IN THE ENVIRONMENT COURT AUCKLAND	**ENV-2020-AKL-**
I MUA I TE KOOTI TAIAO O AOTEAROA TĀMAKI MAKAURAU ROHE	
IN THE MATTER	of an appeal under the 1st Schedule Resource Management Act 1991 (RMA)
BETWEEN	**AWATARARIKI RESIDENTS INCORPORATED** Appellant
AND	**BAY OF PLENTY REGIONAL COUNCIL** First Respondent
AND	**WHAKATANE DISTRICT COUNCIL** Second Respondent

Notice of Appeal against:

(a) Proposed Plan Change 17 to the Bay of Plenty Regional Natural Resources Plan
(b) Proposed Plan Change 1 to the Whakatane District Plan

Dated this 9th day of June 2020

Solicitor Acting
Richard Allen Law
Solicitors
PO Box 78326
Grey Lynn
Auckland
t: 09 361 0331
e:richard@richardallenlaw.co.nz

Counsel Acting
Rob Enright / Ruby Haazen
Level 2, 85 Albert St
Auckland
m: 021 276 5787
e: rob@publiclaw9.com
rghaazen@gmail.com

To: The Registrar
Environment Court
Auckland

1 Awatarariki Residents Incorporated (the **Society**) appeals against the following decisions:

(a) Decision by Bay of Plenty Regional Council to approve Proposed Plan Change 17 to the Bay of Plenty Regional Natural Resources Plan (**PC17**);

(b) Decision by Whakatane District Council to approve Proposed Plan Change 1 to the Whakatane District Plan (**PC 1**);

(c) These decisions were the subject of a joint hearing and a joint decision issued by Commissioners, subsequently approved by each Council under Clause 17 of Schedule 1 to the RMA.

2 The Society was a submitter and further submitter, on behalf of its members, to PC17 and PC1.

3 The Society is not a trade competitor for the purposes of s308D RMA.

4 The Society received notice of the joint decision on 1 April 2020. According to advice received from the Bay of Plenty Regional Council, the appeal period runs from the date that COVID19 Level 4 restrictions are lifted in the Bay of Plenty.

5 The decision on PC17 was made by the Regional Council. The decision on PC1 was made by the District Council.

6 The decisions appealed by the Society are identified by the Commissioner decision as follows:

Plan Change 17

[34] Proposed Plan Change 17 to the BOPRC Regional Natural Resources Plan was requested by WDC as a private plan change to address the existing use rights issue. PC17 inserts provisions for debris flow risk management on the Awatarariki Fanhead into the Natural Hazards chapter of the RNRP. It has provisions that will extinguish residential activity existing use rights for 21 listed properties in the High Risk Debris Flow Policy Area by making the use of land for a residential activity a prohibited activity from 31 March 2021. BOPRC has jurisdiction to make rules (including prohibited activity rules) because one of its functions under section 30(1)(c)(iv) of the RMA is to control the use of land for the purpose of avoiding or mitigating natural hazards. Section 10 of the RMA specifies that the protection of existing use rights does not extend to a land use that is controlled under section 30(1)(c).

[35] Counsel for WDC Andrew Green advised us that in his knowledge, this would be the first example of regional plan provisions being used in this way in New Zealand.

[36] Importantly, neither PC1 nor PC17 amend existing objectives and policies in the WDP or RNRP. Instead, the plans changes introduce supplementary provisions to better recognise and manage risk within the Awatarariki Fanhead. [Footnotes omitted]

Plan Change 1

[28] Proposed Plan Change 1 to the WDP delineates the Awatarariki Fanhead at Matatā as the Awatarariki Debris Flow Policy Area. The Policy Area is divided into 'high', 'medium' and 'low risk' areas. The high risk area is rezoned from Residential to Coastal Protection Zone, reflective of its limited development potential and future use and its relationship to the adjacent coastal reserve. Residential activity within the High Risk Debris Flow Policy Area is a Prohibited Activity, as are other activities except those relating to transitory recreational use of open space.

[30] The High Risk area contains 45 properties in total, of which 34 are in private ownership and 11 are owned by public entities. Of the 34 privately-owned properties, 16 contained dwellings and 18 were vacant sites or sites with unconsented structures.

[31] The Medium Risk Debris Flow Policy Area retains a Residential zoning. However, any new activities or intensification of existing activities are subject to a resource consent application, where natural hazard risk is assessed in deciding whether to grant or refuse consent and impose any necessary conditions.

[32] The Low Risk Debris Flow Area also retains a Residential zoning. The level of risk is identified in the WDP and Land Information Memoranda and will be taken into account in any resource consent application proposing to intensify activities. [Footnotes omitted]

7 The appellant appeals against the whole of each of the decisions of the Regional and District Council. Reasons for appeal and relief are set out below.

REASONS FOR APPEAL

General reasons for appeal against PC17 and PC1 (jointly "the decisions") are:

8 The relevant area is identified as:

(a) the Awatarariki fanhead at Matatā, with property descriptions listed in Table NH3 for properties identified as high risk (PC17);

(b) the Awatarariki Debris Flow Policy Area (high risk, medium risk, low risk) identified on Planning Maps 101A and 101B to the Whakatane District Plan (PC1);

(c) The Society has 32 members. All members are families that live permanently, have homes or own vacant land within the properties identified as "High Risk" and listed in Schedule NH3.

Validity and jurisdiction

9 Elements of PC17 and PC1 are unlawful and ultra vires Council's statutory functions and powers:

(a) There is no jurisdiction to remove existing use rights to occupy affected land, by using a plan change process to override s10 RMA; alternatively, there is no jurisdiction, absent a requirement for reasonable compensation;

(b) Section 85 RMA imposes a direct or indirect fetter on abuse of public power by the Regional and District Councils. Evicting people from their homes in March 2021, revoking lawful occupation and residential

activities under s10 RMA, without reasonable compensation, is an abuse of public power. It is contrary to public policy and the relevant wellbeings and values in s5 and Pt 2 RMA.

Part 2 RMA

10 The decisions on PC17 and PC1 do not promote sustainable management, community wellbeing and relevant principles in Part 2 RMA. Society members are directly and substantially affected by the obligations the plan changes impose on residential land, including the purported extinguishment of existing use rights.

Statutory framework

11 The decisions are inconsistent with the relevant statutory functions of the Regional and District Councils. PC17 and PC1 do not achieve integrated management because adverse impacts are disproportionate to risks being managed, and the manner in which risks are managed. Avoidance or mitigation of natural hazards anticipates lesser forms of hazard management than the controls set out in PC17 and PC1.

12 The decisions are not appropriate, efficient or effective in terms of the relevant statutory tests in s32 RMA, and do not implement the higher order instruments as anticipated by sections 63-68 and sections 72-76. In terms of cost-benefit, the principal costs are borne by members of the Society within areas identified as high risk. These costs (and the related adverse effects) are not avoided, remedied or mitigated by the proposed methods identified by the plan changes.

Section 85 RMA

13 The decisions are unreasonable in terms of s85 RMA and trigger relief under that provision (if one or both the plan changes are confirmed). Relevant provisions in PC17 and PC1 breach s85 RMA because the plan changes make the subject land owned by members of the Society:

(a) incapable of reasonable use; and

(b) place an unfair and unreasonable burden on the owners of that land.

Adverse effects

14 The decisions result in significant adverse effects by limiting or prohibiting residential activities in residential properties within the identified risk areas. These are significant impacts in terms of the wellbeings identified by s5 RMA. The voluntary managed retreat funding package does not avoid, remedy and mitigate adverse impacts on landowners represented by the Society.

15 All Society properties are zoned residential. Society members and their families have lived at Matata for a number of years. All Society properties were purchased prior to 2005. Some families have intergenerational history at Matata and have 2 or 3 generations living on site.

16 Society members were affected by the 2005 event in different ways. Some lost all or part of their homes; some were undamaged. Members stayed on their land and rebuilt their homes or built new homes with a 2006 Building Act decision, garages and landscaped their properties and gardens relying on assurances from the District Council that people could continue living at Matatā. Some Society members were refused later (2016) Building Act consents to build permanent structures. But they still use their land for holidays and other residential uses. There has been no change in risk profile. Instead the District Council has changed its view of what is acceptable risk.

Risk assessment

17 PC1 and PC17 are reliant on the quantitative risk assessment provided in support of the plan changes. There are flaws in the risk assessments, affecting their reliability and relevance. The assessment methodology has relied on incorrect inputs including but not limited to: an overly conservative or 'precautionary' approach not justified by the factual matrix, scale of risk assessment (whether inner property features are assessed or risk assessment is at zonal scale only), options for lesser forms of risk management that do not involve prohibiting or restricting residential activity (such as early warning systems or other management).

18 A zone-based risk regime is not mandated or encouraged by the relevant planning instruments.

19 The risk assessment is uncertain but the consequences to Society members and their families are both certain and unfounded. Prohibited status is a disproportionate response given difficulties with the risk assessments.

20 PC17 adopts Australian Geomechanics Standards[1], that include significant qualifiers as to relevance and application for existing use scenarios where sensitive users already occupy land identified as subject to potential hazard, and reasonably available alternative methods exist for hazard mitigation.

Alternatives assessment

21 PC17 and PC1 fail to address reasonably available alternative options with lesser impact on families represented by the Society.

Planning instruments

22 To the extent relevant, PC17 and PC1 do not give effect to the NZCPS. The decision wrongly relied on Objective 5 and Policy 25.

23 PC17 and PC1 do not give effect to the relevant provisions of the Regional Policy Statement including that:

[1] Journal and News of the Australian Geomechanics Society Volume 42 No 1 March 2007

(a) Allowance should be made for coastal residential activities enabled by the RPS, even if these inherently add to risk. Integrated management allows for residential activities in the coastal environment (with management of natural hazard risk).

(b) PC17 and PC1, in requiring that people and their communities avoid living in the subject properties at Matatā from 2021, is inappropriate and does not represent a reasonable response to the existing environment, and impact of climate change.

(c) To the extent that high risk is established (denied by the Society), an alternative means of risk avoidance or risk mitigation is appropriate. To the extent that properties in NH3 fall within a "high risk" area, then RPS Appendix M identifies a number of options for management of natural hazards including high risk areas.

(a) Other relevant provisions in the RPS that enable people and communities to reside in coastal environment with managed risk.

Alternatives

24 PC17 and PC1 do not allow for lesser interventions and alternatives such as:
(a) mitigation of hazard while enabling Society members to remain living in their homes;
(b) adopting an information-based approach to managing hazard risk;
(c) adopting an event-based approach (such as early warning systems) to managing hazard risk;
(d) Lesser alternatives exist that manage or mitigate the hypothetical risks, without removing existing use rights.

RELIEF SOUGHT

25 The Society seeks the following relief:

(1) As first preference, withdraw PC17 and PC1; or delete PC17 and PC1 under s85 RMA.

(2) As second preference, amend PC17 and PC1 to address the matters identified in this Appeal and relief sought in the Society's submissions, including the general and specific relief identified in the submissions. Without limiting that relief, amend the identification of high risk properties and ensure that residential activity may lawfully continue in properties identified as high risk.

(3) In addition to (1) and (2):

(a) if PC1 is confirmed so that existing or future residential activities have prohibited status (or require resource consent) from 31 March 2021 (or any other relevant date) then a direction under s85 RMA that the relevant Council acquire each of the properties

listed as high risk under the Public Works Act 1981, subject to the written consent of each individual property owner or person with an estate or interest in the relevant land; and/or

(b) If PC17 is confirmed so that existing or future residential activities have prohibited status (or require resource consent) from 31 March 2021 (or any other relevant date) then a direction under s85 RMA that the relevant Council acquire each of the properties listed as high risk under the Public Works Act 1981, subject to the written consent of each individual property owner or person with an estate or interest in the relevant land.

(4) Consequential or other relief.

DATED this 9th day of June 2020

……..
Rob Enright/Ruby Haazen
Counsel for Appellant

ATTACHMENTS
Decisions of consent authorities;
Submission and further submission by Society;
Names and addresses of persons to be served with this Appeal;
Parties served with a copy of this notice of appeal will not be served with the attachments, and may obtain a copy from the Appellant on request.

Address for Service

Solicitor:
Richard Allen
PO Box 78326
Grey Lynn
Auckland
E: richard@richardallenlaw.co.nz
Ph: 09 361 0331

With copy to:

Counsel by email to Rob Enright at rob@publiclaw9.com and Ruby Haazen at rghaazen@gmail.com

Advice to recipients of copy of notice of appeal

How to become party to proceedings:
You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal. To become a party to the appeal, you must:

- Within 15 working days after the period for lodging a notice of appeal ends, lodges a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
- Within 20 working days after the period for lodging a notice of appeal ends, serve copies of your notice on all other parties.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (see form 38).

How to obtain copies of documents relating to appeal:
The copy of this notice served on you does not attach a copy of the appellant's submission or the decision (or part of the decision) appealed. These documents may be obtained, on request, from the appellant.