

**BEFORE THE ENVIRONMENT COURT
AT AUCKLAND**

ENV-2020-AKL-000064

**I MUA I TE KOOTI TAIAO O AOTEAROA
TĀMAKI MAKAURAU ROHE**

IN THE MATTER	of an appeal under the first schedule of the Resource Management Act 1991 (RMA)
BETWEEN	AWATARARIKI RESIDENTS INCORPORATED SOCIETY Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL First Respondent
AND	WHAKATĀNE DISTRICT COUNCIL Second Respondent and Requestor of Plan Change 17

**JOINT AFFIDAVIT OF CRAIG BARRY BATCHELAR AND GERARD MATTHEW
WILLIS**



PLANNING

23 November 2020

**BROOKFIELDS
LAWYERS**

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We, Craig Barry Batchelar and Gerard Matthew Willis, planners of Tauranga and Auckland, solemnly and sincerely affirm:

1. INTRODUCTION

- 1.1 Our qualifications and experience are as set out in the exhibits marked **A** and **B** annexed to this affidavit.
- 1.2 We both gave evidence at the Commissioner hearing which resulted in the decisions on Plan Changes 1 and 17, which are the subject of this appeal.
- 1.3 We have both prepared statements of evidence for the Environment Court addressing the Plan Change provisions and matters raised in the Awatarariki Residents Incorporated Society (**ARIS**) appeal.
- 1.4 We have read the Expert Witness Code of Conduct set out in the Environment Court's Practice Note 2014 and we agree to comply with it. We confirm that the issues addressed in this statement of evidence are within our respective areas of expertise, except where we state we are relying on the specified evidence of another person. We have not omitted to consider material facts known to us that might alter or detract from our expressed opinion.
- 1.5 This affidavit addresses:
 - a) The requirements of the Bay of Plenty Regional Policy Statement (RPS) to reduce risk in areas of high natural hazard risk;
 - b) The rationale for the effective date of 31 March 2021 for the prohibited activity rule NH R71 in Plan Change 17 (**PC17**);
 - c) The proposal to extend the effective date of the prohibited activity rule to 31 March 2022 for 10 Clem Elliot Drive, Matatā.

2. RPS REQUIREMENTS

- 2.1 Objective 31 of the RPS requires the:

“Avoidance or mitigation of natural hazards by managing risk for people's safety and the protection of property and lifeline utilities”

- 2.2 The RPS includes an extensive suite of policies (NH 1B to NH 14C) to achieve Objective 31. These require, amongst other things, hazard risk to be assessed and a level of risk (High, Medium or Low) assigned for each Natural Hazard Zone.



- 2.3 Policy NH 3B specifies the natural hazard risk outcomes to be achieved in Natural Hazard Zones. It states that:

“In natural hazard zones subject to High natural hazard risk reduce the level of risk from natural hazards to Medium levels (and lower if reasonably practicable)”

Explanation

...

“Consistent with Policy NH 2B, high natural hazard risk within a natural hazard zone should not be tolerated and requires a response to reduce risk. There may be occasions when the need to reduce natural hazard risk is immediate but in most cases reducing risk from high levels will need to occur over time. These timeframes may span years or even decades in order to manage disruption and cost. This is particularly true when risk reduction relies on land development and redevelopment processes that relate to design life of buildings and infrastructure.”

- 2.4 Based on expert advice on the presence of a high loss of life risk in the Awatarariki debris flow natural hazard zone, this is an occasion when the need to reduce natural hazard risk is “immediate”. Council cannot rely on land development and redevelopment processes to reduce risk in this case. Risk reduction options have been thoroughly investigated by the Council. The only practicable way to reduce loss of life risk to an acceptable level is to move people out of harm’s way (managed retreat).
- 2.5 The ability to achieve “immediate” risk reduction has been affected by the required process for, and practicalities of, achieving managed retreat. This has involved risk assessment, risk reduction strategy development and approval by central and local government, property acquisition via a voluntary process, and the statutory plan change process. This work has spanned nearly 5 years.
- 2.6 Accordingly, the approach that has been applied at Awatarariki is that risk should be reduced to an acceptable level as soon as practicable, if not immediately, as directed by the RPS.



3. RATIONALE FOR THE EFFECTIVE DATE OF 31 MARCH 2021

- 3.1 Under Plan Change 17, residential activities subject to High Risk Debris Flow on the Awatarariki Fanhead are subject to the following rule (Rule NH R71):

"From 31 March 2021, the use of land for a residential activity is a prohibited activity on any property listed below in Table NH 3."

- 3.2 The rationale for the effective date of 31 March 2021 is provided in the Section 32 Report at Section 10.2:

"It is also reasonable to consider the anticipated completion of the voluntary managed retreat strategy property acquisition process (forecast as December 31, 2020) and to set an appropriate date shortly after this for the Prohibited Activity rule to apply. This will avoid creating conflict with the land purchase agreements. Three months after this date is proposed with a date of 31 March 2021 when the rule will apply, and residential activity would be required to cease."

- 3.3 The Section 32 report footnotes the Indicative Business Case (Table 12, p 65) as the source of the information on the voluntary managed retreat strategy property acquisition process.

4. PROPOSED 31 MARCH 2022 EFFECTIVE DATE FOR 10 CLEM ELLIOT DRIVE, MATATĀ

- 4.1 In the context of settlement discussions, we were asked to consider whether occupation of 10 Clem Elliot Drive beyond 31 March 2021 could be considered to be compliant with the RPS. We considered a number of potential scenarios for an extension of Rule NH R71 for 10 Clem Elliot Drive.
- 4.2 We were both of the opinion that the extended occupation would not give effect to RPS Objective 31 and Policy NH 3B (appropriately interpreted given the High loss of risk) that retreat should occur "immediately" to reduce high loss of life risk. As addressed above, we both considered that the process and practicalities of achieving managed retreat was a relevant consideration, and consistent with the approach of achieving retreat "as soon as practicable".
- 4.3 Based on legal advice, it was understood that an Environment Court decision approving PC17 would likely be appealed to the High Court and in the



circumstances, it would also be likely that a stay of the Environment Court decision would be obtained. If this were to occur, the operative date for the prohibition to take effect could be pushed out by up to 12 months. On that basis, the date for imposing the prohibition on residential activities on the Whalley property could, in practice, be as late as 31 March 2022.

4.4 In these circumstances, the Whalley's could occupy the house lawfully, without any controls to manage risk while a decision was awaited from the High Court. Importantly, that occupation would occur without the early warning system now proposed, and as referred to in Section 5 below.

4.5 Extending the date for prohibition for the Whalley property to recognise the potential delay in the provisions taking effect, while not ideal, would not be contrary to the principle that reducing risk to an acceptable level should occur as soon as practicable. As noted above, we determined that the appeal could be settled without prolonging the potential period that the Whalley property would be subjected to a High loss of life risk.

4.6 Indeed, early resolution of the appeal with regard to other properties would shorten the timeframe for reducing risk. Accordingly, we concluded that a better overall risk reduction outcome could be achieved by agreeing to an extension of the effective date to 31 March 2022 for 10 Clem Elliot Drive, Matatā.

4.7 We drafted suggested amendments to Plan Change 17 to give effect to the extension of the effective date by one year. This is included in Exhibit 3.

5. EARLY WARNING SYSTEM

5.1 To address residual risk, the Whalley's have proposed an Early Warning System and evacuation plan (EWS) as part of the agreement to an extended occupation.

5.2 We have read the evidence of Peter Blackwood, Dr. Chris Massey and Professor Tim Davies. We accept that they have assessed the relevant matters.

5.3 Dr Massey and Professor Davies conclude that the proposed EWS will reduce loss of life risk (AIFR) at the Whalley's dwelling from 10^{-3} (0.1%) to somewhere between 10^{-3} to 10^{-4} (0.1 to 0.01%) but is unlikely to reduce AIFR to below the risk tolerability threshold specified in the Bay of Plenty Regional Policy Statement and adopted by Council (i.e. 10^{-4} or 0.01%).



5.4 Notwithstanding that the RPS risk threshold will not be attained through the use of the EWS, we remain of the opinion that a better overall risk reduction outcome will be achieved by agreeing to the requested extension, compared to the risk reduction outcome where matters remain in dispute for an extended period of time with no EWS. The proposed EWS would help to reduce the residual risk as far as reasonably practicable.

6. CONCLUSION

6.1 In our opinion, the extent to which the RPS is given effect to by Plan Changes 1 and 17 is not materially affected by allowing for a 1 year sunset occupation of the Whalley property at 10 Clem Elliot Drive provided an EWS is implemented as set out in the evidence of other Council witnesses.

AFFIRMED at Tauranga)
this 24th day of November)
2020 before me:)



Joanne Pamela Tisch
Solicitor
Tauranga

A Solicitor of the High Court of New Zealand



(Craig Barry Batchelar)

AFFIRMED at Auckland)
this 26th day of November)
2020 before me:)



Eon Lai
Barrister and Solicitor
of the High Court of New Zealand
Auckland

A Solicitor of the High Court of New Zealand



(Gerard Matthew Willis)



Exhibit "A" – Qualifications and Experience Craig Batchelar

1. I hold the position of Planner at Boffa Miskell Limited. I am a Director in the firm. I am currently the national Technical Leader for the company's planning discipline and Te Hihiri (Māori cultural advisory) discipline.
2. My planning qualification is Bachelor of Regional Planning (1st Class Hons) obtained from Massey University in 1984. I have been a full member of the New Zealand Planning Institute since 1988.
3. I have worked in the planning profession for 35 years in central and local government and the private sector.
4. From 1989 to 2000, I was employed by Tauranga District Council as a planner in a variety of roles including management of the Council's Environmental Services Group from 1995 to 2000. This included development of the Council's policy and practice for natural hazard risk management.
5. I managed Tauranga District Council's "Dunewatch" initiative. This was a unified planning strategy which involved coastal hazard susceptibility mapping and risk assessments, a Plan Change (coastal hazard zones), building and site development guidelines, and the implementation of a coast care programme to restore dunes and increase natural resilience to erosion events. The Plan Change element was successfully defended in the Environment Court where I provided a statement of planning evidence.
6. I was also engaged in Civil Defence while employed by Tauranga District Council. This included a term as Local Controller for the joint Western Bay of Plenty Tauranga Civil Defence and Emergency Management organisation.
7. From 2000 to 2004 I was self-employed as a planning consultant. My projects included an engagement as Technical Director for the western Bay of Plenty subregional "SmartGrowth" initiative during 2000-2003. Part of this assignment included natural hazard

This is a true copy of the exhibit marked with the letter "A" referred to in the annexed joint affidavit of CRAIG BARRY BATCHELAR affirmed at Tauranga this 24th day of November 2020 before me:

Solicitor of the High Court of New Zealand / Justice of the Peace

Joanne Pamela Tisch
Solicitor
Tauranga

This is a true copy of the exhibit marked with the letter "A" referred to in the annexed joint affidavit of GERARD MATTHEW WILLIS affirmed at Auckland this 25th day of November 2020 before me:

Eon Lai
Solicitor of the High Court of New Zealand / Justice of the Peace
Barrister and Solicitor
of the High Court of New Zealand
Auckland

susceptibility mapping as an input to the development of a subregional settlement pattern (Spatial Plan).

8. Since joining Boffa Miskell Ltd in 2004, I have assisted both local government and private sector clients with a wide range of regional and district policy and plan development, structure planning, private plan changes, and resource consents.
9. I have provided planning consultancy services to the Whakatane District Council in several capacities over the last 15 years including the preparation of applications for resource consent for Council projects; processing applications for resource consent; giving planning evidence to consent hearings and the Environment Court; and providing a range of policy advice including being engaged as a planning expert to report on District Plan natural hazard provisions.
10. Boffa Miskell was engaged to prepare applications for regional and district resource consents for several post event "regeneration" projects at Matatā including the Ohinekoao Stream works, Waimea Stream works, Matatā Lagoon restoration, Awatarariki Stream flood mitigation works, and Waitepuru Stream debris flow diversion works.
11. The Council decisions on the Matatā lagoon restoration, Awatarariki Stream flood mitigation works, and Waitepuru Stream debris flow diversion works were appealed to the Environment Court. I provided statements of planning evidence. The Council resource consent decisions were substantially upheld.
12. I worked closely with the Council/consultant project team on developing proposals for engineering-based debris flow risk mitigation for properties on the Awatarariki Fanhead to the point where this 'structural' approach was found to be unviable, and the Council's risk management strategy changed to a planning-based approach.
13. I have assisted the Council with the development of the planning-based approach relating to the debris flow natural hazard risk mitigation for the Awatarariki stream.



Exhibit "B" – Qualifications and Experience – Gerard Willis

1. I am a director of Enfocus Limited, a resource management consultancy based in Auckland. I have practised as a planner and resource management specialist for the past 30 years.
2. I hold a Bachelor of Regional Planning (Hons) degree from Massey University and am a full member of the NZ Planning Institute. I am a certified decision-maker under the Ministry for the Environment's Making Good Decisions programme.
3. My previous experience includes working in policy and regulatory planning roles in local government both in New Zealand and in the United Kingdom. I also spent a considerable part of my early career in central government roles including as a senior policy analyst at Ministry for the Environment and environment adviser to the Minister for the Environment.
4. Since 2001, I have been a planning and environmental consultant, establishing my own practice in 2002. In that capacity I have acted for a number of district and regional councils and provided advice to companies, Maori trusts and government agencies on a wide range of regional and district planning issues.
5. Of note, I was contracted by the Bay of Plenty Regional Council to assist with developing the natural hazards provisions of the operative Bay of Plenty Regional Policy Statement. Subsequent to that, I have assisted the Regional Council in a number of natural hazards-related projects.
6. I have also been involved in policy development at the national level including assisting Local Government New Zealand develop its position on natural hazards issues including authoring the 2014 report Managing natural hazard risk in New Zealand – towards more resilient communities.

This is a true copy of the exhibit marked with the letter "B" referred to in the annexed joint affidavit of CRAIG BARRY BATCHELAR affirmed at Tauranga this 24th day of November 2020 before me:

Solicitor of the High Court of New Zealand / Justice of the Peace

Joanne Pamela Tisch
Solicitor
Tauranga

This is a true copy of the exhibit marked with the letter "B" referred to in the annexed joint affidavit of GERARD MATTHEW WILLIS affirmed at Auckland this 26th day of November 2020 before me:

Solicitor of the High Court of New Zealand / Justice of the Peace

Fon Lai
Barrister and Solicitor
of the High Court of New Zealand
Auckland

Exhibit "C" 7. Suggested Amendments to Plan Change 17 Rules

Rules

NH R71 **Prohibited - Residential Activities subject to High Risk Debris Flow on the Awatarariki Fanhead at Matatā after 31 March 2021**
From 31 March 2021, the use of land for a residential activity is a prohibited activity on any property listed below in Table NH 3.

NH R72 **Prohibited - Residential Activities subject to High Risk Debris Flow on the Awatarariki Fanhead at Matatā after 31 March 2022**
From 31 March 2022, the use of land for a residential activity is a prohibited activity on Allot 322 TN of Richmond (10 Clem Elliot Drive, Matata)¹.

Glossary **Meaning of "Residential Activity" and "Property"**

For the purposes of Rule R71

- "residential activity" shall mean the use of land or buildings by people for living accommodation whether permanent or temporary and includes, but is not limited to, any dwellings, apartments, boarding houses, hotels, hostels, motels, camping grounds, mobile homes, caravans, tents, and accommodation for seasonal workers.
- "property" shall mean, as applicable to the context, the parcel of land described in Table NH 3 and shown with a yellow border on Figure NH1.

This is a true copy of the exhibit marked with the letter "C" referred to in the annexed joint affidavit of **CRAIG BARRY BATCHELAR** affirmed at *Tauranga* this *24th* day of *November* 2020 before me:

Solicitor of the High Court of New Zealand / Justice of the Peace

Joanne Pamela Tisch

Solicitor

Tauranga

This is a true copy of the exhibit marked with the letter "C" referred to in the annexed joint affidavit of **GERARD MATTHEW WILLIS** affirmed at *Auckland* this *26th* day of *November* 2020 before me:

Solicitor of the High Court of New Zealand / Justice of the Peace

Ben Lai

Barrister and Solicitor

of the High Court of New Zealand
Auckland

¹See Environment Court Determination XXXX 2020

Table NH 3

Legal Description	Physical Address
Lot 1 DPS 46347	16, 16A, 18, 18A Clem Elliott Drive, Mata
Lot 2 DP 308147	14B Clem Elliott Drive, Matatā
Lot 1 DP 308147	14A Clem Elliott Drive, Matatā
Lot 3 DP 308147	12B Clem Elliott Drive, Matatā
Lot 4 DP 308147	12A Clem Elliott Drive, Matatā
Allot 322 TN OF Richmond	10 Clem Elliott Drive, Matatā
Allot 323 TN OF Richmond	8 Clem Elliott Drive, Matatā
Lot 1 DPS 54496	7 Clem Elliott Drive, Matatā
Lot 2 DPS 54496	5 Clem Elliott Drive, Matatā
Lot 2 DPS 4869	23 Richmond Street, Matatā
Lot 3 DPS 4869	21 Richmond Street, Matatā
Allot 360 TN OF Richmond	5 Pioneer Place, Matatā
Allot 361 TN OF Richmond	6 Pioneer Place, Matatā
Allot 362 TN OF Richmond	7 Pioneer Place, Matatā
Lot 4 DPS 4869	96 Arawa Street, Matatā
Lot 5 DPS 4869	94 Arawa Street, Matatā
Lot 1 DPS 16429	100 Arawa Street, Matatā
Lot 2 DP 306286	104 Arawa Street, Matatā

