

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

CLARIFICATION OF ISSUE RELATING TO INCORPORATION BY
REFERENCE

4 March 2020

CooneyLeesMorgan

ANZ Centre
Level 3, 247 Cameron Road
PO Box 143
TAURANGA 3140
Telephone: (07) 578 2099
Fax: (07) 578 1433
Lawyer Acting: M Hill
Email: mhill@clmlaw.co.nz

MAY IT PLEASE THE HEARINGS PANEL

Introduction

1. An issue has arisen during the course of the hearing in relation to whether the requirements of Appendix L to the Regional Policy Statement (**RPS**) have been met by the manner in which the *Australian Geomechanical Society – Landslide Risk Management 2007* (**AGS 2007**) risk assessment methodology has been incorporated into the Regional Natural Resources Plan (**RNRP**) through Proposed Plan Change 17 (**PPC17**).
2. During consideration of this issue it has become apparent to counsel that the AGS 2007 appears not to have been correctly incorporated into PPC17. That is because material cannot be incorporated by reference into a private plan change which has been “accepted” rather than “adopted” by Council under clause 25(2) of Part 2 of Schedule 1 to the Act.
3. However, for the following reasons it is submitted that this does not matter because the AGS 2007 have also been incorporated in Proposed Plan Change 1 to the Whakatane District Plan (**PPC1**) and have taken legal effect.
4. A small adjustment would be required to Policy NHP6 of PPC17 to remove the proposed reference to AGS 2007 and replace it with reference to “*a recognised risk assessment methodology that complies with Appendix L of the RPS*”.
5. It is submitted that AGS 2007 is already a “recognised” risk assessment methodology because it has been incorporated by reference into PPC1, and has taken legal effect. This avoids the “sequencing” issue previously raised by Counsel for the District Council.
6. The Regional Council could, at a later date, incorporate AGS 2007 directly into the operative RNRP.
7. Mr Olliver will address this proposal in his supplementary Officer’s Report.

Explanation

8. The provision in the Act for incorporation by reference (Clause 30 of Part 3 of Schedule 1) provides for certain material (such as industry standards) to “*be incorporated by reference in a plan or proposed plan*”.

9. "Plan" is defined in s.43AA to mean a regional or district plan (which are in turn defined to mean an *operative plan*), which is not currently applicable here.
10. "Proposed plan" is defined to include a "proposed plan" or "*a change to a plan proposed by a local authority which has been notified under clause 5 of Schedule 1 ... and includes a proposed plan or a change to a plan proposed under part 2 of Schedule 1 that has been adopted by the local authority under clause 25(2)(a) of Schedule 1*" (s43AAC).
11. The important point is that it does not include a private plan change which was accepted rather than adopted by a local authority, which is the situation here. The policy rationale appears to be ensuring that local authorities rather than private plan change applicants (which will not commonly be other local authorities) manage information which is incorporated into their plans.
12. In this case, the material has been properly incorporated in a "proposed plan" being proposed PPC1 (Proposed Policy 18)¹. As noted above (para 10), a "Proposed Plan" is defined to include a change to a plan which has been notified under clause 5 of Schedule 1. That was the process followed for PPC1.
13. It is submitted that PPC1 therefore complies with Appendix L to the RPS, which provides that:

Compliance with Appendix L means:

- (a) Use of Steps 1 to 6 below (the default methodology); or
- (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. [emphasis added]

14. The issue raised previously by the Hearings Panel is whether the reference to a "*regional ... or district ... plan*" means an operative plan, rather than a proposed plan change.
15. If it means an operative plan, the question is whether a sequential approach is required whereby the AGS 2007 must first be incorporated into the operative District

¹ Policy 18 provides: "*To assess the natural hazard risk from Debris Flows on the Awatarariki fanhead at Matatā by undertaking a risk analysis using the methodology set out in the Australian Geomechanical Society – Landslide Risk Management 2007.*"

Plan or RNRP in order for it to be a “recognised risk assessment methodology” which can then be relied on as the basis for compliance of the Proposed Plan Changes with Appendix L to the RPS.

16. Counsel for the District Council submitted, by way of written response to questions from the Hearing Panel dated 28 February 2020, *“that strictly AGS 2007 does not at present, constitute “a recognised risk assessment methodology included in a Regional, City or District Plan” and “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.”* (paras 1.25 to 1.18).
17. It is the view of this Counsel that another interpretation is available which should respectfully be preferred. Clause 30(3) of Schedule 1 provides that *“Material incorporated by reference in a plan or proposed plan **has legal effect** as part of the plan **or proposed plan**.”* [emphasis added].
18. For the reasons explained above, “proposed plan” includes PPC1.
19. Thus, the AGS 2007, which has already been incorporated by reference into PPC1 according to the public consultation process required by Schedule 1, has already taken legal effect. This is similar to the provision in s.86B of the Act for certain rules in a notified plan to take immediate legal effect upon notification.
20. Given the AGS 2007 already have legal effect as part of PPC1, it is submitted the Appendix L requirements have been satisfied. The proposed amendment to Policy NH6 of PPC17 to refer to a methodology which complies with Appendix L, which in turn refers to a methodology “included in a District Plan”, provides the necessary link.
21. The proposed amendment to Policy NH6 of PPC17 does not give rise to issues of scope. It is a correction to reflect the correct legal position and not a substantive change. It leads to the same outcome of recognising AGS 2007.
22. Whether AGS 2007 is an appropriate and reliable methodology is a matter of merit and the Hearings Panel is entitled to consider this issue if validly raised in any remaining submissions, consistent with the Panel’s delegation to hear and determine submissions.
23. If the Hearings Panel does not consider there is scope to amend Policy NH6 in the manner proposed, the Regional Council may make the minor alteration pursuant

Clause 16 or 20A of the First Schedule (correction of minor errors which do not affect substantive rights).

Dated 4 March 2020



Mary Hill

Legal counsel assisting the Consent Authority in relation to Proposed Plan Change 17