BEFORE THE ENVIRONMENT COURT **ENV-2020-AKL-000064**
AT AUCKLAND

I MUA I TE KOOTI TAIAO O AOTEAROA
TĀMAKI MAKAURAU ROHE

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

LEGAL SUBMISSIONS OF AWATARARIKI RESIDENTS INCORPORATED IN SUPPORT OF DETERMINATION

Dated 8 December 2020

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INTRODUCTION

1. Terms of settlement are identified in the affidavit evidence provided by Council. It includes an amendment to PC17 to extend, for 10 Clem Elliot Drive, the effective date of the prohibited activity rule NH R71 in PC17 from 31 March 2021 to 31 March 2022.

2. The key issue for this Court's determination is whether the proposed amendment is appropriate, effective and efficient in light of the statutory framework and sustainable management purpose, and the higher order instruments, largely the RPS.

3. ARI was a submitter and further submitter to both Plan Change 1 and 17 (**PC1** and **PC17**). At the time of the original submission, the society represented 25 Awatarariki residents. That number has decreased as residents have taken up the Voluntary Managed Retreat (**VMR**) package and moved on. During its 3-year operation, ARI has represented the majority of the most significantly affected parties to PC1 and PC17. The key concern of ARI has been to strike the right balance between exposure to risk and wellbeing of this small community, in light of coercive powers being exercised by the Regional and District Council, which are largely legally untested (in particular, whether the Regional Council can extinguish existing use rights by rule in a plan, absent compensation). That issue remains unresolved.

4. ARI does not agree that the findings on risk demonstrate a need to extinguish existing use rights, nor that "this is an occasion when the need to reduce natural hazard risk is "immediate"" [1]. ARI disputes the interpretation placed on RPS Policy NH3B. Reference to "immediate" is in the explanation to the Policy, not the Policy itself; and the wording is qualified:

> "..There may be occasions when the need to reduce natural hazard is immediate but in most cases reducing risk from high levels will need to occur over time.."

5. Policy NH3B needs to be read in light of the wider policy framework. The "explanation" is not directive language. Wider context (the debris flow event occurred in 2005) is relevant to "immediacy". 12 months for one household may be seen as a proportionate and reasonably immediate response in light of a 15 year process.

[1] At [2.4] Joint Affidavit of Craigh Batchelar and Gerard Mathew, dated 23 November 2002.

6. For the purposes of settlement, ARI does not contest the plan change provisions. But it submits the Court should avoid making any findings on merits, or appropriateness, given the narrow issue now before the Court. The coercive nature of the Plan Changes, and risk/causation issues reasonably capable of being disputed, should (with respect) be left to another day.

7. Where the parties differ is with regard to whether an Early Warning System (**EWS**) can reduce risk to a level in which residential activities can continue. In any event ARI have come to terms with the settlement for the reasons set out in the Joint Affidavit of Pamela, Rick and Rachel Whalley ("**the Whalley affidavit")**.

8. The District Council supports the proposed exemption based on a planning rationale that compares exposure to risk for the Whalley family where these proceedings carry on (including senior courts appeals) as opposed to an imperfect Early Warning System and risk management procedures until 31 March 2022. ARI agrees in part with this rationale, but say that this is too narrow a lens, and wellbeing considerations under the RPS are also relevant to the 12 month extension.

BACKGROUND

9. Background is set out in evidence already before this Court, the Council Decision on PC1 and PC17[2] and legal submissions for the District Council. The Whalley affidavit also includes a timeline of key events from the date of the debris flow in 2005 until settlement in October 2020.

GROUNDS FOR 1 YEAR EXTENSION

10. A bespoke planning exception for one family may relevantly have regard to the individual circumstances and wellbeing of that family. This includes their acceptance of hypothetical risk, and contractual commitment to adhere the EWS. Wellbeing factors include:
    a. consideration of the intergenerational significance of 10 Clem Elliot to the Whaley family;
    b. time and effort that the Whalley family have put into their home both before and after the 2005 Debris Flow major event;
    c. significance of the decision to leave their home and the time to adjust to this shift;

[2] 26 March 2020.

d. health and wellbeing of Pamela Whalley in preparing for and undertaking the move out of her home; and
e. support and agreement of other ARI members to the Whalley family being the only family to stay on for the extra year.

11. Objective 31 referred to[3] in the planning evidence of Craig Batchelar and Gerard Mathew Willis, refers to managing risk for peoples safety AND protection of property. This must include an understanding of peoples relationship to property, as tied to their wellbeing both economically and socially.

12. A risk management approach to use, development and protection of land can apply to individual as well as collective groupings. It is more proportionate and better promotes wellbeing to consider the individual, as well as the "community" lens. "Community wellbeing" includes whanau wellbeing. Where a family is afforded the time to transition out of the property and into their new reality, where this process is supported by the wider community, this is more aligned with overall wellbeing. Individual fatality risk is or may be calculated on a household basis.

13. The Whalley's have provided evidence regarding their responses to four natural hazards threats since 2009. The effectiveness of an early warning system should be based on whether or not this particular family will respond to an EWS rather than applying a generalised response rate[4]. In any event, where the Whalleys fail to evacuate or maintain their EWS they are faced with permanent removal within 7 days; this can be contractually enforced[5]. This provides a double incentive to the Whalleys to be vigilant in maintaining the EWS and terms of their settlement agreement.

14. Council planning experts state that the ability to achieve "immediate risk reduction has been affected by the required process for, and practicalities of, achieving managed retreat."[6] It should not be lost that ten years preceded the five years of managed retreat planning processes[7]. Ten years in which residents were told it was safe to remain in their houses following the 2005 Debris Flow event. In light of Council's delay

[3] At [2.1] "*Avoidance or mitigation of natural hazards by managing risk for people's safety and protection of property and lifeline utilities."*
[4] At [3.1] and [3.2] of Joint affidavit of Chris Massey and Tim Davies (23 November 2020).
[5] Settlement agreement, appendix 7: "*That the Whalleys must permanently vacate 10 Clem Elliot Drive within 7 days if they fail to adhere to an early warning*."
[6] At [2.5] Joint affidavit of Chris Massey and Tim Davies (23 November 2020)
[7] Ibid.

ARI say it is reasonable to provide time for residents to now adjust the reality of removal.

15. Long term climate change risk is not material or even relevant to a 12-month period, ending on 31 March 2022. Health and safety of communities are important RMA considerations, but risk should not be piled upon risk to produce a "sum of all risk" approach: *Transwaste Canterbury Ltd v Canterbury Regional Council* C29/2004, 22 March 2004 at [183]; *Taranaki Energy Watch Inc v South Taranaki District Council* [2018] NZEnvC 227; *Lambton Quay Property v Wellington City Council* [2014] NZHC 878 at [87]-[89].

VMR PACKAGE, s85 and the Declaration

16. ARI consider that the approach adopted by WDC and BoPRC was not "pioneering"[8] but unreasonable and heavy handed. The future implications of PC17 forced residents out of their homes and into the VMR process. It was not voluntary. Choices residents faced and potential outcomes of not taking up the offer were severe both economically and for residents wellbeing. This wider context is equally relevant to future learnings.

Conclusion

17. ARI support the settlement reached, but for reasons different, and perhaps more expansive, than the District Council position. ARI submits that there is a reasonable planning rationale, the extension is appropriate, and promotes s5 RMA wellbeing. Some measure of dignity is preserved to the Whalley family, by this modest 12-month extension.

Dated this 8th day of December 2020

R Enright / R Haazen
Legal Counsel for Awatarariki Residents Incorporated

[8] At [1.4] legal submissions for WDC.