

**BEFORE A HEARING PANEL: WHAKATANE DISTRICT COUNCIL AND BAY
OF PLENTY REGIONAL COUNCIL**

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of submissions and further submissions
on Plan Change 1 (Awatarariki
Fanhead, Matatā) to the Operative
Whakatane District Plan and Plan
Change 17 (Natural Hazards) to the
Bay of Plenty Regional Natural
Resources Plan

LEGAL SUBMISSIONS ON BEHALF OF WHAKATĀNE DISTRICT COUNCIL

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MAY IT PLEASE THE HEARING PANEL

1. INTRODUCTION

- 1.1. The Whakatāne District Council (**District Council**) has initiated these proceedings to ensure that the high loss of life risk that exists at the Awatarariki Fanhead is avoided or mitigated, to meet its obligations under the Bay of Plenty Regional Policy Statement (**RPS**) and the Resource Management Act 1991 (**RMA**).
- 1.2. The proceedings engage the complex interface between the responsibilities of local authorities to manage natural hazards; the concepts of risk, uncertainty and individual tolerance; and private property rights.
- 1.3. On 18 May 2005, extremely heavy rainfall in the steep catchments behind Matatā, Whakatāne caused several debris flows which devastated much of the coastal township of Matatā (the **2005 Event**). The 2005 event caused an estimated \$20 million of damage, arising from 27 homes being destroyed, 87 properties being damaged and major transport links being cut. The most destructive debris flow was from the Awatarariki Stream at the western end of Matatā, where an estimated 300,000 cubic metres of debris was deposited on the Awatarariki Fanhead. While there were no deaths or injuries, the destructive force of the natural hazard was such that deaths could easily have occurred.
- 1.4. Since the 2005 event, the District Council, aided by an extensive array of consultant experts and through consultation with the local community, has expended significant effort to understand the risk that exists on the Awatarariki Fanhead and the options (and their effectiveness) to avoid or mitigate the risk, where it is high.
- 1.5. This work has resulted in a three-fold hazard management approach that the District Council is progressing:
 - a. First, a proposed District Plan Change identifies an 'Awatarariki Debris Flow Policy Area' with high, medium and low risk areas, and rules restricting development on land in the medium and high risk areas (**PPC1**);

- b. Second, a proposed private plan change request to the Bay of Plenty Regional Council (**Regional Council**) to extinguish the existing use rights of properties in the high risk policy area (**PPC17**); and
- c. Third, a voluntary managed retreat programme providing financial incentive to residents in the high risk area to relocate (**Voluntary Managed Retreat**).

1.6. These proceedings relate to the two proposed Plan Changes 1 and 17 (together referred to as the **Proposed Plan Changes**). The Proposed Plan Changes were notified on 19 June 2018.¹ Eight submissions were received on PPC1 (three in support and five in opposition) and four further submissions were received (two in support and two in opposition). Seven submissions were received on PPC17 (two in support and five in opposition). No evidence has been pre filed on behalf of submitters.

1.7. These legal submissions cover the following:

- a. The steps that the District Council has taken since the 2005 event leading to notifying the Proposed Plan Changes, determinations made under the Building Act 2004 and an update on the Voluntary Managed Retreat which is occurring in parallel to these proceedings;
- b. I then summarise the Proposed Plan Changes and briefly comment on timing and the relationship with the Voluntary Managed Retreat Programme;
- c. Third, I set out the legal framework for the Proposed Plan Changes, including:
 - i. A brief discussion on regional and territorial authority responsibilities;
 - ii. The Panel's decision-making framework under the RMA;

¹ This notification included reference to the Proposed Plan Change maps at appendix 7 and 8 of the section 32 assessment:
https://www.whakatane.govt.nz/sites/www.whakatane.govt.nz/files/documents/contact-us/have-your-say/2018-plan-change/plan_change_1_awatarariki_section_32_20180608_final_complete_a1299377.pdf

- iii. Section 10 of the RMA and existing use rights;
 - iv. Section 85 of the RMA relating to “reasonable use” of land; and
 - v. The concepts of risk and uncertainty;
- d. Finally, I address matters raised in submissions on the Proposed Plan Changes, with reference to the District Council’s evidence.

2. BACKGROUND

District Council Investigations following 2005 Event

- 2.1. The District Council engaged GNS Science to investigate the causes of the 2005 Event. GNS Science concluded that the debris flows were a natural event triggered by exceptionally heavy rain that was driven by a combination of abnormally warm, moist air, very unstable conditions and, most importantly, a near stationary convergence line along the coastal fringe from the Eastern Coromandel to the Bay of Plenty.
- 2.2. Between 2005 and 2008 the Council investigated a range of engineering options to mitigate the debris flow risk to residential properties on the Awatarariki Fanhead and consulted with the community over those options.² Community feedback resulted in the preferred design solution moving from a debris dam to a flexible ring net debris detention structure. The Council approved the ring net option on 23 July 2008 and moved to progress this engineering solution with Tonkin and Taylor.
- 2.3. Between 2008 and 2012 as a consequence of more information being generated through the detailed design and peer review processes, it became clear that the design was not viable. In March 2012, T&T recommended to the Council’s Chief Executive that the project be comprehensively reviewed. As a result of this review, the District Council resolved in December 2012 to not progress with an engineering solution to manage the debris flow risk to the Awatarariki Fanhead and instead investigate planning-based options.
- 2.4. In 2015, the District Council commissioned a hazard and risk assessment for debris flows on the Fanhead. The assessment identified the risks to life

² As described in the evidence of Tom Bassett.

and property on parts of the Fanhead which encompasses 45 properties as being “high”.³

- 2.5. The District Council investigated options to reduce the risk to life on the Fanhead and enable the continued residential occupation of the “high risk” area. This work included assessing the viability of early warning systems and active catchment management practices, such as vegetation enhancement, stream clearance, or structural measures such as engineered detention systems. The authors of the risk assessments and the peer reviewers⁴ all concluded that neither early warning systems nor active catchment management practices were viable options for this catchment.
- 2.6. The District Council was forced to conclude that in the absence of any other viable option, and in the face of ongoing high risk to life, a managed retreat from the high risk area on the Fanhead was necessary.

Determinations under Building Act

- 2.7. There have been two determinations under the Building Act 2004 (**BA**) relevant to these proceedings.
- 2.8. In August 2006 the District Council, through its lawyers, applied to the Department of Building and Housing (**DBH**) for a Building Act Determination. The matters for determination related to the Building Act powers concerning dangerous buildings (Section 124 BA). Two questions were specifically asked of the DBH:
 - a. Were buildings on the Awatarariki Fanhead dangerous in terms of section 121 BA where the danger was an off-site natural hazard that had not been mitigated (as opposed to a building that was dangerous by reason of the condition of its structure); and
 - b. If the buildings were dangerous, should the Council exercise its power under section 124 BA to require the buildings to remain

³ 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.

⁴ From Manaaki Whenua Landcare Research and the University of Canterbury.

unoccupied until mitigation works were undertaken to reduce the danger?

- 2.9. The first DBH determination decision concluded that the houses were not dangerous in terms of section 121, and the Council should remove the section 124 notices. This decision resulted in 6 houses on the Awatarariki Fanhead being rebuilt between 2007 and 2011.
- 2.10. In July 2014, following preparation of the Draft Supplementary Debris Flow Risk Assessment⁵, the District Council sought a determination that it was not reasonable for the District Council to grant a waiver from the building code for two building consent applications in respect of properties which were subject to the High Risk Area. Although the application for determination was with respect to the two building consent applications, the application was clear that the determination would be equally applicable to other properties in the High Risk Area.
- 2.11. The Determination concluded the Council should not issue any further building consents for new dwellings in the High Risk Area, due to the high life safety risk.

Consultation

- 2.12. During the period that MBIE was considering second the BA determination application, the District Council wanted to engage with property owners within the High Risk Area to explore a way forward to manage the debris flow risk. The evidence of David Stimpson outlines the establishment of a Consensus Development Group (**CDG**), the process involved, and the recommendations reached.
- 2.13. A key output of the CDG stakeholder engagement was the identification of a number of streams of work by CDG members that led to the establishment of the Awatarariki Debris Flow Risk Management Programme (**ADFRMP**) in 2015.
- 2.14. During public consultation for Proposed Plan Change 1 in 2017, community feedback included requests for the viability of an early warning system for debris flows from the Awatarariki catchment to be revisited. Prof. Davies was engaged to investigate and report on the viability of an early warning

⁵ Addressed in the evidence of Kevin Hind at paragraph 4.6

system to reduce life safety risk to occupants of properties on the Awatarariki Fanhead. Prof. Davies report concluded that it was feasible to develop a reliable early warning system for road and rail users crossing the Fanhead but not for residents due to the lack of adequate warning time for residents to evacuate when an alarm was triggered.

- 2.15. Other feedback from the community consultation included a request for the District Council to investigate whether or not proactive management of the catchment would significantly reduce the level of debris flow risk to the Awatarariki Fanhead. Prof. Davies was tasked to consider this. His subsequent report on catchment management¹³ identified that the amount of material contained in log-jam dams preceding the 2005 debris flow in the Awatarariki catchment was between 8-14% (40,000-50,000 m³) of the estimated total volume of debris (300,000 m³). The report concluded there was no evidence that active catchment management would reduce debris flow risk on the Awatarariki Fanhead.

Update on Voluntary Managed Retreat

- 2.16. The Voluntary Managed Retreat is addressed in the evidence of Mr Farrell. Two property owners have elected not to participate in the Voluntary Managed Retreat. At the time of these submissions the current status of the programme is:

Description	Number	%
Properties in the High Debris Flow Risk Policy Area	34	
Properties that have entered the Programme	32	94%
Properties that have not entered the Programme	2	6%
Properties settled	13	38%
Properties with unconditional Agreements of Sale and Purchase	4	12%
Properties considering acquisition offers	14	41%
Properties with acquisition offers pending	0	0%
Properties with other arrangements	1	3%

2.17. At the time of filing these legal submissions, the 1 submission to the proposed plan changes have been withdrawn.⁶ In addition, the following submitters have given notice of their withdrawal of support of the submission of the Awatarariki Residents Incorporated Society:

- a. Gerard and Jo Stuckey (5 Pioneer Place);
- b. Puti and Steve Rowe (7 Pioneer Place);
- c. Victoria Humphries-Irwin and Wayne Irwin (94 Arawa St);
- d. Catherine Ann Smith (7 Clem Elliott Drive);
- e. Grant Wilkin (16 Clem Elliott Drive);
- f. Kerry Magee (18 Clem Elliott Drive).

3. PROPOSED PLAN CHANGES

3.1. Despite the Voluntary Managed Retreat, the resource management approach for managing debris flow risks on the Fanhead needs to be changed to appropriately recognise and address the significant risk from debris flow hazards, and to address the positions of those residents who have not agreed to the Voluntary Managed Retreat. I summarise the Proposed Plan Changes in the following paragraphs.

Proposed Plan Change 1 to the Operative Whakatāne District Plan

3.2. PPC1 proposes changes to the Whakatāne District Plan as follows:

- a. Identifying an 'Awatarariki Debris Flow Policy Area' on the District planning maps, constituting "high risk", "medium risk" and "low risk" areas;
- b. Rezoning the "high risk" area from 'Residential' to 'Coastal Protection';
- c. Making all activities in the "high risk" area prohibited, other than the "transitory recreational use of open space"; and
- d. Requiring any new activities or intensification of existing activities in the "medium risk" area to apply for a resource consent, through which process the risk of natural hazard is assessed.

⁶ Submission of Greta Steens-Nicholson and Mark Nicholson

- 3.3. Because of the operation of existing use rights under section 10 of the RMA, rules prohibiting development in the “high risk” area apply to new development or redevelopment only. To mitigate the risk to existing properties, the District Council has made a private plan change request to the Bay of Plenty Natural Resources Plan, which the Regional Council has accepted.

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

- 3.4. PPC17 introduces one objective, three policies and one rule to the Regional Natural Resources Plan to reduce the natural hazard risk on the Awatarariki Fanhead from high to medium (or lower). The provisions prohibit residential activity on “high risk” properties in the Fanhead and thereby extinguish the existing use rights held by landowners of the existing properties.
- 3.5. Table NH3 lists 21 properties the use of which, for residential activity is proposed to be a prohibited activity.

Timing of the Proposed Plan Changes

- 3.6. The Proposed Plan Changes do not detail what measures will be taken after the prohibition of residential activity and extinguishing of existing use rights take effect on 31 March 2021. The Voluntary Managed Retreat will address this issue fully for property owners who “opt in” to that process. In other circumstances, the proposed provisions can be enforced under Part 12 of the RMA (declarations, enforcement, and ancillary powers). The most likely process for this would be through an application to the Environment Court by the Regional Council for an enforcement order.⁷

4. LEGAL FRAMEWORK

Functions of District and Regional Councils

- 4.1. Regional councils and territorial authorities have the following functions of particular relevance to the Proposed Plan Changes:

- a. Controlling the use of land for the purpose of the avoidance or mitigation of natural hazards (regional councils, section 30(1)(c)(i)); and
- b. Controlling 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 (territorial authorities, section 31(1)(b)(i)).

4.2. Evidently, there is a degree of overlap in the functions of regional and territorial authorities with respect to managing natural hazards. The Court of Appeal considered this overlap in responsibilities and the extent of a regional council's jurisdiction and powers in **Canterbury Regional Council v Banks Peninsula District Council**.⁸ The Court of Appeal confirmed that the Canterbury Regional Council had the power when preparing its plans, to the exclusion of district councils within its region, to prohibit or restrict activities on land in the region for the purpose of avoiding or mitigating natural hazards.⁹ This confirms jurisdiction in this case for a regional rule to prohibit residential activities in areas subject to high natural hazard risk.

Responsibilities under other legislative documents

4.3. The responsibilities of territorial and regional authorities with respect to natural hazard management under other legislation are summarised in **Annexure 1** to these submissions.

Legal Test for Panel's Decision Making

- 4.4. District and regional plans should be designed to accord with and to assist territorial and regional authorities to carry out their functions to achieve the purpose of the RMA.¹⁰
- 4.5. District and regional plans must state the objectives for the district (or region), the policies to implement the objectives and the rules (if any) to implement the policies.¹¹ The Supreme Court has said that, when dealing

⁸ **Canterbury Regional Council v Banks Peninsula District Council** CA 99/95 (CA).

⁹ p 196 line 47, p 196 line 54.

¹⁰ Sections 74(1) and 66(1) RMA.

¹¹ Sections 75(1), 67(1) RMA.

with a plan change application, careful attention must be paid to the way in which policies are expressed:¹²

Those expressed in more directive terms will carry greater weight than those in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, “avoid” is a stronger direction than “take account of”.

- 4.6. District and regional plans must give effect to any national policy statement¹³, the New Zealand Coastal Policy Statement¹⁴, any national planning standard¹⁵ and any regional policy statement.¹⁶ No national policy statements or planning standards are relevant to the Proposed Plan Changes.¹⁷
- 4.7. Under section 32 of the RMA, each proposed policy or method (including each rule) is to be examined, having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objectives of the district and regional plan, taking into account:
- a. The benefits and costs of the proposed policies and methods (including rules);¹⁸
 - b. The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods;¹⁹ and
 - c. In making a rule, district and regional councils must have regard to the actual or potential effect of activities on the environment.²⁰

Part 2 RMA

¹² **Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd** [2014] 1 NZLR 593, at [129].

¹³ Sections 75(3)(a) and 67(3)(a)

¹⁴ Sections 75(3)(b) and 67(3)(b)

¹⁵ Sections 75(3)(ba) and 67(3)(ba)

¹⁶ Section 75(3)(c) and 67(3)(c).

¹⁷ A National Policy Statement on natural hazards was signalled in the government's Forward Agenda for National Direction in 2016, however advice on the Ministry for the Environment's website states that *“this is being reconsidered in light of the recommendations of the Climate Change Adaptation Technical Working Group released in 2018.”*

¹⁸ Section 32(2)(a).

¹⁹ Section 32(2)(c).

²⁰ Sections 76(3) and 68(3). The Environment Court provided a useful summary of this test in **Colonial Vineyard v Marlborough District Council** [2014] NZEnvC 55 at [17], recently affirmed in **Cabra Rural Developments Ltd v Auckland Council** [2018] NZEnvC 90.

- 4.8. The Supreme Court confirmed in **Environmental Defence Society Inc v New Zealand King Salmon Co Ltd**²¹ (which related to a private plan change request) that there is generally no need to refer back to Part 2 of the RMA where faced with directive policy obligations under the NZCPS.²²
- 4.9. However, in **Turners & Growers Horticulture Ltd v Far North District Council**²³ the High Court confirmed that **King Salmon** does not preclude consideration of Part 2 under section 74(1)(b) in circumstances where there is no directive obligation in a higher order document:

It will be obvious that the circumstances of the present case are far-removed from those under consideration in New Zealand King Salmon. There is no relevant constraint in a higher order planning document to which Council is required to give effect. The suggestion that Council and the Environment Court were wrong to have regard to pt 2 and s 31 when considering the proposed plan change is directly contrary to s 74 of the Act, which requires this. The Supreme Court did not suggest that pt 2 would be an irrelevant consideration in a case such as the present where decision-makers have choice. On the contrary, the Court said this:

*Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, **even though pt 2 remains relevant.***

(High Court's Emphasis)

- 4.10. Of direct relevance to assessment of the Proposed Plan Changes are the following Part 2 matters:
- a. Section 6(h) requires persons exercising functions and powers under the RMA to recognise and provide for the management of significant risks from natural hazards.
 - b. Section 7(i) of the RMA requires councils to have particular regard to the effects of climate change.

²¹ Above n. 11 at [85].

²² The Court noted three caveats to this rule:

- a. Where there is a challenge to the lawfulness of a planning document;
- b. In instances where the document concerned does not “*cover the field*” and a decision maker will have to consider whether Part 2 aids in dealing with matter(s) not covered; and
- c. If there is uncertainty as to the meaning of particular policies.

²³ **Turners & Growers Horticulture Ltd v Far North District Council** [2017] NZHC 764

- 4.11. These obligations are reflected in the functions ascribed to regional councils and territorial authorities in sections 30 and 31. The substance of how these obligations are to be discharged is provided in the RPS.

Operative Bay of Plenty Regional Policy Statement 2014 (RPS)

- 4.12. I provide only a high level summary of the natural hazard provisions in the RPS, as detailed analysis is given in the evidence of Gerard Willis and in the section 42A report.
- 4.13. Natural hazard provisions in the RPS (operative from July 2016) set out a detailed approach to natural hazard management. In broad terms, the RPS gives effect to the Regional Council's functions and responsibilities under the RMA through a suite of policies that require:
- a. Identification of natural hazards;
 - b. Risk assessment of those hazards (by consideration of both the likelihood and consequence); and
 - c. Management of the risk according to whether it is assessed as "high", "medium" or "low".
- 4.14. The RPS takes a risk-based approach to natural hazard management, meaning both the likelihood of an event occurring and the consequence of events, should they occur, are considered. This approach is a move away from traditional approaches to natural hazard management such as the use of hazard lines which ignore events of less likelihood, ignore the nature of the receiving environment, and reinforce the erroneous view that hazard risk is solely about the potential for a location to experience a hazard event. The risk-based approach ensures that risk is considered, recognising that risk can generally be managed, while hazards generally cannot.
- 4.15. The RPS establishes a comprehensive risk management process which encapsulates risk identification, risk analysis, risk evaluation and risk treatment, bolstered by communication and consultation, monitoring and review. Assessments are to be made at a 'natural hazard zone' scale, meaning the *"zone within a hazard susceptibility area defined by the relevant regional, city or district plan, on the basis of existing or proposed land use, as the appropriate geographic scale to assess hazard risk."* In

essence, this allows a council to take a community wide and integrated view of risk (rather than an assessment at the individual dwelling scale).

4.16. Policy NH 3B applies broadly to new and existing development and requires:

- a. Where risk is High, that it be reduced to Medium or lower if possible;
- b. Where risk is Medium, that it be reduced to as low as reasonably practicable; and
- c. Where risk is Low, that it be maintained within the Low range.

4.17. Policy NH 3B is directive as to the outcomes to be achieved in management of natural hazard risk.²⁴

Natural Resources Plan – Plan Change 9 Natural Hazards

4.18. The Regional Natural Resources Plan identifies the Regional Council functions under section 30(1)(c)(iv) control of the use of land including objectives, policies, methods and rules in regional plans for the avoidance or mitigation of natural hazards. Chapter 20 of the Regional Natural Resources Plan (Natural Hazards) focusses on flood hazards and land drainage and is not relevant to the Proposed Plan Changes.

Section 10 RMA Certain Existing Uses Protected

4.19. Section 10(1) of the RMA provides that land may be used in a manner that contravenes a rule in a district plan or a proposed district plan if it was lawfully established before the rule became operative or the plan was notified, and the effects of the land use are the same or similar in character, intensity and scale to those which existed before the rule became operative or the proposed plan was notified.

4.20. Section 10(4) of the RMA specifies that these “existing use rights” do not apply to any use of land that is controlled under section 30(1)(c) of the RMA (regional control of certain land uses) which includes at subsection (i) “*the avoidance or mitigation of natural hazards.*”

²⁴ Subject to the exemptions in Policy NH 6B for lifeline utilities, and other activities which give rise to significant social, economic, environmental or cultural benefits to the community, and have a functional need for a location that is subject to natural hazard risks.

4.21. The Environment Court in **McKinlay v Timaru District Council**²⁵ considered whether a building which was destroyed by a natural hazard (in that case, a flood) could be reconstructed. The Court found that while the regional plan contained objectives, policies and methods with respect to natural hazards, it did not contain any rules and therefore it did not exercise “control” for the purposes of section 10(4) of the RMA and did not extinguish the existing use rights of the building owner. The Court found that “control” was something more than merely having the *function* of control, it must have implemented regional rules *which do in fact control*.²⁶ PC 17 takes that additional step by implementing regional rules which do in fact control land use, such that existing use rights are extinguished.

Section 85 RMA “Environment Court may give directions in respect of land subject to controls”

4.22. Section 85 RMA is not strictly relevant to the Hearing Panel’s task. Section 85 RMA provides a check on unreasonable planning controls by way of an application to the Environment Court or an appeal.²⁷ Section 85 is not contained in the matters to be considered under sections 66, or 74 RMA for changes to regional and district plans. As such, section 85 RMA is not a relevant consideration or substantive test which the Proposed Plan Changes are required to meet at first instance.

4.23. Moreover, on the facts here, no relief would be granted if the Proposed Plan Changes were challenged before the Environment Court pursuant to section 85 RMA. This is because the ambit of section 85 does not extend to developing or living on land that is subject to natural hazards. The legal basis for this position, and response to the Panel’s question concerning the reference in paragraph 12.21 of Mr Batchelar’s evidence to the legal advice received by the District Council in this regard, is set out below

4.24. A challenge under section 85 RMA would need to be on the basis that the Proposed Plan Changes:²⁸

- a. render the landowners’ interests in their land “*incapable of reasonable use*.”; and

²⁵ **McKinlay, IF & CM v Timaru District Council** (2001) 7 ELRNZ 116.

²⁶ Above n. 23, para [13].

²⁷ Where section 85 has been raised in a submission pursuant to section 85(2)

²⁸ Section 85(3B) RMA

- b. place “*an unfair and unreasonable burden on any person who has an interest in the land*”.

4.25. Under section 85(6) RMA “*Reasonable use, in relation to land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person (other than the applicant) would not be significant*”. The test of “reasonable use” 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 sustainable management of natural and physical resources (a question of public interest).²⁹

4.26. The following have been found to be relevant to a consideration of the two section 85 tests:³⁰

- a. The natural and physical resources in the case;
- b. Whether no reasonable use can be made of the land (the first test);
- c. Part 2 of the RMA;
- d. Part 3 of the RMA and the inference from section 9 that real property rights prima facie meet the purposes and principles of the RMA;
- e. The relevant provisions of the proposed plan;
- f. The rebuttable presumption that the proposed plan is effective and efficient; and
- g. The personal circumstances of the applicant considered objectively.

4.27. The Environment Court in **Golf (2012) Limited v Thames-Coromandel District Council**³¹ recently considered the application of section 85 in the context of an appeal against a proposed open space zoning for private land. The Court conducted an extensive review of case law and found:

These cases, and the others (*Guyco Holdings* and *Creswick Valley Residents’ Assn*) referred to us by counsel for the respondent, demonstrate that there is no additional test beyond that set out in s 85(3): that the Court must determine whether a proposed provision of a proposed plan renders any land incapable of reasonable use and places an unfair and unreasonable burden on any person having an

²⁹ **Hastings v Auckland City Council** EnvC A068/01.

³⁰ **Steven v Christchurch City Council** [1998] NZRMA 289.

³¹ **Golf (2012) Limited v Thames-Coromandel District Council** [2019] NZEnvC 112

interest in the land. Further, they tend to indicate that the Court's evaluation of a case against this test must be based on all the evidence and assessed on the merits with a focus on the public interest, as clarified in Hastings.

4.28. In **Golf (2012)** the Environment Court found that it did not offend section 85 RMA for private land to be zoned for open space purposes, given the structure planning history which had led to that zoning in the operative plan.

4.29. In the context of natural hazards, the High Court in **Francks v Canterbury Regional Council**³² considered an appeal against the positioning of a building restriction line which was included as a result of erosion risk. One of the grounds of appeal was that the Environment Court had failed to consider section 85. The Court found that building on land that was at risk from erosional forces could not be a reasonable use.³³

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 s85 that building upon it was a reasonable use which had to be permitted on the other.

4.30. This is high authority that the protection of section 85 does not extend to developing or living on land that is subject to natural hazards.

4.31. I submit that the District Council's evidence establishes that the degree of natural hazard is such that residential use of the High Risk area is not a reasonable use. The only reasonable uses for this land are "transitory recreational use of open space", road and rail infrastructure, and use for defence training purposes.

Risk and Uncertainty

4.32. Section 3 of the RMA defines "effect" as including "*any potential effect of low probability which has a high potential impact*."³⁴ Section 32 of the RMA also requires councils to examine the risk of acting or not acting to address an issue.

4.33. The High Court considered the legal framework for assessing risk in **Franks**,³⁵ where it was alleged that the Environment Court erred by accepting a hazard management approach based on a "*worst case historic*

³² **Francks v Canterbury Regional Council** [2005] NZRMA 97 (HC).

³³ Paras [75]-[76].

³⁴ Section 3(f) RMA.

³⁵ **Francks v Canterbury Regional Council**, above n. 27 at [16].

scenario” of coastal erosion. When considering the standard of proof required for assessing risk, the Court cited the Privy Council’s judgment **Fernandez v Government of Singapore** which found that the traditional common law approach of the “balance of probabilities” is:³⁶

...inappropriate when applied not to ascertaining what has already happened but to prophesying what, if it happens at all, can only happen in the future. There is no general rule of English law that when a court is required, either by statute or at common law, to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds on its happening are fractionally less than evens.

4.34. The Court in **Franks** noted that this decision:³⁷

...recognised the crucial distinction between fact finding on the one hand, and matters of judgment or evaluation on the other...Satisfaction, for example, as to the avoidance of an adverse effect must be approached differently if such effect is of high probability (s3(e)) as compared to a potential effect of low probability which has a high potential effect (s3(f)).

4.35. Similar approaches to predictions of future effects have been applied in Canada and Australia.³⁸ In **Athey v Leonati**³⁹ the Supreme Court of Canada referred to this body of case law and confirmed that: “*future events need not be proven on a balance of probabilities and are simply given weight according to their relative likelihood.*”

4.36. **Eyre v Christchurch Regional Council**⁴⁰ related to consents to authorise the construction and operation of an off-stream storage dam. The prime issue before the Court was the safety of large numbers of people in the event of breach of the pond embankments. When considering effects of low probability with high potential impact, the Principal Environment Court Judge summarised case law principles:

- a. The word “likely” did not require an assessment based on the balance of probabilities, since to require a threat to be established as more likely to eventuate than not would be unreal. It must be enough if

³⁶ **Fernandez v Government of Singapore** [1971] 2 All ER 691 (PC) at 696.

³⁷ At [20].

³⁸ See **Janiak v Ippolito** [1985] 1 SCR 146 (a decision of the Supreme Court of Canada) and **Malec v C Hutton Proprietary Limited** (1990) 169 CLR 638 (a decision of the High Court of Australia).

³⁹ [1996] 3 SCR 458.

⁴⁰ [2016] NZEnvC 178.

there is a serious or real and substantial risk to a protected interest, a risk that might well eventuate; and that whether or not such a risk existed was largely a matter of judgment.⁴¹

- b. When considering the application of the precautionary principle, the RMA is not a “no risk regime.” Such an approach is incompatible with the definition of sustainable management in section 5 of the RMA which requires the management of resources in a way which enables communities to provide for their social, economic and cultural well-being and for their health and safety.⁴²
- c. Where there was a suggested risk of serious or irreversible harm to the environment, coupled with scientific uncertainty as to the extent of that risk, then decision-makers should be cautious but not inhibited to the extent of a no risk approach.⁴³
- d. Subjective community perceptions of risk, unsupported by evidence, could not influence a decision-maker and the Court should not be influenced by mere perceptions of risk of adverse effects.⁴⁴ In my submission this finding is equally applicable to community perceptions of a lack of risk which are unsupported by evidence.
- e. Where the potential impact is dire then only a very small risk of its occurrence can be contemplated. Risk assessment is characterised as a matter of judgment, rather than factual proof, so that the application of a conventional standard of proof may be unhelpful. Finally, the authorities recognise the need for evidence as to the likely occurrence of events and their potential impact.⁴⁵
- f. Burden of proof is a complex issue in RMA proceedings. Very often RMA proceedings involve proof of existing fact, assessment of future effects and an evaluative judgment in light of prescribed statutory thresholds. Allocation of evidential and persuasive burden is

⁴¹ **Commissioner of Police v Ombudsman** [1988] 1 NZLR 385 (CA) at 391.

⁴² **Aquamarine Ltd v Southland Regional Council** Decision No. C 126/97I **Shirley Primary School v Telecom Mobile** (1999) NZ RMA 66.

⁴³ Ibid.

⁴⁴ **Contact Energy Ltd v Waikato Regional Council** (2000) 6 ELRNZ 1.

⁴⁵ **Francks**, above n. 25 at [14].

problematic and sometimes inapposite in this context, as several leading cases demonstrate.⁴⁶

4.37. In **R J Davidson Family Trust v Marlborough District Council**⁴⁷ the Environment Court found that the “likelihood scale” used by the Intergovernmental Panel on Climate Change is useful and suggests that the “calibrated language for describing quantified uncertainty” about the future. That scale ranges from “virtually certain” (>99% probability) down to “exceptionally unlikely” (<1% probability).

4.38. In a 2016 paper⁴⁸ Judge Jackson advocated for use of the Bayes Rule in the law of evidence. The Bayes Rule describes the probability of an event based on prior knowledge of conditions that might be related to an event, and can tell you how to update an initial probability in the light of further evidence as it becomes available. In this regard, updated climate change predictions and their implications for the return period of the rainfall event that caused the 2005 Event are important, as addressed in the evidence of Mr Blackwood.

5. RESPONSE TO MATTERS RAISED IN SUBMISSIONS

5.1. Much of the response to the matters raised in submissions is provided in the District Council’s evidence. The following summarises and supplements those responses.

Existence of Risk

5.2. There is an extensive body of expert evidence before the Hearing Panel establishing the degree of natural hazard risk on the Awatarariki Fanhead.⁴⁹ The precision of the modelling of risk of landslide and debris flow, the modelling of probability of fatality or injury; and the science as to assessment of risk to properties identified as “high risk” have been detailed at great length in numerous reports. The analyses of probability and consequence have been conducted to internationally very high standards. The risk assessments have been shown to be robust to a large range of input values. This body of evidence is the only expert evidence before the

⁴⁶ **Saddle Views Estate Ltd v Dunedin City Council** (2014) 18 ELRNZ 97 at [90].

⁴⁷ **R J Davidson Family Trust v Marlborough District Council** [2016] NZEnvC 81 at [42].

⁴⁸ Predictions in an Uncertain World – Assessing Effects under the Resource Management Act 1991, Environment Court Judge Jon Jackson, 20 October 2016.

⁴⁹ In particular the evidence of Mr Blackwood, Mr Hind, Mr McSaveney, Mr Davies, and Mr Bassett.

Hearing Panel, and in my submission must be preferred to lay assertions. Findings of fact must be based on material of probative worth, not on mere assertion, suspicion, or speculation.⁵⁰

Mitigation and Engineering Options

- 5.3. The Matatā Resident's Association's submit that a combination of engineering mitigation, partnered with connected early warning systems would enable the majority of Awatarariki residents to stay where they are. This submission is not backed by any evidence.
- 5.4. There have been a great many, extensively reviewed, cost-benefit analyses of the engineering options for mitigation of the risk on the Awatarariki fanhead at all levels of government. These extensive analyses led the District Council to reach the conclusion that engineering solutions were not viable. This decision was not lightly reached by the District Council.⁵¹
- 5.5. Council has commissioned investigations of early warning systems and a combination of bunding on the Awatarariki Stream coupled with an early warning system. It has been conclusively demonstrated that neither early warning systems⁵² nor bunding for individual dwellings can reliably reduce the risk-to-life on the Awatarariki fan to acceptable levels.⁵³
- 5.6. The most recent assessment of the potential for an early warning system to mitigate risk on the fanhead concluded (among other things):⁵⁴

Section 1.7 of the Bay of Plenty Regional Council's Policy Statement calls for a 'precautionary approach' where uncertainty exists. Given the uncertainties associated with a debris flow EWSs effectiveness at protecting life safety as listed in this report, adopting an EWS as the means to mitigate risk to people living on the fan is not, in our opinion, aligned with taking a precautionary approach.

Acceptance of Risk by Individual Landowners

- 5.7. The RPS requires that where areas are subject to High natural hazard risk, the risk be reduced to Medium levels (and lower if reasonably practicable). This is a directive requirement of the RPS which the District Council is

⁵⁰ **ECNZ Ltd v Manawatu-Wanganui RC** W070/90 (PT) at page 96.

⁵¹ Evidence of Mr McSaveney at paragraph 17.5

⁵² Evidence of Dr Massey and Mr Davies

⁵³ Evidence of Mr Davies paragraph 8.2

⁵⁴ Awatarariki catchment debris flow early warning system framework, Massey et al, February 2020

required to “give effect to”.⁵⁵ Given the knowledge of existence of High natural hazard risk on the fanhead, it is not an available or lawful approach for residents to be allowed to accept that risk.

6. CONCLUSIONS

6.1. The District Council is calling 18 witnesses:

- a. Jeff Farrell (Whakatāne District Council);
- b. Mauri McSaveney (Debris Flow Phenomena, Geomorphology, Hazard and Risk Assessment);
- c. Tim Davies (Alluvial Fan Hazards, Debris Flow Phenomena, Debris Flow Modelling, Hazard and Risk Assessment, Risk Mitigation);
- d. Peter Blackwood (Meteorology, Hydrology);
- e. Chris Phillips (Catchment Management);
- f. Tom Bassett (Disaster Recovery, Hydrology, Risk Assessment, Engineering);
- g. Kevin Hind (Debris Flow Modelling, Hazard and Risk Assessment);
- h. Chris Massey (Hazard and Risk Assessment, Early Warning Systems);
- i. Ganesh Nana (Multi-criteria Analysis, Cost-benefit Analysis);
- j. David Stimpson (CDG);
- k. Shayne Donovan-Grammer (Valuation)
- l. Alistair Pratt (Valuation – peer review);
- m. John Reid (Valuation – Process and methodology);
- n. Greg Ball (Property Acquisition);
- o. Amelia Linzey (Social Impact Assessment);
- p. Gerrard Willis (RPS planning);
- q. Wendy Saunders (Risk-based Planning); and

⁵⁵ Section 67(3) RMA and **Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd** [2014] 1 NZLR 593

r. Craig Batchelar (Planning).

6.2. In my submission, this evidence demonstrates that the Proposed Plan Changes represent necessary and appropriate responses to ensuring that the high loss of life risk that exists at the Awatarariki Fanhead is avoided or mitigated, to meet the District Council's obligations under the RPS and the RMA.

A Green / R Ashton

Counsel for the Whakatane District Council

ANNEXURE 1

Local Government Act 2002 (LGA)

1. Section 3: The purpose of the LGA is to provide a framework for local authorities to decide which activities they undertake and the manner in which they undertake them;
2. Section 11A: A core service of local authorities in performing their role includes "*the avoidance or mitigation of natural hazards*";
3. Section 14: Principles relating to local authorities include "prudent stewardship...including by planning effectively for the future management of assets and taking a sustainable development approach";
4. Section 101B requires a 30 year timeframe for infrastructure strategy, and sections 93-97 require a long term plan for a period of no less than 10 years;

Local Government Official Information and Meetings Act 1987

5. Section 44A: Upon request, territorial authorities are required to prepare Land Information Memoranda including special features / characteristics of the land that are known to the authority and not apparent from the district scheme, including relating to natural hazards;

Building Act 2004

6. Section 35: Councils must include information on any special features of the land likely to be relevant to proposed building work;
7. Sections 71-74: Provide various requirements relating to land subject to natural hazards, including providing that a building consent authority must refuse to grant a building consent where land is subject (or likely to be subject) to natural hazards or where work is likely to accelerate, worsen or result in a natural hazard on that land unless adequate provision has been made;

Civil Defence and Emergency Management Act 2002

8. Section 3: The purpose of the act is to improve and promote the sustainable management of hazards to contribute to social, economic, cultural and environmental well-being, safety and property protection; encourage and enable communities to achieve acceptable levels of risk by identifying and

reducing risk; planning and preparation for emergency response and recovery; require local authorities to coordinate, planning, programmes and activities related to civil defence emergency management; and integrate local and national CDEM with national plan and strategy;

Environment Act 1986

9. Sections 17 and 32: The Commissioner for the Environment and the Ministry for the Environment shall have regard to whether any proposals, policies or other matters within their functions are likely to result in the occurrence or increase the chances of occurrence of natural hazards;

Soil and Conservation and Rivers Control Act 1941

10. Makes provision for the conservation of soil resources for the protection of property from damage by floods;

Land Drainage Act 1908

11. Establishes drainage districts and boards and powers to local authorities relating to watercourses and drains.