

BEFORE THE ENVIRONMENT COURT
AT AUCKLAND
I MUA I TE KOOTI TAIAO O AOTEAROA
TĀMAKI MAKĀURAU ROHE

ENV-2019-AUCKLAND-

IN THE MATTER OF

the Resource Management Act 1991
(RMA)

AND IN THE MATTER OF

an application for Declarations under
ss310-313 RMA

BETWEEN

AWATARARIKI RESIDENTS INC.
Applicant

AND

BAY OF PLENTY REGIONAL COUNCIL
First Respondent

AND

WHAKATANE DISTRICT COUNCIL
Second Respondent

AFFIDAVIT OF RICKY BRETT WILFRED WHALLEY IN SUPPORT OF AWATARARIKI
RESIDENTS INC.

Affirmed 18th December 2019

Solicitor
Richard Allen Law
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I, **Ricky Brett Wilfred Whalley**, of Mātata, teacher affirm that:

INTRODUCTION

1. My full name is Ricky Brett Wilfred Whalley. I reside at 10 Clem Elliott Drive, Matatā along with my wife, Rachel Whalley, and mother Pamela Whalley. I am the Chairperson of the Awatarariki Residents Society Incorporated (**the Society**). I am authorised to provide this affidavit on behalf of the Society. I produce as **Appendix 1** a copy of the Society rules and list of members. All members own property affected by the Plan Changes described below.
2. I address the following issues:
 - Plan Changes
 - Background
 - Managed Retreat package
 - Urgency

Plan Changes

3. Before setting out background, I would like to briefly explain the plan changes proposed by Whakatane District Council and the devastating impact these have on our members. Both plan changes identify a high risk area, largely the same residential area as that covered by the footprint of the 2005 debris flow event. It is claimed that the risk to human life is intolerable within the high risk area. Assessment of risk is therefore a key issue.

Plan Change 17

4. Plan Change 17 is the Regional Council's plan change. Residential activity becomes a prohibited activity within the high risk area from 31 March 2021. This includes abolition of existing use rights. I produce as **Appendix 2** a copy of the notified plan change.

Plan Change 1

5. Plan Change 1 is the District Council plan change. Residential activity becomes a prohibited activity within the high risk area from 31 March 2021. Plan Change 1 does not seek to abolish existing use rights. I produce as **Appendix 3** a copy of the notified plan change.
6. The Society is a submitter on both plan changes. I produce as **Appendix 4** a copy of our submissions, which identifies our key concerns. The submissions refers to s85 RMA, because

a/RW

we believe that prohibiting residential activity in residentially zoned land, where people have lived for many years, is patently unreasonable. No compensation is offered.

7. Both plan changes are scheduled for a hearing before independent Commissioners in the week of 2 March 2020. Counsel has advised us that the merits assessment for the plan changes is still to come, and the Court cannot (as part of this application) intervene on merits issues, including any challenge the assessment of risk. Any merits assessment by the Court would be in the context of an appeal to the Environment Court.
8. But we are deeply concerned that we do not lose the ability to argue for compensation under s85 RMA, as a fallback position if our primary relief (to cancel or amend the plan changes) is ultimately rejected. It is for this reason that we have reluctantly filed the declaration, to gain greater certainty for members when dealing with the District Council over its managed retreat package. There is some urgency, because Council has this week confirmed a final deadline of 30 January 2020, on acceptance of any offer for compensation.

Background

9. There is significant background, not relevant to this application for declarations, but perhaps our key point is that the Society does not accept the risk assessment provided by the District Council in support of the draconian attempt to force us out of our homes. It is nearly 15 years since the debris flow event. If the risk is as significant as claimed by the District Council, then it is difficult to understand why Council has left it this long to take action.
10. Rachel and I have lived at Matatā for over 7 years, and my mother has lived here for more than 25 years. The proposition that we can be forced out of our homes, with or without compensation, is devastating.
11. Our house is located in the “high risk” area. This is the area known as the “Awatarariki Fanhead” and many of the houses that fall within this area have been identified as being at high risk from a future debris flow from the Awatarariki catchment. Some existing houses were damaged by the 2005 Debris Flow Event (**Debris Flow Event**) that occurred in Matata following a heavy weather event and high rainfall. Some of the existing houses are replaced houses that were completely destroyed during the Debris Flow Event and others are new houses that have been built in the 14 years since the Debris Flow Event occurred. Some houses only required limited repair, or were undamaged, including our own.
12. Properties within the Awatarariki Fanhead that have been identified as having an “intolerable risk” to a future debris flow are subject to Plan Change 17 to the Bay of Plenty Regional Council’s Natural Resource Plan, and Plan Change 1 to the Whakatane District Plan.



Managed retreat

13. The Society was formed in 24 November 2017 to provide community representation for affected residents at Awatarariki Fanhead. The Society aims to work towards the best outcome for each family involved, regardless of whether they wish to accept a retreat offer from Whakatane District Council (WDC) or whether they wish to challenge the findings regarding intolerable risk through the resource management hearings. Some of the members of the Society were present during the 2005 Debris Flow Event (**Debris Flow Event**) and others have moved into the area following the event.

14. As residents in Mātata my wife, mother and I are constantly conscious of the risk posed by a future debris flow, as with other natural hazards that apply in our area. My mother (Pamela) was present during the Debris Flow Event in 2005. As a family we would not want to stay in a house that is exposed to intolerable risk. However, we do not agree that there is a proper basis for the position that the District Council has arrived at, and that other avenues have not been thoroughly explored. Since the Debris Flow event in 2005, extensive work and finances have been spent by the District Council seeking to resolve their liability if another debris flow is to occur. We feel less time has been spent listening to what residents want, and finding a solution that would have the support and buy in of residents.

15. Since formation the Society has continually sought the following from the District Council an agreement to:
 - a. work collaboratively with the Society to find a workable outcome for all;
 - b. funding arrangements where the matters that remain outstanding for the Society members could be explored. These include:
 - i. Whether catchment management and an early warning system would reduce risk to tolerable for some houses;
 - ii. A review on how intolerable risk was reached.
 - iii. Funding of legal and expert support for Society members.
 - c. The ability of members to maintain their rights to participate in the RMA proceedings while also engaging and negotiating a retreat package with WDC.
 - d. Access to a technical report commissioned by the Regional Council.
 - (i) The author of the report is Andrew Leventhal of GHD Geotechnics.

The Society understand Mr Leventhal undertook an independent peer review in 2018 of the documents provided by the District Council for their application for a proposed plan change to the Regional Council.
 - (ii) The Society requested the peer review and associated reports through the Official Information Act on 7 December 2018. The



BOPRC acknowledged they have this review and associated reports however they have declined to provide this to the Society on 13 December 2018 under s 7 LGOIMA. Andrew Leventhal is the chairperson and a key author of the Material by Reference (Australian Geomechanics Society "Landslide Risk Management" Guidelines, Australian Geomechanics Vol 42 No.1. March 2007) in the application for a plan change.

(iii) On 20 March 2019 the Society laid a complaint to the Ombudsman requesting the release of the Andrew Leventhal (GHD) peer review of the reports and the reports themselves relating to the debris flow and plan change application. This has not been resolved.

16. Plan Change 17 will remove the residential zoning of these properties. If this is lawful, then residents will be forced out of their homes from 31 March 2021. In advance of the hearings for the plan changes, the District Council has put forward a "Managed Retreat" process which involves a voluntary buy-out for residents, following a process of valuation and negotiation. To my knowledge, most of the information on the compensation package is public – and the Council maintains pages on their website setting out the key information. Of course, the valuation details for individual properties are confidential, as are some of the terms of settlement, and our members are keen to protect their privacy around these matters.

17. In a meeting on 23 September 2019, the District Council negotiated with the Society terms for having member properties evaluated. This represented a first step for members to be actively engaged in the Managed Retreat process but did not bind members to the process. Members have until the end of January 2020 to commit to the Managed Retreat Process or refuse the outcome of the evaluations.

18. I produce as **Appendix 5** publicly available information relating to the Managed Retreat on the district council website:

- (i) "Awatarariki Managed Retreat Programme";
- (ii) "FAQS- Awatarariki Fanhead Matata Managed Retreat";
- (iii) "Awatarariki Managed Retreat Programme brochure;
- (iv) and Acquisition Strategy updated December 2018.



19. I produce as **Appendix 6** a power point on Managed Retreat that was presented to property owners by the district and regional councils at a community meeting on 16 July 2019. Our understanding is this is not publically available.
20. As identified in the affidavit by our solicitor, Richard Allen, the District Council has insisted on a special condition that members resign from the Society, if they agree to compensation as part of the Managed Retreat buy-out. Since that time the first family has resigned from the Society after agreeing to a buy-out package with WDC.
21. Members of the Society continue to feel that they do not have the full picture in front of them. Over the preceding 14 years since the Debris Flow event, WDC has changed position many times. This is despite a consistent call by residents to have catchment management and early warning systems looked at as an affordable option for risk reduction. Numerous options have been put to residents to consider, some with support of residents and some which were opposed.

Urgency


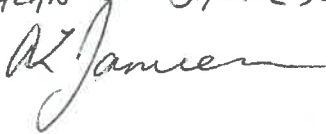
22. We regret that this application has been lodged at a late stage. In the past few months, it has become obvious to us that the District Council wishes to adopt a hardball negotiating strategy to purchase properties.
23. Our Solicitor, only recently engaged on property matters, did not receive a copy of the proposed special condition referred to in paragraph [20] until 9 December 2019. There is a significant shortfall in funding for our independent valuer, and the District Council has refused to make up the balance (it claims that our valuer's costs are unreasonable. We disagree.) Some pressure, behind the scenes, has been placed on at least one family to accept an offer without first taking independent legal advice and independent valuation advice (this is denied by the Council). An impasse has been reached, because the District Council will not extend the deadline for Managed Retreat compensation beyond 30 January 2020. This was confirmed on 16 December 2019, as identified in Mr Allen's affidavit.
24. We do not know where to turn. We believe it would be unfair and unjust if members rejected the voluntary offers being made, under the Managed Retreat package, because these are unacceptable; and the District (or Regional) Council then relied on that rejection as grounds to refuse compensation under s85 RMA. We believe this would be an unjust outcome, but we do not want to gamble with our families' financial futures, given this is (for most member families) our only real asset. We also strongly contest the merits of the plan



changes, and we will be engaging experts at Environment Court level (assuming we can access ELA or other public funding).

25. We have therefore turned to the Court for assistance, and some guidance on how the voluntary offers under the Managed Retreat package may be treated. We do not believe these are equivalent to the Public Works Act process under s85 RMA (but this is a legal issue).

Sworn this 18th day of
December 2019
Before me

Ricky Whalley
) 
)
) ALAN L JAMIESON JP
) 

Alan Lloyd Jamieson, JP
#15239
STRAITFORD
Justice of the Peace for New Zealand

Justice of the Peace / Solicitor of the High Court of New Zealand