BEFORE THE ENVIRONMENT COURT

		Decision No. A 035 /2009	
	IN THE MATTER	of the Resource Management Act 1991 (the Act)	
	AND		
	IN THE MATTER	of appeals under section 120 of the Act	
	<u>BETWEEN</u>	TE RANGATIRATANGA O NGATI RANGITIHI INCORPORATED (ENV-2007-WLG-000200) (ENV-2007-WLG-000201) (ENV-2008WLG-000193)	
	AND	N I HARRIS, E C CAMPION, and G J BAGNALL (ENV-2007-WLG-000206) (ENV-2008-WLG-000176) <u>Appellants</u>	
	AND	BAY OF PLENTY REGIONAL COUNCIL <u>First Respondent</u>	
	AND	WHAKATANE DISTRICT COUNCIL Second Respondent	
Hearing at	Mt Maunganui 6 October - 10 October; 13, 14 October 2008; 9 - 13 February 2009		
Court:	Environment Judge J A Smith (presiding) Environment Commissioner C E Manning Environment Commissioner S J Watson		
Counsel:	Ms V J Hamm and Ms M Paddison for the Whakatane District Council as applicant (the Applicant Council) Mr P H Cooney and Ms J S Andrew for the Bay of Plenty Regional Council (the Regional Council) Mr A M B Green for the Whakatane District Council as respondent (the District Consent Authority) Mr D Potter and Mr C M Paul for Te Rangatiratanga O Ngati Rangitihi Incorporated (the Society) Mr D J Fletcher and Ms S Hollis for N I Harris and others (Mr Harris)		
Date of Issue:	Auth April 2009		



(41h A)

DECISION OF THE ENVIRONMENT COURT

- Decision of the consent authority is confirmed except as to works in Clem Elliott Drive area, subject to finalisation of conditions as outlined in this decision. In particular
 - (a) Amendment to the protocols to insert a reference to preliminary blessings/ceremonies as appropriate to the area.
 - (b) Amendment of conditions to ensure Clem Elliott swale works proceed on the basis of cut to fill.
 - (c) A new condition requiring that either
 - (a) All landowner consents be in place; or
 - (b) A Variation to avoid works on the properties of any non consenting landowners be in place

prior to the commencement of any works under these consents.

- B. As to the consent for works in Clem Elliott Drive:
 - (i) Consent confirmed as to construction of drainage swale (as above);
 - (ii) Consent is cancelled as to excavation and removal of sediment and debris to restore private properties, roads and other Public Open Space in the area around Clem Elliott Drive to the extent it is not covered by consented aspects (ie swale, Awatarariki Stream or Te Awa o te Atua works). In particular there is no consent for placement of debris from that area at the Railway Lagoon site.
- C. Costs, which are not encouraged, are reserved. Any application to be made within 30 working days and a reply with 10 working days with final reply within 5 working days.



REASONS FOR DECISION

Introduction

[1] In May 2005 intense rainfall in the Matata area led to flash flooding and major landslides including several around Matata Township. This resulted in a debris flow and flood (between 200,000m³ and 300,000m³) which deposited debris near the foreshore at Matata, filling lagoon areas well recognised for their bird life and other natural values.

[2] The debris flow also took away a railway bridge. The bridge reconstruction has been the subject of a separate decision of this Court granting retrospective consent (see W072/2008). Various works were performed under the Emergency Work provisions of the Act and a number of consents have been applied for. Some have been granted without appeal, others have been the subject of appeal (such as the railway bridge) before this Court. The debris flow led to major disruption not only of the railway but also of the State Highway and national, regional and local authorities took steps to consider what should be done as a result of the debris flows.

[3] These applications for resource consent were consequent on those investigations and the appeals from grant of them raise both cultural and practical concerns relating to the works envisaged.

History of Debris Flows in the Area

[4] There is no doubt that the Matata area generally has been the subject of a significant number of debris flows over the centuries. Cultural witnesses said that local iwi had known of these events since Maori occupation of the land has occurred. There have been several major debris flows in the Matata area since the signing of Treaty of Waitangi, the last major one being in 1939. Geological evidence demonstrates that there have been debris flows larger than that of May 2005 as well as a number of small ones. There did not appear to be any dispute that part of Matata is built upon debris flows. The phenomena of mass movement of the high prominent escarpments and gullies behind Matata and along the Matata Straights is well documented both from flooding and earthquake events. Similarly volcanic ash from the Tarawera eruption covered this area in 1886.



[5] Matata represents the western most extent of the Rangitaiki Plains (**the Plains**) which was, until drained in early 20th century, the delta of the Tarawera and Rangitaiki Rivers. The contribution of the Whakatane River to the east of the wetland delta was not subject to evidence before us.

[6] The eastern most extent of the Plains is bounded by Whakatane Township and the outlet to the Whakatane River itself. In the centre of the Plains is Mt Edgecumbe, a significant topographical feature. Prior to European settlement the plains area was an extensive delta of wetlands with the mouths of the Tarawera and Rangitaiki Rivers at Matata at the western extremity or at Whakatane at the eastern extremity. There seems to be a suggestion that, particularly in flood conditions, waters may have discharged into the ocean between these two points.

Ngati Rangitihi

[7] Matata itself has been continuously occupied by hapu of the Ngati Rangitihi iwi as the whakapapa of the Ngati Rangitihi takes their occupation of this area back to the landing of the early canoes of Te Arawa. As is to be expected in the densely occupied Bay of Plenty area, their occupation of the general area, particularly through the Rangitaiki Plains, has been disputed. Ngati Awa and Ngati Tuwheratoa a Kawarau both have claims to this area. Nevertheless there does not appear to be any serious dispute that Ngati Rangitihi have occupied the area now known as Matata Township continuously since well before the Treaty of Waitangi. Evidence given establishing long-term occupation of this area, included references to a bone cleaning area on the Te Awa o te Atua area in front of Matata village from where koiwi were placed in caves within the Awatarariki catchment area.

[8] The Awatarariki Stream flows through steep gully land behind Matata township and previously flowed into delta area of Tarawera River now known as the Rangitaiki Plains. This area was known as Te Awa o te Atua and was immediately adjacent to the Ngati Rangitihi settlement in this area.

[9] The Ngati Rangitihi hapu at Matata operated a ferry system across Te Awa o te Atua adjacent to the village. People wishing to travel to the north (northwest) would wait at the gate and were then ferried across the river so as to continue their journey on the western side of the outlet.



[10] Numerous battles were fought in the area contesting the gateway to the Rangitaiki Plains and we were told that many of the ancestral chiefs of Rangitihi had either died of their wounds in battle or gone to die in the dune swales on the foreshore of the harbour on the seaward side of Te Awa o te Atua.

[11] In addition the area was of considerable cultural importance for several reasons:

- (a) We understand that Ngati Rangitihi and other iwi recognised the domain of taniwha on the landward side of the Te Awa o te Atua outlet for several kilometres along the river's length which imposed certain constraints upon the type of activities that could be conducted there.
- (b) A number of significant battles between iwi were fought in this area, the most significant being a battle in 1863 or 1864 involving some 700 warriors including from Ngati Awa, and Ngati Rangitihi. The battle, we understand, raged in the area around the western side of the outlet to Te Awa o te Atua (Clem Elliott Drive area) and eventually warriors were driven upstream into the Awatarariki catchment with significant loss of life. This has made the area, (now known as the *quarry area*), of notable importance with respect to koiwi of Ngati Awa, and Ngati Rangitihi.

[12] In 1917 the Tarawera River was redirected through a cut of some 5km to the east of Matata and, since that time, the reach between the cut and Matata has become increasingly silted up. Until the 1950s the area was still open to the tidal influence and the effluent from the upstream industrial activities ponded in the lagoon area before the village and led to considerable concern. Eventually flapgates were installed and since then the water areas have re-established as lagoons.

[13] A 1939 debris flow down the Awatarariki catchment bought down koiwi, not only those of Ngati Rangitihi but also koiwi of other warriors in the major battles that have been fought in the area. Those koiwi were spread in the Clem Elliott Drive area particularly. The 2005 major debris flow brought down a much more significant flow and covered a far wider area. Nevertheless it is accepted that the debris includes koiwi of Ngati Rangitihi, Ngati Awa and Ngati Porou. Although not explicit, it appears that Tuwheratoa may also have koiwi in the area brought down by these debris flows.



The Areas in Question

[14] We note that the debris flows also damaged a number of houses, particularly those in the Clem Elliott Drive area which is within the immediate debris fan of any flow from the Awatarariki Gorge catchment. Annexed hereto and marked **A** is a plan of the general area showing the area we shall refer to as *Te Awa o te Atua Lagoon* being the area of Te Awa o te Atua Lagoon immediately in front of the Matata settlement between the causeway and the Awatarariki streambed. This is delineated to the north by the foredunes and foreshore area, to the south by the highway and grassed reserve, at the eastern end by the causeway and the area occupied by the Reserve camping ground, with the western end being the true left bank of Awatarariki Stream.

[15] To the east of the causeway is the rest of the Matata lagoon areas which were largely unaffected by the debris flow although we noticed some light silts to the immediate east of the causeway.

[16] To the west of the Te Awa o te Atua lagoon area is a central area which we will describe as *Clem Elliott Drive*. It consists, in part, of areas that have been filled in since the Tarawera River cut was made and has been subject to extensive sand mining by Patterson and Sons. Mr Patterson is the chairman of the Society one of the appellants in this case. The area of Clem Elliott Drive has been subject to more recent developments including a number of newer houses, some of which were significantly damaged or destroyed by the debris flow. This area is immediately in front of the point where the Awatarariki Stream flows from the Awatarariki gully area and is also described as the debris fan. It has been subject to a number of debris flows including those of 1939 and 2005.

[17] To the west of this area is an area known variously as the Railway or Far Western Lagoon (we shall refer to it as the *Railway Lagoon*). From a point between the railway line which crosses State Highway 2 at this point and the Clem Elliott area, with its foredunes, these lagoons extend some distance to the west. There is a mixture of exotic and native vegetation and further to the west a holiday camp known as *Murphys Campground*. The debris flow deposited a significant volume of rocks and other debris immediately in front of the gully (in the Clem Elliott Drive area) and also spread large amounts of silt and other lighter material both to Te Awa o te Atua Lagoon in the east O and Railway Lagoon in the west.



[18] Emergency works after the debris flow involved excavating some 20,000-30,000m³ of material and dumping it in the Railway Lagoon area. We understand the area was already subject to significant infilling by silts and other materials (including cars and the like washed away by the event). The debris flow itself largely filled-in the Te Awa o te Atua Lagoon but also to some extent the Railway Lagoon.

[19] Subsequent to the debris flow events, the silted areas have become repopulated by exotic species including willows, but is essentially a monoculture of raupo. There are some open water areas remaining in both lagoons although those within the Te Awa o te Atua region are particularly limited. Even those within the Railway Lagoon are significantly compromised by sediment at the eastern end. As one progresses to the west however the ponds improve in quality to the extent where those near Murphy's camp in the treed area appear to be in a more natural condition.

Scope of the Appeals

[20] The Council has undertaken an investigation in respect of four projects which together represent the Matata Regeneration Project. These are the Awatarariki Catchment, the Waitepuru Catchment, the Waimea Catchment and the Ohinekoao Catchment. All of the current appeals relate only to the Awatarariki Catchment but do not represent all of the works within that catchment. They include:

- 1. Flood hazard mitigation works involving the clearance and realignment of the Te Awa o te Atua stream channel below Moores Bridge;
- 2. The work associated with the partial restoration of the Te Awa o te Atua lagoon and its environs;
- 3. Construction of a drainage swale behind the foredunes in the Clem Elliott Drive area;
- 4. Maintenance of works above (1) to (3);
- 5. Excavation and removal of sediment and debris in the Clem Elliott Drive area to restore private properties, roads and other Public Open Space;



- 6. The retrospective consent for lowering and contouring of an existing debris mound in the Railway Lagoon area and for the emergency works earlier mentioned.
- 7. Allowing for further depositions of debris arising from the maintenance of the stream and lagoon application and possibly involving some debris (rocks and roots) arising from the restoration works of the stream and lagoon.
- 8. Placement of debris on the Railway Lagoon debris mound from clearance of Clem Elliott Drive area (estimated at some 40,000m³).

[21] Importantly these appeals do not address matters such as the reconstruction of the Railway Bridge (which has been the subject of a separate decision) and any debris detention system on the Awatarariki Stream or other works to avoid future major debris flows. This issue was the subject of a preliminary application for adjournment by Mr Fletcher for Mr Harris and supported by the Society. It was the position for the Applicant Council that these works could be justified on a standalone basis without reference to any hazard mitigation to be achieved for debris flows. The Applicant Council contend that hazard mitigation is achieved by these works in respect of flood flows and that the restoration works also have enhancement and beneficial effects on the environment justifying the approval in any event.

[22] We need to make it very clear however that the works the subject of these appeals do not seek to avoid or prevent a repetition of the 2005 debris flow events or their impact. Accordingly, as many witnesses pointed out, a repeat of the 2005 event would overwhelm and obviate any benefits from these works.

Debris Flows

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[23] We should briefly mention our understanding as to why the avoidance of future hazard mitigation for debris flows is more problematic than suggested by the applicant Council. The Awatarariki Catchment is a small steep-sided catchment extending to just behind the Railway Bridge. We accept the catchment is prone to slips and partial and total blockages from time to time, often during heavy rainfall events. Given constrictions within the stream's length, particularly just upstream of its outlet to the foreshore area, it

is nearly inevitable that from time to time debris will accumulate, partially or totally dam the stream and then there will be failure leading to the movement of large volumes of water, rock and other debris. Given that this can occur at a number of points within the catchment there is clearly the potential for a cascade effect of one blockage collapsing, and the subsequent collapse of downstream blockages. In those types of circumstances huge pulses of debris such as occurred in 2005 can and do occur from to time.

[24] Immediately downstream of the Awatarariki Gorge outlet to the foreshore is the Railway Bridge. It formerly had a fairly small flow capacity, probably in the order of 20-30 cubic metres per second (*cumecs*), but perhaps as high as 55 cumecs. It was a simple structure with a laid bed of concrete as is described in more particular detail in our previous decision (W072/2008). We accept evidence given to us, (including an eye witness account by Mr Harris), that in the 2005 debris flow a significant amount of debris built up on this bridge. With the failure of the bridge the debris was carried down. Mr Harris reports the sound of very heavy boulders moving.

[25] We were told by Mr Cotter, an engineer called by Mr Harris, that in suitable debris flow density (for example where the weight of water is double that of solid material) 2 tonne rocks have negligible weight. Once the bridge failed, debris flows proceeded both overland and downstream.

[26] Just downstream of the Railway Bridge is a bridge over State Highway 2 known as *Moore's Bridge*. This bridge has a capacity to pass some 55 cumecs of flood flow. This is in excess of a 100 year rainfall event. When the bridge is overwhelmed debris diverts across the top of the bridge and also to the east and west. Given the natural downward slope of the area immediately in front of the gully it would tend to flow from the Railway Bridge to the west as it did in 2005 and immediately into the Clem Elliott Drive area. As the flow disperses, it loses both velocity and depth, leading to dropping out of heavier materials such as large boulders, with the finer material being carried further.

[27] The major concerns regarding the hazard from debris flows are potential damage to railway and/or trains, State Highway 2 and/or vehicles and people on them, and to homes and people in the area. It is not possible to divert the stream so it avoids either of the Railway, State Highway or homes and accordingly the problem for the Council is how to avoid or minimise the risk of damage to people and structures.

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[28] There was a suggestion from one of the appellants, Mr N I Harris, that a flume could be installed which would take the debris from the gully right out to sea. He acknowledged that this would mean that the State Highway would have to be higher than the maximum dimensions of that flume, meaning a very significant new bridge structure would need to be constructed. There would be even more serious problems for the railway as we discussed in our earlier decision. Quite simply the problems of raising a bridge to a height sufficient to accommodate all debris flow under it are almost insurmountable. This has led the Council's consultants to consider detention structures upstream of the bridges to try and prevent debris reaching the Railway Bridge or Highway Bridge. Essentially this requires some engineering approach that may hold back debris material in the order of 200,000-400,000m³. Not unnaturally there is some concern both as to how such a system might be designed, constructed and maintained at reasonable cost and what the consequences might be if such a structure were overwhelmed. Any application is yet to be filed.

[29] Mr R B Cotter, the civil engineer called for Mr Harris, considered that another alternative was to provide an overland flow path below the Railway Bridge diverting debris flow to the west. This could be both cost-effective and simple. The only concern is that it would mean that debris flows would still occur, possibly over the Railway Bridge and almost certainly over the State Highway. Such an approach may need to involve early warning systems and the ability to close of the State Highway and Railway Bridge if necessary (such as is undertaken in respect of the lahar flows in the Tangiwai area).

[30] Ms Hamm for the Council even suggested that the consultants were now looking at the possibility of a flexible net to catch the debris and hold it back. Concerns were expressed by Mr Harris and others as to the practicalities and hazards of such an approach. Given the fact that debris flows will occur from time to time in this catchment, and that the size of a particular debris flow cannot be predicted (there have been much larger debris flows than the 2005 event), we cannot help but wonder whether an approach which directs the flow may be the most practical available. Nevertheless it is not for this Court to assess an appropriate approach to the issues but merely to recognise that any debris flow solutions have their own complexities.

[31 Nevertheless, for current purposes, the Council applications must stand on their own merits. At best they provide some minor attenuation and improvement in respect of

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debris flows and there may be some capacity for these improvement works to assist with smaller debris flows, that is in the order of 50,000 or a 100,000m³, depending on the size of the particular pulse transporting the debris.

[32] There is no doubt that the application before us would assist in dealing with flood events the associated siltation and for certain debris flow pulse events which are able to be accommodated in the maximum capacity of Moore's Bridge and the Railway Bridge where the major constraint is now Moore's Bridge at 55 cumecs capacity. Nevertheless the improvements to the Awatarariki Catchment downstream of Moore's Bridge and the flood way controls intended through the Te Awa o te Atua area would assist with dealing with high siltation events and debris flows up certain volumes. However it was acknowledged by all experts in the area that the works envisaged would be overwhelmed by an event of the size of the 2005 debris flow event.

The Council's proposal

- [33] The essential elements of the Council's proposal consist of:
 - (1) Improvement to Te Awa o te Atua Lagoon area by creating a floodpath with detention bays (4) and also a lagoon area near Matata with excavation landscaping and planting to achieve a replicate of water areas previously on site.
 - (2) Improvements to the Awatarariki Catchment downstream of Moore's Bridge to improve its capacity and direct water into the floodway system.
 - (3) Railway Lagoon works retrospective consents for works undertaken on the debris stockpile and consents for further placement on debris to a maximum of 200000m³ (a further 100000m³) over the next 35 years. In addition rehabilitation and control works to avoid erosion and sediment discharge and stabilise ground and improve amenity.
 - (4) Clem Elliott Drive works situated on the debris fan between the true left bank of the Awatarariki and the Railway Lagoon, Consent for construction of a swale to drain to Flood Bay 1/ Awatarariki Stream and



its ongoing maintenance. The description of other works was very vague. They were referred to in the application as:

Excavation and removal of sediment and debris to restore private properties and roads and other public space in the area around Clem Elliott Drive.

Mr T Bassett, the water resources engineer called for the applicant was equally vague as to works beyond the construction of the swale. He refers to material to be cleared from the Clem Elliott Drive area to the debris disposal area $(40,000m^3)$ and states in his evidence in chief (at para 57):

Clearly there will be significant volume to be placed as part of the final clearance of the Clem Elliott subdivision $(40,000m^3)$.

[34] It became clear later in the discussion that the further debris disposal volume to the Railway Lagoon consists of:

- (a) clearance of Clem Elliott area 40,000m³;
- (b) large rocks and stumps for rehabilitation in flood way and Te Awa o te Atua Lagoon (perhaps 5,000 10000m³ or so);
- (c) the maintenance by dredging silt from Flood Bay 1 over the next 35 years say $(100,000m^3)$.

[35] No detailed evidence was advanced as to the necessity of works in the Clem Elliott Drive which have no hazard mitigation or environmental enhancement function. As it transpired, significant issues arise in the Clem Elliott Drive area where we conclude most koiwi would be deposited from the 1939 and 2005 debris flow events and where there is greatest risk of a further debris flow event. In short it appears that the clearance works are largely to benefit landowners rather than the wider community. We accept the swale is to provide a wider community benefit.



Te Awa o te Atua Proposals

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[36] The proposed Awatarariki stream works and the lagoon restoration works have been integrated so as to improve flow capacity through the stream system and provide increased flood protection. The use of floodbays to exclude flood flows and sediment from the lagoon are intended to facilitate the restoration and sustainability of the lagoon habitat.

[37] Flood Bay 1 is designed essentially to slow water down and provide an area for silt deposition to occur. It will need to be regularly maintained and Council estimates that it may have a life expectancy of up to 35 years with the removal of silt of around $100,000m^3$ which is to be disposed of in the Railway lagoon area. Of course the length of time until the $100,000m^3$ silt is deposited and removed is entirely dependent on the type of flood events which occur and the amounts of silts deposited in Flood Bay Area 1.

[38] The engineers were not able to give us an exact silt capacity of the Flood Bay 1 area but we understood it to be something in the vicinity of 20,000-30,000m³. There is also some capacity through the additional flood bays for silt deposition although only in the most major flood events would silt be deposited in the additional flood bays.

[39] In certain flow events, the flood bays would become full of water and, in most extreme scenarios, the floodwaters would overflow the central causeway to the eastern lagoon areas. In lower flows, the stream would be directed through Flood Bay 1 to Flood Bay 2 and thence into the restored lagoon areas. Water would flow through the restored lagoon areas into Flood Bay 5 and, thence, through the causeway culvert to the eastern Matata lagoons.

[40] The restored lagoons would be on the landward side of the Te Awa o te Atua lagoon where Council essentially seeks to recreate some open and shallow water areas by excavation. Further consideration by landscape architects and ecologists has led to an approach which would create varying water depths, enabling different indigenous plant species to be re-established in the area and, hopefully, re-establishing wildlife, particularly bird life, back into this area. A hope is that the depth of up to 2m of water would be able to be maintained by using the flood bay to avoid the siltation which has **previously** occurred. Although the lagoons are a relatively small area compared with the

former lagoons, nevertheless the aim is to establish a high quality area replicating or enhancing the natural lagoon that was there prior to the 2005 flood.

[41] It is intended that the engineering works through this area would be a cut to fill regime. In other words, the excavated material would be deposited either in the central bund or in the foreshore area on the seaward side of the flood bays or around the stream banks with no surplus material to be disposed of. Given the likelihood of koiwi being discovered, particular protocols have been developed to address this.

The Works and the Impact

[42] During the course of the hearing significantly more information has been provided and the Court now has detailed landscaping plans showing how these works will be undertaken for the Railway and Te Awa o te Atua Lagoons and the range and type of plant species involved. We note in particular that the landscape architect has shown planting in the area of access to Flood Bay 1 where excavation of silts will need to occur. It appears to us that if this consent were to be granted, provision should be made for a track in this area sufficient to take the trucks required to remove the silt and the excavator. Planting should be constructed to accommodate this function and provide any screening of the area for nearby residences, as appropriate.

[43] For the excavation works in Clem Elliott Drive and with the removal of silt there is a strong probability of koiwi or other taonga being discovered from time to time. We will come to discuss the protocols in more detail but we recognise that particular attention needs to be taken in addressing the cultural issues in respect of these works.

- [44] The major concerns of the parties could be summarised as follows:
 - (1) Cultural concerns

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- (2) Whether consents on proposed works precluded Treaty of Waitangi claims over the same areas of land
- (3) Whether there were any safety or hazard mitigation benefits of these consents
- (4) Whether the proposed works achieved any benefits to the environment or the local community
 - The cost to the local community.

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[45] We, of course, recognise that the Court must be satisfied that the proposal is acceptable and achieves the sustainable management purpose of the Act. The activity is fully discretionary in terms of the Plan and accordingly the Court needs to have regard all matters in section 104(1), including the New Zealand Coastal Policy Statement, any regional or local plans, the effect of the activity and any other matters that the Court considers appropriate. We shall discuss each area of concern in turn.

(1) Cultural effects

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[46] We note immediately that there is a dispute between the Society and other members of the Ngati Rangitihi iwi as to whether the conditions of consents granted by the Council and accepted as beneficial by the Whakatane District Council (as consent authority) are appropriate in this case. The Council's position is that Ngati Rangitihi did participate in preparing a cultural impact assessment in conjunction with Ngati Awa and Tuwharetoa a Kawerau and that the issues of cultural concern to Ngati Rangitihi have been fully and properly addressed in terms of the consultation and conditions of consent.

[47] That position is supported by a number of witnesses including:

- (1) Mr Henry Pryor, a kaumatua in Ngati Rangitihi and the chairman of the marae committee. He is also on other boards involving Ngati Rangitihi lands and interests.
- (2) Mr Ronald Kawe is a cultural consultant with Boffa Miskell who was retained to undertake the cultural aspects of consultation for the Applicant in respect of these consents.
- (3) Ms Beverley Hughes is a former officer with the Regional Council, but now Manager, Environment Ngati Te Awa.

[48] As the hearing progressed it transpired that there was a dispute within Ngati Rangitihi as to who represented the interests of Ngati Rangitihi in dealings with the Regional and District Councils. Mr Pryor gave evidence that he was authorised to deal with this cultural impact assessment on behalf of Ngati Rangitihi and particularly in respect of the Ngati Rangitihi residents of Matata. Mr Patterson as chairman of the Society and Mr Potter as secretary say that the Society holds a mandate from the iwi in respect of Waitangi Tribunal claims and that Mr Pryor does not speak for Ngati Rangitihi nor is he authorised to deal with the Council on this matter.

[49] The cross-examination and evidence on this matter became very personal and quite heated. We do not think this approach reflected well upon Mr Paul or Mr Potter in particular. Unfair allegations were made against Mr Pryor and Ms Hughes in particular which we find to be completely unfounded. All Ngati Rangitihi witnesses agreed that a hui a iwi had given very clear instructions to the parties including Mr Pryor, Mr Patterson and Mr Potter that they were to sort out issues of governance and representation promptly. We think that the Ngati Rangitihi iwi as a whole would be very disappointed to hear that these arguments were taken up before the Environment Court. They reflect badly upon the parties who made the allegations and they do no credit to the mana of Ngati Rangitihi as a whole. We refuse to be drawn into an argument as to who holds a general mandate for Ngati Rangitihi.

[50] We are directed by the Act to concerns as to the cultural issues that arise in this case, looking to the evidence on these matters. Remarkably, after considering the cross-examination, we conclude that there is little dispute as to the cultural matters. Mr Patterson for example accepts that Mr Pryor is a kaumatua with knowledge of matters of koiwi and waahi tapu. The witnesses for the Society also appeared to accept that Mr Pryor was the iwi liaison officer for Ngati Rangitihi with the Whakatane District Council and Regional Council.

Cultural concerns

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- [51] There were four concerns expressed by the Society, three of which were cultural:
 - (1) the effect on the domain of taniwha and waahi tapu of that domain;
 - (2) the effect on koiwi and the waahi tapu associated with koiwi;
 - (3) the effect on the swale areas (between the foreshore and the Old Northern Bank of the Te Awa o te Atua) and the waahi tapu of that area;
 - (4) the financial cost to the people of Ngati Rangitihi who lived in Matata.

[52] The cost issue is one held in common with the other appellants and we will discuss this later. As to the cultural concerns, by the conclusion of the case we understood the position agreed between the witnesses to be as follows:

- (a) That the swales on the northern side of the Old Te Awa o te Atua were an area where a number of chiefs had died either from wounds in battle or otherwise and it had special significance to Ngati Rangitihi. It may also contain some koiwi of warriors who fell in battle.
- (b) The domain of the Taniwha was the area of riverbed on the landward side of the Old Te Awa o te Atua River, back from the former mouth of the river and along its length to the current position of the Tarawera cut. There were some constraints in this area (tapu) but it did not appear to prevent the taking of eels, swimming or fishing generally.
- (c) The debris flows, particularly those in 1939 and 2005 brought down koiwi being not only ancestral bones of Ngati Rangitihi placed in the catchment but also of warriors killed in battle including Te Awa and Ngati Porou and Tu Wharetoa. Given that those debris flows deposited material in the Clem Elliott Drive area and in the lagoon particularly, those areas had become waahi tapu as a result.
- (d) Nevertheless, Mr Paul and Mr Pryor were both agreed that there were steps that could be taken to make the works permissible (noa). Mr Pryor's clear view was that the resource consent protocols incorporated conditions, agreed between Ngati Awa, Tuwheratoa and Ngati Rangitihi, which were appropriate to deal with these issues. Mr Paul explained further that it would be necessary for proper ceremonies to be undertaken before the works were commenced and, if appropriate, during the course of the works.

[53] Our view was that Mr Pryor took it that such ceremonies would be performed and did not consider it a necessity that they be referred to in terms of the consents. We understood Mr Pryor to be saying that when the works were commenced he understood that there would be an appropriate ceremony and that if the protocol was activated for Cany reason, then each of the iwi would be able to undertake the appropriate ceremonies.

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[54] In support of that position Mr Pryor pointed out that as a child he had swum and had fished and even taken eels from the banks in the Te Awa o te Atua River. Both Mr Paul and Mr Pryor seem to accept that there were particular activities in the Lagoon area that would not be seen as appropriate but that generally the area was not so restricted as to prevent any use.

[55] We have regard to Mr Potter's evidence showing the position for the cleaning of koiwi on the banks of Te Awa o te Atua, a ferry crossing in the position of the causeway, the utilisation of the area for a number of purposes including the taking of sand by Mr Patterson, fishing and other uses. We have concluded that the critical issue is to ensure that there is proper respect for the waahi tapu rather than preventing any use of the area whatsoever.

[56] The issues then turn as to whether or not the protocol adopted in the consultative CIA of Ngati Rangitihi, Ngati Awa and Tuwheratoa a Kawarau is appropriate. In that regard the evidence of the witnesses for the Society was particularly thin. Neither Mr Potter nor Mr Patterson purported to know whether the protocols were or were not appropriate. Given Mr Patterson's deferment to Mr Pryor's knowledge on this issue, we have concluded that at least for those witnesses they acknowledged Mr Pryor had appropriate knowledge of the protocols to be followed.

[57] Mr Paul did not go this far but nor did he suggest in what way the protocols were inappropriate. He acknowledged that certain processes and ceremonies needed to be conducted but that it was possible that the works could be undertaken (the area made noa). He did not suggest in what way the protocols failed to do this. For our part we immediately recognise that preliminary ceremonies would be entirely appropriate for this site and that these are not specifically identified in the protocol. Nevertheless we expect that given the long experience of such procedures in the Bay of Plenty this had very much been taken for granted by all the parties without the specific requirement for its inclusion. To avoid any doubt whatsoever that it is possible for appropriate protocols to lift the tapu and render the area <u>noa</u> we consider the conditions should be amended with a statement that preliminary ceremonies in accordance with the desires of the Ngati Rangitihi Marae Committee (or the governing body of Ngati Rangitihi if one is resolved prior to the commencement of the works) be undertaken.



[58] We understand that this condition should also be extended to Ngati Awa and Ngati Tuwheratoa kawarau but this may need to be in separate ceremonies or protocols given that their interests differ from Ngati Rangitihi.

Koiwi in the debris flows

[59] We acknowledge the added complexity of koiwi in the 3 areas of works. As we understand the evidence there are some koiwi of warriors fallen in battle particularly on the western side of the mouth of the former Te Awa o te Atua River. This would include some of Clem Elliott Drive but also the area of the Railway Lagoon. The disturbance of the koiwi could have both historical, cultural and spiritual implications. We do not understand there, to be much excavation in the Railway Lagoon and thus it is the Clem Elliott Drive (debris flow area) where such a risk is the greatest.

[60] There are also koiwi which have been washed down Awatarariki Stream particularly in debris flows in 1939 and 2006. Given the 1939 debris flow affected the fan area we conclude the strongest prospect of koiwi is on the fan (Clem Elliott Drive area). Given the lack of detail as to how the 40,000m³ would be excavated on Clem Elliott Drive area we conclude there is a likelihood of disturbance of koiwi deposited prior to the 2005 debris flow including from the 1863 battle.

[61] There is no doubt in our minds that wider issues than just debris removal arise in Clem Elliott Drive. This is the area where most heavy debris was dumped by the 2005 debris flow. The lagoons are filled mainly with the lighter silts. We accept the 2005 debris flows may have carried some koiwi to both the Railway and Te Awa o te Atua Lagoons. However most koiwi are likely to be in the fan area because:

(1) It includes koiwi of fallen warriors.

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- (2) It includes debris from 1939 debris flows and earlier flows.
- (3) Most heavier debris (as opposed to silt) was deposited on the fan area (Clem Elliott Drive area).

Conclusion on Cultural Matters

[62] These issues have been thoroughly considered by Council and their advisors. The protocols developed explicitly considered the cultural impacts of rehabilitation works after the 2005 flood. It is not clear that the parties to the CIA report were aware of the extent of works envisaged over the Clem Elliott Drive area or on private properties in particular. In the joint CIA report they describe at page 16 consent activity including Clem Elliott as "preliminary excavation of bulk material from lagoon and transport to debris disposal area".

[63] The report then notes:

It is extremely important that excavation to remove debris from the area does not go so deep as to excavate the original land height and if that was to occur then the bones of fallen Te Kao Kaoroa are likely to be excavated also.

[64] Accordingly we would have expected to see some clear reason for the works on Clem Elliott Drive in particular and also a demonstration of how the cultural issues would be addressed in detail.

[65] We accept the flood mitigation for the stream works and the hazard mitigation and rehabilitation for Te Awa o te Atua.

[66] We have been given no reason why debris (40,000m³) needs to be removed from Clem Elliott Drive to the Railway Lagoon and particularly how excavation of debris or materials from prior to the 2005 debris flow can be avoided.

[67] We accept the protocols are generally appropriate in all areas but Clem Elliott Drive. In that area however we are struggling to understand why the cultural concerns should give way to land modification works which would allow construction in an area at risk of future debris flows.

The Issue of Mandate

[68] We cannot leave the cultural issues without commenting on some of the evidence that was given on this matter.



[69] The Court became very concerned during the course of the evidence for the Society. We concluded that witnesses were suggesting that other witnesses before this Court had mislead this Court as to the authority of Mr Pryor, Ms Rota and Mr T Hunt to represent Ngati Rangitihi for the purposes of this consent. The issue turned on the outcome of a particular meeting on 5 November 2006.

[70] Ms Beverley Hughes and Mr Kawe and Mr Pryor were very clear in their evidence that Mr Pryor, Ms Rota and Mr Hunt received an authority to deal with the cultural impact assessment on this consent application. The Society raised arguments that the hui of 5 November 2006 was not properly advertised; that the appointment had not been properly minuted and it was not put to a vote. However, (on being pressed by the Court) they also said that there had been no discussion or mandate given by any means to these people.

[71] Ms Hughes was recalled and gave further very clear evidence on this matter. She was clearly very upset by the suggestion that she had misled the Court. She was adamant that the matter of authority had been discussed at the hui and that the conclusion of that discussion was that the decision had already been made that Mr Pryor, Ms Rota and Mr Hunt should represent the iwi.

[72] She acknowledged that no formal vote was taken but highlighted that she had never said to the Court that it had been. Mr Pryor's evidence was very similar.

[73] We accept entirely Mrs Hughes recollection of events. To the extent that that differs from the recollection of Mr Patterson and Mr Potter, we prefer the evidence of Mrs Hughes. We found her to be a credible and careful witness.

[74] On the other hand, Mr Potter and Mr Patterson on a number of occasions obfuscated or avoided direct responses to questions. When Mr Cooney put to Mr Potter that the meeting of 5 November 2006 was to discuss the proposed rehabilitation of the lagoon, Mr Potter said:

I do not know anything about that. (I do not think so).

[75] Then when Mr Cooney put to him that 30-40 people turned up to consider the rehabilitation plan and who should be mandated, he accepted that he and Mr Patterson EAL OF



were present. Later Mr Cooney put that Mr Pryor, Ms Hughes and Mr Kawe were present at that meeting in November 2006 and say that Mr Pryor was clearly given the mandate, and asked if he was saying they are wrong?

Mr Potter: Yes I am. There were no minutes taken of the meeting and they cannot produce any minutes, and I was there and Mr Patterson was there and is quite wrong. From memory if was not a properly advertised meeting.

[76] After a warning from the Court he said:

I did not put much worry on it when I heard it in Court here yesterday, the evidence being given to that effect because it was not a properly advertised hui with 14 days notice. So, in that case, if does not really count as an official hui a iwi decision.

- [77] Mr Cooney then put the question in another way.
 - Q. Was there a decision made at that meeting to appoint Mr Pryor and two other marae trustees to represent Ngati Rangitihi in consideration and approval of the rehabilitation works?
 - Mr Potter: No, it was not, definitely.

Later Mr Potter accepted in answer to questions from the Court that he had been at the meeting at the Ngati Rangitihi marae on 5 November 2006. The Court then put the following proposition:

- Q. Do you recall any discussion concerning persons who might represent Ngati Rangitihi and any authority in any capacity and further negotiations and discussions concerning the Matata Lagoon Rehabilitation Project?
- Mr Potter: No, sir, there wasn't.
- [78] We have concluded as a fact that:
 - (a) a presentation was made to the Marae on 5 November 2006 concerning the rehabilitation of the lagoon;
 - (b) that there was a discussion concerning representation and further negotiations and discussions concerning the Matata Lagoon Rehabilitation Project;



(c) Mr Perihana for the Society sought a mandate. However the authority to deal with the cultural impact assessment of Mr Pryor, Ms Rota and Mr Hunt was confirmed by announcement by Mrs Condon, a recognised kuia of Ngati Rangitihi, as the consensus of the group.

[79] On that basis we conclude that Mr Potter was unreliable in his evidence before the Court.

[80] Mr Patterson told that Court about his attendance at the hui on 5 November 2006 and confirmed that Mr Pryor, Mr Kawe and Ms Hughes were all present at that hui along with himself and Mr Potter together with a number of other persons including Mrs Condon.

[81] Mr Patterson confirmed that there was a presentation and that there was discussion about a cultural impact report pertaining to the projected regeneration works. Mr Patterson confirmed that there was a discussion about having a joint report. Mr Patterson then said that Ms Hughes left the meeting because the presence of Ngati Awa was challenged.

[82] Mr Patterson says that no mandate was given. It may be that Mr Patterson answered these questions on the assumption that the Court was referring to a vote rather than a confirmation of authority. Nevertheless we discount his evidence to the extent that his evidence conflicts with the facts as we have found them and the evidence of Mr Kawe, Ms Hughes and Mr Pryor.

[83] Moreover, for all the arguments suggesting that Mr Pryor and others did not have an authority to deal with a cultural impact assessment for Ngati Rangitihi, the Society made no effort to establish before the Court that it held any mandate in respect of this particular resource consent in respect of Ngati Rangitihi. To the contrary the clear evidence was that they had sought but not obtained such a mandate. They could not represent to this Court that they spoke for Ngati Rangitihi on this issue. That they attempted to do so while attacking the mandate of Mr Pryor and others is of considerable regret to this Court.

[84] Mr Potter suggested that the Society was authorised by the Ngati Tionga hapu of SEAL Argan Rangitihi but took no steps to prove such authority. We have concluded that

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Mr Pryor, Ms Rota and Mr Hunt had authority to address the cultural impact assessment and negotiations between Ngati Rangtitihi and the consent authorities in relation to the rehabilitation project. We acknowledge that issues of mandate and authority to deal more generally for Ngati Rangitihi are still to be resolved. In any event we have concluded, given the high level of commonality of the evidence on cultural issues, that nothing in particular turns upon the differences.

Treaty of Waitangi Matters

[85] We also note that the Society has been maintaining claims before the Waitangi Tribunal and state that the preferred position of the iwi as a whole is that the Tarawera River be returned to its original course past Matata as Te Awa o te Atua. We have concluded that nothing in this proposal would prevent such an outcome ultimately being achieved although significantly greater excavation works would be necessary to enable the river to return to its original course.

[86] A rediversion could occur without compromising the majority of the works that have been undertaken. The central bund in the Te Awa o te Atua Lagoon may compromise the eventual reestablishment of a river course and significant issues in relation to the design and implementation of the re-routing of the river would need to be undertaken. However the removal by excavation of some of the siltation from the lagoon would assist in reducing some of the cost that otherwise would be necessary for excavation for a river course in that area.

[87] We acknowledge that significant issues would arise from any decision to return the river to its original outlet. The Rangitaiki Plains have been extensively drained as a result of the cut directly to the sea and the addition of a further 5kms of river reach is likely to raise the plains' ground water level significantly. There are a whole range of works that would need to be undertaken and necessary resource consents obtained. For current purposes we may conclude that undertaking the current application works would not compromise any eventual reestablishment of the river past Matata should that ever be seriously contemplated. However certain works, such as the various flood bays and separation bund in the centre, would likely become redundant.



Costs issues

[88] This is an issue argued in common between the Society and Mr Harris. The Matata community is a very small community (we were told less than 300 ratepayers) and the costs of these works (which will be in excess of \$1m) were to be visited upon the local community to the extent of 50%.

[89] The evidence both for the Society and the other appellants was that such a cost would be unaffordable by many residents in Matata. We were told they would have to sell their properties and leave given the adverse effect on property values from the debris flow. They were concerned that they would lose their homes.

[90] The response for the Council was that such matters are not the concern of the Court relying on primarily on comment in *New Zealand Rail v Marlborough District* $Council^{I}$ that:

In any case the [statutory] considerations it is the broad aspects of economics rather than the narrow consideration of financial viability which involves the consideration of a suitably or otherwise of a venture and the means by which it is to be accomplished.

[91] In *Beadle v The Minister of Correction*² the Environment Court after citing New *Zealand Rail* said:

The starting point is that the broad aspect of economic effect of a proposal on the community at large is a relevant consideration but the financial viability of a project, the profitability or otherwise of the venture and the means by which it is to be accomplished are not relevant considerations. ...In this case the promoter is the Minister of the Crown and the cost will be met from public funds. However the fact that public funds are to be employed does not mean that it is the financial viability of the project and the means by which it is to be accomplished are relevant factors.

[92] Ms Hamm's proposition was that matters of rating allocation are for the Council under the Local Government Act 2002 and that the adverse effect in terms of the rating impact is beyond the scope of the RMA.

994] NZRMA 70. doc (sp)

[93] In *Fullers Group Limited v Auckland Regional Council*³ the Court accepted that costs could be addressed through an annual plan process of the Council and that there are rights of public submission and statutory checks.

[94] In *Omokoroa Ratepayers Association v Western Bay of Plenty District Council*⁴ a concern was raised as to the impacts on rates of the new sewage treatment and disposal system. In paragraph [42] the Court noted:

(a) [The] decision that the cost of a public work is appropriate is one to be made by the elected members of the Council for which they are responsible to the electorate. Such a decision is not a decision under the Resource Management Act and is not appealable to the Court.

[95] Similar comments were made in *Tainui Hapu v Waikato Regional Council*⁵ and *Stop Action Group v Auckland Regional Council*⁶.

[96] However Mr Fletcher, counsel for Mr Harris, developed this argument in a slightly different way, He addressed the issues under Part 2 of the Act, section 5:

Sustainable management...which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while...

He argued that the proposal would result in adverse economic and social effects arising from the rating impacts. Mr Fletcher's basis for this submission, and the point of distinction from *Omokoroa* was that the District Plan directed decision-makers to have regard to the best practicable option before resolving on a modification of natural features and processes as a means of hazard mitigation. He noted that the District Plan did not contain a definition of best practicable option, and submitted that it was appropriate to adopt the definition of that term given in the Act.

[97] The definition in s2 of the Act relates specifically to the discharge of a contaminant or emission of noise, and means:



The best method of preventing or minimising the adverse effects on the environment having regard, among other things to-

- (a) ...
- (b) the financial implications and the effects on the environment of that option when compared with other options; and
- (c) ...

We therefore turn our attention to the planning instruments.

The Requirements of the Planning Instruments

[98] Mr Fletcher's submissions turned on Policy 1 of the objectives and policies (2.4.3) in the Natural Hazards Section of the Whakatane District Plan (p46). That policy is:

(t)o avoid modification of natural features and processes for the purposes of natural hazard management unless research and community consultation justifies the need for modification by being the best practicable option.

[99] Ms Hamm did not direct us to any particular other policies but it is clear that Chapter 2 contains the issues, objectives and policies overlaying the rest of the Plan. The purpose and principles states (p7 District Plan):

Sections 2.1 - 2.11 are designed to identify the significant resource management issues in rural and urban environments of the Whakatane District and the objectives and policies for achieving the requirements for the sustainable management of the district's natural and physical resources.

[100] Accordingly it has been necessary for the Court to undertake some investigation of the relevant issues, objectives and policies in terms of land subdivision and development. Issues 2.1.2(3) identifies that potential for disturbance or desecration of sites of cultural significance. It is reflected in tangata whenua Policies 1 - 4 (page 24) relating to consultation and maintaining the mauri of water and other natural resources. Policy 2 of the land resource objective LRS3 (page 25) to sustain the life supporting capacity of soil states:



Where the land resource is degraded by an activity, it should be rehabilitated to a level similar to surrounding areas or to the nature of the site before degradation.

[101] Chapter 2.4 of the Plan specifically deals with storms, floods, landforms, volcanic eruptions and geothermal eruptions among others.

[102] Under significant resource management issues arising 2.4.2 (page 45) are the following:

- 3. Whether the modification to, or the placement of structures on, over or under land to prevent or reduce the adverse effects of an event are environmentally appropriate and sustainable.
- 4. The avoidance or mitigation of future development in areas idenfified as sensitive to natural hazards particularly in the coastal environment.

[103] 2.4.3 Policies (page 46) provides:

Policy 1

To avoid modification of natural features and processes for the purposes of natural hazard management unless research and community consultation justifies the need for modification by being the best practicable option.

Policy 3

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 to land by erosion, falling debris, subsidence slippage or inundation from any source.

Policy 7

To encourage the retention of natural areas and landforms such as dunes and wetlands which play an important role in hazard mitigation.

[104] In the explanation to 2.4.3 the Plan notes inter alia:

Modification of natural processes (eg flood protection works, retaining walls) may be an option where if is proven to be necessary and in the best interests of the community, including the protection of current investment and land and buildings.

[105] Section 2.6 (page 51) addresses cultural heritage issues and objective CH1 is the protection in perpetuity of areas of cultural heritage value from inappropriate subdivision, FAL oce and development. Policy 1 provides:



The effects of activities on, in and around scheduled cultural heritage features should not result in their destruction or deterioration.

[106] Policy 3 of objective CH2 (2.6.3 page 51) is

The adverse effects of activities on, in and around cultural heritage features should be avoided, remedied or mitigated.

[107] It appears to be common ground that the majority of the areas with the exception of Clem Elliott Drive and an area landward of it appear to be included within cultural heritage delineations on Map 18 of the Plan.

[108] In respect of landscape in section 2.7 of the Plan objective LS1 (page 54) provides:

To recognise, protect, and where appropriate enhance the existing visual quality and natural character of the outstanding natural features and landscapes in Schedule 5.3.

[109] Again the witnesses did not appear to address this issue directly but we conclude that the Railway Lagoon area is part of the landscape area while Clem Elliott Drive is not and Te Awa o te Atua Lagoon is a natural heritage area rather than a scheduled cultural heritage area.

[110] Section 2.10 addresses the coastal environment. Policy 1 - 2.10.3 (page 70) makes it clear that the natural character includes wetland and ecosystems and their margins. Nevertheless there are no other policies that directly appear to address natural character issues. The natural heritage section of the Plan was withdrawn on 15 August 2003 and it is unclear what the status of the natural heritage identification for the lagoon is.

[111] Having considered the relevant provisions of the Plan including all of those to which we were directed by Mr Batchelar and Mr Kemeys, we come back to the provisions of 2.4.3 and Policy 1. This effectively requires a positive judgment that the modifications proposed are the *best practicable option is the modification of natural features and processes after research and community consultation*. In this case it is clear the debris flow is a natural process and accordingly the general enabling provisions of section 5 take on a new flavour. In terms of the Plan, these provisions require that the *General* works proposal is the best practicable option in the circumstances. We point out



that this is not a requirement directly of section 5 but rather one that has been imposed by the Council itself in its Plan.

Research and community consultation

[112] There is no doubt that the Council has undertaken extensive research and community consultation. It has retained well-known geological engineering expertise to consider the options and recommendations have been made by them. It is clear to us that there has been extensive consultation with the community, including iwi, with a view to identifying the best of those options.

[113] Ms S Peake, a landscape architect, called for the District Council, and supported by the Regional Council, considered that the 'do nothing' option was a real option for the rehabilitation works in this case. She made it clear that this did not mean no intervention whatsoever but simply minimal intervention to control weed species and seek in a passive way to encourage an appropriate natural environment in the area.

[114] Mr C D Bishop, a terrestrial ecologist, called for the Regional Council, was of the view that if there was minimal intervention, there was likely to be an increase in value of wildlife habitat, indigenous wetland bird species and the reedland. Mr Bishop's observations showed that there was already indigenous native succession in the debris flow areas and that the natural vegetation succession may include a much higher percentage of indigenous plants than was appreciated following the initial survey.

[115] Mr Bishop also noted that the wetland area has been replaced and will have a different species composition and proportion of dry land habitat if left unchanged. He opined that the clearance of raupo reedland for the restoration of the lagoon may have some negative effect because of the inherent ecological values associated with raupo reedland. We note that the witnesses for the Society indicated that raupo was regarded by local Maori as a desirable form of vegetation, and that they would be unconcerned if it dominated the former lagoon area.

[116] Although Mr Bishop considered that the reinstatement of the lagoon may have a positive environmental impact, this was only *if sufficient resources are committed to this project*. If so, his view was that the resulting mix of open water reedland, raupo, willow EAL OF and other vegetation types is likely to provide, in the fullness of time, habitat for a wider

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range of indigenous species. Mr Bishop's view was clearly influenced by the fact that at that time he did not consider the possibility of minimal intervention in the way of weed control without the excavation works planned.

[117] Mr Bishop recognises that the calculation as to whether there are positive benefits to offset known negative environmental effects of disturbing the natural watercourse is difficult. He also acknowledges that it is not possible to restore a very rare natural community using artificial methods. He concludes that the analysis of Appendix 1 shows that the benefits of these activities *probably* outweigh the cost of disturbance to the current vegetation associations in the Western and Far Western Lagoons.

[118] He considers that the proposal is highly likely to provide positive benefits if:

- (a) The detailed restoration plan is followed;
- (b) Sufficient resources committed to ensure follow-up planting; and weed control;
- (e) Appropriate indigenous vegetation is established to protect in-stream habitat;
- (d) A detailed restoration plan is prepared for the Western (ie Railway) Lagoon;
- (e) There is weed control in the Railway Lagoon; and
- (f) All plantings are appropriate, locally sourced indigenous species.

[119] One could hardly describe this as a ringing endorsement of the proposal. This caution is reflected in Ms S Peake's evidence as a landscape architect. Although she eventually endorses the project with appropriate detailed conditions proposed by the Council, she nevertheless continues to suggest that a viable alternative is minimal intervention by way of control of weed species.

[120] It is arguable that this design represents the best practicable option. However the second provide the natural hazard. On that basis

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we have concluded that 2.4.3 Policy 1 does not apply to the restoration or enhancement works. These are judged in the more general terms of the District and Regional Plans which essentially means an application of the Act. In that regard, the enhancement of the amenity of the area and indigenous vegetation is a benefit. Although it is realised at a cost, we do accept that there is a marginal overall benefit from the restoration works, particularly if they are undertaken in circumstances described by Mr Bishop.

[121] In relation to the flood bay and stream works, we conclude that the evidence is unequivocal that these represent an improvement both in terms of flood mitigation and, secondly, in terms of the capacity for siltation events up to small debris flows. With the improvements to the Railway Bridge undertaken we are in no doubt that the capacity of this waterway to deal with an event with higher flow than it previously could will result from the improvements to the stream and flood bays.

[122] We accept that there will be some attenuation in respect of debris flow events especially those smaller flows which do not involve huge pulses of debris. Although there are limits to the avoidance of natural hazard which these works will produce (they cannot deal with a debris flow of the size of 2005), the managed mitigation of naturally occurring adverse effects is nonetheless real.

[123] In practical terms the modification to the course of the stream and the construction of flood bays represents a practical hazard mitigation. We acknowledge that the research and consultation undertaken by the Council is sufficient to satisfy their consultants that it represents the best practicable option. The Court agrees that the hazard mitigation can be combined with the restorative works we have discussed is a benefit but even without the restorative works the works to the stream and flood bays would nevertheless constitute improvements.

<u>Clem Elliott Drive area</u>

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[124] Little evidence addressed the Clem Elliott Drive area separately. With the exception of the swale construction, we are unable to conclude that the works are intended to represent natural hazard mitigation or restorative works. From the evidence we have seen there is little to commend the works as providing any natural hazard mitigation and on this basis Policy 1 of 2.4.3 did not apply. It is equally unclear what **Oparticular** advantages (except to landowners who may wish to build on the land) would be

achieved from the excavation and clearance of debris. We recognise that this is an area where koiwi are likely to be encountered.

[125] It is also in this area where large quantities of debris was intended to be moved to the Railway Lagoon, essentially to clear the sites for rebuilding. We suggest the swale could be constructed on a cut to fill basis but had no evidence on the point.

[126] We remain troubled about the excavation and clearance works in Clem Elliott Drive and are not convinced at this stage that such works are acceptable. Whereas the works within the Lagoon essentially seek to cut to fill, there does not appear to be any intention to do the same for the Clem Elliott Drive area. Although the effect of the natural distribution of the debris flow is retained overall within the Te Awa o te Atua Lagoon, the same is not intended for Clem Elliott Drive.

[127] The Court notes that construction in the Clem Elliott Drive area has always been contentious with various witnesses telling us that they always consider it a dangerous area to build in.

[128] In the end this Court must be satisfied that the works in Clem Elliott Drive are appropriate. If we were faced simply with the construction of the swale with any cut material being retained in the immediate area then we would see that improved drainage is of advantage generally. However in the circumstances of this case the other works in the Clem Elliott Drive have essentially been included with little direct evidence given to this Court to justify the works. We have concluded that the construction of the swale can be justified provided that the fill is retained in the area but that we are not prepared to authorise the general clearance and removal of the debris from Clem Elliott Drive area (the fan area).

[129] Our reasons for this are essentially that we do not consider that the matter has adequately justified. However we remain particularly concerned as to the cultural effects given:

- (1) the koiwi deposited from the 2005 debris flow and in earlier debris flows;
 - the koiwi of warriors fallen in battle;

(2)

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- (3) the absence of evidence of any substantial environmental improvement to the area, particularly in terms of indigenous fauna or flora;
- (4) absence of any method to ensure only 2005 debris is removed.

[130] The swale does represent a flood hazard mitigation step and we acknowledge in that regard, that the potential disturbance of koiwi may be justified as the best practicable option. Nevertheless we consider that the debris should be moved the minimum distance necessary and material utilised within the same area on a cut to fill approach. Thus only the swale justifies itself as the best practicable option under 2.4.3 (Policy 1) and also as acceptable under the Act.

The Railway Lagoon

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[131] Provided the hazard mitigation restorative works are done on a cut to fill basis, we do not understand there to be any substantial debris to be transported to the Railway Lagoon debris fill area. We were told that certain rocks and other materials which were not able to be utilised within the Te Awa o te Atua Lagoon (ie stumps and the like) might be incorporated in the debris area and we see that as entirely appropriate. Nevertheless a condition would need to be imposed that only materials that could not reasonably be incorporated within the other works could be moved to the debris area. This would substantially reduce the amount of fill to be carried and also the potential for the disturbance for koiwi. The major further debris that would come to the Railway Lagoon would therefore be from the clearance of the siltation ponds.

[132] The major sources of this would be the general siltation in foreshores and floods and the potential for smaller debris flows to be deposited along the streambed toward the flood bay. We understand that the applicant has sought to deposit up to 100,000m³ of such material. Although it indicated a higher figure in opening it was eventually accepted that its own application sought only this quantity and cannot be extended during the course of the hearing.

[133] This is a key feature of the ongoing maintenance of the works. Accordingly we are faced with the question of whether or not such deposition is appropriate. In this SEAL Oregard the cultural impact assessment prepared by the joint parties considered that such

deposition could be appropriate if appropriate protocols were observed. For our part we consider that the prospect of koiwi being found in silts is significantly lower than, for example in the heavier material deposition in Clem Elliott Drive area. We also note that emergency works have already deposited debris material in the Railway Lagoon and the ability to utilise further silts and other fills will enable the applicant to restore this area to a more natural landform than that existing currently.

[134] We consider that conditions need to be checked to ensure that adequate steps are taken for cut-off drains and the like to avoid any potential discharges further to the west. We also think that appropriate protective works should be undertaken to maintain and improve the water quality of the remnant lagoons immediately adjacent to the debris stockpile area.

[135] On the basis that the transport of silt is likely to occur gradually over a period of years (up to 35 years) we consider that this is an appropriate consent. We consider that there are important cultural reasons to retain the silts in the immediate area of Matata.

[136] The area of the Railway Lagoon is still part of the general fan area between Murphy's Camp and the eastern causeway. We accept these works represent the best practicable option to reduce the hazard risk from the siltation of the stream area while minimising the amount of movement of debris within the area. Generally the flood bays will be filled by siltation from the stream. We consider that this is reasonable approach in the circumstances and is the best practicable option.

The Matata Camp ground

[137] One of the particular issues raised was the effect of the proposed works on the camp ground and whether the Matata Community Reserve Board approved the works. It is intended that fill from the Te Awa o te Atua Lagoon be deposited on the camp ground site and this cannot be done without the Minister's permission, the grant of which may have been delegated to the Reserve Board.

[138] Currently the usable area of the camp ground is relatively low lying and there would be advantages in that area being built up. The Reserve Board were considering the proposal at the time of hearing. Although it may be possible to bund the site as it fronts the lagoon beyond the boundaries of the Reserve Board land it would clearly be

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preferable to reach appropriate accommodation to fill the Reserve Board land. It is nearly inevitable that any increase in the land height by using fill would significantly increase the usable area for the camp ground and enable the Board to consider an extension of the facilities on the site.

[139] In the end we have concluded that we should not assume that the Reserve Board will necessarily grant permission but note that the Council will not be able to implement the rehabilitation and flood bay aspects of the consents without such permission. If necessary they may be able to vary their consent to enable them to utilise the fill elsewhere (ie bunding around the camp ground) if they are not able to obtain consent.

[140] The Council considered they had reasonable prospects of gaining approval. Subsequent to the hearing, Mr Patterson as Chairman of the Reserve Board filed a memorandum advising that the Board by the casting vote of the Chairman (Mr Patterson) has rejected the Council's application to deposit fill. We note that DOC have given general approval and have control of the camp ground land (though delegated to the board). Although we cannot conclude that consent could not be obtained it would have been wise to ensure these approval prior to hearing rather than relying on further steps which may alter or delay the commencement of works.

Maintenance

[141] It follows from our discussion that we consider that the maintenance of the flood bays and the other maintenance of the stream's lagoon works involved in these consents is generally appropriate and the best practicable option. Control of weed species and removal of silts serves hazard mitigation and amenity functions. In our view the use of the silt in the Railway Lagoon area will enable a proper completion of the debris fill areas and enable the rehabilitation to a much more natural contour and vegetation over coming years.

[142] The full benefit effect of the hazard mitigation will not be realised unless the area is maintained. To this end our view is that suitable access would need to be maintained so that the excavators and trucks could readily have access to Flood Bay 1 to remove silts and to enable ready transportation to the Railway Lagoon debris fill area. That of course follows as the best practicable option to achieve the objectives already outlined.



Conclusion of Practicable Options and Cost

[143] Having considered all those matters we come back again to the question of cost. Our view tentatively is that section 5 is not specific as to the economic factors the Court can take into account. We acknowledge that the Council has the power to set rates and it is not this Court's function to interfere with that. Nevertheless the cost consequence on an individual appellant may be a matter that can be considered in cases where the flow on effects would serve to disable people and communities or prevent them from providing for their economic well-being. If benefits of a particular action can be taken into account surely any detrimental effects can be.

[144] In the circumstances of this case we do not wish to express a final view. We simply say that even if costs are taken into account we consider that the majority of works in this case are justified. With or without us taking into account the cost factors we are not satisfied that the works on Clem Elliott Drive are appropriate beyond the swale construction.

[145] The end result is that whatever view is taken as to the relevance of the cost to ratepayers of this project the outcomes remain unchanged.

Part 2 generally

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[146] Having discussed the general matters that come into play under S104(1)(c) nobody suggested any other matters beyond cost under section 104 which might apply. Turning to our mind to Part 2 of the Act the Court is always seeking to achieve sustainable management. In that regard we consider that the Hearing Commissioners in making their decision clearly had in mind the various elements we have discussed. However in referring to the decision under S290A we can find no discussion of or justification for the excavation and clearance works in Clem Elliott Drive.

[147] The Commissioners were generally satisfied that cultural matters could generally be addressed. We agree with them although we consider that there is not a sufficient justification for the works in the Clem Elliott Drive given the high likelihood of koiwi being in that area. We consider that otherwise the protocols put forward are generally appropriate. We wish to give the parties an opportunity for final consideration as to whether those could be improved, particularly by the insertion of preliminary blessing and protocol procedures.

[148] We accept the proposition of the Council that generally the implementation of these consents will enable the local community by improving the amenity of the area and reducing flood risk and also maintaining the capacity of the stream network to cater for significant rainfall events. We accept that the flood hazard works are the best practicable option determined from research and consultation.

[149] We consider that the enablement of individual property owners at Clem Elliott Drive by way of clearance of debris does not adequately or sufficiently justify the cultural and historical concerns relating to koiwi in the debris fan and battle area.

[150] The maintenance consents enable the works to have a continuing life by maintaining the design efficiency of the works into the future (recognising that they may not have the capacity to cope with significant debris flow events).

[151] Furthermore, we do not consider that these works would preclude outcomes under the Waitangi Tribunal processes if the land was re-vested in local iwi. Moreover, we are satisfied that these works would not of themselves prevent any re-routing of the Tarawera River back through the Te Awa o te Atua Lagoon area. In fact to re-establish the river it would likely be necessary to excavate the debris flows and earlier siltation so as to provide a bed for the river again. Although significantly greater works would be involved these works could serve to reduce the work necessary if such outcomes were agreed in the future. Accordingly issues under the Treaty of Waitangi do not arise under S8.

[152] Finally given the uncertainty of fill placement on Reserve Board land we consider the consent should be subject to either consent of the Board or a Variation obtained for alternative works prior to this consent commencing. Otherwise cut materials may be subject to disposal elsewhere. The retention of materials in the area is a key feature of the approval by the Court.



Outcome

[153] With the exception of the excavation and clearance of the Clem Elliott Drive areas the consents are confirmed subject only to finalisation of conditions. In that regard we direct the Council to consult with the parties as to:

- (a) rewording the protocol to include any appropriate preliminary ceremonies;
- (b) the amendment of conditions, if any, relating to Clem Elliott Drive to ensure the swale works proceed on the basis of cut to fill;
- (c) a new condition requiring that all necessary landowner consents must be in place or a variation to the consent be in place for works relating to non consenting landowners property prior to commencement of the works.

and the other matters identified in this decision.

[154] Consent to clearance in the Clem Elliott Drive area, other than those outlined in(b) above, is refused.

[155] The consents and conditions proposed by Council (after consultation) are to be filed within 30 working days. If not agreed parties have 10 working days to comment and the Council a further 5 working days. The Court will then issue final consents and conditions determining any remaining differences between the parties.

[156] Application for costs is not encouraged. Any application is to be filed within 30 working days, replies within 10 working days and final reply within 5 working days thereafter.

DATED at Auckland this	23 rd day of	April	2009.
For the Court:)		
J A Smithor Environment Judge)		
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Proposed Works - Railway Lagoon, Awatarariki Stream & Te Awa o te Atua Lagoon

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