

**BEFORE THE ENVIRONMENT COURT
AT AUCKLAND**

ENV-2020-AKL-000064

**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 SOCIETY**

Appellant

AND

**BAY OF PLENTY REGIONAL
COUNCIL**

First Respondent

AND

WHAKATĀNE DISTRICT COUNCIL

Second Respondent and Requestor
of Plan Change 17

**LEGAL SUBMISSIONS ON BEHALF OF THE WHAKATĀNE DISTRICT COUNCIL
IN SUPPORT OF DETERMINATION**

23 November 2020

**BROOKFIELDS
LAWYERS**

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1. INTRODUCTION

- 1.1 On 18 May 2005, extremely heavy rainfall in the steep catchments behind Matatā, Whakatāne caused several debris flows which devastated much of the coastal township of Matatā (**2005 Event**).
- 1.2 The 2005 event caused an estimated \$20 million of damage, arising from 27 homes being destroyed, 87 properties being damaged and major transport links being cut. The most destructive debris flow was from the Awatarariki Stream at the western end of Matatā, where an estimated 300,000 cubic metres of debris was deposited on the Awatarariki Fanhead. While there were no deaths or injuries, this was extremely fortunate. The destructive force of the natural hazard was such that deaths could easily have occurred.
- 1.3 Since the 2005 event, the Whakatāne District Council (**District Council**), aided by an extensive array of consultant experts, and through consultation with the local community, has expended significant effort to understand the risk that exists on the Awatarariki Fanhead and the options (and their effectiveness) to avoid or mitigate the risk.
- 1.4 This expert analysis and community engagement concluded that there were no cost effective engineering options and resulted in the District Council progressing a pioneering three-fold hazard management approach:
 - a) a proposed District Plan Change identifying an 'Awatarariki Debris Flow Policy Area' with high, medium and low risk areas, and rules restricting development on land in the medium and high risk areas (**PC1**);
 - b) a proposed private plan change request to the Bay of Plenty Regional Council (**Regional Council**) to extinguish the existing use rights of properties in the high risk policy area via regional plan rules (**PC17**); and
 - c) a Voluntary Managed Retreat (**VMR**) programme providing financial incentives to residents in the high risk area to relocate, and other

property owners without dwellings to divest their interests in this area.

- 1.5 The VMR was jointly funded by the District Council, Regional Council, and the Crown. Residents and other property owners in the high risk area could opt in to the VMR. Doing so initiated a process of independent valuations to determine property acquisition offers. The VMR process provided for mediation and arbitration to resolve any differences of valuation opinion. Residents could accept offers at any time, but were not bound by the outcomes of arbitration, whereas the acquiring authorities were bound by such outcomes. The VMR provided a significant financial incentive to property owners to retreat as the valuation methodology excluded the adverse effect on property value of the debris flow hazard. Otherwise the VMR adopted standard Public Works Act 1981 valuation principles, including the principle of liberality.
- 1.6 The Plan Changes were publicly notified, and a hearing was conducted before a panel of independent hearings commissioners. This hearing raised complex questions concerning the interface between the responsibilities of local authorities to manage natural hazards; the concepts of risk, uncertainty and individual tolerance; and private property rights. The hearing panel was required to grapple with legal questions concerning the jurisdiction of regional councils to extinguish existing use rights under section 10 RMA and the proper interpretation of section 85 of the RMA relating to “reasonable use” of land.
- 1.7 The decision of the hearing panel of 26 March 2020 upheld the Plan Changes, with minor amendments.
- 1.8 On 9 June 2020, Awatarariki Residents Incorporated (**ARI**) appealed the decision of the hearing panel to the Environment Court.¹ The grounds of ARI’s appeal were broad and included challenges to the validity and jurisdiction of the plan changes, as well as the underpinning risk assessments.

¹ By decision [2020] NZEnvC 036 the time for lodging appeals was extended to 30 working days after COVID-19 Alert Level 4 restrictions were lifted in the Bay of Plenty by the New Zealand Government.

- 1.9 By joint memorandum of 3 November 2020, the parties advised the Court that a resolution of this appeal had been reached on terms that included:
- a) acceptance by members of ARI of offers under the VMR programme to purchase their properties on the Awatarariki fanhead;²
 - b) an agreement that the parties would seek a determination from the Court regarding an extension for 10 Clem Elliot Drive, Matatā to the effective date of the prohibited activity rule NH R71 in PC17, from 31 March 2021 to 31 March 2022. This agreement was subject to an obligation of the owner and occupiers of 10 Clem Elliot Drive, Matatā to enter into a contract with the respondents which requires adherence by the occupiers of 10 Clem Elliot Drive to an early warning system based on Metservice weather warnings;
 - c) the appeal being otherwise resolved on a no costs basis.
- 1.10 Accordingly, the Court is not being asked to rule on the broad grounds of ARI's appeal. The only issue on which the parties seek the Court's determination is the appropriateness of an extension for 10 Clem Elliot Drive, Matatā to the effective date of the prohibited activity rule NH R71 in PC17, from 31 March 2021 to 31 March 2022.
- 1.11 While the Court is not generally seized of the issues raised by the ARI appeal, the District Council does wish to note, in passing, that the 29 July 2020 report of the Resource Management Review Panel "*New Directions for Resource Management in New Zealand*" makes a series of recommendations in relation to climate change adaptation and managed retreat. These recommendations included a proposed Managed Retreat and Climate Change Adaptation Act. This would establish an adaptation fund to enable central and local government to support necessary steps to address the effects of climate change and would also deal with the many complex legal and technical issues involved in the process of managed retreat. The District Council hopes that the experience and learnings of this

² 6 Clem Elliot, 10 Clem Elliot, and 18A Clem Elliot

process inform the development of a purpose-built legislative framework for managed retreat.

2. THE ISSUE FOR DETERMINATION

2.1 The District Council has prepared the following affidavit evidence in support of the request to extend the effective date for 10 Clem Elliot Drive, Matatā:

- a) a joint statement of planners Mr Batchelar and Mr Willis concerning the requirements of the Bay of Plenty Regional Policy Statement (**RPS**) to address high risk natural hazard areas;
- b) a statement of meteorologist Mr Blackwood in relation to the frequency with which Metservice rain warnings are likely to be issued between 15 December 2020 and 31 March 2022;
- c) a joint statement of natural hazard scientists Dr Davies and Dr Massey addressing the effectiveness of an Early Warning System (**EWS**) to reduce natural hazard risk for the occupants of 10 Clem Elliot Drive, Matatā until 31 March 2022.

2.2 Messrs Batchelar and Willis depose that the RPS requires natural hazard zones subject to high natural hazard risk to be reduced to medium risk (or lower if reasonably practicable). District Plans must give effect to this requirement. Based on expert advice on the presence of a high loss of life risk in the Awatarariki debris flow natural hazard zone, the need to reduce natural hazard risk is “immediate”. However, the only practicable way to reduce loss of life risk to an acceptable level is to move people out of harm’s way (managed retreat). The ability to meet the immediate need to reduce risk on the fanhead from high to medium has been tempered by the procedural requirements of the Plan Changes and VMR. The rationale for the 31 March 2021 date was therefore driven by the estimated timeframe for completion of these processes, including any appeals to the Environment Court, thus achieving the requirements of the RPS as soon as practicable.

2.3 However, further appeals to the High Court (and potentially Court of Appeal) have the very real potential to push out the effective date of the prohibited activity rule by at least 12 months. In circumstances where

landowners are resisting a regulatory requirement to vacate their residence, it is submitted to be likely that the Higher Courts would grant a stay of the effect of an Environment Court decision upholding the Plan Changes, with the result that residential activity (without any EWS) would continue on the fanhead for that period.

- 2.4 Messrs Batchelar and Willis depose that early resolution of the appeal with regard to properties other than 10 Clem Elliot Drive would shorten the timeframe for reducing risk. Accordingly, they concluded that a better overall risk reduction outcome could be achieved by agreeing to an extension of the effective date to 31 March 2022 for 10 Clem Elliot Drive, Matatā, subject to the requirement for an EWS. In the deponents' opinion the extent to which the RPS is given effect to by PC1 and PC17 is not materially affected by allowing for a 1 year sunset occupation of the Whalley property at 10 Clem Elliot Drive, provided an EWS is required.
- 2.5 Mr Blackwood's evidence addresses meteorological data around the Awatarariki catchment area. Noting that this is very difficult to predict, Mr Blackwood estimates the number of times the MetService rainfall threshold criteria for Severe Weather Warnings are likely to be exceeded between 15 December 2020 and 31 March 2022 is between 1 and 5 times.
- 2.6 The joint affidavit of Messrs Massey and Davies summarises the debris flow risk analysis for the Matatā fanhead and the assessment of the Whalleys' EWS as a response to that risk. The deponents then provide an assessment of the efficacy of the proposed EWS to address risk during the proposed extension of the effective date of the prohibited activity rule to 31 March 2022 for 10 Clem Elliot Drive, Matatā.
- 2.7 This discussion indicates that the risk to life from debris flow hazards is not reduced to zero if the proposed EWS is in place. This is because there is a possibility that a potential debris-flow triggering rainfall event is missed and thus no warning issued, and as a result the Whalleys do not evacuate. The probability that one of these missed events could be large enough to trigger a debris flow is not currently known but is likely to be relatively small. The risk reduction afforded by the proposed EWS could be up to an order of magnitude, thus reducing the risk at the Whalleys' dwelling from 10^{-3} (0.1%) to somewhere between 10^{-3} to 10^{-4} (0.1 to 0.01%).

- 2.8 While the requirement for an EWS would not reduce risk for 10 Clem Elliot Drive from high to medium, the system will have a degree of efficacy in reducing risk. In addition, the settlement will ensure that the prohibited activity rule comes into effect for several other properties on the fanhead on 31 March 2021. Having regard to the wider planning and legal context of this proceeding, it is submitted that the settlement reached with ARI is a reasonably efficient and effective outcome.
- 2.9 The District Council wishes to emphasise that the degree of efficacy of an EWS to reduce risk for one property on the fanhead for an additional year is not to be taken as an endorsement of an EWS as a longer term or broader scale use of this tool to reduce debris flow risk. The evidence of Messrs Massey and Davies is clear that an EWS would not achieve the necessary risk reduction in the longer term.

3. CONCLUSION

- 3.1 The amendments sought to the rules of PC17 to extend, for 10 Clem Elliot Drive, Matatā the effective date of the prohibited activity rule NH R71 in PC17 from 31 March 2021 to 31 March 2022 are annexed to the affidavit of Messrs Batchelar and Willis, and repeated as an **annexure** to these submissions.
- 3.2 The resolution of this proceeding will bring the journey of the communities affected by the 2005 Event one step closer to its end. The District Council wishes to express its thanks to all who have participated.

A Green / R Ashton

Counsel for the Whakatāne District Council

ANNEXURE - Requested Amendments to Plan Change 17 Rules

Rules

- NH R71** **Prohibited - Residential Activities subject to High Risk Debris Flow on the Awatarariki Fanhead at Matatā after 31 March 2021**
From 31 March 2021, the use of land for a residential activity is a prohibited activity on any property listed below in Table NH 3.
- NH R72** **Prohibited - Residential Activities subject to High Risk Debris Flow on the Awatarariki Fanhead at Matatā after 31 March 2022**
From 31 March 2022, the use of land for a residential activity is a prohibited activity on Allot 322 TN of Richmond (10 Clem Elliot Drive, Matatā)³.
- Glossary** **Meaning of “Residential Activity” and “Property”**
For the purposes of Rule R71
- “residential activity” shall mean the use of land or buildings by people for living accommodation whether permanent or temporary and includes, but is not limited to, any dwellings, apartments, boarding houses, hotels, hostels, motels, camping grounds, mobile homes, caravans, tents, and accommodation for seasonal workers.
 - “property” shall mean, as applicable to the context, the parcel of land described in Table NH 3 and shown with a yellow border on Figure NH1.

³ See Environment Court Determination XXXX 2020

Table NH 3

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