changes to consider encompass other NPS in addition to the NPS-UD. This is a matter of natural justice and giving the public an opportunity to submit on a process they have an understanding of as advertised on the Regional Council webpage, letters to interested persons and the initial reporting and drafting of the changes.

Referencing 'avoid' in response to reverse sensitivity effects

42. The Panel has requested a direct response to hearing submission points by Fonterra and Kiwi Rail referring to 'avoid' in reference to reverse sensitivity effects.

43. Within the Kiwi Rail planning evidence that the suggested changes to various polices use the term *'the avoidance of reverse sensitivity effects'* or *'avoids the potential for reverse sensitivity effects'.*

44. Within the Fonterra further planning submission dated 28 June 2023, the submitter provides an analysis of the Waikato Regional Council operative RPS issues, objectives and policies that are relevant to reverse sensitivity effects. It is within these policies that the terms 'minimising potential for reverse sensitivity', and 'avoiding or minimising the potential for reverse sensitivity' are detailed. In implementing the relevant policies, Method UFD-M2 – sets out that local authorities should have particular regard to the potential for reverse sensitivity effects when assessing resource consent applications, district and regional plans.

45. Similarly, to the Waikato RPS although specific to the transport network, operative (and unchanged through Change 6) *Policy UG 1A: Protecting the national and regional strategic transport network* sets out that significant transport networks (such as the rail line) shall be identified in the Regional Land Transport Plan and district plans and to protect these corridors for regional transport purposes. This policy refers to Methods 1 and 4 of the RPS

which are methods requiring policy implementation into district plans (Method 1) and the process to amend the Regional Land Transport Plan for policy implementation (Method 4).

46. In my experience district plans such as the Tauranga City Plan include rules specific to Kiwi Rail reverse sensitivity to manage those effects. Such examples include building design controls and buffer zone overlays which captures sensitive receivers within proximity to the rail line. At a regional policy statement level, care is needed when using directive terms such as 'avoid' which offers little to no avenue to mitigate or remediate those effects, as they currently are at a district level. It is appropriate that some flexibility is provided for the district plan to respond to different circumstances applying in different localities.

47. In my opinion *Policy UG 23B: Providing for the operation and growth of rural production activities* and *Policy UG 24B: Managing reverse sensitivity effects on existing rural production activities in urban areas* directly addresses the concerns raised by Fonterra on the basis that these policies address reverse sensitivity effects on rural production activities (which includes processing and research facilities that directly service or support those rural land use activities of Fonterra) when they are occurring in both rural and urban settings. Further, *Policy EI 3B: Protecting nationally and regionally significant infrastructure* provides for Kiwi Rails concerns as the definition of regionally significant infrastructure includes the Bay of Plenty rail network.

48. The Panel has also queried whether there is a case for Change 6 to consider reverse sensitivity effects within an existing urban area, and my opinion is that this already the case through Policy UG 24B and Policy EI 3B. District plans should already recognise and provide for the protection from reverse sensitivity effects for activities such as rural production activities and rail as provided by the existing policy direction of the RPS.

Cultural Redress v Cultural Offsetting

49. At the Hearing, Des Heke requested that reference to 'cultural redress' be included in addition to the reference to cultural offsetting being reinstated. It was my prior recommendation to have the reference to cultural offsetting deleted in response to submissions by tāngata whenua opposing the concept. It was the intention to signal offsetting may be appropriate in certain circumstances but that would be a matter to be canvassed with tāngata whenua on a case-by-case basis. It is not intended as a starting point, rather that once other options (e.g. avoid, remedy then mitigate) have been exhausted it may be the only avenue left.

50. The Hearing Panel have asked what the complications are of reinstating the fifth paragraph while elaborating it is a form of cultural redress. As reworded, the paragraph within the explanation statement could read as follows:

    One of the means of giving effect to these principles is through methods developed in conjunction with tangata whenua as a form of cultural redress to offset the impacts of urban development on culturally significant values, sites or areas.

51. Complications of amending the explanation text to include cultural redress include:

- Cultural redress is not defined and nor is it a concept used anywhere else in the RPS.
- Cultural redress is a Crown / Treaty settlement concept and not one used in the RMA framework.
- The relief was not specifically requested in Mr Heke's submission
- Mr Heke's submission does not include in its relief a general clause seeking consequential or other amendments considered appropriate to address his concerns
- Submissions by Retimana Whānau Trust (3-3/3-4), Ngāti Moko (24-2) specifically seek deletion of the fifth paragraph referencing offsetting

Definition of Māori owned land

52. The Hearing Panel has asked for a definition of Māori owned land. This recognises there are changing views on what is considered to be Māori owned land (such as leasable land and associated activities). In PC6 the only policy that references Māori land is Te Tiriti o Waitangi Principles Policy UG 22B. Appendix A 'Definitions' of the operative RPS does not include a definition for 'Māori land'. However, RPS Policy IW 1B 'Enabling development of multiple-owned Māori land' includes the following footnote linked to the term 'Māori land' which states: *'I.e., land in multiple ownership under Te Ture Whenua Māori Land Act 1993.'*

53. The purpose of a footnote is to provide additional information or clarification on a particular point mentioned in the main text. Footnotes are typically used in academic, scholarly, or formal writing to support statements, cite sources, offer tangential explanations, or provide further context. More importantly footnotes are useful for providing translations of foreign words or phrases, defining technical terms, or clarifying abbreviations or acronyms used in the text. The footnote serves as a default definition in the absence of one being included in Appendix A - Definitions.