IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of

Proposed Plan Change 1 to the Whakatāne District Plan

Proposed Plan Change 17 to the Bay of Plenty Regional Natural Resources Plan

REPORT AND DECISIONS OF THE HEARING COMMISSIONERS

26 March 2020

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1.0 INTRODUCTION

[1] On 19 June 2018 the Whakatāne District Council (WDC) notified Plan Change 1 – Awatarariki Fanhead, Matatā (PC1) to the Operative Whakatāne District Plan (WDP) and the Bay of Plenty Regional Council (BOPRC) notified Plan Change 17 – Awatarariki Fanhead, Matatā (PC17) to the operative Regional Natural Resources Plan (RNRP).

[2] PC17 is a private plan change request from the WDC.

1.1 Appointment of hearing commissioners

[3] The WDC and the BOPRC, both acting under s34A of the RMA, appointed us the undersigned, as hearing commissioners to hear and determine the submissions on PC1 and PC17. The Councils also delegated to us all their functions under sections 37 and 41D of the RMA. Both Councils reserved unto themselves the authority to approve the proposed plan changes pursuant to Clause 17 of Schedule 1 to the RMA.[1]

[4] For the avoidance of doubt, we affirm that throughout the performance of our duties we have been entirely independent and objective in considering and making determinations on the submissions.

1.2 Hearing of submissions

[5] A total of eight submissions[2] and four further submissions were received on PC1. A total of eight submissions[3] and two further submissions were received on PC17.

[6] We received a combined report[4] under section 42A of the RMA on PC1 and PC7 and the submissions on them. Expert evidence from WDC (as proposer of the plan changes) was circulated prior to the hearing in accordance with a procedural Minute that we issued. We conducted public hearings in Whakatāne from 2 to 4 March 2020 for the submitters who wished to be heard.

[7] We undertook a site visit on 2 March 2020 accompanied by Charles Harley, BOPRC Team Leader, Eastern Catchments. We flew around the upper Awatarariki Stream catchment and over the Awatarariki Fanhead debris zones by helicopter. We also drove around the streets within the Awatarariki Fanhead debris zones, viewing the Awatarariki Stream, houses that remained and sections where houses had been removed. At the owner's invitation, we walked around the house and section at 10 Clem Elliot Drive.

[8] Prior to the hearings, we posed written questions to WDC witnesses to enhance our understanding of the plan changes, the submitter requests and the grounds for them, and the advice given in the Section 42A Report. Written answers were provided to those questions on 26 February 2020 along with the WDC's opening legal submissions. We received the WDC

[1] Terms of Reference, Awatarariki Plan Change Hearing Panel, Bay of Plenty Regional Council, Whakatāne District Council, August 2019.
[2] The submission from Glen Baker was received one day late and under delegated authority we have waived compliance with the deadline for lodging submissions for that submitter. In other words, the late submission is accepted.
[3] The submission and further submission from Mark and Greta Nicholson were subsequently withdrawn.
[4] Proposed Plan Change 1 to the Whakatāne District Plan & Proposed Plan Change 17 to the Bay of Plenty Regional Natural Resources Plan, Awatarariki Stream Debris Flow Risk Management, s.42A Planning Report on Submissions and Further Submissions, John Olliver, 20 December 2019.

closing or Reply submissions on 17 March 2020, together with submissions from Mary Hill, counsel for BOPRC.

[9] We endeavoured to conduct the hearings with a minimum of formality to an extent that allowed for fairness to all submitters. An audio recording of the proceedings was made available on the WDC webpage as the hearing proceeded. Following the completion of the public hearings, we deliberated on the matters raised in the submissions, made decisions on them and prepared this Decision.

1.3 Our approach to this Decision

[10] In the main body of this Decision we firstly set out the background to the plan changes; discuss the voluntary managed retreat programme; state in narrative form our findings about the law and superior instruments applicable to the process; discuss iwi cultural values and interests; discuss key technical matters, and thereafter address issues raised by submitters.

[11] As noted earlier we received a combined Section 42A Report which was authored by planner John Olliver, a director of Bloxam Burnett & Olliver Limited. We also received comprehensive planning evidence from Craig Batchelar, a planner and partner at Boffa Miskell Limited.[5] Both planners recommended minor amendments to PC1.

[12] To avoid unnecessary repetition, as provided for by section 113(3)(b) of the RMA, we adopt the 'summary of decisions sought' for each submitter that is set out in section 5 of the Section 42A Report.

[13] In Appendix A of this Decision we set out our decisions on the submissions. We also set out our reasons for those decisions. Again, to avoid unnecessary repetition and as provided for in section 113(3)(a) of the RMA, we do that by cross-referring to the Section 42A Report author's 'Response' and 'Reasoning' text (set out in section 5 of the Section 42A Report) and also to sections of this Decision.

[14] As a result, our Appendix A (comprising only 2 pages) is relatively short compared to similar schedules contained in other plan change decisions that readers may be familiar with.

[15] A consequence of our approach is that section 5 of the Section 42A Report **must** be read as forming part of this Decision.

1.4 Protection of sensitive information

[16] As requested by counsel for Awatarariki Residents Incorporated (ARI), pursuant to section 42(1)(b) of the RMA, we made an Order prohibiting or restricting the publication or communication of the document tabled by ARI that formed Appendix D (titled "Affidavit of Richard Vivian March Allen on Behalf of Awatarariki Residents Society Inc Sworn 19th December 2019") to the "Statement of Evidence of Rick Whalley, Rachel Whalley and Pamela Whalley on Behalf of the Awatarariki Residents Society Inc dated 5 March 2020."

[17] The Order commenced on 4 March 2020 and in conformance with section 42(3)(b) of the RMA it will cease to have any effect at the conclusion of these proceedings.

[5] Mr Batchelar has advised WDC on planning issues at Matatā since 2005, shortly after the debris flow events in May 2005.

2.0 BACKGROUND TO THE PLAN CHANGES

[18] The background to the plan changes is comprehensively discussed in the Section 32 Report,[6] the Section 42A Report and the evidence of the WDC witnesses, particularly that of Jeffrey Farrell, the Manager Strategic Projects at the WDC. We briefly summarise our understanding of this background below.

[19] On 18 May 2005 a storm triggered a debris flow[7] of about 300,000m^3 in the small and steep Awatarariki Stream catchment at Matatā, causing significant damage[8] to land, buildings, and road and rail infrastructure on the Awatarariki Fanhead.[9] Fortunately, there were no fatalities. The return period of the storm was initially thought to be around 200 to 500 years, [10] but a recent updated meteorological report that takes into account climate change has determined that by the turn of the century a storm of the same magnitude as the 2005 event could have a return period of between 40 to 80 years.[11] Debris flows can be expected to occur as a result of any future storm known to be capable of generating them.[12] The risk of a further debris flow at Matatā is therefore both significant and as certain as any natural phenomenon can be. We note that there is also irrefutable evidence of previous debris flows having occurred at Matatā.[13]

[20] The WDC undertook investigations to understand the cause of the 2005 debris flow and identify potential mitigation options (including retreat, debris dams in the catchment, and flood channels on the Fanhead). The investigations identified that the debris flow resulted from many slope failures triggered by the rainfall which caused landslides to fall into already flooded stream channels.[14]

[21] In 2005 a debris dam and debris flood channel were initially the WDC's preferred mitigation options. However, by 2009 community feedback had resulted in the preferred engineering design being a flexible ring net in the upper catchment with deflection bunds and raised building platforms on the Fanhead.[15]

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[6] Planning Provisions for Debris Flow Risk Management on the Awatarariki Fanhead, Matatā, Section 32 Evaluation Report Prepared for Whakatāne District Council, 8 June 2018.

[7] A debris flow occurs when enough fine sediment enters a steep stream (e.g. from a hillslope failure) to turn the stream flow into a thick, muddy slurry; in this state the flow is able to erode and transport rocks and boulders of virtually any size. The whole flow transforms into the consistency and density of wet concrete and moves down-valley as a wave or surge carrying boulders and trees. EIC Dr Tim Davies, paragraph 7.3.

[8] A total of 27 homes were destroyed, 87 other properties were damaged, and major transport links were cut, resulting in an estimated $20 million in damage.

[9] The Fanhead comprises an area of approximately 7 ha, with the Awatarariki Stream flowing through or across the Fanhead to a sediment basin and then to Matatā Lagoon. EIC, Dr Christopher Phillips, paragraph 6.4.

[10] The concept of a 200 or 500 year return period implies that the event, if it occurs at all, will only occur a long time in the future. This is not correct. In his written answers to our questions Mr Hind told us that there is a 10% chance that a 200 year return period event will occur within a 20 year timeframe and a 4% chance that a 500 year return period event will occur within that same 20 year timeframe. In addition, a 200 year return period does not mean that the event is certain to occur within a 200 year span. Mr Bassett told us verbally that the statistical probability of an event with a 200 year return period occurring within 200 years is 63%. Mr Basset also confirmed that assessments of probability are constantly updated as data accumulates. Thus, the probability of an extreme event occurring will likely be reduced when and if it does actually occur.

[11] EIC, Peter Blackwood, paragraph 1.3.

[12] EIC Dr Tim Davies, paragraph 7.10.

[13] EIC, Dr Maurice McSaveney, paragraph 13.1 and 13.7.

[14] EIC, Dr Maurice McSaveney, paragraph 6.1.

[15] The initial concept was for the ring net barrier to detain approximately half of the debris volume anticipated in a 2005-equivalent event and for the remainder to be delivered to the Fanhead via a spillway. The debris would then be directed away from the residential area through the use of earth barriers or bunds. Design subsequently moved towards a full containment option using a larger ring net barrier. EIC, Kevin Hind, paragraphs 1.2 and 1.4.

[22] A 2006 Building Act Determination overturned a WDC proposal to prevent people returning to the Fanhead and repairing or replacing their damaged homes. Six property owners subsequently rebuilt or replaced their dwellings between 2007 and 2011.[16]

[23] Following an independent review in June 2012[17] of the cost, durability and stability of the ring net structure, it was recommended that WDC take no further action to implement the debris flow control system. Instead, in December 2012 WDC resolved to pursue non-structural planning-based options. Fanhead options were included in a community consultation document issued in February 2014.[18] However, that work was put on hold until new natural hazard policies in the Bay of Plenty Regional Policy Statement (RPS) became operative in 2016.

[24] Meanwhile, in 2015 WDC commissioned a hazard and risk assessment[19] for debris flows on the Fanhead which identified the risk to life and property on parts of the Fanhead encompassing 45 properties as being "High".

[25] In July 2016 a second Determination issued by the Ministry of Business, Innovation and Employment concluded that because a high probability for loss of life existed and, as risk reduction building mitigation options were not viable, the WDC acting as a BCA was correct to refuse to issue a waiver from the building code for two building consent applications for new dwellings within the High Risk area of the Awatarariki Fanhead. In lay terms we understand that the Determination acknowledged the risk to life safety was high and that houses should not be permitted to be built there.[20] It was effectively a test case.

[26] In the meantime, a Consensus Development Group formed by WDC in 2015 resulted in the Awatarariki Debris Flow Risk Management Programme (Risk Management Programme), which promoted multiple work streams to manage the loss-of-life and property damage risk from future debris flows within the Awatarariki Stream catchment. The Risk Management Programme identified 'voluntary managed retreat' as the most effective measure to reduce risk.[21] Managed retreat incentivises owners of properties in a natural hazard area that has been assessed as having an unacceptable loss-of-life risk, and for which no viable risk mitigation options exist, to relocate out of harm's way.

[27] In July 2019 Central Government (specifically the Minister of Local Government) confirmed up to $5.019 million of financial assistance towards managed retreat at Matatā. That equated to a one third-share of the $15.058 million total cost of managed retreat, with the other two shares being provided equally by WDC and BOPRC. The size of the funding package was based on property valuations initiated by WDC in 2016 and updated in 2018 to account for likely property market movements out to July 2019. We discuss this further in section 4 of this Decision.

[16] EIC, Jeffrey Farrell, paragraph 1.4.
[17] Alan Bickers (Jayal Enterprises) – *Review of Awatarariki Catchment Debris Control Project*, June 2012
[18] Draft Awatarariki Fanhead Strategy Issues and Options, February 2014.
[19] The assessment was peer reviewed by independent debris flow experts from GHD, GNS Science, and the University of Canterbury. Later, as part of a Building Act determination, a further independent expert peer review was commissioned by the Ministry of Business, Innovation and Employment.
[20] EIC Farrell, paragraphs 5.29 to 5.36.
[21] Based on a Multi Criteria Analysis of five options: Status quo, Managed voluntary retreat – dwellings only, Managed voluntary retreat – 300,000 m^3 debris flow, Managed voluntary retreat – 450,000 m^3 debris flow, and Compulsory retreat. EIC, Dr Ganesh Nana.

3.0 SUMMARY OF THE PLAN CHANGES

[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.

[29] The location of the high (pink), medium (orange) and low (yellow) risk areas are shown below.

[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.[22]

[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.[23]

[22] EIC, Jeffrey Farrell, paragraph 1.10.
[23] EIC Craig Batchelar, paragraphs 10.4 and 10.5.

[33] Because of existing use rights that arise under section 10 of the RMA, changes to the WDP are only effective in managing new development or redevelopment in the Awatarariki Debris Flow Policy Area.[24] RMA section 10 means that owners of existing residential dwellings, for instance, can continue to use those dwellings, so long as the effects of that use are the same or similar in character, intensity and scale to the effects when the rules in PC1 have taken effect.

[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[25] that will extinguish residential activity existing use rights for 21 listed properties[26] in the High Risk Debris Flow Policy Area[27] 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.[28] 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).[29]

[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.[30]

[36] Importantly, neither PC1 nor PC17 amend existing objectives and policies in the WDP or RNRP. Instead, the plans changes introduce supplementary provisions[31] to better recognise and manage risk within the Awatarariki Fanhead.

4.0 VOLUNTARY MANAGED RETREAT PROGRAMME AND FUNDING PACKAGE

[37] The voluntary retreat programme applies to properties located in the High Risk Debris Flow Policy Area. The 'voluntary managed retreat' funding package enables property owners who wish to participate in the voluntary managed retreat programme to sell their properties at an assessed 2019[32] baseline market value that is not discounted to reflect either the debris flow hazard or the plan changes.[33] The property owner can then relocate to a safer location. A property owner can seek their own independent valuation and if that is significantly higher than WDC's valuation,[34] then the respective valuers meet in a without prejudice, non-binding, facilitated mediation process in an endeavour to resolve the valuation differences and reach

[24] Refer *McKinlay v Timaru DC* (2001) 7 ELRNZ 116.
[25] One objective, three policies and one prohibited activity rule.
[26] PC17 Table NH3.
[27] PC17 contains Table NH3 which lists 18 lots in Clem Elliot Drive, Richmond Street, Pioneer Place and Arawa Street.
[28] Confirmed by the Court of Appeal in *Canterbury Regional Council v Banks Peninsula District Council* CA99/95.
[29] Interestingly, undeveloped or vacant properties in the Awatarariki High Risk Debris Flow Policy Area have no existing use rights and because of the MBIE Determination 2016/034, irrespective of what the District Plan says, they have no useable development rights either and, in reality, have a nominal value only. EIC, John Reid, paragraph 6.2.
[30] Responses to Legal Questions from the Hearing Panel, 2 March 2020, paragraph 1.3.
[31] PC17 introduces one new objective in the RNRP while PC1 introduces no new objectives in the WDP.
[32] For the 31 privately owned properties. EIC, Shayne Donovan-Grammer, paragraph 5.4.
[33] The baseline value includes an allowance for the owner's legal fees for the sale of their existing property and purchase of a replacement property (if applicable) and a relocation allowance if the property is the owner's primary place of residence. EIC, Greg Ball, paragraph 3.3; EIC Alastair Pratt. Paragraph 5.4.
[34] Valuations of 45 properties in High Debris Flow Policy Risk Area were undertaken by valuation staff at TelferYoung (Tauranga) Ltd and subsequently peer reviewed firstly by consultant valuer Alastair Pratt of TelferYoung (Tauranga) Ltd and secondly by independent valuer John Reid of Added Valuation Ltd.

mutual agreement on a fair base value.[35] If mediation does not resolve the matter then an arbitration[36] process can occur.[37]

[38] Property owners are not required to contribute to the costs of the WDC's valuation process and those valuations have not been discounted to reflect the absence of real estate agents' fees for the sale of the property.[38]

[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.[39] 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.[40]

[40] The 'voluntary managed retreat' funding package was not confirmed when the plan changes were notified and it is evident that this lack of certainty was of understandable concern to submitters in opposition.

[41] WDC's opening legal submissions noted that as at 26 February 2020, thirty two of the 34 properties in the High Debris Flow Policy Area had entered the voluntary managed retreat programme. Thirteen properties had been purchased and a further four properties had unconditional sale and purchase agreements in place. Nine of those seventeen properties contain dwellings. Another fourteen property owners were considering acquisition offers.

[42] We note that one of the properties in the programme is the subject of an application for a Māori Reservation under Part 17 of Te Ture Whenua Māori Act 1993. Such a reservation would be consistent with PC1's land use provisions in the High Debris Flow Risk Area.

[43] We understand that the Crown's funding contribution to the 'voluntary managed retreat' funding package terminates on 30 June 2020. Jeffrey Farrell advised[41] that the WDC has no managed retreat funding in its LTP for the 2020/21 year and the final date for property owners to accept acquisition offers is 31 May 2020.

[44] Craig Batchelar made the important point that despite the voluntary managed retreat programme, the risk of future debris flows still needs to be managed through regulatory measures because there may be incomplete take up of voluntary managed retreat (within the High Debris Flow Policy Area) and risk will remain in areas affected by debris flows in the Medium Debris Flow Policy Area.[42]

[35] EIC, Greg Ball, paragraph 3.7

[36] By reference to a third valuer appointed by the President of the New Zealand Institute of Valuers. The decision of the third valuer becomes the updated baseline market value used in a revised acquisition offer to the respective property owner. EIC, John Reid, paragraph 1.2.

[37] EIC, Shayne Donovan-Grammer, paragraph 5.14.

[38] EIC, John Reid, paragraph 7.2.

[39] Responses to Legal Questions from the Hearing Panel, 2 March 2020, paragraph 1.22; Closing submissions on behalf of Whakatāne District Council, section 4.

[40] Ibid, paragraph 1.23.

[41] Affidavit of Jeffrey Robert Farrell on behalf of Whakatane District Council, 16 March 2020.

[42] EIC Craig Batchelar, paragraph 9.11.

5.0 STATUTORY FRAMEWORK

[45] We now address the statutory framework relevant to our assessment of the submissions on the plan changes.

5.1 RMA provisions

[46] The statutory frameworks for the consideration of PC17 and PC1 are largely identical. Both must be prepared in accordance with the statutory functions of the respective authorities,[43] Part 2 of the Act and the obligation to have particular regard to an evaluation report prepared in accordance with Section 32.[44] Similarly, both must take into account any relevant planning document recognised by an iwi authority.[45] Lastly, both must give effect to any national policy statement[46], any New Zealand Coastal Policy Statement[47], any national planning standard[48] and any regional policy statement.[49]

[47] One unique feature is that a district plan must not be inconsistent with a regional plan for any matter specified in Section 30(1).[50] Accordingly, PC1 must not be inconsistent with PC17.

5.2 National policy statements and regulations

[48] The Section 42A Report author advised that there are currently no national policy statements or environmental standards that are directly relevant to the plan changes, other than the New Zealand Coastal Policy Statement (NZCPS). We received no evidence to the contrary and we are not aware of any other relevant documents in these categories.

[49] The Awatarariki Fanhead is within the coastal environment as denoted in Appendix I (Map 25) of the RPS. While a debris flow is not a coastal hazard *per se*, so as to make NZCPS objectives and policies related to coastal hazards binding on the outcome here, we note that the plan changes are consistent with the intent underlying NZCPS Objective 5 and Policy 25 which respectively read:

> Objective 5
> To ensure that coastal hazard risks taking account of climate change, are managed by:
> - locating new development away from areas prone to such risks;
> - considering responses, including managed retreat, for existing development in this situation; and
> - protecting or restoring natural defences to coastal hazards
>
> Policy 25: Subdivision, use and development in areas of coastal hazard risk
> In areas potentially affected by coastal hazards over at least the next 100 years:
> a. avoid increasing the risk of social, environmental and economic harm from coastal hazards;

[43] Section 30 in relation to BOPRC and section 31 in relation to WDC, although the relevant statutory function is largely the same in both cases: "*the control of the use of land for the purpose of …" the avoidance or mitigation of natural hazards" (BOPRC)* and "*the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of … the avoidance or mitigation of natural hazards" (WDC).*
[44] Section 66(1) and section 74(1) respectively
[45] Section 66(2A)(a) and section 74(2A) respectively.
[46] Section 67(3)(a) and section 75(3)(a) respectively.
[47] Section 67(3)(b) and section 75(3)(b) respectively.
[48] Section 67(3)(ba) and section 75(3)(ba) respectively.
[49] Section 67(3)(c) and section 75(3)(d) respectively.
[50] Section 75(4)(b).

b. avoid redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards;
c. encourage redevelopment, or change in land use, where that would reduce the risk of adverse effects from coastal hazards, including managed retreat by relocation or removal of existing structures or their abandonment in extreme circumstances, and designing for relocatability or recoverability from hazard events;
d. encourage the location of infrastructure away from areas of hazard risk where practicable;
e. discourage hard protection structures and promote the use of alternatives to them, including natural defences…'

[50] In particular we note NZCPS Objective 5 (bullet 2) and Policy 25(c) which specifically refer to managed retreat.

5.3 RPS provisions

[51] As noted above, section 75(3)(c) of the RMA requires a district plan to give effect to the RPS. Similarly, section 67(3)(c) requires a regional plan to give effect to any RPS. The Bay of Plenty RPS contains comprehensive provisions on natural hazards. The provisions take a risk-based approach intended to ensure that risk is considered, recognising that risk can generally be managed, while hazards generally cannot be managed.[51]

[52] The RPS provisions were discussed by the Section 42A Report author and by WDC planning experts Craig Batchelar and Gerard Willis, Director of planning consultancy Enfocus Limited. We have had regard to those helpful assessments.

[53] The sole RPS natural hazard objective (Objective 31) is "*Avoidance or mitigation of natural hazards by managing risk for people's safety and the protection of property and lifeline utilities*." In this case we find that the plan changes give effect to that objective. The debris flow natural hazard risk to residents is avoided in the High Risk Debris Flow Policy Area (residential use being prohibited there) and mitigated elsewhere.

[54] There are 14 policies relating directly to natural hazards (NH1 – NH14). We consider the more relevant ones below.

[55] On its face Policy NH14C assigns the responsibility for developing natural hazard land use control rules to the WDC so there is no issue with PC1. Regarding PC17, importantly, a footnote (or advice note) to Policy NH14C Table 12a states "*The allocation of responsibilities under this policy does not remove the right of the Regional Council to exercise its functions and powers in that regard. Should it choose to do so, any such provisions will be subject to a plan or plan change process under Schedule 1 to the Act*." We find that PC17 is consistent with that text, given that it is being considered in a RMA First Schedule process.

[56] In that regard we note the end of hearing submissions of Mary Hill who submitted that the insertion of the footnote to Table 12a was not an afterthought. She went on to say that the RPS acknowledges the ability of BOPRC to control land use for the avoidance or mitigation of natural hazards by overriding existing use rights and confirms that the allocation of responsibilities under RPS Policy NH14C does not remove that power. Notably, the RPS recognises that the

[51] EIC Gerard Willis, Appendix 2, page 4.

exercise of that power should be through a plan change process, which is what has occurred through PC17.[52]

[57] We accept those submissions.

[58] However, returning to Policy NH14C, we consider its purpose is clearly to comply with section 62(1)(i) of the RMA, which directs that regional policy statements must identify the local authority with responsibility for specifying the objectives, policies, and methods for the control of the use of land, among other things, "*to avoid or mitigate natural hazards*". The RMA does not appear to envisage the situation in this case where the RPS assigns responsibility to one local authority, but reserves the ability of the other local authority to exercise its statutory functions.

[59] We see no clear reason why a RPS cannot do this, so we therefore agree with Gerard Willis that the 'door is left open' for the RNRP to manage risk to an existing use. However, we think it follows that in such a situation BOPRC is not required to implement the RPS in this manner. Rather, it is exercising an independent statutory function where that is the most effective and efficient planning response (as we find is the case here).[53]

[60] Policy NH7A(d)(i) requires debris flow risks to be mapped which is what PC1 does by delineating the Awatarariki Debris Flow Policy Area on WDP maps. Policy NH8A requires risks to be classified as either High, Medium or Low in accordance with Appendix L. That Appendix refers to a *"recognised risk assessment methodology including in a regional, city or district plan."* We note that the 'User Guide' that supports (but is not part of) the RPS refers to AGS 2007 as an acceptable alternative risk assessment methodology.

[61] We discussed with Ms Hill whether when it refers to a *"regional, city or district plan",* Appendix L means an operative plan in each case, consistent with section 43AA of the RMA. Ms Hill helpfully drew our attention to a provision in the definition section of the RPS that implies terms defined in the RMA are intended to be read with that meaning. As Ms Hill pointed out, however, definitions in the RMA (including we note those in section 43AA) are prefaced with the qualifier, *"unless the context requires another meaning."* Both she and Mr Green argued that the context in this case requires adoption of another meaning that would include proposed plans.

[62] Mr Green submitted[54] that the reference in Appendix L to a *"city plan"* implies that the definition in the RMA does not apply, since that is not a term defined (nor, we note, used) in the RMA. He also pointed out that the alternative of a methodology *"recognised in the consideration of a resource consent"* would involve contemporaneous consideration both of the methodology and its application, suggesting that a sequential approach would not have been intended in a plan setting.[55]

[63] In her closing response, Ms Hill provided us with background to this aspect of Appendix L.[56] The reference to plans was a response to a joint district council submission on the RPS seeking a more robust process for identifying an alternative risk assessment methodology (to the default

[52] Response by Counsel for Bay of Plenty Regional Council in relation to Issues Arising concerning Plan Change 17, 17 March 2020, paragraphs 33 and 34.
[53] EIC Gerard Willis, paragraph 6.6 and his Appendix 2, page 8.
[54] Closing Submissions on Behalf of Whakatāne District Council, para 7.4.
[55] Mr Willis also gave evidence that a sequential approach would be both inefficient and less beneficial to stakeholders.
[56] Response by Counsel for Bay of Plenty Regional Council in relation to Issues Arising concerning Plan Change 17, 17 March 2020, paras 11-16

in Appendix L) than approval by the CEO of BOPRC (the notified position). While the submission was accepted, we regard that background as equivocal since it gives no clear indication of just how robust the process needs to be: whether, for instance, initial evaluation and acceptance by Council is sufficient, or whether the First Schedule process must run its course.

[64] While Mr Green is correct, and reference to a *"city plan"* implies a less strict approach to the use of RMA terms, we regard that as equivocal too. A contextual approach might require reference to the operative *"city plan"*.

[65] Given the contextual indicators are unclear, we consider it is safer to proceed on the basis that the RPS should be interpreted in line with the statutory definition, and accordingly, that it does not provide for use of the AGS 2007 methodology yet. Accordingly, the policies relying on risk assessment as the basis for direction are not binding on us.

[66] However, that is not the end of the matter. Dr Massey told us that the AGS 2007 methodology should give the same assessment of risk if the same expert is using both it and Appendix L, which supports the view of the Section 42A Report author[57] that AGS 2007 is an appropriate risk management methodology to apply in this case, regardless of whether or not it is referred to in Appendix L. We discuss AGS 2007 further in section 8.2 of this Decision.

[67] Policy NH2B requires natural hazard risks to be classified as High, Medium or Low which is what PC1 does within the Awatarariki Debris Flow Policy Area. PC17 similarly refers to the High Risk Debris Flow area, but provides additional certainty by individually listing the properties affected by prohibited activity Rule NH R71.

[68] Importantly, as noted by counsel for WDC, Policy NH3B is directive[58] in that it requires district and regional plans to "achieve" a reduction of High natural hazard risks in natural hazard zones to Medium (and lower if reasonably practicable); Medium risks are to be reduced to be as low as reasonably practicable; and Low hazards are to be kept Low. That is precisely what PC1 and PC17 do. Policy NH11B requires the effects of climate change to be incorporated into risk assessments. As noted above, the updated meteorological report that takes into account climate change places the 2005 debris flow causing storm's return period at between 40 to 80 years by the turn of the century.

[69] Policy NH12A is particularly relevant, albeit as a "broad directive policy" that requires councils to work with their communities, iwi authorities, and other affected stakeholders to find the most appropriate way to give effect to a policy. It requires Policy HN3B to be 'promoted' through plans taking into account natural hazard risk reduction measures including, where practicable, to existing land use activities, and where necessary, by controlling the location, scale and density of the subdivision, use, development and protection of land and land use change in city, district and regional plans.

[70] On its face, this is somewhat less directive than Policy HN3B. We asked Mr Batchelar about any implications we should draw from the difference in language. In our view this is potentially important given the direction in the Supreme Court's decision in *EDS v The King Salmon Company Ltd*[59] that careful attention needs to be paid as to how policies are expressed. Mr Batchelar considered that while less directive, Policy NH12A needed to be read in the light of the outcome sought in Policy HN3B. We find that, arguably, Policy HN12A(a) provides more

[57] Supplementary s42APlanning Report, John Olliver, 4 March 2020, paragraph 10.
[58] Responses to Legal Questions from the Hearing Panel, 2 March 2020, paragraph 1.5(a).
[59] [2014] 1 NZLR 593 at [129].

flexibility of action than Policy HN3A might on the face of the matter suggest, but that flexibility needs to be read taking account of Policy HN12A(c) that requires that regional, city and district plan provisions *"provide a high degree of certainty for the establishing and maintaining of essential risk reduction works and other measures."* The management retreat program is not a *"work"*, but it is another measure for this purpose.

[71] In summary, while not binding on us for the reasons discussed above, the RPS provides a clear policy intention, to which in our view, we should ascribe considerable weight.

[72] One submitter addressed the RPS provisions and for the sake of continuity we discuss that here instead of in section 8 of this Decision.

[73] Counsel for the Awatarariki Residents Incorporated (ARI) submitted that the RPS provisions do not mandate hazard risk assessment to be undertaken at a spatial scale requiring equal treatment of all properties identified as high risk. In essence, the thrust of those submissions was to support a planning approach whereby because of the topography and characteristics of the area around a house, together with the characteristics of the house itself (namely whether it was a single or double story house), that house might remain suitable for residential occupation and use despite being situated within the PC1 High Risk Debris Flow Policy Area. If adopted, such an approach might enable some of the ARI members to remain in their homes that are still located within the High Risk Debris Flow Policy Area.

[74] We reject those submissions.

[75] In our view the "Natural Hazard Policies" section of the RPS clearly mandates a 'zone' based approach to natural hazard risk assessment and planning. Counsel for ARI relied in particular on RPS Policies NH3B and NH8A to support his alternative 'individual dwelling' risk management approach.

[76] We agree that Policy NH3B is one of the most salient provisions. However, the explanation to Policy NH3B states (our emphasis):

> "The policy uses the term "natural hazards zone". That term is defined in Appendix A – Definitions. It requires risk to be considered over a broad spatial context that extends beyond the site of a single development or land use. The concept of a natural hazard zone is important as a means of managing cumulative risk over time. It is also important for understanding existing natural hazard risk that may already be faced by a community or group of activities."

[77] Furthermore, Policy NH8A is to (our emphasis) "*Assess natural hazard by: (a) Defining natural hazard zones with hazard susceptibility areas ….*".

[78] Even if counsel for ARI is correct and a plausible interpretation of the RPS could enable individual dwellings within the PC1 High Risk Debris Flow Policy Area to remain available for residential occupation, we reject such a proposition on its merits.

[79] Counsel for ARI did not call any technical evidence. However as noted in WDC's Reply submissions,[60] Professor Tim Davies (Professor in the School of Earth and Environment, University of Canterbury) and Dr Maurice McSaveney (Emeritus Scientist at GNS Sciences and Visiting Professor at the State Key Laboratory of Geohazard prevention and Geoenvironmental protection, Chengdu University of Technology, Chengdu, China) called by WDC addressed the

[60] Closing Submission on behalf of Whakatane District Council, 17 March 2020, paragraph 12.6.

behaviour of debris flows and the characteristics of individual dwellings. Their evidence was that topography has a limited impact on the distribution of debris on the Fanhead, boulders on properties may provide more material for the debris flow rather than materially impeding its flow, and it cannot be guaranteed that the next debris flow event will behave the same as the previous one.

[80] We accept that expert technical evidence.

[81] Counsel for ARI also did not call any planning evidence. However, the option of an 'individual dwelling' risk assessment was helpfully addressed in the planning evidence of Gerard Willis who was called by the WDC. Mr Willis stated:[61]

> "Risk is something that applies at all scales but by simply focusing on the individual property scale, the potential exists for cumulative effect on community well-being, services and infrastructure to be over-looked.
>
> Risk assessment of each individual property would be burdensome and focus council's attention on the individual rather than the community as a whole. Accordingly, risk assessment at the natural hazard zone scale can be critical to making the planning approach manageable and sustainable – particularly as it applies to existing developed areas.
>
> Allowing individual properties within a High risk natural hazard zone to individually (re)assess risk at a property level with the view to somehow being excluded from the wider management response, would likely lead to ad hoc-ism and a range of costs and risks to local authorities and infrastructure providers (who would be required to keep services in place in a high risk environment) and to people other than the excluded property occupants (who would likely continue to have access to the area due to the need for the territorial council to maintain public vehicular access to properties and may be encouraged to visit unaware of the risk)."

[82] We accept Mr Willis' planning evidence on this matter.

[83] In overall terms we find that PC1 and PC17 are consistent with, and in fact give appropriate effect to, the policy intent underlying the relevant RPS natural hazard policies.

5.4 RNRP and WDP provisions

[84] The RNRP contains an existing chapter on natural hazards. NH01 (Objective 49) is that the effects of flood hazards on the region's people, communities, and natural and physical resources are avoided or mitigated. Insofar as a debris flow is a form of flood, the plan changes are consistent with that objective.

[85] PC17 introduces a new objective NH04 into the RNRP:

> Avoidance or mitigation of debris flow hazard by managing risk for people's safety on the Awatarariki Fanhead.

[86] PC17 also introduces three new policies (NHP6 to NHP8) which require assessing the debris flow risk hazard using the methodology set out in Australian Geomechanics Society – Landslide Risk Management 2007; reducing debris flow risk by ensuring existing residential land uses retreat from the high risk hazard area as soon as reasonably practicable; and to extinguish existing use rights that would otherwise enable those residential land uses to continue.

[61] EIC Gerard Willis, Appendix 1, page 3.

[87] A district plan must not be inconsistent with a regional plan for any matter specified in section 30(1) of the RMA.[62] We find that PC1 is an entirely appropriate response to the RNRP provisions introduced by PC17.

[88] Chapter 18 of the WDP addresses natural hazards. Objective Haz1 is to manage the subdivision, use, development and protection of land so as to avoid or mitigate the adverse effects of natural hazards on the life and wellbeing of people, and significant environmental values. Under that objective Policy 3 is to avoid or mitigate the adverse effects of the subdivision, use or development of land which is, or is likely to be, subject to material damage by erosion, falling debris, subsidence, slippage or inundation from any source; Policy 11 is to manage the avoidance or mitigation of natural hazards according to their level of risk; and Policy 12 is to take into account the effects of climate change when identifying hazards.

[89] We find that PC1 is consistent with the above operative WDP provisions.

5.5 Iwi management plans

[90] Section 74(2A)(a) of the RMA states that councils must take into account any relevant planning document recognised by an iwi authority and lodged with the council, to the extent that its content has a bearing on the resource management issues of the district. In that regard the Ngāti Rangitihi Iwi Environmental Management Plan prepared by the Te Mana o Ngāti Rangitihi Trust in 2011 is one such document, as is the Ngāti Awa Environmental Plan; Te Mahere Whakarite Matatiki Taiao o Ngāti Awa, published in November 2019.

[91] To the best of our knowledge (primarily on the basis that both Ngāti Rangitihi[63] and Ngāti Awa submitted in support of the plan changes, but elected not to be heard, and from the fact that there were no dissenting views expressed) the provisions of these relevant iwi management plans been recognised and taken into account.

[92] The other two iwi with close interests in the area, Ngāti Tūwharetoa and Ngāti Hinerangi, chose not to submit on the plan changes. Nothing we were told led us to conclude that they opposed the plan changes.

5.6 Section 85 RMA and Bill of Rights Act

[93] A submitter, the Matatā Action Group, suggested that WDC has ignored the spirit of the New Zealand Bill of Rights Act 1990 and has placed severe limitations on the lives and freedoms of the residents and property owners bordering the Awatarariki Stream at Matatā.

[94] The spokesman for this group, Mr Welsh, did not provide detail to support the Group's submission, but the latter refers to sections 8, 19 and 28 of the 1990 Act that in accordance with Section 5, can only be subject to "*such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".*

[95] We have difficulty understanding how the relevant sections bear upon our consideration of PC17.[64]

[62] Section 30(1)(c)(iv) is the control of the use of land for the avoidance of natural hazards.
[63] Ngāti Rangitihi lodged a further submission in support of the Ngāti Awa submission.
[64] Matata Action Group was not a primary submitter on PC1.

[96] Section 8 relates to deprivation of life. PC17 and PC1 are focussed on saving lives, not their deprivation.

[97] Section 19 relates to freedom from discrimination. Issues of "*discrimination"* might conceivably arise if the residents of the Awatarariki Fanhead were being treated differently to residents of other hazard prone areas. Dr Chris Massey, Principal Scientist at the Institute of Geological and Nuclear Sciences Limited, provided useful comparative data about different levels of hazard applying around New Zealand which satisfied us that the regulatory responses in PC17 and PC1 are not materially out of step with criteria applied elsewhere. He told us, for instance, that the Christchurch District Plan employs a fatality risk trigger for rockfalls of $1x10^{-4}$. In his closing submissions, Mr Green provided us with the detail we had requested of the relevant Christchurch District Plan provisions: in summary, in the highest risk area, residential buildings are a prohibited activity.[65]

[98] Although PC17 and PC1 employed a lower risk threshold (of $1x10^{-5}$), of the existing dwellings in contention and to which the plan changes apply prohibited activity rules, all but one is in the modelled $1x10^{-3}$ risk contour, and the remaining dwelling is within the $1x10^{-4}$ risk contour. We therefore do not consider the difference material, quite apart from the persuasive evidence of Professor Davies, suggesting that the uncertainties in the modelling here provide more grounds for caution than might be the case in other situations.

[99] Later in this report,[66] we also discuss an Environment Court authority confirming application of a $1x10^{-6}$ trigger for avoiding fatality risk to neighbours of hazardous industrial plants.

[100] Having said that, as we discuss below, utilisation of RNRP rules to 'extinguish' existing use rights is a novel feature. To consider a submission that it represented discrimination in a Bill of Rights sense, however, we would have needed evidence that other cases have arisen with essentially similar characteristics and a different approach has been taken here. We did not have evidence of that kind.

[101] Mr Enright, counsel for ARI, rested his case more on Part 2 of the RMA and common law principles around not interpreting provisions to enable taking of property rights without compensation, relying in turn on the decision of the Supreme Court in *Waitakere City Council v Estate Homes Limited*[67]. To the extent that case recognises a 'right' not to have one's property rights taken without compensation, section 28 of the Bill of Rights Act 1990 might be considered relevant. Section 28 is a catchall providing that "*an existing right or freedom"* is not impliedly abrogated by reason of it not being specifically mentioned in the Act. Such considerations are also intertwined with the potential application of section 85 of the RMA although its relevance to our consideration of PC17 and PC1 was the subject of contention as between counsel for WDC and for ARI.

[102] Starting with RMA section 85, it is entitled "*Environment Court may give directions in respect of land subject to controls"*. Counsel for WDC contended that this title was significant as prior to 2017 the section had been entitled "*Compensation not payable in respect of controls on land"*.

[103] While the bulk of section 85 is indeed focussed on the powers available to the Environment Court, subsections (1) and (2) appear to be more general effect. They read:

[65] Closing Submission on behalf of Whakatane District Council, 17 March 2020, Annexure.
[66] Section 8.3.
[67] [2006] NZSC 112.

> *"(1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.*
> *(2) Notwithstanding subsection (1), any person having an interest in land which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds –*
> *(a) In a submission made under Schedule 1 in respect of a proposed plan or change to a plan; or*
> *(b) In an application to change a plan made under clause 21 of Schedule 1."*

[104] As above, the balance of the section is about the powers of Environment Court to direct modification, deletion or replacement of a provision in a plan or proposed plan, or alternatively that the local authority acquire the land under the Public Works Act 1981 with the agreement of the owner. Section 85(3B) states that the grounds for an Environment Court direction are that the proposed provision:

> *"(a) makes any land incapable of reasonable use; and*
> *(b) places an unfair and unreasonable burden on any person who has an interest in the land."*

[105] The fact that RMA section 85 may be raised as a ground for opposition to a proposed plan provision (as it has been in this case by ARI amongst others) raises the question as to what we as the decision-makers on submissions on PC17 and PC1 may do with such an objection. The answer provided by the Environment Court in *Gordon v Auckland Council*[68] *is* as follows:

> *"… the position is now tolerably clear…. subsection (2) provides a ground on which dissatisfied landowners can challenge a provision in a Proposed Plan or Plan Change. In its hearing processes the Council can consider that ground of challenge and, if it finds it convincing, may delete or amend the proposed provision accordingly. If there is dissatisfaction with the Council's decision, an appeal to the Court may follow under clause 14 of Schedule 1 and the same grounds of challenge can be considered on appeal, de novo."*

[106] Counsel for WDC contended that we ought not to follow the Environment Court's lead, essentially on two grounds. Firstly, that it would create an anomalous situation where the Environment Court is subject to an additional constraint (needing to consider whether the relevant provision places an unfair and unreasonable burden on any landowner) that we are not subject to. While this is the case, counsel accepted that the converse (of the Environment Court having both powers and duties that do not apply at first instance if his argument were accepted) is equally anomalous. Accordingly, counsel placed more weight on the amendments to section 85 that occurred in 2017, in particular the change noted above to the section heading. As counsel noted, under sections 5(2) and (3) of the Interpretation Act 1999, the section heading is able to be considered in ascertaining the meaning of the text that follows it. We do not draw the same inference as counsel from the change to the heading. Given that section 85(1) continues to state that compensation is not payable in respect of controls on land, we consider it reflects a shift in emphasis, to refer to the principal role of the section (to guide the exercise of the Environment Court's discretions in this area) rather than indicating a change in meaning from that previously applying.

[107] In particular, we do not consider that the heading supports an argument that the sole jurisdiction to apply section 85 rests with the Environment Court. We accept that the position that found favour with the Environment Court in the *Gordon* decision (and the earlier decision

[68] [2012] NZEnvC 7 at [24].

in *Riddiford v Masterton District Council and Others*[69] that preceded it), produces some anomalies, but we consider equally that counsel for ARI made a strong point when he submitted that if his client was able to raise section 85 in a submission, we as the decision-makers on that submission are logically obliged to have regard to it.

[108] We are also mindful of the discussion of common law principles that counsel for ARI referred to us in the Supreme Court's *Estate Homes* decision referred to above.

[109] The Supreme Court observed that there is no general statutory protection for property rights in New Zealand under which the taking of property without compensation is unconstitutional and prohibited. It noted specifically that the New Zealand Bill of Rights Act 1990 did not protect interests in property from appropriation. It noted, however, that the Magna Carta, which is still in force, requires effectively that appropriation of land must be undertaken pursuant to law "*and the statutory practice it is to confer entitlements to fair compensation where the legislature considers land has been taken for public purposes under a statutory power."*[70]

[110] The Supreme Court observed further:

> *"In general, where permission to develop land is refused, with the consequence that it has greatly reduced in value, the Courts have not applied the statutory presumption and have treated what has happened as a form of regulation rather than a taking of property."*[71]

[111] The Court found that in the case before it (which involved conditions on a subdivision consent), there was no element of "*taking"* for this purpose. It emphasised that absence of choice must be present in taking a property before the principle of statutory interpretation that it had noted could be invoked.[72]

[112] In our view, this suggests that a distinction might potentially be drawn between PC1 and PC17. Applying the principles set out by the Supreme Court, PC1 is a form of regulation. Those deprived of the ability to develop their land are not subject to a taking of property rights because they have a choice whether or not to develop their land and if not, how they might use it (accepting that a prohibited activity rule is at the far end of the regulatory spectrum).

[113] By contrast, if PC17 is upheld, the landowners in the identified High Risk Debris Flow Policy Area will have no choice. They will be unable to continue to live in their homes. We think this is a strong reason to consider the application of section 85 in the context of PC17.

[114] We are fortified in that view by the clarification provided by the Environment Court in *Hastings v Auckland City Council*[73] that:

> *"Section 85 contemplates an owner of an interest in land challenging a Plan provision on the ground that it renders an interest in land incapable of reasonable use. On a reference derived from such a submission, the test to be inferred from Section 85 is not whether the proposed zoning is unreasonable to the owner (a question of the owner's private rights), but whether it serves the statutory purpose of promoting*

[69] [2010] NZEnvC 262.
[70] [2006] NZSC 112 at [45].
[71] Ibid at [47].
[72] Ibid at [51].
[73] Environment Court Decision A068/2001 at [98].

sustainable management of natural and physical resources (a question of public interest). The implication is that a provision that renders an interest in land incapable of reasonable use may not serve that purpose. The focus is on the public interest, not the private property rights."

[115] Clearly, consideration of whether the plan changes serve the statutory purpose is relevant to our decisions on both plan changes.

[116] In summary, we are not persuaded by counsel for WDC's submission that section 85 is not relevant to our consideration of PC17 at least.

[117] The closest case to the present one, related to the application of section 85, counsel for WDC referred to us was a Christchurch Plan Change seeking to preclude development in erosion prone coastal areas at the southern end of New Brighton. In *Francks v Canterbury Regional Council*[74] the High Court upheld a prohibited activity rule in the Christchurch City Plan that precluded residential land use and subdivision activities seaward of an identified building line. Most of the issues related to the location of the building line, but the High Court considered the potential relevance of section 85 and concluded[75]:

"…once the building line was drawn by the Court so as to position lots 31 and 38 to the seaward side, the cause was lost. A S85 evaluation was not going to avail the appellants. How could the Judge find that the land was at risk from erosional forces on the one hand, and conclude in terms of Section 85 that building upon it was a reasonable use which had to be permitted on the other."

[118] As we discussed with counsel for WDC, while this finding clearly supports the prohibited activity rule in PC1 (given the conclusion we have reached on the degree of hazard), PC17 introduces the additional element of requiring existing dwellings to be vacated.

[119] While the High Court's reasoning would imply the same conclusion, we are not so sure that it is quite as simple as that, particularly given the principles of statutory interpretation referred to in the *Estate Homes* decision where the landowner is given no choice as to their cause of action.

[120] This case, however, also has the additional feature of the Council's buy back offer.

[121] We note that in its *Hastings* decision, the Environment Court recorded its agreement that at least 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."*[76]

[122] Counsel for WDC submitted that the buy out offer was not "*compensation"*, for reasons that were not entirely clear to us. Counsel for ARI submitted that the buyout offer is not mitigation "*because it cannot be enforced against the Plan Change proponent, absent agreement."*[77]

[123] While a buy out might go further than true "*compensation"* for the lost property rights, acquisition was one of the options the Environment Court referred to in its *Hastings* decision.

[74] CIV-2003-485-001131.
[75] Ibid at [76].
[76] A068/2001 at [97].
[77] Legal submissions for ARI at page 7 (as varied verbally).

We also struggle with counsel for ARI's argument. As it was described to us[78], the arrangements put in place by the Councils and the Crown are binding on them, once a property owner has entered the process and provided a valuation that complies with standard valuation practices. Potentially more concerning is the fact that, as it was described to us, the buy out programme has a deadline of 30 June 2020, and it cannot be assumed that it will continue thereafter. That would require a fresh commitment by the participants (the Crown and the two Councils).

[124] This was of particular concern to ARI, who argued that they ought to have the opportunity to test the underlying merits of the plan changes in the Environment Court without losing the right to compensation. They produced evidence of undertakings by the Councils that declining to enter the Council buy out programme would not preclude a landowner from seeking relief under section 85 in the Environment Court.

[125] We think that that must be right as a matter of law irrespective of any undertaking, although as we observed to counsel for ARI, the members of the Incorporated Society should perhaps reflect on whether the relief granted by the Environment Court pursuant to section 85 (if the Court decided to grant relief) might potentially be rather less attractive than the offer that the Councils and the Crown are currently making. The latter values the land assuming the debris flow hazard does not exist, whereas our understanding valuation in a Public Works Act context is that it would not make that assumption. As we have noted above, that difference is likely to manifest in a significant reduction in value established via the Public Works Act process.

[126] Ultimately, we have concluded that however it is described, the Council buy out process is available to residents at this point, and will continue to be available following release of this Decision, at least for the period within which the submitters have to determine whether they will appeal to the Environment Court. If a party chooses to appeal (as is their right), the Environment Court will consider all of these matters, including what relief, if any, it directs pursuant to section 85. The fact that the buy out offer may have lapsed by then is not in our view critical, as the Environment Court has the ability to direct acquisition pursuant to the Public Works Act, subject to the landowners agreeing. We therefore conclude that we can and should have regard to the availability of the buy out programme in determining whether PC17 (and to a lesser extent PC1) render the land within the identified high hazard area incapable of reasonable use.

[127] We refer specifically in that regard to our conclusion in section 4 of this Decision that the valuation process proposed is both robust and very fair in the circumstances. Against that background, we apply the reasoning of the *Francks* decision: continued residential occupation of the High Risk Debris Flow Policy Area is not a 'reasonable' use of the land in all of the circumstances.

[128] We therefore find that PC17 is not an unreasonable response to the identified hazard and, to use the phraseology in the *Hastings* decision, that it appropriately serves the statutory purpose of promoting sustainable management of natural and physical resources in that regard.

[129] The existing constraints on building within the identified High Risk Debris Flow Policy Area pursuant to the Building Act make the application of RMA section 85 to PC1 rather clearer. There are significant parallels with the situation on the Awatarariki Fanhead to that considered by the Environment Court in the *Gordon* decision to which we referred earlier. There, land on a headland was the subject of controls under the then Historic Places Act 1993 that effectively precluded development of the land. The Court held that proposed provisions making new

[78] Confirmed in Mr Farrell's affidavit, sworn 16 March 2020.

buildings within the identified area a discretionary activity appropriate, notwithstanding the potential application of section 85.

[130] We conclude that in the circumstances, PC1 likewise does not deprive the landowners of the reasonable use of their land.

5.7 Building Act 2004

[131] In this section of our Decision we discuss the application of the Building Act to the Awatarariki Debris Flow Policy Area. The reason we do so is to consider if the intent of PC1 and PC17 aligns with the duties of the WDC under that Act.

[132] The natural hazard provisions of the Building Act (sections 71 to 74) provide for a Building Control Authority or BCA (the WDC in this case) to consider the granting of building consents on land that is subject to, or likely to be subject to, one or more natural hazards.

[133] The Building Act requires a BCA to grant a building consent on land subject to natural hazards if it considers that the proposed building work will not accelerate, worsen or result in a natural hazard on the land or other property; the land is subject to one of more natural hazards; and it is reasonable to grant a waiver or modification to the Building Code.

[134] As we noted in section 2 of this Decision, in 2006 the WDC sought a Determination under the Building Act as to whether the existing dwellings on the Awatarariki Fanhead were dangerous in terms of section 121 and if so, should they require the buildings to remain unoccupied until mitigation works were undertaken to reduce the danger.[79] The Determination concluded that the houses were not dangerous and consequently six houses were rebuilt between 2007 and 2011.[80]

[135] A subsequent Building Act Determination in 2016 took into account further modelling work commissioned by WDC and the 2012 resolution of the WDC to not proceed with an engineering solution to manage the debris flow hazard for residential properties on the Awatarariki Fanhead.[81] The background to the 2016 Determination was WDC's refusal to grant building consent waivers for two proposed buildings.

[136] The WDC's application for the 2016 Determination stated that "*the two properties belong to a wider geographical area…as being subject to a high annualised loss of life risk potential*" and "*that the outcome of the determination will therefore be of wider application*".[82] Whilst one of the objectives of the Determination request was to be able to apply the expected result over a wider area, the Determination only specifically referred to the two subject properties. However, the Determination relied in part[83] on the "*… technical evidence provided by the authority that a natural hazard could well happen in the Awatarariki fanhead*." The 2016 Determination noted that while the debris flow "*… was not specifically listed under section 71(3) as a natural hazard …. a debris flow or flood clearly falls within 'falling debris' of rocks and boulders and 'inundation' as flooding*".

[79] EIC, Jeffrey Farrell, paragraph 5.12.
[80] EIC, Jeffrey Farrell, paragraph 5.13.
[81] Section 32 Evaluation Report, 8 June 2018, Appendix 2.
[82] EIC, Jeffrey Farrell, paragraph 5.33.
[83] MBIE Determination 2016/034 para 8.2.4.

[137] In light of the above history we conclude that WDC (acting as a BCA) would be unable to grant a building consent or a waiver from the Building Code for properties located within the High Risk Debris Flow Policy Area. In that regard we find that PC1 and PC17, both of which intend to make residential activities and associated buildings a prohibited activity in the High Risk Debris Flow Policy Area, are entirely consistent with the WDC's duties under the Building Act.

6.0 IWI CULTURAL VALUES AND INTERESTS

[138] We understand that key concerns for tangata whenua include protection of heritage sites like the Kaokaoroa Reserve, waahi tapu such as the Te Awatarariki Stream, human safety, and meaningful involvement in the ongoing resolution of the challenges posed by potential debris flows in this location.

[139] A submission in support of the plan changes was lodged by Te Rūnanga o Ngāti Awa. It referred to a letter of support previously provided to WDC in November 2017 which the Rūnanga asked to be considered as a submission on the plan changes. Te Mana o Ngāti Rangitihi Trust (based at Matatā) lodged a further submission in support of Te Rūnanga o Ngāti Awa.

[140] Neither Te Rūnanga o Ngāti Awa nor the Te Mana o Ngāti Rangitihi Trust wished to be heard. However, importantly Te Rūnanga o Ngāti Awa's November 2017 letter of support stated that they considered the proposed retreat option would remove homes and families from a location that was in harm's way; it would bring certainty to those families and the community, ensure central government agencies contributed financially to the relocation of families into new homes in a safe location, and it would protect people from making future investments in residential subdivision at this location by inserting a prohibited activity rule for residential development which would otherwise place people in harm's way, at night, when they and their families and any guests are sleeping.

[141] Te Rūnanga o Ngāti Awa also stated that the prohibited activity status would protect people from making future investments in building their homes in this high-risk location while the permitted activities rules will allow for people to continue to enjoy appropriate activities at the location. They concurred that every option that might have enabled people to remain in their homes at the Fanhead had been exhausted.

[142] We consider that Te Rūnanga o Ngāti Awa's submission and the Te Mana o Ngāti Rangitihi Trust's further submission lend considerable weight in favour of the plan changes.

7.0 TECHNICAL MATTERS

[143] In this part of our Decision we briefly discuss three technical matters that underpin the plan changes and which were also of concern or interest to submitters.

7.1 Non-regulatory alternatives considered

[144] A range of non-regulatory options (engineering or structural interventions, catchment management, early warning and evacuation systems) were identified in section 8 of the Section 32 Report. We briefly discuss these here as several submitters considered them to be preferable to the planning approach embodied in PC1 and PC17. We return to the submitters' concerns in section 8.4 of this Decision, including the option of risk acceptance.

[145] The Section 32 Report noted that engineering or structural options had not proven to be reasonably practicable. Kevin Hind, Technical Director (Engineering Geology) at Tonkin & Taylor Ltd, advised that he had investigated a debris detention barrier, with and without a spillway, and earth barriers or bunds as means of protecting the Awatarariki Fanhead residents from future debris flows. Due to the size, performance uncertainties, difficulties in construction, maintenance and overall cost of such measures they were considered non-viable.[84] As we noted in section 2 of this Decision, WDC accordingly decided not to proceed with them.

[146] Catchment management options rely largely on tree planting to stabilise the very steep valley sides in the Awatarariki Stream catchment, together with the management and removal of accumulated debris from the stream bed. Dr Chris Phillips, Principal Scientist and Portfolio Leader for "Managing Land & Water" with Manaaki Whenua - Landcare Research, advised that that such approaches were likely to be cost-prohibitive and have little material impact on future debris flow hazards.[85] The evidence of Dr McSaveney and Professor Davies supported Dr Phillips' conclusion and we accept that collective and uncontested expert evidence.

[147] Early warning systems were thoroughly investigated by Professor Davies and Dr Massey. Professor Davies advised that an early warning system was not feasible because of the short time it takes for a debris flow to reach the Fanhead and the lack of location-specific data on antecedent catchment conditions that might trigger a debris-flow.[86] Dr Massey advised that multi-staged debris flow early warning systems were unlikely to allow all people potentially present on the Fanhead to evacuate to safe areas. In his view adopting an early warning system was not aligned with the precautionary approach promoted by the RPS.[87] Again we accept this uncontested expert evidence.

[148] We note that the Bay of Plenty CDEM Group agreed with the WDC's assessment that a warning system cannot be relied upon to provide dependable warnings, with adequate time, to sufficiently reduce the risk to life for residents.[88] We also note that in order to ensure that a debris flow does not occur without a warning being given, there will necessarily be false warnings given where no debris flow occurs. That would undermine the credibility of the system and experience from Japan suggests that false warnings (where a warning is given and no debris flow occurs) happen between 40 and 50% of the time.[89]

[149] On the evidence before us we conclude that non-regulatory options simply do not provide a realistic means of reducing the current intolerable risk of loss of life from future debris flows.

7.2 Delineation of risk zones

[150] As we discussed earlier in this Decision, consistent with the policy direction of the RPS, the plan changes rely on the land in the Awatarariki Fanhead area being delineated into high, medium and low risk zones. We discussed the relevant RPS provisions in section 5.3 of this Decision. There we noted that the WDC employed the AGS 2007 as the basis for their risk assessment methodology. We discuss the formal incorporation of AGS 2007 into PC1 and PC17 in section 8.2 of this Decision.

[84] EIC Kevin Hinds, paragraphs 1.2 to 1.5.
[85] EIC Christopher Phillips, paragraph 1.2.
[86] EIC Tim Davies, paragraph 1.11.
[87] EIC Chris Massey, paragraph 1.2.
[88] Bay of Plenty Civil Defence Emergency Management Group submission on PC1.
[89] Debris Flow Risk, Awatarariki Catchment - Early Warning System Work stream, Nicola Litchfield Head of Department Active Landscapes, GNS Science, 10 December 2015.

[151] The approach taken by the WDC to delineating risk on the Fanhead and their adoption of a 1 x 10^{-5} per annum risk contour to delineate the High Risk Debris Flow Policy Area was criticised by some submitters. We discuss the selection of the 1 x 10^{-5} per annum risk contour in section 8.3 of this Decision.

[152] Despite the fact that no expert evidence on that matter was called by any submitter, for completeness and for the benefit of readers of this Decision, in this section we briefly discuss the WDC's risk zone delineation process from a technical perspective.

[153] As we noted earlier, in 2013 the WDC commissioned a report titled "Quantitative Landslide and Debris Flow Hazard Assessment Matatā Escarpment"[90] and in 2015 it commissioned a further report titled "Supplementary Risk Assessment Debris Flow Hazard Matatā".[91] The 2015 report was to be read in conjunction with the earlier 2013 report.

[154] The 2013 report was based on a general Quantitative Landslide Risk Assessment (QLRA)[92] that generated high, moderate and low hazard zones. The 2015 report was informed by additional detailed debris flow modelling that was to serve the basis of the Loss of Life risk assessment and the annual Loss of Life risk contours. It included some discussion of the annual Loss of Life risk that is typically considered intolerable or unacceptable. However, it did not provide a "*recommendation as to which risk contour [should be used to define] any proposed area of potential retreat*".[93]

[155] The 2015 report was peer reviewed by Dr McSaveney and Professor Davies.[94] Their review recommended that a probabilistic analysis be undertaken to determine how sensitive the Loss of Life risk calculations were, and that the 1x10^{-5} contour be used to delineate the minimum retreat area, compared with the 1x10^{-4} contour suggested by AGS (2007).[95]

[156] As a result of the McSaveney and Davies peer review, Kevin Hind undertook additional probabilistic risk analyses based on the results of the numerical modelling undertaken in 2013.[96] Mr Hind advised that a "…. *clear outcome of the risk analyses was that the identification of a broad area of unacceptable risk, be it 10^{-4} or 10^{-5}, is quite insensitive to the assumptions used in the calculations*"[97] and "…*in the case of the Awatarariki fanhead, the Loss of Life Risk is simply too high from a repeat of the 2005 event that tinkering around the edges with different parameters simply does not produce a different result*".[98]

[157] BOPRC referred the 2015 Tonkin and Taylor report to GHD for a second peer review. Importantly, GHD stated that the Loss of Life risk assessment was robust and had been carried out in accordance with industry best practice.[99] GHD suggested that a property specific risk assessment might result in some properties being categorised as being within a medium risk zone. That suggestion was seized upon by submitters including ARI and we discussed that matter in section 5.3 of this Decision. In that regard, we acknowledge the opinion of Mr Hind that "*Purely from a technical standpoint, it can be demonstrated that not only is a property-*

[90] Tonkin and Taylor, November 2013.
[91] Tonkin and Taylor, July 2015.
[92] EIC Kevin Hind, paragraph 6.56.
[93] Ibid, paragraph 6.139.
[94] Peer review: Awatarariki debris flow fan risk to life and retreat zone extent, MJ McSaveney, TRH Davies, November 2015.
[95] EIC Kevin Hind, paragraph 6.145.
[96] Ibid, paragraph 4.8.
[97] Ibid, paragraph 6.156.
[98] Ibid, paragraph 7.5.
[99] Ibid, paragraph 6.147.

specific risk assessment approach not realistic, it doesn't materially change the outcomes of the risk assessment presented [in the 2013 and 2015 Tonkin and Taylor reports]".[100]

[158] On the evidence available to us we are satisfied that the WDC's debris flow risk assessment process for the Awatarariki Fanhead was robust and was carried out in accordance with industry best practice.

7.3 2005 event recurrence interval

[159] As noted earlier, the initial assessment of the 2005 storm that caused the catastrophic debris flow was that it had a return period of between 200 and 500 years.

[160] Peter Blackwood, Principal Technical Engineer at BOPRC, advised that "…*global warming will both increase sea levels and rainfall intensities. The increase in rainfall intensities had up until recently been less accurately forecast [when compared with sea level rise]. The Ministry for the Environment document "Climate Projections for New Zealand: Snapshot" in 2016, set out four alternative futures called representative concentration pathways (RCP) based on different greenhouse gas concentrations in the atmosphere*". He went on to state that under the RCP scenarios that will result in the highest temperature increases, the 2005 storm event would be expected to have a 40-50 year return period under RCP 8.5 and 60-80 year return period under RCP 6.0.[101]

[161] We acknowledge that those return periods are an estimate of the possible return period of the 2005 event at the end of this century i.e. in 80 years time. Nevertheless, what is clear is that intense rainfall events will become more common and that the return period of the rainfall event that triggered the 2005 Awatarariki debris flow will significantly reduce. In our view this adds further weight to the appropriateness of the precautionary approach taken by WDC in establishing the High Risk Debris Flow Policy Area.

8.0 SUBMITTER ISSUES

[162] As we noted earlier, many of the submitters in opposition expressed uncertainty as to whether Government would contribute financially to the relocation of affected families.[102] Other submitters were opposed to the plan changes until such time as the voluntary retreat package was agreed between WDC and landowners.[103] Uncertainty around the voluntary retreat funding package no longer exists and so we do not address that matter further.

[163] Some submitters contended that the plan changes were inconsistent with the higher order statutory instruments. As discussed in sections 5.1 to 5.4 of this Decision we have already concluded that is not the case and so we do not address that matter further.

[164] As noted by Craig Batchelar,[104] a submission was lodged by Kiwirail Holdings Ltd regarding rail corridor operations being inadvertently "caught" by proposed rules and the New Zealand

[100] Ibid, paragraph 6.151.
[101] EIC Peter Blackwood, paragraph 11(i).
[102] Including Awatarariki Residents Incorporated which recorded that as at the date of submission, it represented 25 Matatā residents and landowners who oppose PC1. However, the WDC opening legal submissions noted that six parties had since resigned from the Society, namely Gerard and Jo Stuckey (5 Pioneer Place); Puti and Steve Rowe (7 Pioneer Place); Victoria Humphries-Irwin and Wayne Irwin (94 Arawa St); Catherine Ann Smith (7 Clem Elliott Drive); Grant Wilkin (16 Clem Elliott Drive); and Kerry Magee (18 Clem Elliott Drive).
[103] Including Keith Sutton.
[104] EIC Craig Batchelar, paragraphs 12.3 and 12.4.

Defence Force made a further submission in support of Kiwirail seeking amendments to provisions which might affect temporary military operations.

[165] We acknowledge those submissions and adopt the Section 42A Report author's recommendations[105] for the Kiwirail submission. We address the New Zealand Defence Force further submission in section 8.8 of this Decision.

[166] We reminder readers that we discussed the Awatarariki Residents Incorporated view of the RPS in section 5.3 of this Decision.

8.1 Lawfulness and Council functions

[167] Some submitters[106] suggested that the plan changes were unlawful and ultra vires the Councils' statutory functions and powers.

[168] The legal submissions for WDC cited *Canterbury Regional Council v Banks Peninsula District Council*[107] as confirming that Canterbury Regional Council had the power, when preparing its plans, to prohibit or restrict activities on land in the region for the purpose of avoiding or mitigating natural hazards, to the exclusion of the district council's within its region. That case focussed more on the inter-relationship between the Canterbury Regional Council and the district councils within its region than on how the powers in question might be exercised, but we agree that it appears to confirm jurisdiction.

[169] Although submissions on PC17 and PC1 challenge the lawfulness of PC17 in particular, no submitter explained why either or both plan changes could not as a matter of law impose prohibited activity status for both new and existing residential activities within an identified high hazard area. We note that counsel for ARI expressly reserved his position on the application of section 10(4) of the Act, as it affects the validity of PC17[108]. As above, the High Court's decision in *Francks* confirms jurisdiction in the district council sphere and while counsel for WDC advised that regional council rules extinguishing existing use rights had not previously, to counsel's knowledge, been applied, we see no reason in principle while that could not be done.

[170] The fact that there is jurisdiction does not, of course, mean that exercise of that jurisdiction is appropriate. That requires consideration of the statutory tests that we considered in sections 5.1 to 5.5 of this Decision.

8.2 PC17 and AGS 2007

[171] Some submitters[109] questioned the use of the Australian Geomechanics Society Landslide Risk Management (AGS 2007) document. We understand that AGS 2007 was first adopted by WDC as an appropriate natural hazard risk management framework for a landslide risk assessment project for the Whakatāne and Ōhope escarpments which commenced in 2011 and was expanded to include Matatā.

[105] Which mirror those of Mr Batchelar.
[106] Including the Awatarariki Residents Incorporated Society.
[107] Court of Appeal Decision 99/95.
[108] Legal Submissions for ARI at [20].
[109] Including the Matatā Residents Association.

[172] This is a different issue to that discussed above: whether AGS 2007 is a recognised risk assessment methodology for the purposes of RPS Appendix L.

[173] PC17 is a private plan change that has been "accepted" but not "adopted" by BOPRC. As notified PC17 intended to include AGS 2007 into the RNRP by way of proposed Policy NHP6 in the RNRP which would read:

> To assess the natural hazard risk from Debris Flows on the Awatarariki fanhead at Matatā by undertaking a risk analysis using the methodology set out in Australian Geomechanics Society – Landslide Risk Management 2007.

[174] Some submitters queried the incorporation of AGS 2007 into PC17. We are comfortable that the Councils correctly followed the procedure mandated by RMA Schedule 1 Clause 34 regarding the need to make copies of AGS 2007 available to the public and to then receive and consider comments from the public on it before incorporating it into the plan changes.[110]

[175] However, we note and accept the submissions[111] of Mary Hill, counsel for BOPRC, that AGS 2007 appears not to have been correctly incorporated into PC17. That is because material cannot be incorporated by reference into a private plan change which has been "accepted" rather than "adopted" by the BOPRC under Clause 25(2) of Part 2 of Schedule 1 to the Act.

[176] Ms Hill went on to submit that this does not matter because AGS 2007 has also been incorporated in PC1 to the WDP and has taken legal effect.[112] She submitted that as AGS 2007 already has legal effect as part of PC1, the RPS Appendix L requirements have been satisfied. She suggested that a small adjustment could be made Policy NHP6 of PC17 to remove the proposed reference to AGS 2007 and replace it with reference to "*a recognised risk assessment methodology that complies with Appendix L of the RPS"*. RNRP Policy NHP6 would therefore refer to a methodology which complies with Appendix L because it in turn refers to a methodology "included in a District Plan".

[177] Consistent with the submissions of Ms Hill, in his end of hearing report the Section 42A Report author Mr Olliver advised that to overcome any actual or perceived issues regarding proposed RNRP Policy NHP6 it could be amended to read:

> To assess the natural hazard risk from Debris Flows on the Awatarariki fanhead at Matatā by undertaking a risk analysis using a ~~the~~ methodology that complies with Appendix L to the Regional Policy Statement ~~set out in Australian Geomechanics Society – Landslide Risk Management 2007~~.

[178] While we consider AGS 2007 does not yet meet the criteria in Appendix L (because it is not part of the operative WDP), we accept the submissions of Ms Hill and the planning advice of Mr Olliver as to how the technical issue Ms Hill identified might best be addressed. In terms of section 32AA of the RMA, we agree with Mr Olliver that the efficiency and effectiveness of including an alternative risk assessment methodology through the process set up by Appendix

[110] Clause 30 of Part 3 of Schedule 1 of the RMA provides for certain material (such as industry standards) to "be incorporated by reference in a plan or proposed plan". "Proposed plan" is defined to include a "proposed plan" or "a change to a plan proposed by a local authority which has been notified under clause 5 of Schedule 1 … and includes a proposed plan or a change to a plan proposed under part 2 of Schedule 1 that has been adopted by the local authority under clause 25(2)(a) of Schedule 1. (our emphasis).

[111] Clarification of Issue Relating to Incorporation by Reference, Mary Hill, Cooney Lees Morgan, 4 March 2020.

[112] Clause 30(3) of Schedule 1 of the RMA provides that "Material incorporated by reference in a plan or proposed plan has legal effect as part of the plan or proposed plan."

L is still achieved by PC1 and it is not essential that AGS 2007 be specifically referred to in both plan changes.[113]

[179] For completeness, we note that counsel for ARI appropriately conceded, when questioned by us, that the recommended amendments to Policy NHP6 would be "permissible" and it would be an "over-reach" to categorise them as substantive given that they merely propose to cross-reference Appendix L of the RPS.

8.3 Level of risk

[180] Some submitters[114] suggested that the WDC's assessment of risk was imprecise and overstated the actual level of risk from future debris flows.

[181] While the fact that no persons were killed in the 2005 event might suggest grounds for future confidence, the position of WDC and its witnesses was that this was just good fortune. Mr Farrell produced a number of photographs illustrating the devastation that resulted from the 2005 event to support that view.

[182] We also had the benefit of evidence from Mrs Pamela Whaley, who was present in her house at 10 Clem Elliott Drive during the 2005 event and who gave us a vivid personal description of the debris flow coming towards it. She advised that a 4 foot deep flow of water hit the house, but that the logs entrained in the debris flow luckily stopped a few metres short of the house. Understandably, estimates of just how far short varied, but in our view, it was far too close for any comfort to be drawn from the relative lack of damage to that particular property.

[183] Counsel for ARI also referred specifically to the delay since 2005, suggesting that the risk cannot be as serious as WDC suggested. We do not accept that follows. If WDC had brought the plan changes to hearing without having thoroughly considered alternative options and / or put the funding in place for displaced residents, it would justifiably have been criticised for that too.

[184] While the delays have been unfortunate and have undoubtedly contributed to the stress and worry to residents detailed by Mr Whalley, we have to consider the plan changes on the basis of the evidence before us.

[185] We note again in that regard that submitters in opposition did not provide any expert technical evidence in support of their views.

[186] As outlined in the evidence of Professor Davies,[115] the WDC decided to take a precautionary approach to delineating risk levels on the Awatarariki Fanhead because lives are at risk if dwellings are permitted there; in the event of a death, decision makers need to demonstrate that they have used an appropriate level of risk that recognises the imprecisions of the available analysis. For the same reasons the extreme levels of acceptable risk-to-life recommended in international literature have been used. The WDC decided that in this case an acceptable per person life-risk was $1x10^{-5}$ per year, which is equivalent to an annual probability of 0.00001 or a 1 in 100,000 chance of being killed. We note that the $1x10^{-5}$ AEP line corresponds closely with the mapped limit of boulders deposited in the 2005 event.

[113] Supplementary s42A Planning Report, John Olliver, 4 March 2020, paragraphs 9 and 10.
[114] Including the Awatarariki Residents Incorporated Society.
[115] Statement of Evidence of Tim Davies on behalf of Whakatane District Council, Risk Analysis and Options Assessment, 15 January 2020.

[187] Interestingly, the Environment Court is in the process of considering how hazard issues associated with oil and gas production facilities in South Taranaki should be managed, having released two interim decisions on the subject. [116] Those decisions are notable for the Court's confirmation that sensitive land uses (including but not limited to residential dwellings) should be avoided within the contour illustrating the assessed 1×10^{-6} annual fatality risk.[117] Obviously, this is a materially lower risk than that used as the trigger in PC1 and PC17, and it therefore provides strong support for avoidance at the level of objectives and policies at least in this case also.

[188] In the more recent South Taranaki decision, the Court considered and rejected suggestions (by the appellant's planning witness) that new residential development should be a prohibited activity within the 'unacceptable risk' contour. It approved non-complying activity status. As we read the Court's decision, however, it is based on the source of the risk being reflected in the nature of the activities being carried out on the oil production site and that being something that is inherently subject to change.[118]

[189] The clear message we drew from the passage or the Court's decision discussing the point is that it is only where the risk profile has changed that there ought to be an opportunity to consider the use of the land on the merits.

[190] Unlike the industrial process facilities that the Court was considering in South Taranaki, for PC1 and PC17, the likelihood of a natural hazard occurring is not influenced by human action at source (although we heard evidence of the risk increasing as a result of climate change). We therefore find the approach taken in PC17 and PC1 is supported by the Environment Court's South Taranaki decisions.

[191] Finally, in terms of this topic, counsel for ARI made a specific request that we exercise our power to direct BOPRC to produce what he described as the first Leventhal report, on the basis that this was necessary for a proper consideration of the plan changes. The Section 42A Report produced as Appendix 5, a technical assessment of debris flow risk management on the Awatarariki Fanhead authored by Greg Kotze and Andrew Leventhal for GHD Limited and dated 31 October 2019. That report describes the two authors as senior technical directors in geology and geotechnics respectively. We also observe that Mr Leventhal was the Chair of the group responsible for the AGS 2007 guidelines, on which a number of the expert witnesses for WDC relied.

[192] The GHD Report records[119] that the issues canvassed in it were initially addressed in a draft Technical Assessment Report dated 22 August 2018. The report produced with the Section 42A Report is the finalised version of that draft.

[193] Counsel for BOPRC, Ms Hill, submitted that contrary to the legal submissions for ARI, we could request production of the draft report, but we cannot require its production because the powers of a Commission of Inquiry conferred on the Hearing Panel do not include the power of investigation in section 4C of the Commissions of Inquiry Act 1908. While the section 4C powers are not available to us, section 41(1)(c) of the RMA states that we can exercise the powers in section 4D to summons witnesses. The latter includes the power to direct the summonsed witness to produce any relevant document. We could utilise that route to get to the same point.

[116] *Taranaki Energy Watch Inc v South Taranaki District Council* [2018] NZEnvC 227 and [2020] NZEnvC 18.
[117] See [2018] NZEnvC 227 at [62].
[118] See [2020] NZEnvC 18 at [64].
[119] At page 2.

[194] Considering that possibility, while we can understand a natural suspicion on the part of ARI as to what that draft GHD report might have said, we do not consider that seeing it is critical to our examination of the issues surrounding the plan changes. Ms Hill has confirmed[120] that the draft report does not contain any site-specific risk assessments. That is probably the only thing of potential interest to us, although even then, the weight we could give to such an assessment in the absence of the author is questionable. More broadly. BOPRC's technical advisers are entitled to revise their opinions prior to finalising their reports. If indeed that occurred in this case (we do not know whether it did) the most that would indicate would be the possible need to enquire as to the basis on which any change of position has been arrived at.

[195] We therefore decline to make an order requiring production of the draft GHD report.

[196] We also note that the final GHD report was addressed to Ms Llewell, in-house counsel for BOPRC. If we had considered there to be a case for requiring the earlier draft to be produced, before making any orders, we would need to have explored whether the draft report was the subject of legal privilege (and therefore proof against any order we could make in that regard).

8.4 Alternatives and lesser interventions

[197] Some submitters[121] opposed the plan changes as they considered that alternative engineering solutions had not been fully investigated, including a combined bunding and early warning system. As discussed in section 7.1 of this Decision, we have already found that alternative engineering solutions have been fully investigated and discounted for sound reasons. We reiterate that submitters in opposition did not provide any expert technical evidence in support of their views.

[198] Other submitters[122] opposed PC1 because in their view it did not allow residents to remain in their homes while adopting an information-based or event-based approach to managing the risk. For example, Pamela Whalley was resident in her house at 10 Clem Elliott Drive during the 2005 debris flow event. At the hearing she told us that she did not now feel frightened about heavy rainfall events and believed that a future debris flow would behave differently than the 2005 event. She also advised that she and her family would self-evacuate based on MetService severe weather advice and provided two examples where this had occurred.

[199] It appeared to us from the answers given by Pamela Whalley to our questions, however, that in one of those cases, the Police required evacuation and in the other, not all residents may have left.

[200] We are also concerned that as predicted extreme weather events multiply with no major debris flow, readiness to take a precautionary approach and evacuate will inevitably wane.

[201] The Section 32 Report discussed the option of simply accepting the risk of a future debris flow. There is a distinction between a resident's acceptance of risk and the obligations on government agencies to manage community risk, including the potential need to rescue affected homeowners and supporting the recovery of the area. In that regard, in response to our questions, Amelia Linzey, Chief Planner in the Planning business at Beca Group Limited, advised

[120] Response by Counsel for Bay of Plenty Regional Council in relation to Issues Arising concerning Plan Change 17, 17 March 2020, paragraph 25.
[121] Including the Matatā Residents Association and the Matatā Action Group.
[122] Including the Awatarariki Residents Incorporated Society.

that there was an expectation that government agencies will keep people out of danger. We also note the comments of the Environment Court in *Taranaki Energy Watch Inc v South Taranaki District Council*[123] to the effect that residents are not the sole arbiter of risk in a situation where hazard risk is involved.

[202] It was Dr Massey's opinion that a multi-staged debris flow early warning system would be unlikely to allow all people potentially present in the hazard zone to evacuate to safe areas, irrespective of where they were on the Fanhead. People who don't notice the alert, or did not or could not evacuate, would continue to be exposed to the potentially life-threatening debris flow risk.[124]

[203] We consequently agree with the Section 42A Report author that a debris flow warning system would not be appropriate due a combination of factors, including the lack of calibrated debris flow data and the time that would be required to collect such data (estimated 'decades' to 'centuries') and the likely high proportion of false alarms, which could lead to complacency (which we liken to a 'boy who cried wolf' situation).

[204] Some submitters[125] considered that catchment management activities would reduce the risk of future debris flow events. We note the evidence of Dr Phillips that vegetation or forest enhancement (including supplementary indigenous vegetation planting, weed control, or the broadcast aerial delivery of native seeds); planting out the southern and western margins of the catchment that are currently in pastoral farmland; stream clearance (log jam removal); or structural measures such as engineered detention systems (check dams[126]) in the catchment above the Fanhead while technically feasible (but not reasonably practicable) would in all likelihood be cost-prohibitive and have little material impact on the risk of future debris flows occurring.[127]

[205] In overall terms we concur with the Section 42A Report author's observation that the technical assessments and peer reviews that have been completed to date[128] show that allowing residents to remain in their homes is not feasible. The Councils have statutory obligations to act on behalf of communities to reduce or mitigate risk to life from natural hazards. A repeat of the May 2005 debris flow would not only put remaining residents at risk, but also the lives of emergency services personnel who would inevitably be involved in rescuing those residents. We agree with Craig Batchelar that a repeat debris flow event would require the clean-up and reconstruction of infrastructure and buildings for reoccupation if that was the adopted hazard management strategy.[129]

[206] So, despite the seeming willingness of some individuals to accept the risk of future debris flows and remain in their houses, we find that the wider "community risk" of allowing that to occur outweighs the perceived benefits that might accrue to those individuals.

[123] [2020] NZEnvC 18 at [77].
[124] EIC, Dr Christopher Massey, paragraph 3.1.
[125] Including Glen Baker and Ron Welsh.
[126] In the Awatarariki Stream on the order of 100 such structures, each 5 m high, would be required, and the cost and environmental disturbance required to build and maintain them would be extremely high. EIC Dr Tim Davies, paragraph 1.12.
[127] EIC, Dr Christopher Phillips, paragraphs 1.2, 6.12, 6.13 and 6.14.
[128] As listed in Table 3.3 of the Section 42A Report.
[129] EIC Craig Batchelar, paragraph 14.21.

8.5 Reasonable use of land

[207] Some submitters[130] opposed the plan changes as they considered that PC1 was a breach of section 85 of the RMA insofar as it rendered land incapable of reasonable use and placed an unfair and unreasonable burden on the owners of that land. We have considered that issue in the context of our discussion of section 85 of the RMA in section 5.6 of this Decision.

8.6 Prohibited activities

[208] In section 8.1 of this Decision we discussed the jurisdiction to confirm prohibited activities. Counsel for ARI submitted that "*prohibited status should be reserved for specific circumstances where materially justified".* He referred us to the Court of Appeal decision in *Coromandel Watchdog of Hauraki Incorporated v Chief Executive of the Ministry of Economic Development*[131] as providing examples. In that case, the Environment Court had held that prohibited activity status should only be used where the activity in question should not be contemplated in the relevant place, under any circumstances. The Court of Appeal held that that was too narrow a view and that prohibited activity status might be appropriate in a number of other situations. One of the examples given by the Court was where a precautionary approach is appropriate.

[209] We agree with counsel for ARI that prohibited status should be reserved for circumstances where that is materially justified. The question we have to consider is whether, on the merits, it is materially justified in this case. The uncontradicted expert evidence for WDC would support a view that this is a case where residential activity should not be contemplated within the identified High Risk Debris Flow Policy Area (i.e. applying the narrow test of the Environment Court). We also observe that one of the bases advanced to support the approach taken in PC17 and PC1 is the application of a precautionary approach.

[210] Some submitters[132] who opposed the plan changes considered the 'prohibited activity' status adopted by PC1 and PC17 to be a disproportionate response given what they perceived to be difficulties with the Councils' risk assessment. As set out in section 7.2 of this Decision we have already found that the risk management approach and assessment undertaken by the Councils to be robust and appropriate in the circumstances.

[211] In our view the prohibited activity status for future residential use provides clear and certain direction that such use is no longer appropriate given the demonstrable risk to human life and property within the High Risk portion of the Awatarariki Debris Flow Policy Area. Consistent with the policy direction of the RPS that we outlined in section 5.3 of this Decision, we find that prohibited activity status reliably reduces the existing intolerable high loss of life risk for residential properties in the High Risk portion of the Awatarariki Debris Flow Policy Area to a tolerable level, and is therefore appropriate.

[212] Lending weight to our finding above, we note the evidence of Dr Wendy Saunders, a Senior Natural Hazards and Climate Change Planner at GNS Science. Dr Saunders recently updated her 2013 desk top, risk-based approach to determining what an appropriate activity status for residential use would be in the High Risk portion of the Awatarariki Debris Flow Policy Area. She advised that based on the technical risk information now available, her knowledge of the actual number of houses within the hazard area, and new climate change projections prepared by Peter Blackwood, her 2019 desktop reassessment shows the 'risk' for land use planning

[130] Including the Awatarariki Residents Incorporated Society.
[131] [2007] NZCA 473.
[132] Including the Awatarariki Residents Incorporated Society.

purposes is 'intolerable' and the corresponding appropriate consent status has changed from 'discretionary' in 2013, to 'non-complying' or 'prohibited.[133]

[213] On a minor matter, we note that PC1 added new explanatory text to Other Methods 18.7.1 of the WDP that referred to regional rules affecting development in the Awatarariki High Risk Debris Flow Policy Are. We consider that text could be enhanced by specifically referring to Rule NH R71 of the Regional Natural Resources Plan that is inserted into that Plan by PC17. The amended text reads:

> Anyone planning to purchase land or undertake development in the Awatarariki High Risk Debris Flow Policy Area is advised to contact the Bay of Plenty Regional Council to determine if there are any regional rules that would affect their development, including in particular Rule NH R71 of the Regional Natural Resources Plan which prohibits residential activity on properties in the Awatarariki High Risk Debris Flow Policy Area that are listed in Table NH3.

8.7 Removal of existing use rights

[214] As we have noted earlier, PC17 extinguishes existing use rights for residential activities on properties located in the High Risk Debris Flow Policy Area. This is a fundamental aspect of reducing the risk of debris flows in that area from its existing unacceptable level. Having considered the evidence relating to the ongoing loss of life risk arising from future debris flows across the High Risk Debris Flow Policy Area, we find that the extinguishing of existing uses right is appropriate and consistent with the higher order instruments including the NZCPS and RPS.

[215] In that regard we endorse the commentary in section 10 of the Section 32 Report that extinguishing the existing uses rights in the High Risk Debris Flow Policy Area:

a) is unambiguous and reflects level of risk which is not capable of mitigation;
b) recognises the intolerable risk to life on parts of the Awatarariki Fanhead and, once in place, is the most efficient means of reducing this risk to medium or lower; and
c) while there will be an inevitable impact of loss of homes and property rights for affected owners/occupiers and indirect social and economic impacts from displacement of part of the community, that is outweighed by the economic and social benefits from reducing the risk to life.

[216] While we have found that the NZCPS and the RPS do not require implementation of PC17, we agree with the closing submissions of Ms Hill, as follows[134]:

> *"The obligation for the Regional Natural Resources Plan (through PC17) "to give effect to" the RPS (s.67(3)) means "to implement" its provisions. It does not mean that PC17 cannot go further than what the RPS directly provides for so long as, in so doing, it does not conflict with, or preclude implementation of, the RPS."*

[217] We find that this is one of the cases where *"going further"* is appropriate.

[218] We note in this regard that in terms of social costs Amelia Linzey concluded that the potential social costs identified for the 'status quo' (being the potential loss of life and the potential adverse social consequences on people's quality of life resulting from the damage / loss of

[133] EIC Dr Wendy Saunders, paragraph 1.2 and her written answers to our pre-circulated questions in the document titled 'Responses to Written Questions for WDC Witnesses – 26 February', page 61.
[134] Response by Counsel for Bay of Plenty Regional Council in relation to Issues Arising concerning Plan Change 17, 17 March 2020, paragraph 36.

property that would result from another debris flow) are greater than the social costs identified from the plan changes.[135] While we accept that many residents have a different view, we accept Ms Linzey's independent assessment.

8.8 NZDF Further Submission

[219] The New Zealand Defence Force (NZDF) lodged a further submission in support of the KiwiRail Holdings Limited (KiwiRail) submission on PC1. NZDF sought for provision to be made for temporary military training activities (TMTAs) within the proposed Awatarariki Debris Flow Policy Area.

[220] The Section 42A Report author recommended granting the relief sought by NZDF subject to them confirming that TMTAs do not include residential occupation, in terms of the definition of "residential activity" contained in the WDP. NZDF confirmed that to be the case in a letter addressed to the Panel Members dated 12 February 2020. NZDF did not attend the hearing.

[221] Under Clause 8(2) to Schedule 1 of the RMA a further submission must be limited to a matter in support of or in opposition to a relevant submission. The submission of KiwiRail sought amendments to PC1 Rules 18.2.6.3(c) and 18.2.6.6(c) to enable the maintenance and operation of existing utilities on all land so as to retain connections of benefit to the community. KiwiRail simply sought the deletion of the words "in a public place" from those two rules.[136]

[222] We do not consider that the KiwiRail submission provides scope to amend PC1 to allow TMTAs to occur within the Awatarariki Debris Flow Policy Area as either a permitted activity or a restricted discretionary activity. We do not understand TMTA to be "existing utilities" providing connections of benefit to the community. Furthermore, NZDF sought amendments to PC1 Rule 18.2.6.4 which was not the subject of the KiwiRail submission.

[223] Accordingly, for the reasons outlined above, we have decided that the NZDF further submission on PC1 should be rejected.

9.0 SECTION 32AA ASSESSMENT

[224] As we have noted previously, in compliance with section 32 and Clause 5 of Schedule 1 of the RMA, the WDC prepared and publicly notified an evaluation report dated 8 June 2018 ('the Section 32 Report'). We have had particular regard to the Section 32 Report.[137] Section 32AA of the RMA requires a further evaluation of any changes made to the plan changes after the initial evaluation report is completed. The further evaluation can be the subject of a separate report, or it can be referred to in the decision-making record.[138] If it is referred to in the decision-making record, it should contain sufficient detail to demonstrate that a further evaluation has been duly undertaken.[139]

[225] If the amended plan change text arising from our decisions on submission is adopted by the Councils, this Decision (including Appendices A and B) is intended to form part of the Councils' decision-making records. Therefore, in compliance with Schedule 1,[140] and electing the second

[135] EIC Amelia Linzey, paragraph 1.9.
[136] As notified Rules 18.2.6.3(c) and 18.2.6.6(c) read (our emphasis) "The erection of new, and the minor upgrading (including ancillary earthworks) and maintenance of existing, network utilities and related structures **in a public place**."
[137] RMA, s66(1)(e).
[138] RMA, s 32AA(1)(d) and (2).
[139] RMA, s 32AA(1)(d)(ii).
[140] RMA, Schedule 1, cl 10(2)(ab).

option in section 32AA(1)(d), we would need to include in this Decision a further evaluation of any amendments to the plan changes that are additional to those evaluated and recommended by the Section 42A Report author and accepted by us.[141]

[226] In this case the only additional amendments arising from our assessment of submissions relate to the further submission of the NZDF, the omission of notified additions to the RNRP 'User Guide' proposed by PC17, an amendment to WDP Other Methods 18.7.1, and an amendment to the definition of a Suitably Qualified and Experienced Practitioner.

[227] We discussed the NZDF further submission in section 8.8 of this Decision and our reasoning therein related largely to issues of scope and so there is no need for a section 32AA assessment.

[228] Regarding the second matter, as noted by the Section 42A Report author, there is no 'User Guide' to the RNRP either within that Plan or external to it.[142] Mr Olliver suggested that the notified 'User Guide' text could instead be included in Appendix 1 to the RNRP. That Appendix is arranged by high level topic and outlines the explanations and principal reasons for provisions in the Plan. Its format differs from the PC17 'User Guide' text. Given that the PC17 'User Guide' text was not notified as an amendment to RNRP Appendix 1, coupled with its different format to existing Appendix 1 text, we are not persuaded that including the PC17 'User Guide' text in Appendix 1 would be permissible in terms of scope and so again there is no need for a section 32AA assessment should it be omitted.

[229] In terms of WDP Other Methods 18.7.1 we find that additional wording will improve the effectiveness of that section and provide a more efficient means of alerting readers of the WDP to the corresponding controls in the RRMP. Regarding the definition of a Suitably Qualified and Experienced Practitioner, we have inserted a requirement for the expert to be "experienced in natural hazard management". We put that to Mr Batchelar during the hearing and he agreed that would be an effective improvement. We conclude that both of these minor amendments to the notified text of PC1 represent reasonably practical options for better achieving Objective Haz1 of the WDP.

[230] Finally, as we discussed in section 8.2 of this Decision we have adopted, as provided for by section 113(3)(b) of the RMA, the further amendments to PC17's Policy NHP6 recommended to us by the Section 42A Report author in his end of hearing report.[143] We also adopt his reasoning which we consider to be sufficient for the purposes of section 32AA.

10.0 EVALUATION AND DECISIONS

[231] We have considered and deliberated on the submissions lodged on the plan changes and the reports, evidence and submissions made and given at our public hearing. In making our decisions on the submissions we have sought to comply with all applicable provisions of the RMA. The relevant matters we have considered, and our reasons for them, are summarised in the main body of this Decision and are cross-referred to in Appendix A. We are satisfied that our decisions are the most appropriate for achieving the purpose of the RMA and for giving effect to the higher-order instruments.

[141] As we have noted previously, we have adopted the author's reasoning (or justification) for the amendments he recommended to us that find favour with.
[142] Supplementary s42APlanning Report, John Olliver, 4 March 2020, paragraph 12.
[143] Supplementary s42APlanning Report, John Olliver, 4 March 2020, paragraph 9.

10.1 Part 2 matters

[232] Under sections 66(1)(b) and 74(1)(b) respectively, regional and district plans must be prepared in accordance with the provisions of Part 2 of the RMA.

[233] The Supreme Court instructs us[144] that in a situation where a higher order document directs a particular First Schedule outcome then there is no ability to refer back to Part 2 to form a contrary view except in the case of invalidity (of the higher order document), incomplete coverage, or uncertainty of meaning.[145]

[234] Although we were referred to the NZCPS, we consider that the guidance it provides in this case is of only general assistance. It does not direct the outcome.

[235] We have found that neither does the RPS direct the outcome in this case because the assessment of hazard risk has not been undertaken in accordance with Appendix L of the RPS and (in the case of PC17) BOPRC has a discretion whether to adopt the plan change in this case. We therefore need not consider whether any of the exceptions noted by the Supreme Court apply. It is both appropriate and necessary that we have regard to the direction provided in Part 2 of the Act.

[236] Counsel for WDC referred us to RMA section 6(h) which requires us to "*recognise and provide for the management of significant risks from natural hazards"*. Counsel also directed us to section 7(i) of the Act which requires us to have particular regard to the effects of climate change.

[237] By contrast, counsel for ARI referred us to the purpose of the Act. Section 5 directs the use, development and protection of national and physical resources in a way, or at a rate that enables people to provide for their social, economic and cultural wellbeing and for their health and safety while, among other things, sustaining the potential of physical resources to meet the reasonably foreseeable needs of future generations.

[238] We observe that, when interpreting and applying section 5 of the Act, the Supreme Court makes clear[146] that it is for the decision maker on a plan change to determine whether use, development or protection is appropriate in the case before it. It is not necessary to achieve all three at once (even assuming that were possible).

[239] The residents' view is that PC1 (in particular) does not enable them to provide for their social, economic and cultural wellbeing. That view is understandable, but 'wellbeing' has many elements. Even without the specific reference to it in section 5, it would encompass health and safety issues inherent in continued occupation of the High Risk Debris Flow Policy Area.

[240] We find that the risk to life and property within the identified High Risk Debris Flow Policy Area on the Awatarariki Fanhead is a significant risk in terms of RMA section 6(h). That section does not direct how management of that risk should be recognised and provided for, but in section 5 terms, we find that protection of health and safety of people should be the dominant concern in a high-hazard area. We find further that the approach taken in PC17 and PC1 is consistent with that emphasis.

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[144] In *Environmental Defence Society Inc v The New Zealand King Salmon Company Limited* [2014] NZSC 38.
[145] Ibid at [90].
[146] In the *King Salmon* decision just noted at [24(d)].

[241] Mr Blackwood's evidence was that weather events of the scale that occurred in 2005 will become progressively more frequent as a result of the effects of climate change. As Kevin Hind identified, that may not translate into a materially greater hazard risk as the connection between particular weather events and particular debris flows is uncertain, but it certainly supports PC1 given that any new dwelling will have an anticipated life well into the period where Mr Blackwood identified climate change will make a real difference to weather patterns.

[242] Climate change effects are less relevant for PC17 which addresses the here and now.

[243] Nevertheless, for the reasons set out above we conclude that the approach taken in PC1 and PC17 is consistent with Part 2, given the evidence that we heard.

10.2 Proposed Plan Change 1 to the Whakatāne District Plan

[244] Pursuant to the powers delegated to us by the Whakatāne District Council under section 34A of the Resource Management Act 1991 we reject or accept submissions on PC1 as set out in Appendix A. The resultant amended Whakatane District Plan text is set out in Appendix B.

10.3 Proposed Plan Change 17 to the Bay of Plenty Regional Natural Resources Plan

[245] Pursuant to the powers delegated to us by the Bay of Plenty Regional Council under section 34A of the Resource Management Act 1991 we reject or accept submissions on PC17 as set out in Appendix A. The resultant amended Bay of Plenty regional Council Regional Natural Resources Plan text is set out in Appendix B.

Fraser Campbell

Rauru Kirikiri

Trevor Robinson

Robert van Voorthuysen (Chair)

Dated: 26 March 2020

APPENDIX A – DECISIONS ON SUBMISSIONS

In addition to the primary submissions raising the points listed in this Appendix, the Councils received further submissions in support of, or in opposition to, the primary submissions. To the extent that the points raised by further submissions are not identified directly in this Appendix, we recommend that they are accepted or rejected according to our decisions on the corresponding primary submission points.

The exception to this is the further submission of the New Zealand Defence Force which we deal with in Section 8.8 of this Decision.

Submissions on PC1 to the Operative Whakatāne District Plan

Submitter	Sub. Pt.	Plan Provision	Decision	Reason
Awatarariki Residents Incorporated Society	WDP 7.1	General	Reject	See Section 5.2 of the Section 42A Report and Sections 4.0, 5.0, 7.0 and 8.1 to 8.7 of this Decision.
	WDP 7.2	3.2.5		
	WDP 7.3	Section 18.1		
	WDP 7.4	Section 18.2		
	WDP 7.5	Rule 3.4.1.1 Activity Status Table		
	WDP 7.6	Section 21 Definitions		
	WDP 7.7	18.2.6.2 Advice note		
	WDP 7.8	18.7.1 Other Methods		
	WDP 7.9	Planning Maps		
Bay of Plenty CDEM Management Group	WDP 5.1	3.2.5	Accept	See Section 5.2 of the Section 42A Report and Section 8.0 of this Decision.
	WDP 5.2	Sections 18.1 &18.2		
	WDP 5.3	Planning Maps		
Glenn Baker	WDP 8.1	General	Reject	See Section 5.2 of the Section 42A Report and Section 8.4 of this Decision.
Keith Sutton	WDP 3.1	General	Reject	See Section 5.2 of the Section 42A Report and Sections 4.0 and 8.4 of this Decision.
KiwiRail Holdings Ltd	WDP 4.1	Section 18.2	Accept	See Section 5.2 of the Section 42A Report.
	WDP 4.2			
	WDP 4.3			
Matatā Residents Association	WDP 6.1	General	Reject	See Section 5.2 of the Section 42A Report and Sections 7.1 and 8.4 of this Decision.

Submitter	Sub. Pt.	Plan Provision	Decision	Reason
Margaret Gracie	WDP 2.1	Planning Maps	Accept	See Section 5.2 of the Section 42A Report.
Te Rūnanga o Ngāti Awa	WDP 1.1	General	Accept	See Section 5.2 of the Section 42A Report and section 6.0 of this Decision.

Submissions on PC17 to the Bay of Plenty Regional Natural Resources Plan

Submitter	Sub. Pt	Plan Provision	Decision	Reason
Awatarariki Residents Incorporated Society	RNRP 6.1	General	Reject	See Section 5.2 of the Section 42A Report and Sections 4.0, 5.0, 7.0 and 8.1 to 8.7 this Decision.
	RNRP 6.2	Objective NH04		
	RNRP 6.3	Policies NHP6, NHP7, NHP8		
	RNRP 6.4	Rule NH R71		
Bay of Plenty CDEM Executive Group	RNRP 4.1	General	Accept	See Section 5.2 of the Section 42A Report.
Katherine Stevens	RNRP 2.1	NH 04, NH P6	Reject	See Section 5.2 of the Section 42A Report and Sections 8.1 to 8.7 of this Decision.
Margaret Gracie	RNRP 3.1	General	Accept	See Section 5.2 of the Section 42A Report.
Matatā Action Group	RNRP 8.1	General	Reject	See Section 5.2 of the Section 42A Report and Section 8.1 of this Decision.
	RNRP 8.2	Objective NH 04		
	RNRP 8.3	Policies NHP6, NHP7, NHP8 Rule NHR71		
Matatā Residents Association	RNRP 5.1	General	Reject	See Section 5.2 of the Section 42A Report and Sections 7.2 and 8.1 of this Decision.
Te Rūnanga o Ngāti Awa	RNRP 1.1	General	Accept	See Section 5.2 of the Section 42A Report and section 6.0 of this Decision.

APPENDIX B – PLAN CHANGE TEXT

Explanatory text in italics does not form part of the Plan Changes.

Insertions to the text of the operative Plans are shown as <u>underlined</u>.

Deletions to the text of operative Plans are shown as ~~strike out~~.

Amendments to the notified provisions of the plan changes arising from our decisions on submissions are shown in grey wash.

Chapter 3 Zone Descriptions, Activity Status, Information Requirements and Criteria for Resource Consents

Add the following new Policy Area in Section 3.2

3.2.5 Awatarariki Debris Flow Policy Area

3.2.5.1.1 The Awatarariki Debris Flow Policy Area means the land susceptible to debris flow hazards and identified on ~~the~~ Planning Map~~s~~ 101A as either high, medium, or low risk.

The risk areas are:

a. **Awatarariki High Risk Debris Flow Policy Area**: The High Risk area includes land that is subject to a high risk to life and property from debris flows due to the likelihood of future debris flows and the potential for such flows to contain high impact boulders and woody debris, combined with the volume, density, and velocity of any future flow. Existing residential uses should retreat from the High Risk area because other forms of risk mitigation cannot practicably reduce the high likelihood of loss of life. There is also a risk to life for visitors to the area. Urban activities are prohibited in the High Risk area, with other activities only allowed where they relate to transitory recreational use of open space or other specifically identified low risk activities;

b. **Awatarariki Medium Risk Debris Flow Policy Area**: The Medium Risk area includes land that is subject to risk to life and property from debris flows, but is beyond the area where previous debris flows have contained high impact boulders and woody debris. Development is allowed only where a risk assessment establishes that the level of risk is reduced to a level that is as low as reasonably practicable.

c. **Awatarariki Low Risk Debris Flow Policy Area**: The Low Risk area includes land that is subject to risk to property from debris flows, but is beyond the areas where previous debris flows have contained high impact boulders and woody debris. There is potential for flows, predominantly containing sand, silt and gravel, with variable boulder and timber content.

In the Activity Status Table 3.4.1.1 insert a "Pr" with a superscript number to all of the activities in the Coastal Protection column with the following footnote:

In the Awatarariki High Risk Debris Flow Policy Area this activity is a Prohibited Activity.

In the Activity Status Table 3.4.1.1 add an "RD" with a superscript number to activities 1, 2, 4, 5, 6, 7, 9, 10, 11, 12, 16, 17, and 30 in the Residential column with the following footnote:

In the Awatarariki Medium Risk Debris Flow Policy Area this activity is a Restricted Discretionary Activity.

Add a new line to the Activity Status Table 3.4.1.1 as follows:

63	Activities in the Awatarariki High, Medium, ~~High~~ and Low Risk Debris Flow Policy Areas	See Rules 18.2.6.3 – 18.2.6.7

Add a new clause to Rule 3.5.1.1 as follows:

o within the Awatarariki Medium Risk Debris Flow Policy Area (AMRDFPA);

i. Unless the Council otherwise determines that some other assessment is appropriate, an application for resource consent for an extension to a building, a new building, or any other new structure within the AMRDFPA, shall include a report on its suitability, prepared by a Suitably Qualified and Experienced Practitioner, certifying that the extension, building or other new structure will reduce the risk to the activity, and any building and its occupants from a debris flow, to a level that is as low as reasonably practicable, and will avoid causing any increased risk to other activities, and any buildings and their occupants on any other site, from a debris flow.

Amend Section 3.7.25 Natural Hazard Effects as follows:

d. In relation to erosion, falling debris or slippage, and debris flows, the need for ongoing conditions aimed at avoiding, remedying or mitigating future potential adverse effects, and any need for registration of covenants on the lot's Certificate of Title. The Council will have regard to the siting of buildings or building platforms, and the specific design of buildings or other structures to avoid, remedy or mitigate the effect of the hazard;

Chapter 18 Natural Hazards
Section 18.1 Objectives and Policies

Add the following new Policies under Objective Haz1:

Policy ~~18~~ 13
To assess the natural hazard risk from Debris Flows on the Awatarariki fanhead at Matatā by undertaking a risk analysis using the methodology set out in Australian Geomechanics Society, Landslide Risk Management, Australian Geomechanics, Vol 42, No 1 March 2007 ~~the Australian Geomechanical Society – Landslide Risk Management 2007~~.

Policy ~~19~~ 14
a. To reduce the level of natural hazard risk in the Awatarariki High Risk Debris Flow Policy Area from high to medium levels (and lower if reasonably practicable);
b. To reduce the level of natural hazard risk in the Awatarariki Medium Risk Debris Flow Policy Area from medium to as low as reasonably practicable.
c. To maintain the level of natural hazard risk in the Awatarariki Low Risk Debris Flow Policy Area to within the low natural hazard risk range.

Section 18.2 Rules

Amend the Advice Note under Rule 18.2.6.2 as follows:

Council is ~~currently~~ undertaking an assessment of landslide and debris flow risks in the vicinity of the escarpments at Whakatāne, Ōhope, and Matatā. This work is intended to provide the community with a better understanding of the nature and extent of these hazards and the risks they may present. Council has completed the debris flow risk assessment for the Awatarariki fanhead at Matatā and has included a Natural Hazard Policy Area on the Awatarariki fanhead. It is likely that the District Plan maps and rules that control land use and subdivision in areas affected by landslide and debris flow hazards, in areas apart from the Awatarariki fanhead at Matatā, will need to be changed once the risk assessment has been completed. Any changes to

the District Plan will be subject to a public submission process under the Resource Management Act.

Add the following new Rules after Rule 18.2.6.2:

18.2.6.3 Within the area shown as Awatarariki High Risk Debris Flow Policy Area on Planning Map 101A Matatā the following activities are Permitted Activities:

a. The construction of structures and the use of land for passive recreation, including the construction and maintenance of public pedestrian and cycle tracks, interpretative and directional signs, fencing, pedestrian stiles, gates, bollards and associated barriers, seating, landscaping, gardens and grassed areas and rubbish and/or recycling bins;
b. Activities operating in accordance with, or that are provided for in, an approved Reserve Management Plan under the Reserves Act 1977.
c. The erection of new, and the minor upgrading (including ancillary earthworks) and maintenance of existing, network utilities and related structures ~~in a public place~~;
d. Demolition and/or removal of a building or structure;
e. The removal of network utilities;
f. Vegetation clearance;
g. The erection of fencing, signage, a viewing platform and other minor structures, associated with the development of a commemorative reserve on Lot 20 DP 306286;
h. Activities operating in accordance with section 18(2) of the Reserves Act 1977 on the Te Kaokaoroa Historic Reserve (Allotment 373 Town of Richmond)

18.2.6.4 Within the area shown as Awatarariki High Risk Debris Flow Policy Area on Planning Map 101A Matatā the following activity is a Restricted Discretionary Activity:

a. Earthworks

In assessing an application for a Restricted Discretionary Activity for earthworks in the Awatarariki High Risk Debris Flow Policy Area the Council shall restrict its discretion to:

a. Whether the activity will avoid causing any increased risk to other activities, and any buildings and their occupants on any other site, from a debris flow;
b. Whether the activity will appropriately address the accidental discovery of koiwi or other taonga, including giving effect to any protocols agreed with tangata whenua.

18.6.2.5 Within the area shown as Awatarariki High Risk Debris Flow Policy Area on Planning Map 101A Matatā any activity, other than those that are a Permitted Activity under Rule 18.2.6.3 or a Restricted Discretionary Activity under Rule 18.2.6.4, is a Prohibited Activity.

18.6.2.6 Within the area shown as Awatarariki Medium Risk Debris Flow Policy Area on Planning Map 101A Matatā the following activities are Permitted Activities:

a. Residential activities and associated buildings and structures within the existing building or structure envelope, including the footprint, as lawfully established before 31 December 2017;
b. Demolition and/or removal of a building or structure;
c. The erection of new, and the minor upgrading (including ancillary earthworks) and maintenance of existing, network utilities and related structures ~~in a public place~~.

18.2.6.7 Within the area shown as Awatarariki Medium Risk Debris Flow Policy Area on Planning Map 101A Matatā all activities are a Restricted Discretionary Activity unless the activity is listed as a Permitted Activity by Rule 18.2.6.6, or a discretionary, non-complying or prohibited activity in Section 3.4.1 Activity Status Table.

Section 18.4 Assessment Criteria for Restricted Discretionary Activities

Add the following new Rules:

18.4.2 Awatarariki Medium Risk Debris Flow Policy Area

18.4.2.1 Council shall restrict its discretion to

a) Whether the design and layout of the activity will reduce the risk to the activity, and any building and its occupants from a debris flow, to a level that is as low as reasonably practicable;

b) Whether the activity will avoid causing any increased risk to other activities, and any buildings and their occupants on any other site, from a debris flow.

An application for Restricted Discretionary Activity in the Awatarariki Medium Risk Debris Flow Policy Area shall not be notified, or served on affected persons.

Add the following to Other Methods 18.7.1:

Anyone planning to purchase land or undertake development in the Awatarariki High Risk Debris Flow Policy Area is advised to contact the Bay of Plenty Regional Council to determine if there are any regional rules that would affect their development, including in particular Rule NH R71 of the Regional Natural Resources Plan which prohibits residential activity on properties in the Awatarariki High Risk Debris Flow Policy Area that are listed in Table NH3.

The area shown as Awatarariki Low Risk Debris Flow Policy Area on Planning Map 101A Matatā has been assessed as having a low risk to life and property from debris flows from the Awatarariki catchment. While this is an acceptable level of risk, anyone planning to purchase land or undertake development in this area is advised to contact Council to obtain the latest information, and to then evaluate the risk. The debris flood in this area, resulting from a debris flow from the Awatarariki catchment, will be further assessed as part of future district wide susceptibility modelling of flooding. It is possible that the outcome of that assessment will result in controls being placed on land use and/or subdivision.

Add the following definitions after the definition of 'Audible bird scaring devices' in Chapter 21 Definitions:

Awatarariki High Risk Debris Flow Policy Area means land on the Awatarariki fanhead that is subject to a high risk to life and property from debris flows as shown on Planning Map 101A.

Awatarariki Medium Risk Debris Flow Policy Area means land on the Awatarariki fanhead that is subject to a medium risk to life and property from debris flows as shown on Planning Map 101A.

Awatarariki Low Risk Debris Flow Policy Area means land on the Awatarariki fanhead that is subject to low risk of life and property from debris flows as shown on Planning Map 101A.

Add the following definition after the definition of 'Sub-station' in Chapter 21 Definitions:

Suitably Qualified and Experienced Practitioner means a person who is an independent expert with experience in natural hazard management who applies good professional practice, and assesses consequences with reference to accepted benchmarks and industry guidelines.

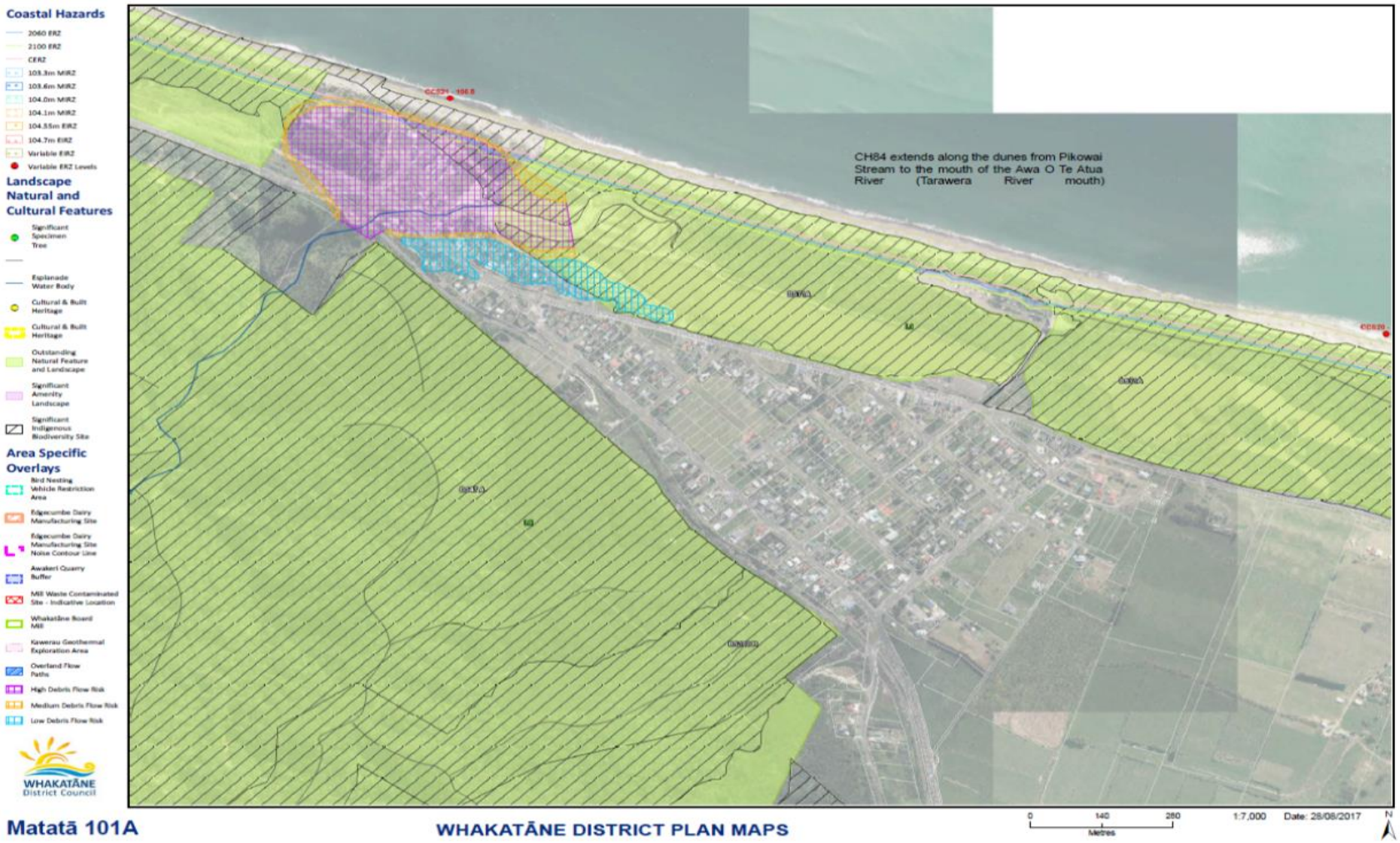
Planning Maps

Amend Planning Map 101A Matatā as shown overleaf to show:

- *Awatarariki High Risk Debris Flow Policy Area*
- *Awatarariki Medium Risk Debris Flow Policy Area*
- *Awatarariki Low Risk Debris Flow Policy Area*

Amend Planning Map 101B Matatā as shown overleaf to show:

- *Coastal Protection Zone underlying the Awatarariki High Risk Debris Flow Policy*



Matatā 101A

WHAKATĀNE DISTRICT PLAN MAPS


Features
Amenity Building Line
Pedestrian Street
Restricted Vehicle Access
Road Widening
National Grid Centre Line
Gas Transmission Pipeline Corridor
Coastal Environmental Line
Railway Corridor Buffer
Designation
Statutory Acknowledgements
Key Urban Space
12m Height Restriction
300 m oxidation pond buffer
Strand Character Area
WHK River Greenway concept
Omeheu Spray Irrigation Scheme
Minginui Access Road
State Highway
Limited Access Road
District Arterial Roads
Natural Hazard
Natural Hazard
Natural Hazard (NHaz4)
Planning Zones
Business Centre
CPZ
Commercial
Community and Cultural
Education
Industrial
Large Format Retail
Light Industrial
Residential
Urban Living
Mixed Use
Active Reserve
Deferred Residential
Rural Coastal
Rural Foothills
Rural Ohiwa
Rural Plains
WHAKATĀNE District Council
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Date: 28/08/2017
1:7,000
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137.5
275
Metres
WHAKATĀNE DISTRICT PLAN MAPS
Matatā 101B

Add the following provisions to chapter NH: Natural Hazards:

Management of Debris Flow Hazards on the Awatarariki Fanhead at Matatā

Objective

NH 04 Avoidance or mitigation of debris flow hazard by managing risk for people's safety on the Awatarariki Fanhead.

Policies

NH P6 To assess the natural hazard risk from Debris Flows on the Awatarariki fanhead at Matatā by undertaking a risk analysis using a ~~the~~ methodology that complies with Appendix L to the Regional Policy Statement ~~set out in Australian Geomechanics Society – Landslide Risk Management 2007~~.

NH P7 To reduce the level of natural hazard risk associated with debris flow on the Awatarariki Fanhead by ensuring existing residential land uses retreat from the high risk hazard area as soon as reasonably practicable.

NH P8 To ensure existing residential land uses retreat from the high risk hazard on the Awatarariki Fanhead by extinguishing existing use rights that would otherwise enable those residential land uses to continue.

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.

Add the following definition to the 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~~ a parcel of land described in Table NH 3 and shown with a yellow border on Figure NH1.

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

Figure NH1

~~To incorporate into the Regional Natural Resources Plan User Guide – The Management of Debris Flow Hazards on the Awatarariki Fanhead at Matatā~~	
~~Issue~~	~~There is a high natural hazard risk to life and property (as defined in accordance with Appendix L of the Regional Policy Statement) from debris flows for some residential activities in the Awatarariki Fanhead natural hazard zone at Matatā.~~
~~Principal Reasons for provisions~~	~~Susceptibility and risk from debris flows in the Awatarariki fanhead natural hazard zone have been carefully studied and assessed in a series of peer reviewed reports undertaken since a major debris flow event in May 2005. A debris flow is a significant threat to life and property on the Awatarariki fanhead due to the potential for large boulders and woody debris in any debris flow, combined with the expected volume, density, and velocity of any future flow.~~ ~~Regional Policy Statement Policy NH 2B states that high natural hazard risk within a natural hazard zone should not be tolerated and requires a response to reduce risk. The Awatarariki Fanhead is a natural hazard zone that includes residential land that is subject to a high risk to life and property from debris flows. It is recommended that existing residential uses retreat from the area because other forms of risk mitigation cannot practicably reduce the high risk of loss of life.~~ ~~The nature of the hazard is such that it is not practicable to reduce the current high risk to a moderate or low level using engineered protection or other measures. Evacuation using an early warning system of an event also does not reduce the risk to an acceptable level. The preferred outcome for the area subject to high risk is therefore to retreat from the area and to move residential activities out of harm's way.~~ ~~These regional plan provisions are integrated with the Whakatane District Council's Awatarariki Debris Flow Risk Management Programme in a unified approach to managing the loss of life and property damage risks from future debris flows within the Awatarariki Stream catchment. The Programme includes hazard and risk modelling, escape routes, warning systems, and a managed voluntary retreat strategy for the Awatarariki High Risk Debris Flow Policy Area under the District Plan, in addition to regulatory measures under the Building Act and Resource Management Act.~~
~~Design of Rules~~	~~Regional Policy Statement Policy NH 14C identifies that the Bay of Plenty Regional Council, city and district councils are responsible for specifying objectives, policies and methods, including any rules, for the control of the use of land for the~~

~~avoidance or mitigation of natural hazards. City and district councils have primary responsibility for controlling land use and they also control subdivision for the avoidance or mitigation of natural hazards. The Bay of Plenty Regional Council has the power to set land use rules to address natural hazard risk to existing land uses.~~

~~Rules in the Whakatane District Plan prohibit land use activities in the high risk area except for activities associated with clearance of the land and ongoing use as public reserve. However, District Plan rules are ineffective in reducing debris flow risk from high to medium (or less) because existing use rights under section 10 of the Act continue to apply and allow residential land uses to continue.~~

~~A Regional Council has the statutory function to control the use of land for avoidance or mitigation of natural hazards, including under a regional plan rule. Existing land uses are not protected from regional plan rules.~~

~~Rules in the Regional Natural Resources Plan prohibit residential uses within the Awatarariki high risk area. These rules remove existing use rights for existing residential activities. The rules recognise that there is the potential for the level of risk to remain high if there is incomplete implementation of the Awatarariki Debris Flow Risk Management Programme and its managed voluntary retreat strategy. The prohibition applies only to sites that are currently in residential use and/or purport to have existing use rights under section 10 of the Act enabling a previous use to re-establish.~~