

I MUA I TE KOOTI TAIAO O AOTEAROA
TĀMAKI MAKĀURAU ROHE

IN THE MATTER of an appeal under the first schedule of the
Resource Management Act 1991 (**RMA**)

BETWEEN **AWATARARIKI RESIDENTS INCORPORATED**
Appellant

AND **BAY OF PLENTY REGIONAL COUNCIL**
First Respondent

AND **WHAKATĀNE DISTRICT COUNCIL**
Second Respondent and Requestor of Plan
Change 17

AND **WHAKATĀNE DISTRICT COUNCIL PLACES
AND SPACES**
Section 274 party

AFFIDAVIT OF RICK WHALLEY, RACHEL WHALLEY AND PAMELA WHALLEY

Dated ~~8~~ 5th December, 2020

5th Dec 2020

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INTRODUCTION

1. This affidavit is made jointly by Rick, Rachel and Pamela Whalley. This affidavit is made in support of the 1 year extension for 10 Clem Elliot Drive, Matata to the effective date of the prohibited activity rule NH R71 in Plan Change 17 (**PC17**) from 31 March 2021 to 31 March 2022 (**the 1 year extension**).

BACKGROUND

2. My (Rick) parents Pam and Bill Whalley, have lived at 10 Clem Elliott Drive since the early 90s (attached, marked "**Appendix One**"). A lifetime of working in the mills in Kawerau enabled them to build their forever home on a beach side section at Matatā (attached, marked "**Appendix Two**"). It is a special place for all the family, with grandchildren and great grandchildren spending a lot of time here over the years. Pam and Bill watched the Matatā Debris Flow in 2005 from the second story of our house. Our house was undamaged in the debris flow event.
3. I (Rick) came home from Australia to help build the home, landscape the gardens, and with my wife Rachel have been living here since 2012, returning home to care for my parents. My father Bill, who was an active member of the Matatā community, passed away at home in 2016. We now live with our mother Pamela Whalley.
4. Our home has intergenerational significance for our whanau. The proposition that we now have to leave our home is devastating.
5. We are all members of Awatarariki Residents Incorporated (**ARI**), Rick Whalley is the chairperson and Rachel Whalley, the secretary. We are authorised by ARI to provide this affidavit.

WITHDRAWAL OF APPEAL

6. The Awatarariki Residents Incorporated (**ARI**) resolved on 28th October 2020 to settle with WDC & BoPRC and withdraw ARI's appeal to the Environment Court. This was decided ahead of a WDC deadline of 30th October 2020 when it was planned to withdraw funding for the Voluntary Managed Retreat (**VMR**) and replace



it with a Public Works Act 1981 (**PWA**) assessment. This would significantly reduce the payments residents would receive for their homes should they be unsuccessful in their appeal to Environment Court¹.

7. ARI had earlier requested on 15th July 2020 that WDC extend the VMR offer until after the outcome of the Environment Court appeal was known (attached, marked "**Appendix Three**"). At that time, ARI had been given the deadline of 22nd July 2020 to accept VMR offers or be subject to the outcome of Plan Change 17 and be forced from their homes in March 2021. We were aware that national funding for the VMR was available until June 2021 and sought that an extension to that date be supported by WDC and BoPRC. Residents felt that they were being coerced to engage with the VMR and should be allowed to exercise their rights under the RMA without fear of being penalised. The VMR offer was extended to 30 October 2020 but no later.
8. In October 2020, WDC provided ARI with a redacted copy of 'Awatarariki Voluntary Managed Retreat Programme – Request for Extension Report' (attached, marked "**Appendix Four**") discussed at the Strategy and Policy Committee meeting of 30th September 2020. In this report WDC notes Compulsory Acquisition of the remaining properties as an option, depending on the outcome of the Environment Court Appeal. Basically if the ARI appeal was successful the Whakatane District Council would consider using compulsory acquisition through the Public Works Act to acquire any remaining properties. This is the first time that it has been raised that the homes at Awatarariki could be subject to Compulsory Acquisition.
9. Throughout the consultation and plan change process, residents were assured that there was no predetermined agenda to remove us from our homes and that a process was being followed to mitigate risk, one in which we could engage and, if we chose, contest (see attached, marked "**Appendix Five**" for timeline).
10. In 2017/2018, ARI sought an MoU and support from WDC for funding of joint risk experts but this was declined. As a result, ARI have had to fund its own legal counsel, risk and planning experts.

¹ Under s62 of the Public Works Act 1981, an assessment of market value would take into account the Plan Change re-zoning of the properties as prohibited and the identified natural hazard risk which would substantially reduce the value of our homes.



11. The WDC budgeted 1.7 million dollars and enlisted 17 experts to implement and defend plan changes that would see us forced from our homes.
12. Although we had prepared our evidence to appeal the plan change, we had to put that to one side. Following receiving the report (**Appendix Four**) it became clear that if we were not successful at the environment court we would lose our homes through compulsory acquisition, we would receive substantially less for our homes through the PWA compensation process and we would carry the burden of our hearing costs. If we were successful at the environment court we could still potentially lose our homes through compulsory acquisition through the Public Works Act receiving substantially less for our homes and we could carry the burden for two hearing costs (RMA and PWA). This was too great a risk for ourselves and other members of ARI.

TERMS OF SETTLEMENT AND PROPERTY ACQUISITION OCTOBER 2020

13. In October 2020, terms of settlement were sought with WDC and BoPRC from ARI that would provide residents with fair value for their homes, support for costs incurred and a sunset clause for Pamela Whalley to be able to remain in her home.
14. Recommendations for settlement were discussed at a WDC Strategy & Policy Meeting on the 22nd October and ratified by Council on 12th November. The public were excluded from both of these meetings. WDC would not negotiate on improving the offers for residents' properties, however they did agree to a contribution towards costs and a conditional extension of occupation for the Whalley family. The extension of occupation is the subject of these proceedings.
15. We have been disappointed throughout this process with how WDC and BoPRC have worked against the community rather than with them. VMR has "voluntary" in its name but it has never felt like a voluntary process to us. Our issues with the fairness of the acquisition process as was raised during the Plan Change Hearing process. However, residents chose to accept the terms of settlement as the alternative was too great a risk to our livelihoods especially with a substantial part of our savings being tied up in our homes.



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REQUEST FOR EXTENDED OCCUPATION - 10 CLEM ELLIOTT DRIVE, MATATĀ

Reasons for request:

16. The Whalley family agreed to discuss settlement terms with WDC to enable Pamela an opportunity to stay in her home in perpetuity. However through the negotiation of a settlement with ARI the Councils would only agree to one year extension as outlined in their statements of evidence.
17. 10 Clem Elliott Drive holds all Pam's special memories. It is the home she built together with her husband Bill, where they retired together, and where Bill passed away. It is a place filled with many happy family memories and as such it is a huge wrench that Pam is required at this time in her life to uproot and move away.
18. For Rick and Rachel, we came home with the commitment to support Pam and Bill so that in their elderly years they could remain in their own home. We feel greatly challenged that the commitment we have made to our family is being taken away from us.

Information to support our request for extension:

19. Our argument in requesting an extension of occupation relies on relativity of risk in that the risk profiles presented by WDC experts (attached marked "Appendix Six") is not as great or equal to, to the risks associated with moving an elderly woman from her home, being nearly 80 years old, frail, and with complex health issues.
20. As it is now 15 years since the event, 8 years since it was decided not to mitigate the debris flow risk, and 5 years since Tonkin & Taylor created risk assessments used to support the plan changes we feel that immediacy should not be an issue and that a compassionate allowance to extend occupation would be appropriate to our situation.
21. In other regions in New Zealand where homes have been subject to natural hazard risks , existing residents have been allowed to stay if they chose (where risk is greater than 1×10^{-4}) or consider an adaptive planning approach. ² . We feel that

² It is concluded that New Zealanders are living with natural hazard annual individual fatality risk of order:



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such an approach would have been more appropriate for existing home owners rather than a hard line approach requiring immediate removal. We feel that providing 1 year for Pam to adjust to having to move is the least that should be done, but it is what we have accepted through settlement.

Management of risk during 1 year extension

22. As part of our settlement with WDC & BoPRC the Whalley family agreed to terms (detailed in "**Appendix Seven**") that require us to vacate our property if there is a Severe Weather Warning or a Severe Thunderstorm Warning affecting the Matatā area. We understand that having an EWS has been a requirement of all residents who have signed their houses to WDC.
23. The Whalley family have voluntarily vacated their property on a number of occasions in recent years for both severe weather warnings and tsunami warnings. We have had no previous issues with evacuating in a timely manner and do not foresee this as being an issue during the 1 year extension.
- Samoa tsunami September 2009
 - Kāikoura earthquake November 2016
 - Cyclone Cook April 2017
 - Cyclone Gita February 2018

-
- 10-6 or more per year averaged over the whole population;
 - 10-5 or more per year for large numbers (tens or 100's of 1000's of people; and
 - 10-4 or more for significant numbers (100s or 1000s +) of people in high risk areas (pp.21-22)

GNS Sciences recommendations are:

Christchurch City Council should consider ways to accommodate the preferences of current Port Hills householders who wish to remain in properties despite assessed risk in excess of Christchurch City Council's sustainable upper threshold of tolerability, via options such as:

- Definition of a higher absolute limit (e.g. 1×10^{-3} annual individual fatality risk) up to which relocation would be at the discretion of householders but above which would be compulsory; and/or
- Permitting householders to remain in their properties but preventing them from selling on to any party other than the Christchurch City Council or another appropriate government agency when they moved or died. (pp. 35-36)

<https://www.ccc.govt.nz/assets/Documents/Environment/Land/gns-ph-riskassesscriteria12684519.pdf>

Chapter 5 Natural Hazards in the operative Christchurch City Council District Plan
<https://districtplan.ccc.govt.nz/pages/plan/book.aspx?exhibit=DistrictPlan>

Community Based Decision-Making for Climate Change Adaptation in Hawke's Bay, New Zealand Clifton to Tangoio Coastal Hazard Strategy 2120
<http://www.deepuncertainty.org/wp-content/uploads/2018/01/14Nov-1110-Daysh-Hawkes-Bay.pdf>



24. We have prepared an evacuation plan (attached, marked "**Appendix Eight**") that outlines steps we will take to vacate our home in the event of a severe weather event. This plan outlines our understanding of how the MetService weather watch and warning alert system works, our procedure for monitoring and responding to alerts, and how we will prepare and undertake evacuation. As a matter of practice we already monitor severe weather warnings on a daily basis.
25. In deciding when to take appropriate action, we adapted the BoPRC approach to Flood Warning of **Monitor, Prepare, Activate**³.
- a. **Monitor** - requires us to keep an ongoing and active check on weather forecasts to identify the potential for onset of severe weather. An alert for a Weather Watch will need to be monitored in case it becomes a Warning.
 - b. **Prepare** - if a Weather Watch becomes a Warning then we prepare to implement our emergency plan in readiness for evacuation and continue to monitor the situation.
 - c. **Activate** - If a Weather Warning changes from Orange to Red, or if a Thunderstorm Warning is issued for our area then we will leave immediately. A red warning notifies the likelihood of an extreme weather event with significant impact, such as the event that took place during the 2005 Awatarariki Debris Flow.
26. We see no issues with complying with an evacuation plan. The above steps are steps that we already have in place given the number of times we have previously needed to evacuate.
27. In agreeing to the terms of settlement noted above the Whalley family have also agreed to indemnify both Councils in the unlikely event there is another debris flow at Awatarariki in their time of continued occupation.

CONCLUSION

³ Bay of Plenty Regional Council Flood Warning Manual p.6
[https://www.rsr.org.nz/wp-content/uploads/Page%209/-%20Flood%20Warning%20Manual%20Updated%20June%202016%20-%20\(Read%20Only\).pdf](https://www.rsr.org.nz/wp-content/uploads/Page%209/-%20Flood%20Warning%20Manual%20Updated%20June%202016%20-%20(Read%20Only).pdf)



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RW

28. **The community at Awatarariki has been gutted by the actions of WDC. To 'save' a community they have destroyed a community.**
29. The majority of homeowners living at Awatarariki did not accept WDC offers because they were in fear for their lives with the prospect of another debris flow but because they were coerced into taking offers because of the stress and uncertainty of being forced from their homes with nothing. The carrot of Voluntary Managed Retreat (VMR), alongside the stick of a plan change to extinguish our existing land use rights, we believe is an abuse of Council power.
30. The collateral damage of the VMR process has been marriage breakdowns, ill health, stress and anxiety. Even the staunchest of opponents has been broken because of the threat to their health and future livelihoods. Having a mortgage, the potential loss of insurance, and the loss of a retirement asset; these were all insurmountable for people who feel they have been forced to accept the WDC's offer.
31. It has been hugely disappointing that the WDC have not worked with the people here since the Consensus Development Group 5 years ago. It was suggested then that the community and council go together to Environment Court to get a fair ruling on what should happen at Awatarariki. This should have occurred.
32. We tried to implement a MoU to work with WDC in 2017/18 to achieve better outcomes for the people at Awatarariki but when BoPRC accepted the Plan change request to extinguish our land use rights the MoU was taken away from us the next day.
33. In other communities grappling with similar issues there has been a very different approach based on resilient communities, adaptive planning and community partnerships. Why could we not have engaged in a similar process and be able to retain our mana and dignity?
34. There are still some who remain at Awatarariki, who had to resign from ARI to enable us to reach a settlement. We ask that the Councils respect them in the

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decision that they have made and do not apply further pressure to them.

35. If there is any lesson to be learned from our story, it is not about risk, natural hazards, mitigations or the opinions of experts BUT that local government needs to change it's adversarial approach to working with communities.

5th Dec 2020
Dated 5th December 2020

SWORN at Whakatane

BY **PAMELA WHALLEY**

This 5th day of December 2020

AT *MATATA*

before me:

[Signature] J.P.



)
) *P Whalley*
)
)

P Whalley

SWORN at Whakatane

BY **RICK WHALLEY**

This 5th day of December 2020

AT *MATATA*

before me:

[Signature] J.P.



)
) *R Whalley*
)
)

R Whalley

SWORN at Whakatane

BY **RACHEL WHALLEY**

This 5th day of December 2020

AT *MATATA*

before me:

[Signature] J.P.



)
) *R Whalley*
)
)

R Whalley

Appendices Index

Appendix One	Photos of Whalley Family
Appendix Two	Photos of 10 Clem Elliot Drive
Appendix Three	Email Richard Allen to WDC 15 July
Appendix Four	Awatarariki Voluntary Managed Retreat Programme – Request for Extension. Report to Strategy & Policy Committee (not publicly available)
Appendix Five	Timeline
Appendix Six	Massey risk profile presented at the hearings
Appendix Seven	Terms of Settlement
Appendix Eight	Whalley Family Evacuation Plan

Appendix One

Pam & Bill Whalley



Appendix Two

Our homes at Matatā. The Whalley home is the u-shaped building in the centre. All other homes have now been removed or in the process of being removed.





Arbitrators decisions

Richard Allen <richard@richardallenlaw.co.nz>

15 July 2020 at 14:50

To: Jeff Farrell <Jeff.Farrell@whakatane.govt.nz>, Graeme Bates <GBates@propertygroup.co.nz>, David Bewley <David.Bewley@whakatane.govt.nz>

Cc: "rob@publiclaw9.com" <rob@publiclaw9.com>, "rache65@gmail.com" <rache65@gmail.com>, Rick Whalley <ricky.whalley61@gmail.com>, Brett Smithies <brett.smithies@extensor.co.nz>

1. As you know I act for the Awatarariki Residents Society Inc.

2. On 13 July, I received notice via the Whalley family that Council has made final offers following receipt of arbitrator decisions. These offers are time-limited, and lapse on 22 July 2020 some 7 days hence.

3. The Society is concerned that:
 - a. The notice given (i.e. 2 weeks from date of email dated 7 July 2020, but notice not received by Solicitors until 13 July) is inadequate;

 - b. Council has acted arbitrarily and unreasonably in deciding to withdraw from the voluntary acquisition scheme at short notice. Our understanding is that funding remains available for the financial year ending 30 June 2021, meaning that unreasonable and needless pressure is being placed on home owners to make a decision;

 - c. The Society requests that Council amend the terms of its offer, to allow an expiry date following the Environment Court hearing scheduled in December 2020. Specifically, any offer should lapse not earlier than say 20 March 2021 to enable society members to participate in the RMA plan change process and exercise their entitlement to independently test, through the Court process, the risk assessment undertaken by Council, with the Society having access to independent experts through central government ELA funding. The Court has already advised that it expects to issue a decision by February 2021;

 - d. If Council is not willing to extend the expiry for the offer, please urgently advise as the Society may then elect to issue urgent proceedings seeking Court intervention;

 - e. At a minimum, we suggest that the expiry date should be extended on an interim basis to allow Society members to carefully consider the terms of the arbitration award, and have opportunity for advice, without fear of the offer being withdrawn.

4. In addition I note, yet again, the offer, expressed as being a "final offer", is still a conditional offer. This not appropriate. This needs to be an unconditional offer.

I await your urgent reply.

Kind regards,

Richard Allen

Director



RichardAllenLaw

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Awatarariki Voluntary Managed Retreat Programme – Request for Extension



Subject: **AWATARARIKI VOLUNTARY MANAGED RETREAT PROGRAMME – REQUEST FOR EXTENSION**
To: **STRATEGY AND POLICY COMMITTEE**
Meeting Date: **WEDNESDAY, 30 SEPTEMBER 2020**
Written by: **MANAGER STRATEGIC PROJECTS**
File Reference: **A1799230**

1 REASON FOR THE REPORT

The purpose of this report is to address a request from the solicitor for the Awatarariki Residents Incorporated Society (ARIS) to keep the Voluntary Managed Retreat (VMR) programme available to ARIS members until after the Awatarariki Plan Change Environment Court appeals have been determined.

2 EXECUTIVE SUMMARY

The Council has been asked to extend the availability of the VMR programme until the end of March 2021. The extension is sought to enable the owners of two properties within the debris flow high risk area of the Awatarariki Fanhead to contest the decisions made by the Independent Panel of Hearing Commissioners on Proposed Plan Change 1 (Awatarariki Fanhead, Matatā) to the Operative Whakatāne District Plan (PC1); and Proposed Plan Change 17 (Natural Hazards) to the Bay of Plenty Regional Natural Resources Plan (PC17) without losing the benefits provided by the VMR programme.

The request is not a simple one.

In addition to issues of equity and fairness, circumstances integral to the VMR programme include a number of legal and social complexities that warrant consideration when determining an appropriate response. The following issues are canvassed in this report:

- (i) Scope: the ARIS request relates to the owners of two properties that have received final offers. It is recommended that any decision which extends the date for acceptance of the final offers for the two properties should also apply to owners of the other properties in the high debris flow risk area not acquired by the Council through the VMR programme. Irrespective of whether or not any extension is provided to enter the programme/accept final offers, provision should be made to cater for the exceptional circumstances relating to [REDACTED], Matatā, where owner representatives have indicated a desire to sell their property under the VMR programme but require time to put in place a governance process to achieve this.
- (ii) The Council's Acquisition Strategy is the delivery mechanism for the VMR programme.
- (iii) The Acquisition Strategy makes provision for:
 - a. valuations to be challenged;
 - b. final offers to be one time offers that property owners may reject (and thereby exit the programme); and

S7(2)(a)

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- c. the entire process for all properties to be completed within a relatively short period of time.
- (iv) The nature of the VMR programme is that it is a natural hazard risk management programme financed through public funds to deliver private benefit. As well as helping people out of a difficult situation, another of the philosophies underpinning the programme is that buy-out offers contain incentives to encourage participation and thereby contribute to effective and efficient delivery of this public policy programme.
- (v) VMR purchase offers calculated under the Acquisition Strategy are generous as they contain incentives to encourage property owner participation. This makes VMR offers considerably higher than the current property market values.
- (vi) Incentives include:
- No discount for the 2005 debris flow when establishing the market value of properties;
 - No discount for the Ministry of Business, Innovation and Employment (MBIE) Building Act 2004 Determination 2016/034;
 - Contributions towards legal costs for selling the Fanhead property and purchasing a replacement property, and relocation costs;
 - Mortgage break fees where applicable;
 - No real estate agency transaction fees being incurred by the property owner;
 - Certainty in knowing that transactions will be completed by having the Council as the purchaser; and
 - Flexibility to specify a settlement date of choice out to 31 March 2021, and to bring that date forward at any time to better meet individual circumstances.
- (vii) The fairness and robustness of the VMR programme was recognised in the decisions of the Independent Panel of Hearing Commissioners at the first instance combined Plan Change Hearing in March 2020.
- (viii) Owners of all 34 privately-owned properties within the Awatarariki Debris Flow High Risk Policy Area have been provided with the opportunity to participate in the VMR programme. To date, 25 (74%) of property owners have either sold their properties to the Council or have unconditional agreements in place.
- (ix) Nine properties on the Awatarariki Fanhead have not been acquired by the Council. These are:



s.7(2)(a)

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- (x) The availability of the VMR programme has been extended several times in response to requests from property owners and the impact of Covid-19, combined with a desire from the Council and funding partners to achieve the primary objective of the programme that all property owners take advantage of the benefits of the programme and relocate away from the high natural hazard risk area. If all property owners were to accept buy-out offers, the Awatarariki Plan Change Environment Court appeals would not need to proceed. This would result in considerable financial savings for local and regional ratepayers. Notwithstanding, it needs to be recognised that individuals are entitled to protect what they see as their self-interest.
- (xi) The Council has expended more than \$10.3M since 2005 in endeavouring to provide a solution to manage the risk to owners of properties on the Awatarariki Fanhead from future debris flows from the Awatarariki catchment.
- (xii) In addition to the Council's expenditure, the Crown and BOPRC have contributed an additional \$7.2M through the VMR programme.
- (xiii) A worst case financial forecast to complete the VMR programme is for a █% budget overspend.
- (xiv) The MBIE Building Act 2004 Determination 2016/034 means that owners of vacant sections are not able to construct dwellings on them. This constraint will continue to apply irrespective of the outcome of the Environment Court appeal.
- (xv) Research has confirmed some property owners have suffered adverse social impacts as a consequence of the 15.5 years that have lapsed since the 2005 debris flow event. The Council has offered, and continues to offer, a range of psychosocial, financial, and legal advisory support services through Navigators but take up has been low.
- (xvi) Property owners are likely to have increasing difficulty in obtaining and maintaining insurance for their properties. This may impact upon any arrangements in place with mortgagees as mortgagees require assets borrowed against to be continuously insured to protect lending equity in the event of a loss occurring.
- (xvii) BOPRC staff have confirmed that any new rules introduced through Plan Change 17 to the Regional Natural Resources Plan will be enforced.
- (xviii) Existing legislative provisions do not facilitate acquisition of land for the purposes of managed retreat from a natural hazard. Maintaining the availability of a VMR programme for property owners to access until after the Environment Court hearing to consider the ARIS appeals on the Awatarariki Plan Change, negates the ambiguity present in the RMA provisions relating to extinguishment of private property rights.
- (xix) The VMR programme is financed through public funds sourced through local and central government agencies. In December 2019 the Whakatāne District community was impacted socially and economically by the Whakaari/White Island eruption. In March 2020, the extent of social and economic disruption was compounded through the impacts of the Covid-19 pandemic which had local, regional, national and global adverse effects. Future local, regional and national economic and social adverse effects from Covid-19 management practices can be

s.7(2)(i)

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anticipated. Consideration of the impact of the current and foreseeable economic and social disruptions on the public is appropriate when considering future expenditure of public funds.

- (xx) Four options are put forward for consideration:
 - a) Option 1 – Support the ARIS request
 - b) Option 2 – Withdraw the VMR programme
 - c) Option 3 – Modify the VMR programme
 - d) Option 4 – Compulsory acquisition
- (xxi) Evaluation of the advantages and disadvantages of each option results in Option 3 being ranked as the second highest for both property owners and funding agencies. This option also provides a good balance between private and public benefit distribution. Option 3 is recommended as the preferred option.
- (xxii) Option 3 involves substituting, from 30 October 2020, the formula for calculating purchase offers in the Acquisition Strategy with the formula in the PWA, and continuing the availability of the VMR programme through to 31 March 2021. A PWA valuation outcome reflects the current market value rather than a market value that has been artificially inflated through discounting the market impacts of the 2005 debris flow and Building Act Determination 2016/034. This results in fair, but not incentivised, market offers for future property purchases.
- (xxiii) Option 3 provides property owners and the Environment Court with confidence that a buy-out option, using a legislated methodology for the acquisition of private land by a public agency, will continue to remain available to property owners until after the Environment Court has determined the ARIS appeals.
- (xxiv) Option 3 can be delivered efficiently through minor changes to the Council's Acquisition Strategy.
- (xxv) An exception to Option 3 is proposed to cover any property under multiple Māori ownership that does not have a governance structure in place to enable sale of the property. This recognises the complexities associated with multiple Maori land ownership and provides for additional time to enable property owner representatives to put in place the necessary governance arrangements. In such cases, the existing purchase offer will continue for as long as a VMR option remains available
- (xxvi) Also importantly, Option 3 is supported by officials from the Council's VMR funding partners.

3 BACKGROUND

The Council adopted the Awatarariki Fanhead, Matatā, Acquisition Strategy (the Strategy) on 28 July 2016 as the basis for delivery of a VMR programme, subject to receipt of external funding support for that programme.

The Strategy reflects established Public Works Act (PWA) principles for acquisition of land and includes a formula for calculating purchase offers that, in addition to incorporating incentives, ensures offers

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include a degree of liberality, are defensible, evidence-based, and able to be challenged through independent valuation.

The Strategy was intended to deliver a transparent and timely process where participation was voluntary (acknowledging that some property owners may choose to remain) and that a ‘who’s in, who’s out’ outcome would be known within a relatively short period of time.¹ Provisions of the Strategy relating to property acquisitions completed after 1 January 2013 were amended in December 2018. No other changes to the Strategy have been made. The Acquisition Process contained in the Strategy is outlined in Figure 1.

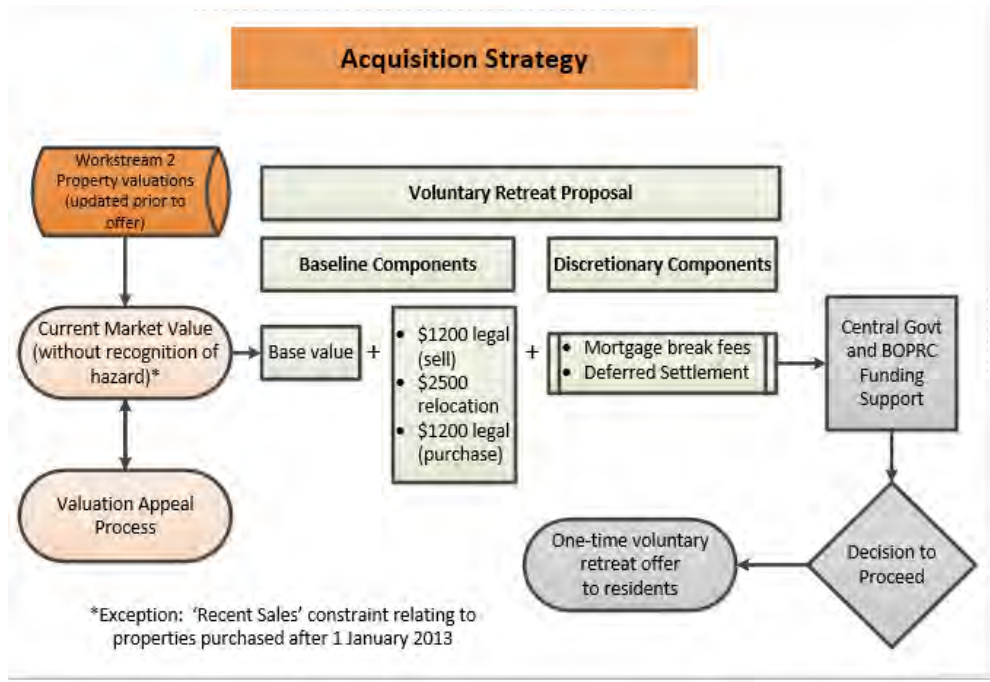


Figure 1 Awatarariki Acquisition Strategy Process

Valuation dispute resolution options provided for in the Strategy and incorporated in the VMR programme include mediation and arbitration. In both cases, the Council is bound by the outputs of those dispute resolution processes but the property owner is not. The dispute resolution processes are based on Crown processes developed for the Canterbury region following the 2010-2011 earthquakes.

In July 2019, the Minister of Local Government confirmed the Crown would join BOPRC and WDC in a shared funding arrangement to deliver the Awatarariki VMR programme. This decision enabled the Council to commence delivery of the programme. The associated Memorandum of Understanding (MoU) recognized the Strategy as the delivery methodology. Timeliness of delivery is reinforced in the MoU by Crown funds being limited to the 2019/2020 financial year.

A meeting with landowners occurred on 16 July 2019 where confirmation of the funding was announced and the processes to deliver the programme and associated proposed timelines were presented – refer Figure 2 and Table 1.

¹ Section 8.1 Awatarariki Fanhead, Matatā, Acquisition Strategy, (2016 and 2018), The Property Group Limited.

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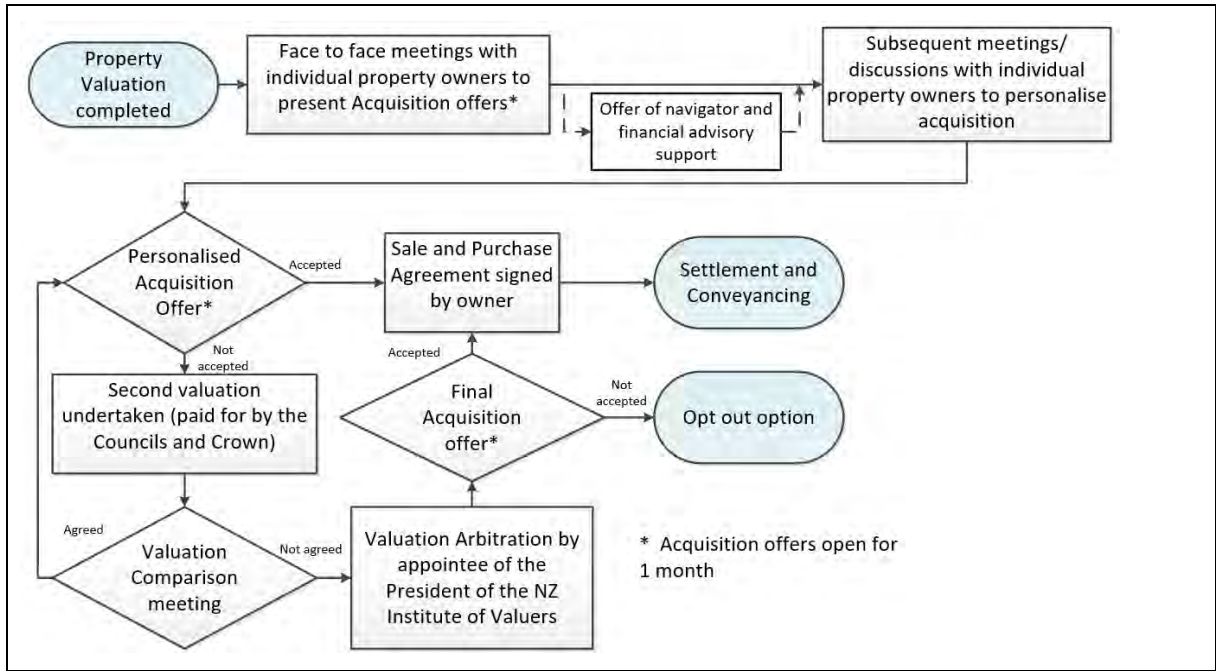


Figure 2 Acquisition Process

The acquisition process has generally worked well, although take-up of navigator and financial advisory support offers has been low. The 'Opt out option' at the final acquisition offer stage in Figure 2 reflects that a response to the final acquisition offer would be a binary one, i.e. accept the offer or opt out. The asterisk notation in Figure 2 reflects the Strategy expectation that this final decision would be made promptly on the basis of property owners being well-informed having worked through the preceding steps in the acquisition process.

In response to numerous requests by property owners for the Council to make a decision on the future occupation status of the Awatarariki Fanhead, delivery of the VMR programme was anticipated to be carried out expeditiously, certainly well before any Plan Change hearing or appeal was to occur. As the formula of the Strategy results in financially attractive purchase proposals (i.e. higher than current market value) for all properties except any captured by the Recent Sales provisions (Section 5.1.9), there was a distinct possibility that all property owners would take-up offers, thereby avoiding the significant costs associated with a combined plan change hearing and any subsequent appeal(s). Due to the plan change processes being funded by local, and to a lesser extent, regional ratepayers, this potential outcome represented opportunities for considerable savings of local and regional community funds.

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Table 1 Proposed timeline

Key Action	Indicative Date
Property owners confirm participation in buy-out programme	July 2019
Valuations and property assessments undertaken	July – August 2019
Acquisition offers provided to property owners	August-September 2019
Property owners have 1 month to: <ul style="list-style-type: none"> • Accept acquisition offer and proceed to settlement • Accept acquisition process but contest valuation amount • Reject acquisition process 	September-October 2019
Site security, building removal and site clearance	Following settlement
Valuation objection processes	September–December 2019

Feedback from ARIS representatives at the property owner meeting included a request to extend the purchase offer acceptance period. This request coincided with submissions on the proposed Plan Changes to delay the Plan Change hearings until after the VMR programme had been completed. In response to the submissions and the meeting feedback, the date for the combined Plan Change hearings was rescheduled from November 2019 to March 2020 and the timelines for entry into the VMR programme and acceptance of offers were extended by two months. The revised timeline is detailed in Figure 3.

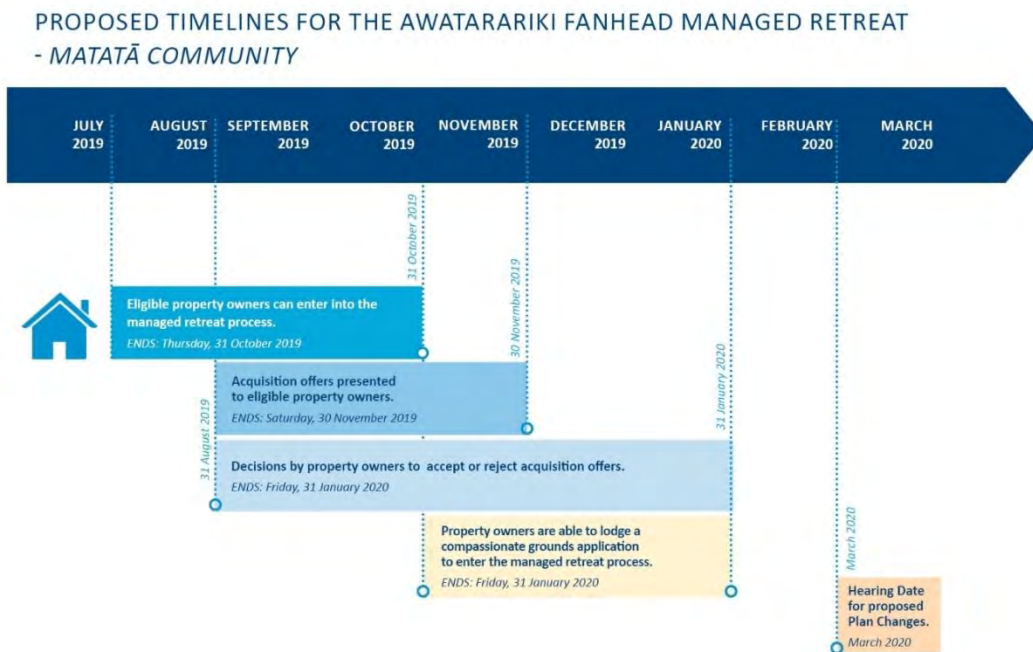


Figure 3 Proposed timelines for VMR – July 2019

The majority of ARIS property owner members did not enter into the VMR programme until 6 November 2019, i.e. after the revised and notified 31 October 2019 cut-off date. Rather than reject the late entrants for being out of time, their late participation was accepted on the basis that their participation aligned with the VMR programme objective of as many property owners as possible taking advantage of the programme’s offerings.

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The late entry into the programme by ARIS members did have consequential flow-on effects. First, the scheduled deadline for acquisition offers to be presented to landowners was not able to be met resulting in the Council extending the deadline for property owners to accept or reject an acquisition offer from 31 January 2020 to 28 February 2020. Secondly, a number of ARIS members subsequently challenged the property valuations and the resultant mediation and arbitration processes were not able to be completed by the 28 February 2020 revised deadline. Consistent with its earlier position, the Council remained desirous of offering the opportunity for as many property owners as possible to take-up VMR offers and therefore again extended the owner acceptance of offer date, this time to 31 March 2020. At this point, Covid-19 intervened and, although mediations were undertaken online, resulting revised purchase offers were accepted by one property owner with the remainder requesting their valuations proceed to arbitration.

The impact of Covid-19 on delivery of the VMR programme was communicated to the other funding partners as the Memorandum of Understanding (MoU) between the funding partners stipulated the availability of the Crown's contribution was confined to the 2019/20 financial year. DIA officials, representing the Crown interest, acknowledged that lockdown measures were a significant constraint on the Council's ability to deliver the VMR programme and advised that Crown funds would carry over into the 2020/21 financial year. BOPRC officials also confirmed their organisation's funds for the VMR programme would continue to be available into the 2020/21 financial year.

Covid-19 lockdown level 3 and 4 restrictions also prevented the appointed arbitrator from conducting site visits. It was therefore not until 2-6 July 2020 that final offers were able to be provided to the ARIS property owners who had sought arbitration. Before making these final offers, the Council received and accepted a written suggestion on 25 May 2020 from counsel acting for ARIS members that the property owners be provided with 10 working days to consider and accept or reject the final offers. This proposed time period was reflected in the final offers and the deadline for acceptance of final offers became Monday, 13 July 2020.

On Wednesday, 15 July 2020, two days after the agreed deadline for acceptance of final offers, ARIS's solicitor sent an email to the Council advising:

- (i) *"The notice given (i.e. 2 weeks from date of email dated 7 July 2020, but notice not received by Solicitors until 13 July) is inadequate;*
- (ii) *Council has acted arbitrarily and unreasonably in deciding to withdraw from the voluntary acquisition scheme at short notice. Our understanding is that funding remains available for the financial year ending 30 June 2021, meaning that unreasonable and needless pressure is being placed on home owners to make a decision;*
- (iii) *The Society requests that Council amend the terms of its offer, to allow an expiry date following the Environment Court hearing scheduled in December 2020. Specifically, any offer should lapse not earlier than say 20 March 2021 to enable society members to participate in the RMA plan change process and exercise their entitlement to independently test, through the Court process, the risk assessment undertaken by Council, with the Society having access to independent experts through central government ELA funding. The Court has already advised that it expects to issue a decision by February 2021;*

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- (iv) *If Council is not willing to extend the expiry for the offer, please urgently advise as the Society may then elect to issue urgent proceedings seeking Court intervention;*
- (v) *At a minimum, we suggest that the expiry date should be extended on an interim basis to allow Society members to carefully consider the terms of the arbitration award, and have opportunity for advice, without fear of the offer being withdrawn”*

This was a surprising request taking into account his earlier email. The General Manager Planning and Infrastructure responded to this email confirming an interim extension to the final acceptance deadline date to 31 July 2020. Due to changes to mid-year meeting schedules, this interim extension was subsequently extended further to late September 2020 to allow time for councillors to consider this request.

A summary of deadline revisions with supporting reasons is provided in Table 2.

Table 2 VMR deadline revisions

Enter Programme	Accept Offers
31 July 2019	31 October 2019
31 October 2019 Requested at 31 July 2019 meeting with property owners and through Plan Change submissions	31 January 2020 Requested at 31 July 2019 meeting with property owners and through Plan Change submissions
	28 February 2020 Late entry by ARIS members caused delays in conducting valuations which were contested
	31 March 2020 To enable mediations and arbitrations to be conducted which were subsequently delayed as a consequence of Covid-19 lockdown requirements
31 March 2020 To enable as many as possible to participate	31 May 2020 To enable mediations and arbitrations to be conducted which were subsequently delayed as a consequence of Covid-19 lockdown requirements
	2 weeks after receiving final offer (July 2020) Proposed by counsel for ARIS
	Mid-September 2020 To enable Council to consider request from ARIS to extend offer period to 20 March 2021

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The Council's approach of being inclusive and flexible, and removing barriers to participation as they arise, has been supported by Council's funding partners and appreciated by the vast majority of property owners who have participated in the programme. Although not shown in Table 2, Council staff have continued to try and engage with those property owners who had not entered the programme before the 31 October 2019 and the 31 March 2020 deadlines.

It is also worthy to note that during the period between the first offer made to ARIS members on 6 December 2019 through to the date of preparing this report, 18 property owners have completed the process with five of those owners going through mediation and four of those five agreeing to sell after receiving revised offers following arbitration. Some of these sales involved properties owned by members of ARIS. The only offers outstanding from the arbitration process are for two properties: [REDACTED].

s.7(2)(a)

4 DISCUSSION

Factors the Committee may wish to consider in responding to the request by ARIS to extend the VMR programme through to late March 2021 are detailed in the following sections.

4.1 Scope

At the time ARIS was registered as an incorporated society it comprised 15 members, the minimum number required under the Incorporated Societies Act 1908. In March 2020, the Chair of the Society gave evidence that ARIS had 16 members. Since March 2020, the Council has settled three properties owned by ARIS members resulting in those members withdrawing their membership from ARIS. Details of the remaining properties not acquired by the Council under the VMR programme, together with their associated ARIS members, are provided in Table 3:

Table 3 ARIS member properties on the Awatarariki Fanhead

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

s.7(2)(a)

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The owner of [REDACTED] has not entered the VMR programme. The owner of [REDACTED] declined the Council's final offer, and the owners of 100 Arawa Street have not responded to the Council's first offer. This means the scope of the ARIS request to extend the VMR programme deadline relating to acceptance of the final offers that followed arbitration relates to two properties: 6 and 10 Clem Elliott Drive. [REDACTED] is a vacant section and [REDACTED] contains a dwelling.

For completeness, there are three other properties on the Fanhead in private ownership where the owners are not members of ARIS; details are provided in Table 4.

Table 4 Privately-owned properties on the Awatarariki Fanhead not affiliated to ARIS

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

s.7(2)(a)

Representatives of the owners of 98 Arawa Street are supportive of selling the land to the Council and have taken advice from the Maori Land Court on the process necessary to achieve this. The process has been delayed due to a combination of difficulties in locating all owners, and the owner

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representatives being members of Te Mana o Ngāti Rangitahi Trust, the Treaty Settlement vehicle for Ngāti Rangitahi Iwi which is in the final stages of completing the Iwi's Te Tiriti o Waitangi settlement claim.

s.7(2)(a)

s.7(2)(a)

The owner of [REDACTED] has not responded to the Council's offer, and the Trustees of [REDACTED] are seeking to acquire Maori Reservation status for their land and are keen to work with the Council in visually integrating their land into the wider Coastal Protection Zone landscape.

s.7(2)(a)

In terms of scope, it is suggested that any extension to the deadline for the owners of the two ARIS properties with final offers should also provide for the two ARIS property owners who have not entered the programme to do so, and that the extended availability of the VMR programme to ARIS members should similarly apply to non-ARIS affiliated property owners.

Irrespective of whether or not any extension is provided to enter the programme/accept final offers, provision should be made to cater to the exceptional circumstances relating to [REDACTED], Matatā, where owner representatives have indicated a desire to sell their property under the VMR programme but require time to put in place a governance process to achieve this.

s.7(2)(a)

4.2 Nature of the VMR programme

In essence, the VMR programme is a natural hazard risk management programme financed through public funds to deliver private benefit. In this case, the private beneficiaries are an identified group of property owners exposed to a life-safety risk determined unacceptable by the Bay of Plenty Regional Policy Statement and international best practice. The VMR programme offers those property owners an opportunity to sell their properties to a public agency at an incentivised market price that will enable them to relocate to a safe location, with the sources of the funds to enable them to relocate being provided by local and regional ratepayers and New Zealand taxpayers.

The Strategy, underpinning the VMR, recognises that once the valuation dispute processes have been exhausted, the VMR programme delivers a 'take it or leave it' purchase offer which may result in some properties remaining in private ownership.

4.3 Fairness and robustness of the VMR programme

The Strategy has been designed on the tried and tested principles of fairness that underpin the PWA. Although many of the clauses in the Strategy reflect fairness attributes, the provisions in sections 4.4 and 8.1 are worthy of note as they consider fairness, not just in relation to affected property owners, but to a wider audience that includes funding agencies and their funding bases:

"4.4 What is vitally important when agreeing on appropriate levels of retreat package offers and subsequent settlements achieved, is that equality and fairness are applied across all affected property owners"

"8.1 As 'guardians of the public purse', the Council is obliged to exercise fiduciary responsibility with expenditure of public funds. Being open to public scrutiny, the options are very limited when considering making any overly generous or excessive settlement offers."

Fairness to Fanhead property owners is enhanced through financial and non-financial incentives that include:

- No discount for the 2005 debris flow when establishing the market value of properties;
- No discount for the Ministry of Business, Innovation and Employment (MBIE) Building Act 2004 Determination 2016/034 (refer section 4.7 for details);
- Contributions towards legal costs for selling the Fanhead property and purchasing a replacement property, and relocation costs;
- Mortgage break fees where applicable;

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- No real estate agency transaction fees incurred by the property owner;
- Having the Council as purchaser provides property owners with certainty that transactions will be completed; and
- Flexibility to specify a settlement date of choice out to 31 March 2021, and to bring that date forward at any time to better meet individual circumstances.

VMR processes are comprehensive and transparent and designed to not be easily manipulated by one party to the disadvantage of another party. It is noteworthy that the Council is bound by the outputs of the mediation and arbitration processes but the property owner is not. In a commercial transaction, both parties would be bound by the outcome of an arbitration.

The Independent Hearing Panel on the Awatarariki Plan Changes examined the valuation process in particular, and concluded in their decision:

“[39] In our view the WDC’s valuation process is both robust and very fair in the circumstances. We agree with counsel for WDC that the natural hazard risk existing on the fanhead would likely have a substantial impact on the price those properties might otherwise achieve on the open market. We also note the point made by counsel that if properties were instead acquired under the Public Works Act then the natural hazard risk would be taken into account, such that the properties would be acquired for lower prices.”

4.4 Acquisition status

Owners of 25 of the 34 (74%) properties on the Fanhead have either sold their properties to the Council under the VMR programme or have unconditional agreements of sale and purchase in place. Of the remaining nine properties, owners of two are working collaboratively with the Council to either sell their property or align their aspirations on future use of the property with the Coastal Protection Zone provisions and public open space. A summary of acquisition offers and status for the nine individual properties is provided in Table 5.

Table 5 Status of acquisitions for Awatarariki Fanhead Properties not acquired under the VMR programme

Address	Owner	Acquisition Offer (GST inclusive)	Status
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

s.7(2)(a)
and
s.7(2)(i)

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[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

s.7(2)(a)

It is clear from Table 5 that, apart from [REDACTED] which has a lower market valuation due to being bisected by the Awatarariki Stream leaving little land area remaining for development, the purchase offers made to property owners are not inconsequential.

4.5 Awatarariki costs since 2005

Since 2005 the Council has spent around \$10.3M of public funds in the investigation of options to manage debris flow risk from the Awatarariki catchment and the delivery of the VMR programme to-date. If the Crown and BOPRC costs paid to date through the VMR programme are included, the spend increases to \$17.5M. Officials' time across the multiple public sector organisations who have been involved in the various processes since 2005 is unknown but would be significant.

4.6 Awatarariki debris flow risk management programme budget

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As reported at the Council's Projects and Services Committee Meeting on 7 September 2020, the VMR workstream is pushing financial budgets, particularly in the areas of valuation dispute costs, site clearance, and specialist property and legal support. A worst case financial forecast is for a [REDACTED] % budget over-expenditure but this provides for all properties to be acquired which is unlikely as one property owner has declined their final buy-out offer and owners of three other properties have not entered into the VMR programme. Financial savings may also be achieved in Workstreams 9 and 11 (District and Regional Plan Changes) but their extent will not be known until after the hearing of the Environment Court Appeal in December 2020.

4.7 Building Act Determination

In 2014, the Council applied to MBIE for a determination under the Building Act 2004. The purpose of the application was to obtain the central regulator's independent formal review of the debris flow risk assessment work that had been undertaken in the context of whether or not it was appropriate for the Council to continue to issue building consents for new dwellings within the high risk area. Consideration of the application took two years. In 2016, Determination 2016/034 was issued confirming the Council's building consent authority should not issue building consents for new dwellings in the high risk area due to unacceptable levels of loss-of-life risk from future debris flows.

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Determination 2016/034 meant that owners of the 18 vacant sections within the high risk area would not be able to construct dwellings on them. This Building Act constraint will continue to apply, irrespective of the outcome of the Environment Court appeal.

Of the nine remaining privately-owned properties in the high risk area of the Awatarariki Fanhead, six are vacant sections or have unconsented structures (containers or buses) on them.

4.8 Vulnerability of property owners

The 15.5 years that have elapsed since the 2005 debris flow have impacted on property owners in terms of psychosocial impacts, financial impact, and finalising a long-standing issue of significance to them².

A range of psychosocial, financial and legal advisory support services have been offered to property owners through the VMR programme in the form of Navigators and the Residential Advisory Services from Christchurch. Notwithstanding that the uptake has been low, these services will continue to be offered through to completion of the programme.

4.9 Insurance and lending sectors response

Prior to the first instance Plan Change hearing, the Commissioners requested information on a number of matters contained in evidence for the Council including whether the land in the high risk area is insurable and, if affirmative, whether a risk premium would be required by insurers. Enquiries with two IAG senior managers, the National Portfolio Manager and the General Manager Corporate Relations, confirmed that IAG will continue to support its existing clients on the Awatarariki Fanhead until the end of the Plan Change processes but not beyond, but IAG has not accepted new clients nor increased sums insured for properties on the Fanhead.

Advice was also given that IAG's insurance risk profile for natural hazards is less conservative than for some other insurers.

Taking that advice into account, it is not unreasonable to assume that property owners are likely to find their ability to maintain/obtain insurance will become more problematic over time, and that this situation will only worsen if PC17 is approved and enforced. This in turn, creates issues between the property owner(s) and their mortgagee, as mortgagees, such as banks, require assets borrowed against to be continuously insured to protect their lending equity in the event of a loss occurring.

4.10 Enforcement outcomes if/when Plan Change 17 becomes operative

Based on staff discussions, if PC17 becomes operative, BOPRC intends to enforce any new rules introduced in that Plan Change. This means that although property owners will continue to own the land, the residents (property owners and tenants) of the three properties with dwellings and the three properties with unconsented structures will not be able to legally occupy those structures. It is unlikely that properties which cannot be legally occupied will continue to be maintained and may become the subject of vandalism when abandoned.

4.11 RMA requirements

The VMR programme has highlighted deficiencies in the current legislative framework around public-funded programmes for managed retreat where the driver for retreat is high natural hazard risk. One public policy deficiency relates to a lack of clarity over the processes that are needed to enable a public agency to acquire land due to a natural hazard where the natural hazard presents an unacceptable level of risk to property owners and that risk cannot be mitigated. In contrast, the PWA makes very

² Statement of Evidence of Social Impact Specialist, Amelia Linzey, on behalf of Whakatāne District Council at combined hearing of Plan Change 1 (Awatarariki Fanhead, Matatā) to the Operative Whakatāne District Plan and Plan Change 17 (Natural Hazards) to the Bay of Plenty Regional Natural Resources Plan, March 2020.

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clear provision for acquisition of private land by a public agency where the purpose of the acquisition is a public work. The PWA is not available to the Awatarariki VMR scenario as the VMR is not a 'public work' as defined in the PWA.

There are no provisions within the RMA or other statutes available to the Council to compulsorily acquire the land for the purpose of a natural hazard managed retreat programme. Notwithstanding, the RMA does include provision for a regional council to introduce rules into a Regional Plan that remove the existing right to use the land for a specific purpose(s). This is the basis of PC17. The RMA also provides that any person who considers that a plan provision, or proposed plan provision, would render the land incapable of reasonable use, may challenge that provision/proposed provision. This is one of the grounds of appeal by ARIS. If the ARIS appeal is successful, the Environment Court could direct the Council to purchase the land but only if the landowner consents to that direction. Calculating the market valuation in such cases is done using the formula prescribed in the PWA.

As outlined in the preceding paragraph, PC17 is based on evidence which establishes that those properties in the high risk area of the Awatarariki Fanhead with dwellings or unconsented structures used for habitation, are not a reasonable use of the land, and that the removal of the right to occupy those properties does not place an unfair or unreasonable burden on anyone who has an interest in that land. In other words, continued occupancy of land on the Awatarariki Fanhead identified as having a high natural hazard risk under the Bay of Plenty Regional Policy Statement, does not constitute sustainable management of the environment, which is the overarching purpose of the RMA (refer s5). In such a situation, owners' property rights become void and no compensation is required as any expectation by the property owner for continued use of the land (in this instance for residential use) is not deemed to be a reasonable expectation.

Unsurprisingly, as well as being one of the matters of appeal, removal of property rights without compensation under PC17 has attracted a high level of national interest and many organisations throughout New Zealand, who have followed the process to date, are now waiting to see how the Environment Court rules on the PC17 proposal.

The legal issues associated with removing property rights under the RMA are complex. To highlight the breadth of some of these issues, the Independent Hearing Panel at the first instance hearing of the Awatarariki Plan Change proposals considered the legal issues. Their reported decision references decisions from the High Court and Supreme Court, the New Zealand Bill of Rights Act 1990 and the Magna Carta, which is still in force.

The Hearing Panel also referenced specific case law. In the referenced example of *Hastings v Auckland City Council*³, the Panel noted that the Environment Court considered the matter of having a buy-out option available as part of a plan provision. The Court found that, in some circumstances, a demonstrated commitment by Council to acquire land or to compensate the owner "may make reasonable an otherwise unreasonable zoning, where this furthers the purpose and principles of the Act."⁴

The Independent Hearing Panel took into account that although the VMR programme had a deadline of 30 June 2020, it was available at the time of the hearing and after the decision was released, including during the appeal period, and therefore its availability to property owners meant that PC17, which extinguished existing use rights, was "not an unreasonable response to the identified hazard and appropriately serves the statutory purpose of promoting sustainable management of natural and physical resources in that regard."⁵

³ Environment Court Decision A068/2001 at [98].

⁴ Report and Decisions of the Hearing Commissioners [121]

⁵ Ibid. [128]

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Looking ahead, these matters will be of strong interest to the Environment Court when it considers the ARIS appeal to the Awatarariki Plan Changes. The Court will be faced with deciding the two tests under s85(3B) of the RMA, i.e. whether or not PC17:

- (i) Makes the land incapable of reasonable use; and
- (ii) Places an unfair and unreasonable burden on any person who has an interest in the land.

As outlined earlier, PC17 proposes that continued occupation of the high risk area is not a reasonable use of the land. If upheld, the Court would not have jurisdiction to order the Council to acquire the remaining properties. This would result in any occupied properties remaining in private ownership but be required to be vacated which is a less than ideal outcome for all parties, but particularly for property owners.

If the Court were to confirm the risk was proven but the plan provisions placed an unreasonable burden on landowners, the Council could be directed to acquire the properties, but only if the property owners agreed. This would place the Court in an awkward position where it has found that the conditions under section 85(3B) are met and the only option available to it is to direct a change to the provisions of PC17 so that people could stay, or do nothing. That is anomalous.

Both of these potential scenarios would be negated if the VMR, or an alternative to the VMR, remains available to property owners until after the Environment Court has determined the ARIS appeal.

It is also relevant to this discussion that the BOPRC planning evidence to the Environment Court on this matter considers the availability of the VMR funding package to be intrinsically linked to the outcome of PC17, as it makes a positive contribution towards the economic wellbeing of affected residents in accordance with s5 of the RMA; a similar position to that of the Independent Hearing Panel Commissioners. For one of the VMR funding partners to hold this view is further reason to not withdraw the VMR programme without replacing it with an alternate option.

4.12 Economic impacts of Whakaari/White Island eruption and the Covid-19 pandemic

Like the 2005 Awatarariki debris flow, the Whakaari/White Island eruption on 9 December 2019 and the 2020 Covid-19 pandemic are examples of low recurrence/high consequence natural disasters. Albeit at different scales, the latter examples have had, and are continuing to have, adverse economic impacts on the District's economy. A recent regional economic update provides statistics on the current state of the regional economy which includes increased job losses, an annual reduced spending in the Whakatāne District at the June 2020 quarter of -\$8.5M, and a slower than forecast economic recovery.⁶

Nationally, as a consequence of the Covid-19 pandemic, nearly 50,000 workers have lost their jobs, businesses have struggled with lower earnings, and incomes have been reduced. With both major NZ political parties supporting the Government's approach to containment of community spread of Covid-19 through national or localised lockdown procedures (e.g. Auckland now Level 2 lockdown with the balance of New Zealand at Level 1), and it being some time before a reliable vaccine becomes available, it is not an unreasonable assumption that future instances of Covid-19 lockdown requirements being implemented within New Zealand, can be expected.

Ongoing local, regional, and national economic impacts due to Covid-19 can therefore be anticipated. This will further complicate local, regional and national economic and fiscal environments moving forward which in turn is likely to lead to higher levels of public scrutiny at the local level on delivery of services and where ratepayer funding is allocated.

⁶ Regional Economic Update and Discussion, Bay of Plenty, Infometrics, 1 September 2020

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4.13 Alternate options

There are a number of options to consider in determining an appropriate response to the request by ARIS's solicitor to extend the VMR programme to 20 March 2021.

Four examples are considered that broadly cover the range of options. The options are described in sections 4.13.1 – 4.13.4 and analysed in Appendix A and section 4.13.5.

4.13.1 Support the request - Option 1

Option 1 involves supporting the ARIS request and extending the deadline for final acceptance of offers through to the end of March 2021.

The Environment Court has indicated it will release its decision on the Awatarariki Plan Change appeal within three months of completing the hearing. ARIS has sought an extension to 20 March 2021 which recognises the Environment Court's timeframe to make and release its decision.

4.13.2 Withdrawal of the VMR programme – Option 2

Withdrawal of the VMR programme expresses a position that the Council considers sufficient time and opportunity has been provided to affected property owners to participate in the VMR programme through to a conclusion, and that further resource committed to an incentivised managed retreat programme is an inappropriate use of public funds. Any withdrawal date should provide adequate time for ARIS members to fully consider their options after having been notified that the VMR programme will be withdrawn. Accordingly, a withdrawal date of 30 October 2020 is proposed.

4.13.3 Modify the VMR programme – Option 3

Option 3 proposes modifying the VMR programme by changing the philosophy of the Acquisition Strategy from an incentivised buy-out programme to a fair buy-out programme by replacing the VMR formula for calculating the quantum of buy-out offers with the formula prescribed in the PWA. The PWA is proposed as it:

- (i) Is a well-used statutory instrument for acquiring private land by a public authority; and
- (ii) Has established and accepted processes to establish fair market valuations; and
- (iii) Is specifically referenced by ARIS in the Environment Court appeal as their preferential methodology for calculating property purchase offers.

This option replaces the incentivised components in the VMR programme with a compensatory component (solatium⁷) prescribed in legislation. The outcome is that property owners are provided with a fair market valuation rather than an incentivised market valuation.

The date proposed for existing offers to be withdrawn and replaced with an alternate offer is 30 October 2020, with replacement offers remaining open until 31 March 2021 which is the date PC17 is proposed to come into effect.

4.13.4 Compulsory acquisition under the PWA – Option 4

The intended outcome of the VMR programme is to integrate the titles of all land acquired and classify that land as 'reserve' under the Reserves Act 1977. From a strategic perspective, a reserve area that includes a combination of all properties, Kaokaoroa Road, Clem Elliott Drive, and Toi Street, offers not only the opportunity for a seamless open space landscape but also optimises efficiencies moving

⁷ A solatium under the PWA is a compensatory payment by the acquiring authority to the landowner for injured feelings or emotional suffering associated with the compulsory sale of their property.

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forward by minimising servicing and operational costs through the removal of roading and other infrastructure.

If the Council were of a view that it was desirable for all of the land within the Awatarariki high debris flow risk area to be acquired by the Council, any properties remaining in private ownership could be acquired under the PWA if the purpose of the acquisition was for a public work. Whereas the PWA does not apply to the VMR programme due to the VMR programme not being a 'public work', the creation of a reserve under the Reserves Act is a 'public work' which brings the availability of the PWA as a public policy tool into play as an acquisition option for the Council.

Compulsory acquisition is not proposed until after the Environment Court has released its decisions and parties to the proceeding have had sufficient time to consider those decisions.

4.13.5 Analysis of options

A comparative analysis of the advantages and disadvantages of each option is provided in Appendix A.

Additionally, financial comparisons of the VMR option (Options 1) against the two PWA options (Options 3 and 4) for the properties not acquired to date, are provided in Table 6. Option 2 is not included in the financial analysis as withdrawal of the VMR programme would have the effect of halting any further acquisition expenditure.

Table 6 Comparative Financial Analysis

Address	Option 1 - VMR Offer (GST inclusive)	Option 3 - PWA (Mid-range) (GST incl)	Option 4 - Future PWA (GST incl)
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

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and
s.7(2)(i)

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[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Financial Private Benefit Ranking	1	2	3
Financial Public Benefit Ranking	3	2	1

* Value estimated - full valuation not undertaken due to property owner not participating in VMR programme

4.14 Option evaluation summary

4.14.1 Option 1 – Support the request

Option 1 is weighted strongly in favour of property owners scoring highest for advantages, disadvantages, and financial benefit. For funding agencies, Option 1 scores second lowest for advantages and disadvantages, and lowest for financial benefit.

This option in effect guarantees the ARIS Environment Court appeal will proceed to hearing. It recognises that individuals are entitled to protect what they see as their self-interest; in this case property owners’ ability to exercise their democratic rights through pursuing the Environment Court appeals with minimal adverse consequences, i.e. without the worry of the VMR programme not being available to them in the event the Environment Court appeal is unsuccessful. Notwithstanding, having contested the Plan Changes, and if unsuccessful, property owners are likely to consider acquisition offers more favourably and sell their properties thereby increasing the success of the VMR programme’s primary objective.

Future purchase prices continue to remain at an incentivised value provided through the VMR programme rather than a reduced but fair market value arrived at under the PWA. Option 1 also recognises that funds are available from the three funding partners until the end of this financial year.

Fairness to ratepayers and taxpayers, and the 25 other Awatarariki Fanhead property owners who have sold their properties to the Council through the VMR programme to-date, comes into question in this scenario. Less weight is therefore given in Option 1 to: the philosophical nature and fairness of the incentivised VMR programme, including the number of extensions granted to programme entry and acceptance deadlines as a consequence of delayed participation by ARIS members; the significant investment of public funds to date in finding a solution to the management of risk from future debris flows from the Awatarariki catchment; the majority of property owners who have completed sale arrangements within programme timeframes; and saving of local and regional public expenditure in a social and economic climate impacted by the Whakaari/White Island eruption and Covid-19 pandemic.

Financially, this is the highest cost option.

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4.14.2 Option 2 – Withdrawal of the VMR programme

Option 2 ranked second lowest for property owners and second highest for funding agencies. This option has the potential to eliminate the Environment Court appeal through reinforcing the benefits of the VMR programme due to its removal, i.e. knowing an option will become unavailable can result in the benefits of that option being more clearly identified and appreciated.

Despite maintaining the integrity of the Acquisition Strategy, if property owners elect to proceed with the Environment Court appeal, removal of the VMR programme and not replacing it with an alternate acquisition option increases the weight given to a legal argument that PC17 places an unfair and unreasonable burden on property owners.

Financially, this is the lowest cost option for the funding agencies as property owners who do not take up VMR purchase offers before programme withdrawal will retain ownership of properties which they will not be able to occupy if PC17 is approved. Unless this option is combined with another option, property owners' ability to constructively move on with their lives may be severely constrained.

4.14.3 Option 3 – Modify the VMR programme

Option 3 is ranked second highest for both property owners and funding agencies. This option proposes modifying the VMR programme by removing the valuation incentives aimed at encouraging property owner participation, and replacing the formula to calculate purchase offers in the Strategy with the statutory formula in place for acquisition of private land by a public agency. Purchase offers under the replacement formula are lower than offers under the existing arrangements. For this reason, Option 3, at an initial glance, has the appearance of containing a punitive element. This is not the case as the detail of Option 3 is founded on the principles of fairness and equity to both property owners and ratepayers.

Option 3 infers that the balance between private and public benefit for the VMR programme has reached a point of change where the initial methodology, which was weighted strongly in favour of property owners, is no longer appropriate. Reasons why the initial methodology is no longer appropriate, include: equity and fairness to those property owners who made their decisions under a framework with prescribed timeframes; the extent of additional accommodation the Council has made to enable property owners to participate in the VMR programme; equity and fairness to ratepayers who are managing through the double impacts of Whakaari/White Island and the Covid-19 pandemic on the local, regional and national economies; and that any replacement offer would continue to be fair having used the accepted and legislated practice in New Zealand for acquisition of private land by a public agency, being the PWA.

The Council commissioned its property valuation expert, John Reid of Added Valuation Ltd, to calculate the valuations of ARIS properties using the PWA formula and, as the calculation is subjective to valuer interpretation of market value, to report the results using low, medium and high range descriptors.

Despite the PWA including payment of a solatium, Mr Reid's assessed valuations reinforce the conclusion of the Independent Panel of Commissioners at the first instance hearing, that PWA valuations will result in significantly lower values than the offers made using the VMR formula. Mr Reid's comparative analysis indicates property valuations assessed under the PWA will result in the quantum of purchase offers to property owners being reduced by 20% (high range), 25% (medium range), and 30% (low range) for properties with houses, and 70% (high range), 80% (medium range), and 90% (low range) for vacant sections. The primary reasons for the differences are:

- (i) The PWA calculation methodology recognises the impact of the 2005 debris flow on property valuations;

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- (ii) MBIE Determination 2016/034 confirming that building consents should not be issued for any new dwellings within the high risk area, thereby resulting in vacant sites not being able to be developed.

The MBIE Building Act determination particularly influences the values for vacant sites.

As the Plan Change proposals have not been given effect to, due to their being under appeal, property valuation impacts associated with these are disregarded for the purposes of the PWA valuation under this scenario.

It is clear from Mr Reid's analyses that, although the PWA is the statutory process for acquiring land for a public work in New Zealand, the values that the PWA calculation methodology delivers are significantly lower than the incentivised offers that have been made under the Council's Strategy and associated VMR programme. That result should not be construed as inferring that the PWA process produces an unfair result; rather it indicates that the PWA process does not include the incentives that the VMR does. An important output of Option 3 therefore is that Option 3 reinforces the benefit to property owners of the VMR programme.

Property owners benefit through Option 3 by receiving certainty on when the current provisions of the Acquisition Strategy relating to final offers will no longer be available and knowing that an alternative buy-out option will remain available until after the Environment Court appeal has been determined, and that the alternative option delivers a fair offer that reflects current market value.

Disadvantages of option 3 for property owners include: that future purchase offers calculated under the PWA are less than offers calculated under the current Acquisition Strategy provisions; and that property owners may feel coerced into accepting offers, and in doing so, are forced to withdraw from supporting the Environment Court appeal.

This option also provides certainty to the Environment Court in knowing that there is a fair sale and purchase process available for property owners while the Environment Court determines the appeal.

Financially, Option 3 is the second highest option for both property owners and the funding agencies.

Delivery of Option 3 will involve amending the Acquisition Strategy by inserting an additional clause drawing to a close the timeframe to consider existing acquisition offers from a prescribed date, after which any new offer would be calculated using the PWA methodology. A suggested close-off date is 30 October 2020 being 4 weeks after this meeting.

An exception to Option 3 is proposed to cover any property under multiple Māori ownership that does not have a governance structure in place to enable sale of the property. This recognises the complexities associated with multiple Maori land ownership and provides for additional time to enable property owner representatives to put in place the necessary governance arrangements. In such cases, the existing purchase offer will continue for as long as a VMR option remains available.

4.14.4 Option 4 – Compulsory acquisition under the PWA

Option 4 is ranked lowest for advantages and disadvantages for both property owners and funding agencies.

This option will involve compulsory acquisition of properties not acquired under the VMR programme. Compulsory acquisition is not provided for in the MoU between the funding partners. There are benefits to BOPRC in the Council compulsorily purchasing those properties with dwellings, so ongoing financial support from BOPRC to deliver this option can be anticipated. However, the position of the Crown is less certain and should not be relied upon if Option 4 were to be selected as the preferred option.

Buy-out costs under this option differ depending on timing. The PWA valuation methodology factors in the environment that is existing at the time an offer is made. This means that a PWA market

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valuation of the Fanhead properties undertaken now would recognise the impacts upon market values of the 2005 debris flow hazard risk but not the plan change proposals, as these are not completed. However, if the compulsory acquisition programme were not implemented until sometime after the Environment Court had delivered its decision, subsequent market valuations would reflect the 2005 debris flow hazard risk **and** the planning framework put in place by the Plan Changes. Mr Reid calculated market valuations under this latter scenario and concluded reductions from the offers made through the VMR programme would be in the order of 90% to 95% for all properties.

Legal challenges to Option 4 are likely.

Financially, Option 4 is ranked the lowest cost option for property owners but the highest cost option for funding agencies, and especially so if implemented after the Environment Court decision. Adverse social impacts are highly likely to substantively outweigh economic efficiencies and so, from a wellbeing perspective, Option 4 is rated lowly.

4.15 Overall Evaluation

The purpose of local government includes *“to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future.”*⁸ The VMR programme is an expression of the Council delivering on all four well-beings through wanting to help-out a section of the District’s community who found themselves in an unenviable position, rather than any statutory requirement to deliver a managed retreat programme. The Local Government Act 2002 also requires the Council to act efficiently, effectively, prudently and sustainably⁹ in exercising its functions.

All four options support the purpose of local government to varying degrees as evidenced in the analyses contained in sections 4.13, Appendix A, and 4.14. The main differences between the options relates to the distribution of benefits. Figure 4 presents the four options within a public/private benefit matrix.

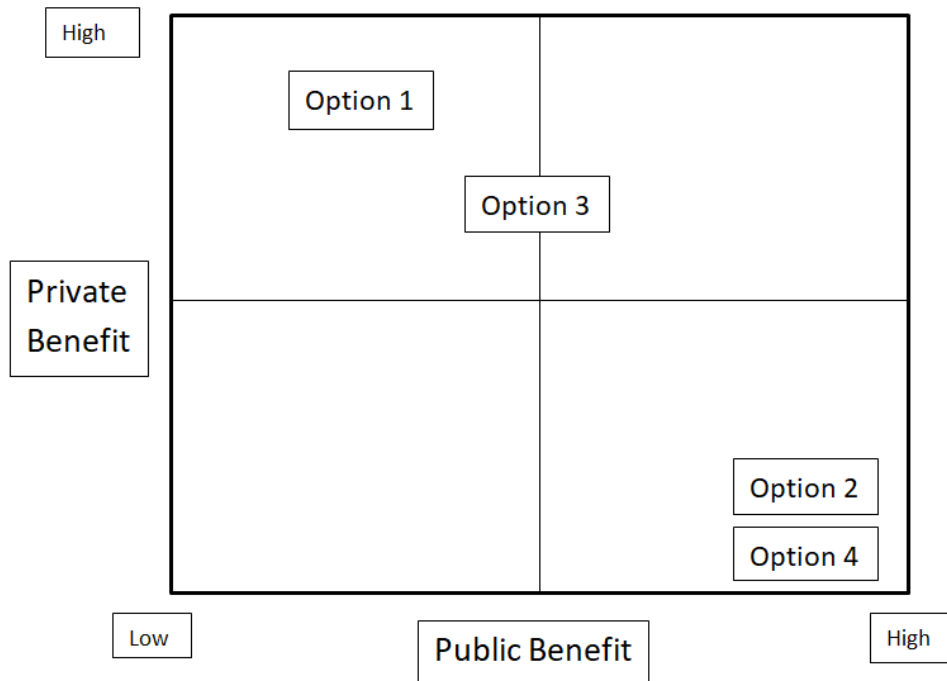


Figure 4 Options Distribution - Public/Private Benefit

⁸ Section 10(1)(b) Local Government Act, 2002

⁹ Sections 14(1)(a)(i),(g) and (h)

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Figure 4 clearly shows those options weighted heavily in favour of either private benefit (Option 1) or public benefit (Options 2 and 4). Option 3 provides a more balanced approach though still weighted in favour of private benefit.

In the context of the exercise of local authority functions, Option 3 can be delivered efficiently through simple changes to the Council's Strategy. It is effective in that a VMR programme option which produces a fair market purchase offer remains available to assist property owners relocate away from a natural hazard with a high life-safety risk. It reflects financial prudence by the Council on behalf of the public funding agencies, and it is sustainable in that it promotes the social, economic, and cultural wellbeing of people and communities, enhances the environment, and provides for the foreseeable needs of future generations by removing the natural hazard risk.

The combination of beneficiary balance, high levels of certainty and fairness for both property owners and funding agencies, and the efficient, effective, prudent, and sustainable exercise of statutory functions are key elements that make Option 3 the preferred option moving forward.

4.16 Views of funding partners

Views of Council's VMR funding partners relating to the ARIS request have been sought. These views are from officials and do not necessarily reflect the views of elected representatives as there has been insufficient opportunity for Ministers and BOPRC elected representatives to substantively discuss the merits of the various options. The reported funding partners' positions on this matter therefore need to be considered in that context.

Discussions with officials representing the funding partners for the VMR programme confirm strong ongoing support for the Council to continue with delivery of the programme.

Officials from both funding partners support Option 3. It remains aligned to the VMR primary objective of all property owners relocating from the high risk area of the Awatarariki Fanhead. It continues to provide property owners with a VMR choice, and recognises that property owners have exercised their democratic choice to not take up public-funded incentivised offers within the timeframes provided, despite the timeframes being extended several times. Also recognised is that Option 3 continues to provide alternate options to property owners, especially when there is no legal obligation for any managed retreat option to be offered.

The Crown's funding contribution, originally constrained to the 2019/20 financial year, has been carried forward into the 2020/21 financial year as a consequence of the Covid-19 pandemic lockdown requirements. Advice from officials is that it is important that the voluntary managed retreat process be completed this financial year. The voluntary managed retreat process includes the Coastal Protection Zone design and its implementation.

4.1.7 Acquisition Strategy Changes

The Executive Director of The Property Group who was one of the authors of the Council's Acquisition Strategy, has confirmed that changes to the Strategy to incorporate Option 3 would involve inserting the following three new clauses:

- 4.2A Acquisition offers calculated under s4.2 and not taken up by 30 October 2020 will become null and void on that date. From 1 November 2020, the quantum of any acquisition offer will be calculated in accordance with the Public Works Act 1981.
- 4.2AA Notwithstanding Section 4.2A, any property under multiple Māori ownership without a governance structure in place will continue to be valued as per section 4.2 while a voluntary managed retreat option remains available.
- 7.2 In accordance with section 4.2A, section 7.1 is replaced on 1 November 2020 with the methodology prescribed in the Public Works Act 1981.

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These changes are included as track changes to the 2018 version of the Strategy which forms Appendix B of this report.

5 ASSESSMENT OF SIGNIFICANCE

The Awatarariki Debris Flow Risk Management Programme has been an eight year process to manage debris flow risk to owners of properties on the Awatarariki Fanhead. Earlier decisions in the process have been significant and subject to extensive public and stakeholder engagement. In relation to the request which is the subject of this report, a representative of the Awatarariki Residents Incorporated Society addressed the Projects and Services Committee meeting on 7 September 2020. The Council therefore already has a sound understanding of the views and preferences of the persons likely to be affected or interested in the matter, and the matter is not of a nature or significance that requires additional public engagement. In addition, direct impacts are constrained to a maximum of nine properties but all affected property owners will continue to have a buy-out option available and, until 30 October 2020 have the ability to select the incentivised VMR purchase option. As a consequence, the significance of this report has been assessed as 'low'.

6 COMMUNITY INPUT AND PUBLICITY

Community input on the Awatarariki Debris Flow Risk Management Programme has been obtained over many years through a combination of LTP and Annual Plan submissions. Extensive engagement and consultation with affected property owners has also occurred through face-to-face, 1 on 1 and group meetings, and through submissions to Plan Changes and presentations to a variety of Committee and Council meetings, both WDC and BOPRC. The VMR programme has, for several years, also been covered by local, regional and national news media.

7 OTHER CONSIDERATIONS

7.1 Legal

Counsel for ARIS has indicated that if the final VMR offers expire before the Environment Court's decision, it will seek urgent injunctive relief, presumably to direct that offers remain open for acceptance for a further period. This could take the form of either an application for an interlocutory injunction or an application for interim orders. Both are applications to the High Court. Advice received from Council's solicitors is that, in both cases, the chances of ARIS being successful are low.

The VMR programme is a non-statutory public policy programme that provides for voluntary participation. Continuing availability of the programme is at the discretion of the Council and other funding partners (BOPRC and the Crown). The programme can be withdrawn at any time although it would be unreasonable to withdraw any existing unaccepted buy-out offer without some form of advance notice to the affected property owner that the offer will lapse at a date prescribed in the notice.

The other legal issue of note relates to the immaturity of the current statutory framework around natural hazard managed retreat in New Zealand. With no statutory managed retreat process in place, the continued provision of a buy-out option that property owners can access has advantages for property owners, BOPRC, WDC, and the Environment Court while the Environment Court appeals remain live.

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7.2 Risks

s.7(2)(a)

The Council's Reputational risk requires careful consideration. This report describes the challenges associated with reaching an equitable balance between private benefit and public benefit in response to a request by ARIS to extend the availability of the VMR programme. If the scope of the request remained narrow, two properties only are considered. If the scope were broadened to include those owners who have not entered the programme, and the one owner who has declined a final offer, a chance to change their mind, the number of properties to be considered increases to eight (does not include [REDACTED] whose owners are seeking Maori Reservation status for their land).

Options 2 and 4 carry the highest reputational risk for the Council. Withdrawal of support to property owners where that support is necessary to resolve a significant issue is a feature of Option 2. Compulsory acquisition at significantly reduced property values under Option 4 would be a disappointing outcome to a long-standing matter and presents a potentially significant reputational risk for the acquiring authority.

Options 1 and 3 also contain reputational risk for the Council. Whereas the reputational risk with Option 1 is that the wider community perceives the Council as being too generous at a time when economic prudence is clearly justified, with Option 3, the reputational risk is that property owners perceive they have been treated inequitably and communicate that perception widely.

Another reputational risk is that the Environment Court supports the appellants and overturns the Hearing Commissioner decisions. This risk is considered low based on the quality and quantity of the debris flow risk management research undertaken as reflected in the comprehensiveness and decisiveness of the Commissioners decisions from the first instance hearing.

8 CONCLUSION

In determining an appropriate response to the request from ARIS to extend the availability of the VMR programme through to the end of March 2021, it is important to weigh up the benefits to the property owners and the benefits to ratepayers, and consider what circumstances exist now that merit a change to the Council's approach in managing the VMR programme. The overall objective of all property owners relocating out of harm's way has not changed. What has changed is that a small minority of property owners who have had several months to consider VMR buy-out offers which have been artificially inflated to encourage owner participation, have neither recognised nor valued their offer's intrinsic benefits. Also changed is that some project costs have come in higher than estimated at a time when the broader social and economic fabric of our communities has changed requiring Whakatāne District residents, ratepayers, employers and employees to manage through the social and financial impacts and uncertainties associated with two natural disasters – the Whakaari/White Island eruption and the Covid-19 pandemic. In such a context, it is not inappropriate that the Council reconsiders the relative positioning of the public and private distribution of benefits provided through the Awatarariki VMR programme.

Option 3 (Modify the VMR Programme) provides a balanced response to the ARIS request. Benefits continue to property owners through the formula used to calculate buy-out offers returning a fair market assessment and the certainty of knowing that the availability of a VMR programme will continue through to the outcome of the Environment Court appeal process. At the same time, the extent of the Council's investment in the search for, and provision of, a solution to manage the Awatarariki debris flow risk to Fanhead properties is recognised, and financial transactions for future Awatarariki Fanhead property acquisitions will reflect the social and financial uncertainties New Zealanders, and more particularly Whakatāne District residents, are having to deal with.

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RECOMMENDATIONS:

1. **THAT** the Awatarariki Voluntary Managed Retreat Programme- Request for Extension report be received; and
2. **THAT** it be recommended to the Council that the request by the Awatarariki Residents Society Incorporated to alter the expiry date of acquisition offers to not earlier than 20 March 2021 be declined; and
3. **THAT** it be recommended to the Council that all unresolved acquisition offers made through the Awatarariki Voluntary Managed Retreat Programme prior to 30 October 2020 will lapse at the end of day on 30 October 2020;
4. **THAT** it be recommended to the Council that the Awatarariki Fanhead, Matatā, Acquisition Strategy (2018) be amended by inserting the following three new clauses:
 - 4.2A Acquisition offers calculated under s4.2 and not taken up by 30 October 2020 will become null and void on that date. From 1 November 2020, the quantum of any acquisition offer will be calculated in accordance with the Public Works Act 1981.
 - 4.2AA Notwithstanding Section 4.2A, any property under multiple Māori ownership without a governance structure in place will continue to be valued as per section 4.2 while a voluntary managed retreat option remains available; and
 - 7.2 In accordance with section 4.2A, section 7.1 is replaced on 1 November 2020 with the methodology prescribed in the Public Works Act 1981.
5. **THAT** it be recommended to the Council that acquisition offers made through the Awatarariki Voluntary Managed Retreat Programme after 1 November 2020 will be calculated in accordance with the Awatarariki Fanhead, Matatā, Acquisition Strategy as amended by Council resolution on 30 September 2020; and
6. **THAT** it be recommended to the Council that the resolutions be released to the public once adopted by the Council; and
7. **THAT** it be recommended to the Council that the report, with the redaction of Tables 5 and 6 withheld pursuant to s7(2)(a), 7(2)(i), 7(2)(j) of the Local Government Official Information and Meeting Act 1987, be released from public excluded once adopted by the Council.

Reasons for the decision:

1. The Committee notes the continued offer of a public-funded voluntary managed retreat programme to owners of properties within the high debris flow risk area of the Awatarariki Fanhead beyond 30 October 2020 provides confidence to property owners that a fair property buy-out option remains available for owners to access until after the Environment Court has determined the Awatarariki Plan Changes appeals by the Awatarariki Residents Incorporated Society;
2. The Committee further notes that acquisition offers calculated under the amended provisions of the Awatarariki Fanhead, Matatā, Acquisition Strategy, whilst providing a fair outcome for property owners, also recognise the extent of the Council's investment in the search for, and provision of, a solution to manage the Awatarariki debris flow risk to Fanhead properties since 2005, and the social and financial uncertainties New Zealanders, and more particularly Whakatāne District residents, have had to manage since December 2019.

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Attached to this report:

Appendix A Analysis of Options

Appendix B Awatarariki Fanhead, Matatā, Acquisition Strategy (2018 with 2020 proposed amendments)

Report Authorisation

Report writer:	Jeff Farrell	Manager Strategic Projects
First Approval:	David Bewley	General Manager Planning and Infrastructure
Final Approval:	Steph O'Sullivan	Chief Executive

Appendix Five

Awatarariki Residents - Key Events Timeline

Date	Event	Consequence
May 2005	An extreme weather event caused widespread damage in the Bay of Plenty area.	Debris flow and flood events in and around Matatā, including Awatarariki catchment. Debris flows caused the destruction of 27 homes and damage to 87 properties across the whole of the Matatā district. Residents of Matatā evacuated from their homes.
December 2006	Building Act Determination 2006/119	People were able to return to their homes and over the following few years houses were repaired and built in Awatarariki.
June 2012	REVIEW OF AWATARARIKI CATCHMENT and DEBRIS CONTROL PROJECT (Bickers Report)	Advice to abandon engineering options and focus on planning options. Submissions from residents, many opposed to the dam, frustrated by escalating costs, increased rates, WDC management of the situation.
July 2013	Consultation - Issues & Options	Community consultation on Landslide, Debris flow Hazards at Matatā, Whakatane & Ohope. Subsequent Draft Landslide Strategy for the whole of the Whakatane district was not accepted by Council (December). Proceeded to focus only on Awatarariki, although WestEnd/Ohope have a higher risk profile and a number of recorded deaths. <i>(People at Matatā feel singled out)</i>
2014 - 2016	BoPRC consults on change to RPS Natural Hazards - RPS becomes operative.	Matatā is used to test proposed RPS scenarios. WDC submissions include recommendations for existing use regulation. WDC notes that once RPS becomes operative WDC may need to make a change to the District Plan to give effect to RPS.
May 2015	Consensus Development Group community working group tasked with 'finding a way forward for Awatarariki'.	Email D. Stimpson 'The Consensus Development Group has not agreed on any option and the status quo remains attractive for some. I expect Council officers will take this into consideration as they prepare their report to Council.' "A solution could be for Council and landowners to collectively commission this research and to put the final results before the Environment Court or other judicial forum. This would ensure a

		robust process is followed and provide any interested party an opportunity to rigorously test any retreat proposals for specific properties. The final result coming from a court of law would be decisive.”
July 2015	WDC Policy Committee proposes a plan moving forward and makes resolutions that include voluntary managed retreat. Minutes and Council report with resolutions	Voluntary Managed Retreat is progressed. Council resolution states 90% agreement from landowners is necessary before making a case to funding partners (BoPRC, Govt)
July 2016	Building Act Determination	Two section owners with consents to build were invited by WDC to make their case. They were unprepared for WDC and associated experts providing evidence regarding natural hazard, risk, climate change and all the reasons they should not build there. WDC uses this as a test case for the Proposed Plan change proposals that follow..
November 2016	Update Report to Council Progressing Voluntary Retreat & District Plan Change	WDC report states that ‘ The group [CDG] also identified that a managed voluntary retreat was the best option for management of the debris flow hazard to Awatarariki fanhead properties.’ This was not true Residents presented with indicative offers for their homes and acquisition strategy for retreat. (Council needed to have 90% sign up their interest to continue to progress with Voluntary Retreat - this didn’t happen)
2017	Change to RMA Act	“The management of significant risks from natural hazards” is a new matter of national importance in section 6 of the Resource Management Act 1991 (RMA).’ & ‘Decision-makers are subject to new procedural principles under the RMA.’
April 2017	BoPRC Meeting (report p.351)	WDC CeO Marty Grenfell & Mayor Tony Bonne present to BoPRC Councillors WDC intention to request a private plan change
June 2017	BoPRC Meeting	Awatarariki residents make submission to BoPRC Councillors stating their objections to proposed plan changes & removal of existing land use rights.
August 2017	Indicative Business Plan & engagement with BoPRC & Government to co-fund retreat.	Indicative Business Plan - Residents are concerned about the inaccuracies being presented as fact and the use of the uncontested Building Determination 2016 to support funding bid.

October 2017	Whalley family meeting with lawyers & WDC	Without prejudice discussion, raised a range of issues for residents. Agreed to develop MoU to work through the issues with residents and independent experts. WDC would not put the Plan Change process on hold.
November 2017	Awatarariki Residents Incorporated is formed.	Community representation for affected residents at Awatarariki. Aiming to work towards the best outcome for each family involved, regardless of whether they wished to stay or to accept a retreat offer.
December 2017	<p>Voluntary retreat is now Managed retreat and a parallel process to the combined plan change processes.</p> <p>The 90% threshold of agreement for retreat resolution is changed retrospectively.</p> <p>WDC resolution to make private plan change request BoPRC Plan Change 17</p>	<p>ARI submission to WDC Councillors</p> <p>Request for Council to stop plan change process and work with affected residents through MoU being developed. Object to the change of threshold for voluntary retreat (<i>continually moving the goal posts</i>).</p> <p>Meeting agenda - includes reports on plan changes (p.7) and thresholds for retreat (p.12) Meeting minutes, including resolutions (from p.22)</p>
February 2018	<p>BoPRC Regional Direction and Delivery Committee Meeting report to receive WDC private plan change request.</p> <p>We advise BoPRC Councillors that we have an MoU in negotiation with WDC, please to defer their decision.</p> <p>ARI submission to BoPRC public meeting.</p>	<p>BoPRC lawyers advise Councillors that they cannot put their decision on hold to await the outcome of MoU between ARI & WDC. Nor can they reject it because they have to comply with the RMA & RPS requirement regarding Natural Hazards - BoPRC accepts the plan change request.</p> <p>WDC withdraws it's MoU with ARI the following day</p>
June 2018	Public consultation Plan Change 1 & 17	Awatarariki residents meet as a group at WDC/BoPRC consultation meeting, rigorously questioning the process being set out and seeking alternative solutions.
August 2018	Letter of complaint to WDC concerning Awatarariki Project Manager	An independent lawyer was commissioned by WDC to investigate, his findings were inconclusive but noted the complete breakdown in trust and recommended that the staff member be removed from any dealings with Awatarariki Residents

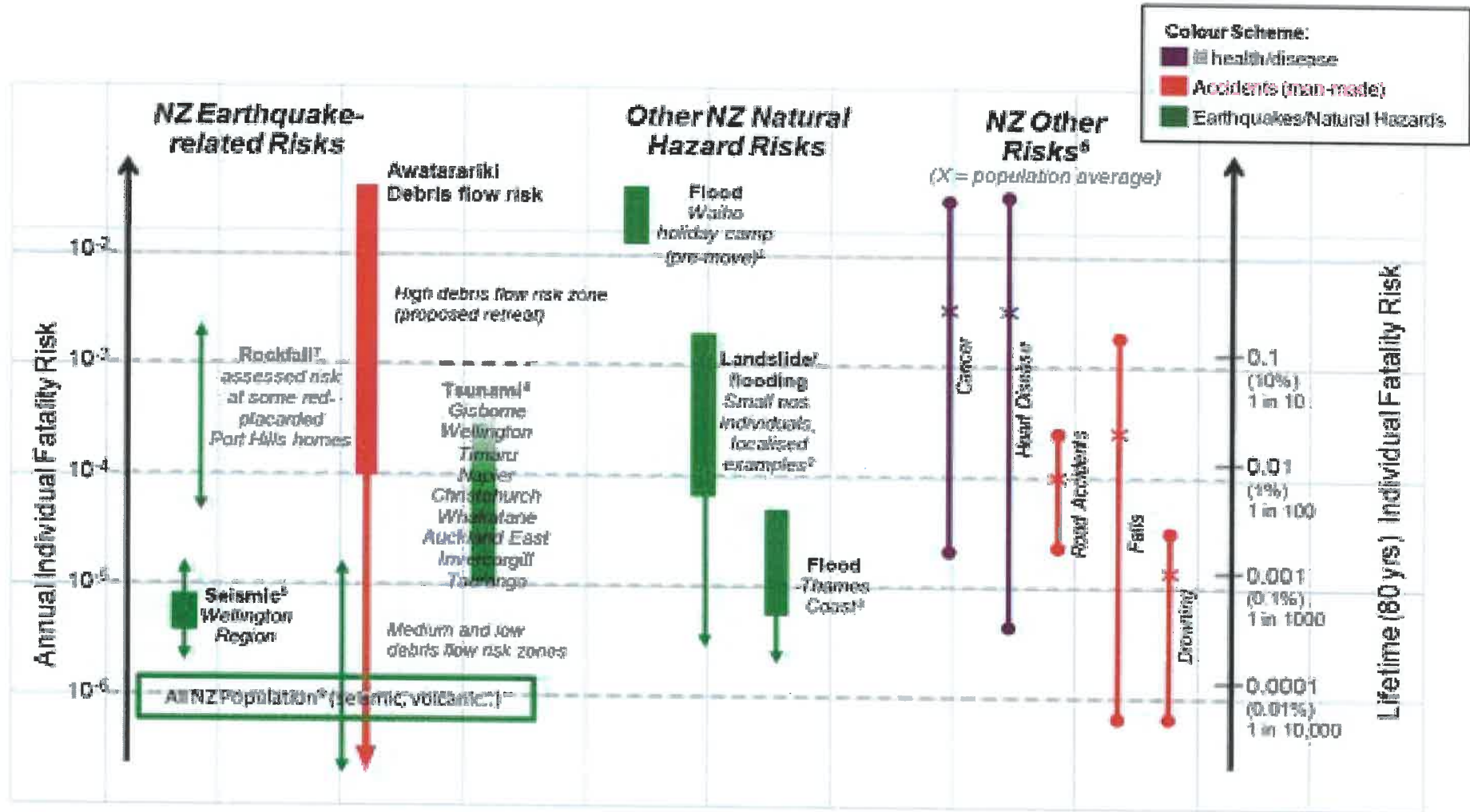
September 2018	Residents declined bank loan due to Natural Hazard hazard identified against the title.	Properties effectively sterilised. <i>(Not sure how this gets to be on titles before any Plan Changes are decided.)</i>
September 2018	Submissions close for joint plan change process	ARI submission to Plan Change 17 BoPRC
December 2018	Plan change process put on hold to progress managed retreat AWATARARIKI FANHEAD MANAGED RETREAT UPDATE ARI submission	“amend the timeline to better sequence the managed retreat option ahead of the Plan Change hearings; and to amend the Council’s Acquisition Strategy.” <i>A year previous would not put on hold to work through our MoU. Concern we would be forced out before RMA had been contested</i> <i>Our submission reflected concern at being left in limbo, asked to progress acquisition for those that need to go, request for legal & expert assistance, need for the plan change process to establish risk. Request for EWS</i>
May 2019	WDC Annual Plan to formalise funding for managed retreat WDC Meeting - ARI Annual Plan submission presented 8 May WDC Report	WDC Annual Plan Meeting Agenda 20 submissions (one ARI - representing 25 people), 7 support, the rest oppose p27. Submissions Appendix p 89 - 92 of agenda
May 2019	Uncertainty regarding funding and timing BoPRC	“That is on the basis that if a plan change, heard by independent commissioners, is successful the Regional Council has agreed in principle to participate in a three way share towards satisfying the financial consideration necessary to effect a Managed Retreat.” BoPRC agreed to support funding Managed Retreat pending the outcome of Plan Change Hearings.
July 2019	Community Meeting Matatā Nanaia letter confirming funding available	WDC, BoPRC lay out their plans for retreat. This was a volatile community meeting with CE BoPRC Fiona McTavish not able to give a straight answer about availability of BoPRC funding and Doug Leeder telling us the eventual outcome if we didn’t take the retreat offer is that “we would be squatters in our own homes.”
July 2019	LGOIA BoPRC:	BoPRC Minutes 21st March 2019 <i>(released under LGOIA)</i>

	<p><i>Can you confirm the position of the BoPRC in relation to co-funding managed retreat, and provide Council documentation that supports this.</i></p>	<p>Resolved That the Regional Council:</p> <p>1 Receives the report, Awatarariki Fanhead Managed Retreat;</p> <p>2 That Council makes an in-principle decision to provide up to \$5 million towards the Awatarariki Fanhead managed retreat, subject to:</p> <p>a) Whakatāne District Council and Government formally approving funding that is at least equal to the Bay of Plenty Regional Council funding allocation.</p> <p>b) Council completing any legislative requirements in relation to a full funding decision, which may include public consultation.</p> <p>c) A full funding decision will be subject to standard Council conditions and any conditions deemed appropriate at the time and subject to the outcome of District Plan Change and Regional Natural Resources Plan Change currently in progress.</p> <p>Crosby/Nees CARRIED Cr Cronin abstained from voting</p>
<p>September 2019</p>	<p>Cabinet paper (1 July) making the decision to co-fund the acquisition of properties at Awatarariki- obtained by ARI under OIA</p>	<ul style="list-style-type: none"> ● As there is no agreed policy framework for managed retreataddressing the natural hazard risk at Matatā will inform this <i>Awatarariki Residents are being used as the test case but not supported or resourced to make it a fair test</i> ● Plan changes would occur with no compensation ● WDC estimates 90% of homeowners are expected to retreat <i>Agreement to participate in Managed Retreat did not meet the 90% threshold originally agreed to (61% with most of the home owners wishing to stay)</i> <p>Treasury was against this funding for a number of reasons:</p> <ul style="list-style-type: none"> ● they believe it would set a funding precedent for climate change situations ● legal issues and liability have not been adequately determined ● Council's financial issues and ability to pay their shares ● it isn't clear what will happen for people who don't take up the offer in regard to plan changes ● it doesn't comply with budget initiatives <i>being extra money outside budget that was previously turned down in the budget</i>
<p>October 2019</p>	<p>Awatarariki Residents Inc AGM</p>	<p>Note that Stuckey family have formally resigned from the ARI. It is a condition of their sale & purchase that they do not belong to any Incorporated Society and rescind their submission to the Plan change processes. Families begin to sign up for Managed</p>

		Retreat with stress and uncertainty about being forced from their homes with no compensation.
October 2019	Cut off date to engage with the Managed Retreat process - extended to 6 November	Cut off dates were extended throughout. Deadlines were used to put pressure on residents to settle ahead of the Plan Change hearings and later ahead of Environment Court appeal.
25 November 2019	First day of the Awatarariki retreat programme marked with Karakia with Ngati Rangitahi	None of the affected residents were invited to participate and were advised of the event after the fact. First three homes are removed & residents have to resign from ARI
December 2019	BoPRC Meeting Agenda Item 11.4: Annual Plan 2019/20 - Confirmation of Direction	Indicates that Awatarariki retreat will not be part of consultation for next Annual Plan , but will be paid for out of the Regional Fund. Resolution (p.2): " Agrees to fund a \$5 million contribution to the Awatarariki Fanhead Managed Retreat from the Regional Fund and delegates to the Chief Executive approve payments including early release of funds if required. " ARI writes to all Councillors to ask them to wait for the outcome of plan changes before committing funding to Managed retreat process (as per their earlier resolution of 21 March 2019). Request ignored resolution is made anyway.
March 2020	WDC Plan Change Hearings	Rule in favour of Councils. ARI lodges appeal to Environment Court
April 2020	WDC Meeting Agenda & Minutes Extends deadline again to May 2020 Indicates that funding is available into 2021	Conclusion Council report: "decisions by the Independent Panel of Commissioner on submissions to Proposed Plan Change 1 (Awatarariki Fanhead, Matatā) to the Whakatāne District Plan (Plan Change 1) and Proposed Plan Change 17 (Natural Hazards) to the Regional Natural Resources Plan have fully endorsed the appropriateness of both Plan Changes and the actions the Council has taken. The decisions are comprehensive and robust and send a clear signal that the high risk zone of the Awatarariki Fanhead is not a location where people should be living. The decisiveness of the decisions also sends a signal to submitters that the chances of any Environment Court appeal against the decisions being successful are low. It is hoped that these signals are picked up and those property owners who have not taken up

		the opportunities offered by the Council's VMRP to date, reconsider their position before the opportunity is lost."
June 2020	WDC Projects & Services Committee	<p>"Open Space Design The 13th workstream in the Awatarariki Debris Flow Risk Management Programme involves the creation of the Coastal Protection Zone open space area. This will provide an opportunity to redesign the western entrance to the town. The project structure includes community representation to ensure project outcomes reflect community input. Stakeholder engagement will commence in July" p.190</p> <p>Awatarariki residents are invited to join Kahui Awatarariki to plan the coastal reserve on the land they have just been forced to leave</p> <p>Open Spaces join the Environment Court proceedings as another party</p>
July 2020	Deadline of the 22nd July to accept Council offer	ARI requests an extension of funding for the Managed Retreat as it is now clear that funding is still available in the 20/21 financial year.
September 2020	WDC Strategy & Policy Meeting	<p>Extension for deadline given to 30 October.</p> <p>Council end VMR offer from that date and replace with PWA assessment.</p> <p>Note that pending the outcome of the Environment Court appeal could use Compulsory Acquisition under PWA.</p>
October 2020	ARI seek settlement with Council	Terms are agreed. Environment Court date 15 December.

Appendix Six



Appendix Seven

- A. An extension to the prohibited activity rule is provided for 10 Clem Elliot Drive to 31 March 2022 on the basis that:
- i. A joint determination is sought from the Environment Court in support of the extension on the grounds (in summary) that this modest extension would not be inconsistent with the RPS (because it recognises the potential delay to the rules coming into effect if there were to be a High Court appeal) and a conservative early warning system is adequate to reduce risk in the relatively short interim period.
 - ii. A contract is entered into between the Councils and the Whalleys with the following terms:
 - a. That only Pamela Whalley, Rick Whalley, and Rachel Whalley, and other members of the Whalley family, may stay overnight at 10 Clem Elliot Drive.
 - b. That the Whalleys provide details of an evacuation plan for approval by the District Council's experts.
 - c. That the Whalleys adhere to the following early warning system:
 - a. Vacate the property when the New Zealand MetService has issued a Severe Weather Warning or a Severe Thunderstorm Warning affecting the Matatā area; and
 - b. Shall ensure that any occupant of the property vacates the property in accordance with this clause; and
 - c. Shall ensure that the property remains vacant until the Severe Weather Warning or Severe Thunderstorm Warning has been cancelled; and
 - d. For clarity the Whalleys may return to the property once the warning has been revoked.

- d. That the Whalleys must permanently vacate 10 Clem Elliot Drive within 7 days if they fail to adhere to an early warning.
- e. That the Whalleys must vacate 10 Clem Elliot Drive by no later than 31 March 2022, or within 6 months of Pam Whalley's death should she die before 1 October 2021 (being 6 months before 31 March 2022).
- f. That the Whalleys have chosen to remain on the fanhead at their own risk and indemnify both Councils for any injury or damage they or members of their family may suffer as a result of the debris flow hazard.

Appendix Eight

Whalley Family Evacuation Plan

GET READY

Who is this plan for?

Household members

Pam Whalley 0273927703

Rachel Whalley 0276566140

Ricky Whalley 021304622

All Whalley family members staying at the time

Address:

10 Clem Elliott Drive, Matatā, 3194

Early Warning Protocol for WDC agreement:

- Vacate our home when the New Zealand MetService has issued a Severe Weather Warning or a Severe Thunderstorm Warning affecting the Matatā area;
- ensure that any occupant of the property vacates the property in accordance with this clause; and
- ensure that the property remains vacant until the Severe Weather Warning or Severe Thunderstorm Warning has been cancelled; and
- return to the property once the warning has been revoked.

Weather Watch & Warning Criteria

Metservice is New Zealand's only authorized provider of Severe Weather Watches and Warnings.

When a Watch is in place (yellow colour code), stay alert and **keep an eye on your local forecast for updates**. Watches are used when severe weather is possible, but not imminent or certain.

There are two levels of warnings for heavy rain, strong wind or heavy snow: an **Orange Warning** (orange hexagon graphic) and a **Red Warning** (red triangle graphic).

An **Orange Warning** will be issued when heavy rain, strong wind or heavy snow is forecast to meet warning criteria. It signifies that people need to be prepared **and take action** as appropriate as there could be some disruption to their day and potential risk to people, animals and property. The majority of warnings issued by MetService will be orange.

A **Red Warning** will be reserved for only the most extreme weather events, such the severe weather resulting from extra-tropical cyclones, where significant impact and disruption is expected. It signifies that people need to **act now** as **immediate action is required** to protect people, animals and property from the impact of the weather.

Severe Thunderstorm Warning (a thunder storm will always be a Red Warning)

In New Zealand, MetService classifies a thunderstorm as severe if one or more of the following criteria are met:

- Heavy rain from thunderstorms of 25mm/h or more.
- Large hail of 20mm diameter or more.
- Strong wind gusts from thunderstorms of 110km/h (60 knots) or more.
- Damaging tornadoes with wind speeds more than 116km/h (63 knots) - i.e. Fujita F1 or stronger.

Severe Weather Warning

MetService will issue a Severe Weather Warning whenever there is an expectation that any of the following weather conditions will occur within the next 24 hours:

Widespread* rainfall greater than 50mm within 6 hours or 100mm within 24 hours;

<https://www.metservice.com/warnings/severe-weather-outlook>

Low confidence:

a 20% likelihood (or 1 chance in 5) that the event will actually happen.

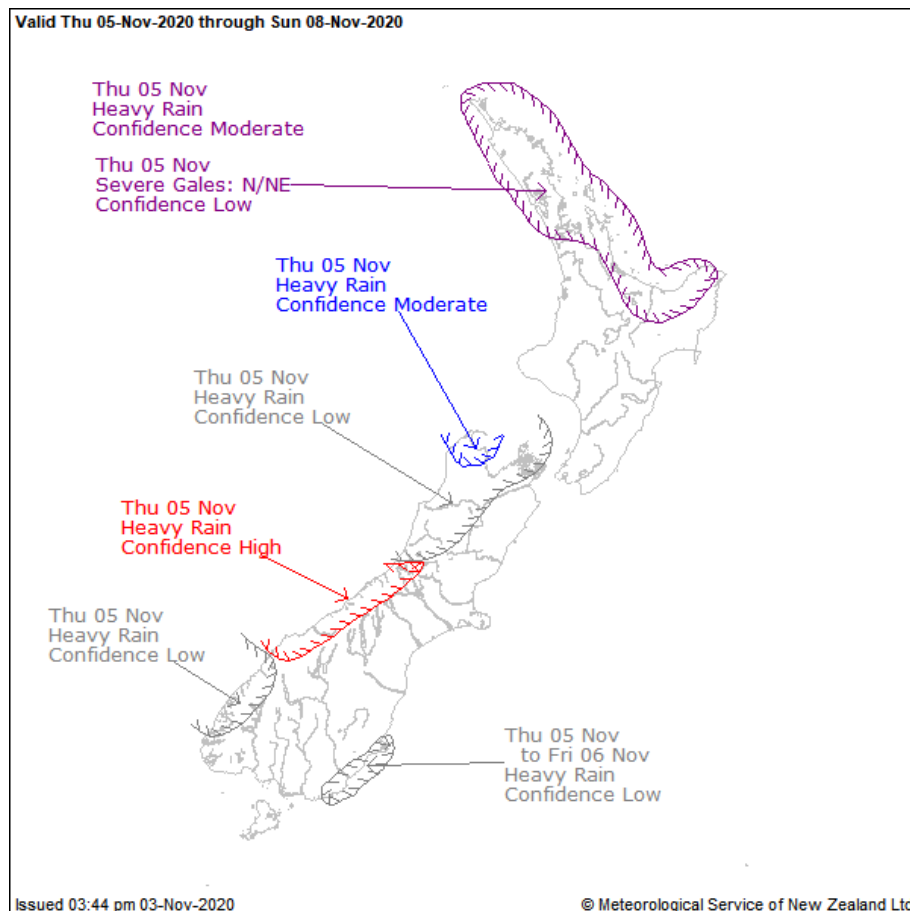
Moderate confidence:

a 40% likelihood (or 2 chances in 5) that the event will actually happen.

High confidence:

a 60% likelihood (or 3 chances in 5) that the event will actually happen.

e.g:



[Explanation of Severe Weather Warning & Watches](#)

Alerting Services

Metservice Watch & Warning email subscriptions, Rachel, Rick & Pam to subscribe:

Confirm your subscriptions to multiple MetService lists! Inbox x  

MetService Admin <stw-service@lists.metservice.co.nz> 13:32 (3 minutes ago)   
to me 

rache65@gmail.com has requested a subscription to the following [MetService](#) lists:

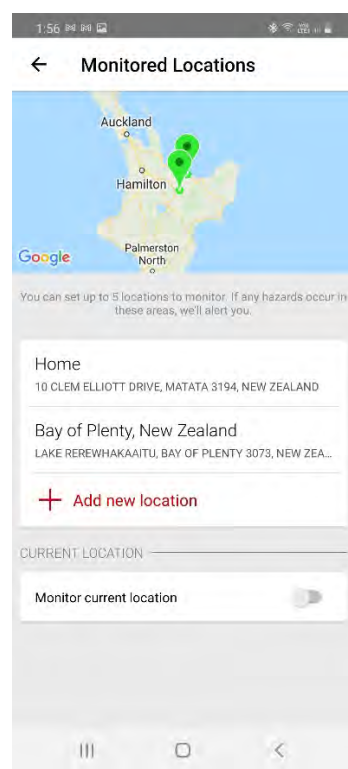
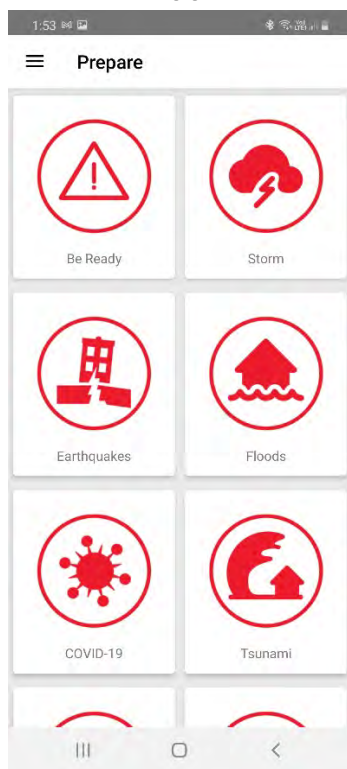
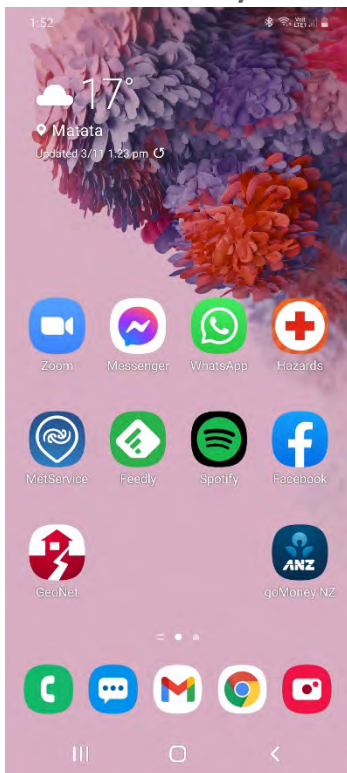
- List "Severe Thunderstorm Watch": Subscription awaiting user confirmation
- List "Severe Weather Outlook": Subscription awaiting user confirmation
- List "Severe Thunderstorm Warning: Bay of Plenty Area": Subscription awaiting user confirmation
- List "Severe Weather Warning": Subscription awaiting user confirmation
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Alerts Red Cross/Civil Defence Hazards App:



Actions to take



Fine weather – no severe weather watches or warnings in place
Monitor weekly weather forecasts (weather app on phone)
Receive weather watch alert MetService email
Monitor <https://www.metservice.com/warnings/severe-weather-outlook> to check whether level of confidence is medium or high
Monitor localized weather forecast
<https://www.metservice.com/rural/regions/bay-of-plenty/locations/whakatane> and
<https://weather.niwa.co.nz/Whakat%C4%81ne> to identify expected time of onset of severe weather conditions



Receive MetService orange weather warning
Continue to monitor forecasts as above
Prepare household to leave (see details below)



Receive MetService red weather warning
Leave immediately

Our meeting place

School House, Lake Rerewhakaaitu (2nd residence)

If we can't get hold of each other

Sarah Walton 0211604628

Sarah Roberts 0273362611

We will get updates by

Met Service website & app

Red Cross App

BoP Civil Defence FB

1XXS

Preparing to leave

Grabbags

Folder - personal info, passports, certificates, cash (Office)

Personal grab bags - warm clothes, medicines, phone chargers, water bottle, snack (bedrooms)

Does anyone have special requirements?

Pam - medicine, medic alert unit

Any pets?

Hidey has cage, food etc at 2nd residence Vets record for Kennels

Chickens - food & water for three days

Where will we go?

School house, Lake Rerewhakaaitu

via Edgecumbe, Te Teko, Murapara (avoid Forest Road)

2nd alternate route via Paengaroa, Rotorua
