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

---

RESPONSES TO LEGAL QUESTIONS FROM THE HEARING PANEL

2 March 2020

BROOKFIELDS
LAWYERS
A M B Green
Telephone No. 09 979 2172
Fax No. 09 379 3224
Email: green@brookfields.co.nz
P O Box 240
DX CP24134
AUCKLAND

Notification of maps Matatā 101A and Matatā 101B

1.1. The notification of these maps is addressed in footnote 1 to the pre-circulated legal submissions of the District Council. These maps were included at Appendix 7 of the section 32 material which was notified. This is sufficient for these maps to be formally notified as part of Plan Change 1.

Canterbury Regional Council v Banks Peninsula District Council confirms jurisdiction. Can you provide any example of that jurisdiction being exercised by a Regional Council to prohibit existing land uses continuing that has been considered by the Environment Court (or otherwise)?[1]

1.2. The only example counsel can identify is the decision of the Environment court in **McKinlay v Timaru District Council**[2]**. The Court** 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.*[3]

1.3. PC 17 takes that additional step by implementing regional rules which do in fact control land use, such that existing use rights are extinguished. To counsel's knowledge this plan change would be the first example of this occurring in New Zealand.

You make the point that Policy NH3B is directive. I asked Mr Batchelor about the relevance of the rather less directive language of Policy NH12A. He agrees that the latter is less directive, but suggests that it needs to be read in the light of Policy NH3B. Is that approach consistent with the passage from King Salmon that you quote at 4.5, and your covering commentary of it?[4]

1.4. The quote from **King Salmon** at paragraph 4.5 of the District Council's legal submissions concerning interpretation of objectives and policies states:

---

1 Paragraph 4.2 of WDC legal submissions
2 **McKinlay, IF & CM v Timaru District Council** (2001) 7 ELRNZ 116.
3 Above n. 23, para [13].
4 Paragraph 4.17 of WDC legal submissions

> 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".

1.5. The approach of Mr Batchelar to interpretation of the RPS is entirely consistent with that approach:

a. Policy NH 3B is directive in that it requires District and Regional plans giving effect to the RPS to "achieve" a reduction of high natural hazard risk to medium level (and lower if reasonably practicable). Giving effect to the achievement of such a reduction is a directive requirement that must be complied with in terms of the Supreme Court's decision;

b. Policy NH 3B is to be met by the application of policies NH 4B and NH 12A, which provide decision makers with choice as to the how the necessary reduction in risk is to be achieved. Under Policy NH 12A, natural hazard risk reduction methods in relation to existing land uses are an available method where practicable, i.e. feasible, and may take many forms. The District Council's evidence demonstrates that the managed retreat approach of the plan changes is the only practicable and feasible method to achieve the level of risk reduction required by policy NH 3B.

1.6. Even without policy NH 12A, the Councils would still be required to meet the directive obligations of policy NH 3B.

As I read it, Appendix L of the RPS defines the point at which a risk is "high" as a fatality risk of 10^{-4}. The Plan Changes adopt the trigger of 10^{-5}, for reasons discussed by Professor Davies, among others. Assuming my reading of Appendix L is correct (please advise if it is not) for properties assessed as being in the 10^{-4} to 10^{-5} range, what outcome does the RPS direct?[5]

1.7. The Plan change adopts the trigger point of 10^{-4} consistent with the approach of the RPS.

1.8. The Plan Changes have adopted the **modelled** 10^{-5} as the outer boundary of the 'high' risk area. This is not the same as adopting 10^{-5} as the trigger. Dr McSaveney and Prof. Davies' peer review of the risk modelling considered the modelled 10^{-4} risk line underestimated the level of risk. Due

---

5 Paragraph 4.17 of WDC legal submissions

to a combination of uncertainties within the model, consideration of photographs of the Awatarariki Fanhead post the 2005 event, geospatial plotting of boulders deposited on the debris fan during the 2005 event, and applying a precautionary approach, McSaveney and Davies recommended the area of high risk be extended out to the modelled 10^{-5} risk contour to ensure that the 10^{-4} level of risk would be captured. The Plan Changes therefore use 10^{-4} as the descriptor of "*high*" risk.[6] This precautionary approach ensures that all high risk areas are captured in the high risk policy area. The response of Professor Davies to the question of Commissioner Campbell is apposite:[7]

> We do not know the real distribution of risk on the fan. Therefore there is the possibility that the precautionary approach will in fact overestimate the risk at any given point. However, the precautionary approach will not underestimate the risk, so where a precautionary approach is followed, there is certainty that the assumed risk is not an underestimate; therefore if fatalities do occur there is certainty that they did so under an acceptable degree of risk.

1.9. Counsel understand that adopting the **modelled** 10^{-4} would result in 3 properties being excluded from the High Risk area. If one were to apply the model with no recognition of the peer-review conclusion, these three properties would be subject to a level of risk in the 10^{-4} to 10^{-5} range and be classified as medium risk. Policy NH 3B of the RPS directs zones assessed as being of medium natural hazard risk to be reduced to as low as reasonably practicable. Therefore, if the model is applied without alteration, the approach in the Proposed Plan Changes remains consistent with the RPS because further reduction in risk levels is reasonably practicable. Had the District Council considered these areas to be medium risk then it would not have offered the managed retreat programme to affected properties.

Have you considered Gordon v Auckland Council [2012] NZEnvC7 in relation to the relevance of Section 85 to our consideration of the Plan Changes (see in particular paragraph 24)?[8]

1.10. The Environment Court in **Gordon v Auckland Council** [2012] NZEnvC7 stated:

---

6 Refer McSaveney.M and T Davies, (2015). Peer Review: Awatarariki debris-flow-fan risk to life and retreat–zone extent, (para ii.)

7 See bottom of page 53 of the District Council witness responses to Commissioner questions

8 Paragraph 4.22 of WDC legal submissions

> [24] Ms Fisher suggested that there was a dearth of authority in decisions about the relationship between s 85(2) and s 85(3), and argued further that the Council, in its first instance decision, failed to deal with the s 85(2) argument at all. We think that, although there was a procedural gap with s 85(3) (see eg *Steven (Re an Application)* (1997) 4 ELRNZ 64), the position is now tolerably clear, as was discussed in *Riddiford v Masterton DC and Ors* [2010] NZEnv 262. Subsection (2) provides a ground on which dissatisfied landowners can challenge a provision in a proposed Plan or Plan Change. In its hearing processes the Council can consider that ground of challenge and, if it finds it convincing, may delete or amend the proposed provision accordingly. If there is dissatisfaction with the Council's decision, an appeal to the Court may follow under clause 14 of Schedule 1 and the same grounds of challenge can be considered on appeal, *de novo*.
>
> [25] Alternatively (or as well) an affected landowner may launch an application directly to the Court under subsection (3) and Clause 21 of Schedule 1. This specifically requires reference to Part 3 of the Act and imports the extra ground (to be made out by the applicant) of *... and places an unfair and unreasonable burden on any person having an interest in the land ...* .

1.11. Firstly, it is noted that this authority sets up the anomalous situation where there is an additional constraint on the Environment Court exercising powers under s 85 that is not applicable to first instance decision makers. There is no discernible basis for requiring the Environment Court to be satisfied that a provision in a plan or proposed plan places *"an unfair and unreasonable burden on any person having an interest in the land"* before exercising powers under section 85 and not having the same test apply to a first instance decision maker (if s 85 is relevant).

1.12. In my submission, and with due respect to the Environment Court, the correct interpretation of the procedure (as it was at the time of **Gordon**) was that a challenge under section 85 is established under subsection (2):

a. in a submission made under Part 1 of Schedule 1 in respect of a proposed plan or change to a plan; or

b. in an application to change a plan made under clause 21 of Schedule 1.

1.13. These steps are the jurisdictional basis for a section 85 challenge but not its procedural route for substantive determination. Subsection (3) provides for this via a determination of the Environment Court. This interpretation does not have the anomalous effect as in Gordon of prescribing different tests under s 85 at first instance and on appeal. The only test applying is before the Environment Court.

1.14. Secondly, section 85 has been substantially amended since the **Gordon** decision. A comparison of section 85 as it was then, and as it is now, is set out in a schedule to these submissions. In summary:

a. The heading of section 85 has changed from "*Compensation not payable in respect of controls on land*" to "*Environment Court may give directions in respect of land subject to controls*". Under section 5(2)-(3) of the Interpretation Act 1999, this section heading is relevant to ascertaining the meaning of section 85. The section heading is directed at the Environment Court's ability to give directions, not at a requirement on local authorities.

b. Subsections (1) and (2) remain the same, and in my submission, subsection (2) continues to set out the jurisdictional requirements for a s 85 challenge before the Environment Court.

c. The remainder of the section has been substantially amended. Some of these amendments are stylistic in effect e.g. splitting out the tests of reasonable use and unfair and unreasonable burden in subsection (3B). A notable substantive change is that subsection (3A) now provides for the Environment Court to direct that land be acquired under the Public Works Act 1981 (where the landowner agrees).

1.15. For these reasons, it is submitted that "reasonable use" under section 85 is not a relevant substantive consideration for the hearings panel to determine. Notwithstanding this primary submission, in the alternative, the District Council submits that the requirements for a challenge under section 85 are not met, such that any challenge to the Environment Court on this basis would fail.

If Section 85 is relevant to us, is it relevant to both plan changes, as I would assume given it is non-specific as to what plan or proposed plan is being referred to?[9]

1.16. If relevant to the hearing panel's determination, then section 85 would be a relevant consideration in respect of both plan changes, provided that it has been raised in a relevant submission to both which has not been withdrawn.

Relying on Gordon at [25] do we need to consider point (b)?[10]

---

9 Paragraph 4.22 of WDC legal submissions

10 Paragraph 4.24 of WDC legal submissions

1.17. If **Gordon** is correct, then point (b) *"an unfair and unreasonable burden on any person having an interest in the land"* would not be an applicable consideration. For the reasons set out above this position is submitted to be wrong.

The quotation from Francks in the previous paragraph refers to "building upon" the land (reflecting the context of the decision as focussing on location of the building line). Is it authority on continuing to live in an existing dwelling? Further, with due respect to the High Court, is the passage you have quoted the correct way to apply s85?; i.e. does it focus on the reasonableness of the use a landowner seeks to permit, or the use(s) the Plan allows be made of the land? [11]

1.18. It is correct that the factual context of Francks was restrictions on future building in a known natural hazard area. However, in my submission there is no reason that the broader principle of residential activity in areas of known natural hazards not being a reasonable use should not be applicable to existing residential activity (where the natural hazard risk is high and there are no available mitigation options other than managed retreat).

1.19. As to the manner in which the High Court has applied section 85, in my submission whether the sole land use which is sought by the landowner is a "reasonable" one is the necessary corollary of whether such land use should be provided for in the plan pursuant to section 85. In this circumstance the questions are two sides of the same coin.

Is it relevant when forming a view as to what is a reasonable use that the District Council is proffering compensation?[12]

1.20. The District Council is not offering compensation for the Proposed Plan Changes or the natural hazard risk on the fanhead. Rather, the District Council (in conjunction with the Regional Council and Central Government) is undertaking an acquisition programme that provides for voluntary managed retreat.

1.21. In terms of the substantive consideration under s 85(3B), the acquisition programme is highly relevant to the test of whether the proposed provisions would place "an unfair and unreasonable burden on any person having an interest in the land". This is because, in the instance of land that has been acquired, the proposer of the plan changes is now the owner of the affected

---

11 Paragraph 4.30 of WDC legal submissions

12 Paragraph 4.30 of WDC legal submissions

interests in land. The District Council is not suggesting that it would bear an unfair and unreasonable burden under the Proposed Plan Changes.

1.22. While two property owners have not entered into the voluntary managed retreat programme, it is submitted that their declining to participate in this acquisition process goes to whether the imposition of the Proposed Plan Changes is "unfair". The reasonableness of not engaging in the programme must be seen in light of the fact that the value of properties for acquisition purposes has been determined without taking into account the high natural hazard risk. This natural hazard riskwould have a substantial impact on the price such properties would achieve on the open market. Additional elements of the acquisition programme include contributions to legal and relocation costs, and the absence of real estate fees.

1.23. It is further noted that if properties were acquired under the Public Works Act 1981 under section 85(3A)(a)(ii) RMA then natural hazard risk would be taken into account, such that properties would be acquired for lower prices.

Have you or any of the Council witnesses applied Bayes Rule to assessment of risk in this case? If so, can you direct me to where that is set out.[13]

1.24. Counsel understand that Bayesian or probabilistic statistics have been used by witnesses in assessing risk. Please see paragraph 7.4 of the evidence of Mr Hind and the references there to paragraphs 6.122 to 6.130 and 6.158 to 6.165 of the same evidence.

Can you assist with a view on the interpretation of the opening words of Appendix L to the RPS:

> **"Compliance with Appendix L means:**
>
> **...(b) Use of a recognised risk assessment methodology included in a Regional, City or District Plan or recognised in the consideration of a resource consent application. This may include risk assessment methodologies incorporated in Regulations or industry codes of practice."**

In his answer to my question about the methodology used, Mr Batchelor (sic) appears to assume that a risk assessment methodology in an industry code of practice might be applied even if it is not included in a Regional, City or District Plan or recognised in consideration of a resource consent application. Is that a correct interpretation in your view? (Put another way,

---

13 Paragraph 4.38 of WDC legal submissions

what does "this" at the start of the second sentence of point (b) refer to?). And if that is the correct interpretation, do the AGS guidelines qualify as an "industry code of practice"? [emphasis added]

1.25. The "this" in (b) is considered to refer to "a recognised risk assessment methodology included in a Regional, City or District Plan or recognised in the consideration of a resource consent application" in the proceeding sentence. The validity of AGS 2007 has been accepted by the Regional Council. The RPS Natural Hazard Risk Assessment User Guide deems AGS 2007 to comply with Appendix L (page 30 at 4.3).

1.26. Plan Change 17 seeks to incorporate AGS 2007 into the regional plan by reference. As this is the case, strictly AGS 2007 does not at present, constitute *"a recognised risk assessment methodology included in a Regional, City or District Plan".*

1.27. It is acknowledged that this presents a sequencing issue for the Hearing Panel's determinations as the risk assessment methodology used to justify the plan changes is not yet included in the regional plan. This sequencing issue can be addressed by the Hearing Panel:

a. First, assessing the appropriateness of AGS 2007 for inclusion in the Regional Plan as a methodology for assessing landslide risk. In my submission, the District Council's evidence and s 42A report illustrate that this document is industry best practice and the most appropriate available tool for assessing landslide risk and this has been recognised by the Regional Council in the RPS Natural Hazard Risk Assessment User Guide

b. Secondly, if satisfied that AGS 2007 is appropriate for inclusion in the Regional Plan, the Hearing Panel should then assess the Proposed Plan changes on that basis.

1.28. It would have been possible for the District Council to first seek a plan change to incorporate AGS 2007 into the Regional Plan and then promote the remainder of the Proposed Plan Changes. This would have resulted in a piecemeal approach to assessment of the Proposed Plan Changes and interested parties may have missed the opportunity to submit on a plan change to incorporate AGS 2007, as its implications may not have been apparent. I submit that the approach adopted by the District Council is

consistent with the RPS (given the sequenced decisions proposed above) and provides a more transparent process for interested submitters.

Professor Davies appears to rely, when setting out his reasons for the view he takes, variously on the "responsibility" Council is under (paras 7.35-36) and the Council's potential "liability" (para 7.54). Are those matters relevant to our reasoning process when identifying the most appropriate plan provisions in each case? And if not, what implications does that have for the view we take of the Professor's evidence.

1.29. The District and Regional Council's "responsibility" for managing natural hazards is relevant to the Panel's deliberations as such responsibility is reflected in the functions under sections 30(1)(c)(iv) and 31(1)(b)(i) RMA. These functions are express relevant considerations under sections 66(1)(a) and 74(1)(a).

1.30. As to Professor Davies reference to potential liability, such liability is the potential corollary if the Councils fail to discharge their functions/responsibilities. As such, paragraph 7.54 of Professor Davies' evidence could be re-cast in RMA language, as follows, without any change in meaning:

> The overall outcome of this information is that the risk-to-life assessment at Awatarariki is necessarily based on poor data with unquantifiable uncertainties; therefore the risk assigned to any specific location on the fan must be the highest possible in order to adequately discharge the district and regional councils functions in respect of the management of natural hazard risk ~~avoid potential liability for future deaths~~.

1.31. As such, it is submitted that Professor Davies use of the non-RMA language of "liability" and "responsibility" should not affect the weight to be afforded to his evidence as these terms correspond to directly relevant RMA matters.

A Green / R Ashton

Counsel for the Whakatane District Council

85 Compensation not payable in respect of controls on land	**85 Environment Court may give directions in respect of land subject to controls**
(1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.	(1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.
(2) Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds—	(2) Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds—
(a) In a submission made under Part 1 of the First Schedule in respect of a proposed plan or change to a plan; or	(a) in a submission made under Schedule 1 in respect of a proposed plan or change to a plan; or
(b) In an application to change a plan made under clause 21 of Schedule 1.	(b) in an application to change a plan made under clause 21 of Schedule 1.
(3) Where, having regard to Part 3 (including the effect of section 9(3)) and the effect of subsection (1), the Environment Court determines that a provision or proposed provision of a plan or a proposed plan renders any land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land, the Court, on application by any such person to change a plan made under clause 21 of Schedule 1, may—	(3) Subsection (3A) applies in the following cases:
(a) In the case of a plan or proposed plan (other than a regional coastal plan), direct the local authority to modify, delete, or replace the provision; and	(a) on an application to the Environment Court to change a plan under clause 21 of Schedule 1:
(b) In the case of a regional coastal plan, report its findings to the applicant, the regional council concerned, and the Minister of Conservation, which report may include a direction to the regional council to modify, delete, or replace the provision.	(b) on an appeal to the Environment Court in relation to a provision of a proposed plan or change to a plan.
	(3A) The Environment Court, if it is satisfied that the grounds set out in subsection (3B) are met, may,—
	(a) in the case of a plan or proposed plan (other than a regional coastal plan or proposed regional coastal plan), direct the local authority to do whichever of the following the local authority considers appropriate:
	(i) modify, delete, or replace the provision in the plan or proposed plan in the manner directed by the court:

(4) Any direction given or report made under subsection (3) shall have effect under this Act as if it were made or given under clause 15 of Schedule 1. (5) In subsections (2) and (3), a 'provision of a plan or proposed plan' does not include a designation or a heritage order or a requirement for a designation or heritage order. (6) In subsections (2) and (3), the term reasonable use, in relation to any 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. (7) Nothing in subsection (3) limits the powers of the Environment Court under clause 15 of Schedule 1 on an appeal under clause 14.	(ii) acquire all or part of the estate or interest in the land under the Public Works Act 1981, as long as— (A) the person with an estate or interest in the land or part of it agrees; and (B) the requirements of subsection (3D) are met; and (b) in the case of a regional coastal plan or proposed regional coastal plan,— (i) report its findings to the applicant, the regional council concerned, and the Minister of Conservation; and (ii) include a direction to the regional council to modify, delete, or replace the provision in the manner directed by the court. (3B) The grounds are that the provision or proposed provision of a plan or proposed plan— (a) makes any land incapable of reasonable use; and (b) places an unfair and unreasonable burden on any person who has an interest in the land. (3C) Before exercising its jurisdiction under subsection (3A), the Environment Court must have regard to— (a) Part 3 (including the effect of section 9(3); and (b) the effect of subsection (1) of this section. (3D) The Environment Court must not give a direction under subsection (3A)(a)(ii) unless—

	(a) the person with the estate or interest in the land or part of the land concerned (or the spouse, civil union partner, or de facto partner of that person)— (i) had acquired the estate or interest in the land or part of it before the date on which the provision or proposed provision was first notified or otherwise included in the relevant plan or proposed plan; and (ii) the provision or proposed provision remained in substantially the same form; and (b) the person with the estate or interest in the land or part of the land consents to the giving of the direction. (4) Any direction given or report made under subsection (3A) has effect under this Act as if it were made or given under clause 15 of Schedule 1. (5) Nothing in subsections (3) to (3D) limits the powers of the Environment Court under clause 15 of Schedule 1 on an appeal under clause 14 of that schedule. (6) In this section,— **provision of a plan or proposed plan** does not include a designation or a heritage order or a requirement for a designation or a heritage order **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. (7) *[Repealed]*