

**BEFORE A HEARING PANEL: WHAKATĀNE 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

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**CLOSING SUBMISSIONS ON BEHALF OF WHAKATĀNE DISTRICT COUNCIL**

**17 March 2020**

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**AUCKLAND**

## **1. INTRODUCTION**

1.1. These closing submissions on behalf of the Whakatāne District Council address the following topics:

- a. Consultation and engagement with the Matatā community;
- b. Timing of the Voluntary Managed Retreat (**VMR**) programme;
- c. Distinctions in valuation approach applying under the VMR and the Public Works Act 1981 (**PWA**);
- d. Section 85 RMA;
- e. WDC's evidential approach to the plan changes;
- f. Regional Policy Statement (**RPS**) issues:
- g. AGS 2007 and Appendix L;
- h. division of labour between Region and District;
- i. directive obligations to act, and
- j. the PC 17 user guide.
- k. Comparison of risk management approach with other New Zealand examples;
- l. "Risk based approach" versus "precautionary approach";
- m. Taking into account climate change;
- n. Early warning systems;
- o. The GHD report and calls for a property by property approach;
- p. Decision making options for the Panel.

## **2. CONSULTATION AND ENGAGEMENT WITH THE MATATĀ COMMUNITY**

### **Allegations of Mr Whalley**

2.1. The evidence of Mr Whalley criticised the process of consultation and engagement with the community between the 2005 event and the development of the Proposed Plan Changes. In this regard a number of the matters in Mr Whalley's evidence relate to a complaint he has earlier made. These matters have been investigated by independent barrister Mr P.M. Lang

and found to be without substance. Accordingly, these are not further addressed.

- 2.2. Mr Whalley made a number of further oral allegations concerning bullying and statements, attributed to officers and elected members, that the outcome of this hearing process was a foregone conclusion. These allegations were levelled at a prior CEO of the District Council and the Chair of the Regional Council. Counsel understand that these allegations are unreservedly refuted by both men.

### **Engagement in accordance with the principles of consultation**

- 2.3. In terms of ‘consultation’, the Court of Appeal’s decision in **Wellington International Airport v Air New Zealand**<sup>1</sup> has identified principles of consultation that can be summarised as follows:

- a. “Consultation is not to be equated with “negotiation”. The word “negotiation” implies a process that has as its objective arriving at agreement. However, “consultation” may occur without those consulted agreeing with the outcome.
- b. Consultation includes listening to what others have to say and considering the responses.
- c. The consultative process must be genuine and not a sham.
- d. Sufficient time for consultation must be allowed.
- e. The party obliged to consult must provide enough information to enable the person consulted to be adequately informed so as to be able to make intelligent and useful responses.
- f. The party obliged to consult must keep an open mind and be ready to change and even start afresh, although it is entitled to have a work plan already in its mind.
- g. Consultation is the statement of a proposal not yet fully decided upon.

- 2.4. The record of engagement, including as detailed in the section 32 report and in Mr Stimpson’s evidence, shows that the District Council has engaged in accordance with these principles of consultation. Both Councils have been

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<sup>1</sup> **Wellington International Airport v Air New Zealand** [1993] 1 NZLR 671

open in sharing information with stakeholders through numerous presentations over several years. The Council has responded to the results of engagement through commissioning:

- a. Investigations of review of risk,
  - b. Two reports to investigate early warning systems;
  - c. Investigations of catchment management, and Chute to Sea mitigation options.
- 2.5. The Council has also been responsive to the feedback of stakeholders through changes to the timing of the combined hearing and to the timeframes of the VMR programme, as addressed below.
- 2.6. All information has been shared and issues raised through engagement have been thoroughly investigated with an open mind. The process has resulted in a clear understanding of the positions of the parties and stakeholders, but this has not resulted in agreement. In this instance there is no lack of understanding, just a lack of agreement.

#### **Evidence of Mr Nana and Ms Lindsey**

- 2.7. At the hearing there was criticism of the evidence of Mr Nana and Ms Lindsey not including engagement with community stakeholders. Both witnesses acknowledged it would be best practice to do so. However, it is submitted that this should not affect the weight that the panel affords to their evidence as both witnesses were clear that for such engagement to change the conclusions of their assessment, the weightings allocated to loss of life would need to reduce substantially and to a level that they could not support.

### **3. TIMING OF VOLUNTARY MANAGED RETREAT AND PLAN CHANGES**

- 3.1. The case for the Awatarariki Residents Society Incorporated (**ARI**) was that it was improper for the Council to proceed with the VRM programme prior to the conclusion of the plan change process. ARI suggested that the Council was using the VMR programme as inappropriate leverage in these proceedings.
- 3.2. The evidence of Mr Farrell was that timing of the VMR has been driven by the availability of funding from the District Council and central government. Initially, there was not universal support for VMR from central government and the funding is only available until the end of June 2020. Had the District

Council waited until final determination of the Proposed Plan Changes to progress VMR, there is no certainty that funding would be available at that stage.

- 3.3. The supplementary affidavit of Mr Farrell provides an update on the status of the VMR, including the extensions that have been made to the timelines where possible. Ongoing funding from unexpended District and Regional Council monies cannot be assured and is subject to long term/annual planning processes.
- 3.4. Moreover, the CDG had the opposite view to ARI, and sought VMR first and to only progress plan changes where necessary after that. The submissions of Sutton and Nicholson to the Proposed Plan Changes support this approach.

#### **4. VALUATION UNDER THE VMR AND PWA**

- 4.1. ARI expressed a preference for any acquisition of fanhead properties to be under the Public Works Act 1981 (**PWA**) pursuant to section 85(3A)(a)(ii) RMA after an Environment Court hearing. This preference is totally counter to securing the best sale price for landowners. This is because under the PWA the effect of the debris flow hazard would be taken into account, whereas under VMR it is not.
- 4.2. The VMR valuations are proceeding on the basis that the 2005 event did not occur. No discount to values is being made for:
  - a. The high degree of debris flow hazard risk to which properties are subject;
  - b. The effect of the Building Act 2004 determination that residential buildings cannot be constructed on those sites that do not presently contain buildings; and
  - c. The potential outcomes from the proposed plan changes.
- 4.3. Because these factors have been ignored, there is no expert valuation evidence as to the effect they would have on the market value for affected properties. However, the valuers were clear in answers to questions from the commissioners that the ability to construct and use a dwelling on the land would account for the lion's share of a property's value. Without the ability to construct and use a dwelling, land values would be "nominal" only. In respect of those properties with dwellings and subject to the High Natural hazard risk,

the implications for this in terms of a prospective purchaser obtaining insurance and borrowing against the property, would have a highly significant detrimental effect on value. The VMR acquisition package is therefore very favourable compared to the market value of properties.

- 4.4. The same cannot be said of a PWA acquisition process. Under section 62(1)(c) PWA, compensation is assessed without taking into account the effect of the public work on value (be it positive or negative) before the specified date. Applying this principle to section 85(3A)(a)(ii) RMA, the equivalent of the public work would be the Proposed Plan Changes. However, excluding the effect of the Proposed Plan Changes on values of properties in the High Risk area would not exclude the substantial effect on value caused by:

- a. The high loss of life risk from the debris flow hazard that properties are subject to; and
- b. The effect of the Building Act 2004 determination that residential buildings cannot be constructed on those sites that do not presently contain buildings.

- 4.5. These are pre-existing facts that are not a facet of the proposed plan changes and would substantially reduce the acquisition price that landowners would achieve under the PWA, as compared to the VMR. While a solatium of up to \$35,000 could be paid under the PWA<sup>2</sup>, it is highly improbable that this would come close to bridging the gap in value. As such ARI's preference for a PWA process is troubling and the District Council strongly encourages ARI and its members to reconsider this position.

## 5. SECTION 85

- 5.1. The relevance of the Bill of Rights to section 85 was raised by Commissioner Robinson. The RMA is to be interpreted consistently with the Bill of Rights where possible.<sup>3</sup> In general, town planning legislation has been seen as an imposition on private property rights and the RMA is a continuation of that. Significantly, the Bill of Rights does not include protections for private property, so it does not appear that it has any direct bearing on the ability of consent authorities to regulate the use of natural and physical resources under the

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<sup>2</sup> Section 72C PWA

<sup>3</sup> New Zealand Bill of Rights Act 1990, section 6

RMA. The RMA is a legislative limitation on private property rights and the Bill of Rights does not appear to have any direct impact upon that. However, section 85 can be seen as providing a check or protection which fulfils a similar constitutional role to the Bill of Rights.

- 5.2. In terms of whether residential use of land subject to high natural hazard risk, and continuation of such use, is a “reasonable use”, subsection (6) of section 85 states:

**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.

- 5.3. Counsel for ARI submitted that “reasonableness if defined by the effects of the use and user – i.e. residential – and not the receiving environment (risk posed by debris slip)”. This submission picked up the thread of Commissioner Robinson’s question as to whether the High Court had correctly applied section 85 in **Francks**.<sup>4</sup>
- 5.4. It is accepted that section 85(6) defines reasonable use to includes activities “whose actual or potential effects on any aspect of the environment or on any person (other than the applicant) would not be significant.” However, it is not accepted that the actual and potential effects of people living in a high natural hazards area are only significant for the residents themselves. This risk has significant actual and potential effects for the wider community and responsible agencies. When the next debris flow event occurs, it will not be only the residents who are affected. The effects will be acutely felt by others in proximity.<sup>5</sup>
- 5.5. Further it is submitted that the passive recreation uses which remain permitted under the Proposed Plan Changes are a reasonable use of land once residential use ceases.

## 6. WDC’S EVIDENTIAL APPROACH TO THE PROPOSED PLAN CHANGES

- 6.1. The case for ARI was critical of WDC’s evidential approach to the plan changes in terms of the extensive expert reports commissioned and in calling 17 independent expert witnesses. This criticism is not accepted.

<sup>4</sup> **Francks v Canterbury Regional Council** [2005] NZRMA 97 (HC).

<sup>5</sup> See evidence of Mr Batchelar at paragraph 14.19 and reference to page 35 of the section 42A report.

- 6.2. The District Council's evidence was entirely proportional to the significance of the issues and the need to properly establish the case for the pioneering approach that is being proposed.

## **7. REGIONAL POLICY STATEMENT**

### **AGS 2007 and Appendix L**

- 7.1. The status of AGS 2007 as a methodology for assessing risk has been an issue because, while the Proposed Plan Changes propose to include this document in the Regional Plan, AGS 2007 is not yet incorporated in an operative plan as envisaged by appendix L of the RPS. In our submission this does not present an impediment to approval of the plan changes as:
- a. The Appendix L risk assessment methodology is a default methodology and the incorporation of other methodologies is envisaged by the RPS;
  - b. Under clause 34 of schedule 1, the Councils consulted on the inclusion of AGS 2007 by reference in the Proposed Plan Changes prior to notification;
  - c. The process of consideration of inclusion of the AGS 2007 methodology alongside the proposed plan changes allows for an integrated consideration of its appropriateness and no prejudice arises for submitters;
  - d. Mr Willis and Mr Oliver both stated that contemporaneous adoption of alternative recognised risk assessment methodologies with specific plan changes was anticipated at the time the RPS was being developed;
  - e. The expert consensus is that AGS 2007 is the most appropriate tool for assessing landslide hazard;
  - f. In answers to questions from the Panel, Chris Massey gave evidence that if the values derived under AGS 2007 were inputted to the default Appendix L methodology, the same risk assessment outcomes would result.



- 7.2. The submissions of Ms Hill dated 4 March 2020 provide a further route for the Panel through Appendix L of the RPS. Counsel agree with those submissions and adopt them.
- 7.3. Commissioner Robinson questioned how the meaning of “regional, city or district plan” could mean anything other than an operative plan, given the RMA definition in section 43AA and the RPS’s adoption of RMA definitions where a term is not otherwise defined. However, these definitions only apply unless the context requires another meaning and it is submitted that here the context does require another meaning.
- 7.4. Appendix L is a “default” methodology and provides the following list of situations where an alternative methodology may be used: *“included in a regional, city or district plan or recognised in the consideration of a resource consent application.”* This list includes:
- a. A “city plan” which is not a term defined under the RMA, which suggests that the strict RMA definitions were not intended to apply to the other types of plan listed; and
  - b. A resource consent application which allows the proposal and the alternative risk assessment methodology to be considered together.

This approach enables the best risk assessment methods to be applied where appropriate to the circumstances.

- 7.5. This context requires the words “regional, city or district plan” to include a proposed plan change so that consideration of the change and the alternate methodology can occur together (as would be the case with a resource consent application).
- 7.6. If the Panel finds that there has been a flaw in the way that AGS 2007 has been included in PC 1, then the District Council supports the s 42A report writers recommended minor rewording of Policy NH P6 as a solution:

To assess the natural hazard risk from Debris Flows on the Awatarariki fanhead by undertaking a risk analysis using a the methodology that complies with Appendix L of the Regional Policy Statement set out in the Australian Geomechanics Society – Landslide Risk Management 2007.

## **Division of Labour Between District and Region**

- 7.7. ARI argued that the RPS doesn't enable rules in the Regional Plan to extinguish existing use rights, suggesting that this oversteps the division of responsibilities set out in policy NH 13C and HN14C. There is policy support for the Regional Council taking action to manage natural hazards. The footnote to Policy 14C states:

\* Under section 30(1)(c)(iv) of the Act, the Regional Council has the function to control land use for the avoidance or mitigation of natural hazards. The Act allows the Regional Council to exercise that function in such a way as to override any existing use rights available under section 10(1) of the Act. The allocation of responsibilities under this policy does not remove the right of the Regional Council to exercise its functions and powers in that regard. Should it choose to do so, any such provisions will be subject to a plan or plan change process under Schedule 1 to the Act.

- 7.8. The rules proposed in Plan Change 17 are therefore expressly contemplated by the RPS.

#### **Directive Policies**

- 7.9. Commissioner Robinson questioned whether Policy NH3B and NH12A, when read together, supported the proposed Plan Changes. It is submitted that when read together with the RPS guidance as to policy categorisation, these policies support the outcomes in the proposed plan changes:

- a. Policy NH3B is a "specific directive policy" that must be included in the policies, rules and/or other methods of regional and district plans.
- b. Policy NH12A is a "broad directive policy" that requires councils to work with their communities, iwi authorities, and other affected stakeholders, to find the most appropriate way to give effect to a policy.

- 7.10. Policy NH3B is a substantive policy that directs an outcome (in this case to reduce high loss of life risk), whilst Policy NH12A directs the general process to be followed by councils to achieve that outcome. Accordingly the proposed plan changes give effect to the outcome required by NH3B.

#### **Plan Change 17 user guide**

- 7.11. It is submitted that no issue as to scope arises because the PC17 explanatory text was notified as to be included in the regional plan as a user guide where such document does not in fact exist. It is a permissible change of form, not substance, to include this within Appendix 1 as submitted by Ms Hill.

## 8. COMPARISON OF RISK MANAGEMENT APPROACH WITH OTHER NEW ZEALAND EXAMPLES

8.1. Commissioner Robinson questioned whether the approach to tolerable risk which underpins the Proposed Plan Changes is more or less conservative than has been applied elsewhere. The evidence of Mr Massey illustrated that the  $10^{-4}$  annual individual fatality risk (AIFR) level is consistent with approaches to management of hazards throughout New Zealand:<sup>6</sup>

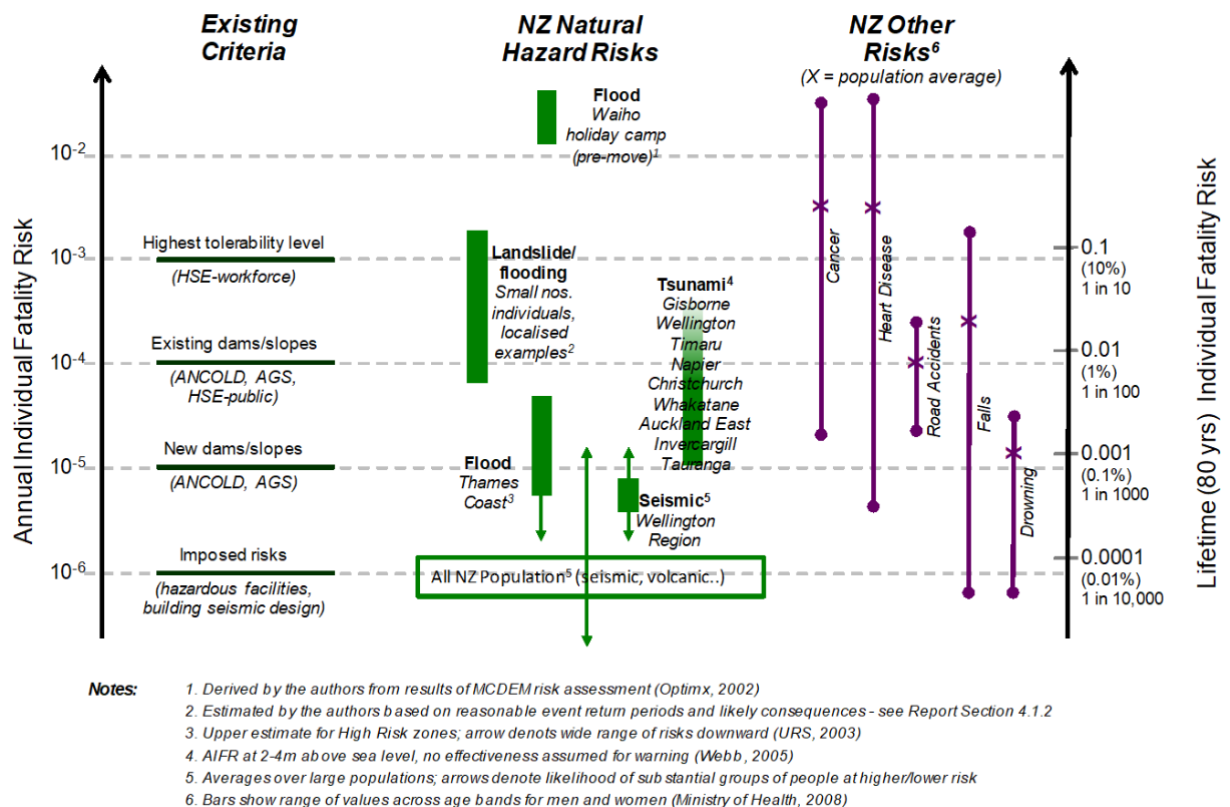


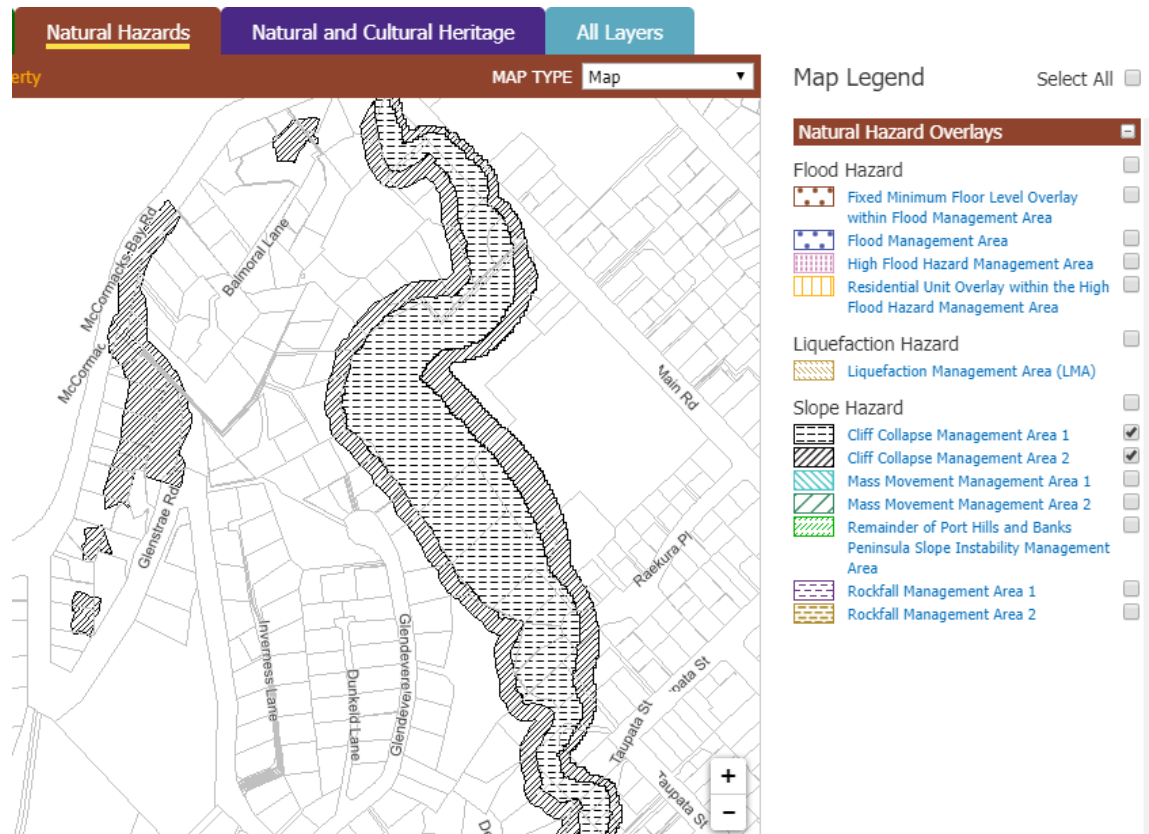
Figure 7 Comparison of New Zealand Risks and Existing Criteria.

8.2. Mr Massey advised that the  $10^{-4}$  level had recently been used to formulate planning provisions for rockfall hazard in the Port Hills. The Commissioners questioned what activity statuses applied under those provisions and Mr Massey advised that these were detailed.

8.3. The full activity table at Table 5.6.1.1a of the Christchurch District Plan is set out as an **Appendix** to these submissions. Differing activity statuses are applied for various activities to different hazard areas. An example of the mapped hazard areas is shown below. Prohibited activity status is applied

<sup>6</sup> Canterbury Earthquakes 2010/2011 Port Hills Slope Stability: Principles and Criteria for the Assessment of Risk from Slope Instability in the Port Hills, Christchurch; T. Taig, C Massey, T Webb; GNS Science Consultancy Report 2011/319, March 2012, Figure 7

extensively in Cliff Collapse Management Area 1, including for residential activity.



8.4. The conceptual approach which is applied to natural hazard risk management is similar in the Christchurch District Plan and the Proposed Plan Changes. A material distinction is that the provisions applying to the Cliff Collapse Management Area 1 do not extinguish existing use rights. This likely reflects:

- a. The finding in the Port Hills Slope Stability risk assessment that the elevated level of risk in the wake of the earthquakes was expected to fall by a factor of about 5 over the next 5-10 years;<sup>7</sup> and
- b. That unlike the BOPRC RPS, the Christchurch District Plan does not explicitly require risk reduction to be achieved.<sup>8</sup>

<sup>7</sup> Canterbury Earthquakes 2010/2011 Port Hills Slope Stability: Principles and Criteria for the Assessment of Risk from Slope Instability in the Port Hills, Christchurch; T. Taig, C Massey, T Webb; GNS Science Consultancy Report 2011/319, March 2012, Pages 25-29

<sup>8</sup> See policies 5.2.2.1.1 and 5.2.2.1.2 and 5.2.2.4.1 b

- 8.5. Another New Zealand natural hazard risk management response with which a parallel could be drawn is the Building (Earthquake-prone Buildings) Amendment Act 2016. Under that legislation, building owners are required to strengthen earthquake prone buildings (or demolish them) and no contribution is made from central government to assist (excepting Heritage New Zealand grants). By contrast, here there is a programme of acquisition, at liberal values, requiring no financial contribution from the owners themselves to mitigation of the natural hazard risk.

## **9. “RISK BASED APPROACH” AND “PRECAUTIONARY APPROACH”**

- 9.1. ARI submitted that the District Council had adopted a “precautionary approach” rather than a “risk based approach”. This submission is misconceived. There is no difference between a precautionary and a risk-based approach. The precautionary approach is a subset of risk based approaches which uses lower risk values.
- 9.2. The precautionary approach has been used as part of the basis for deeming the modelled  $10^{-5}$  to be the actual  $10^{-4}$ . A precautionary approach is called for by the RPS and had been demonstrated to be appropriate due to modelling uncertainties, the inherent complexities of debris flows, and the focus on reducing loss of life risk (rather than the inconvenience of property damage). In any event, as was illustrated in responses to questions from the panel, moving the High Risk area from the modelled  $10^{-5}$  risk contour to the  $10^{-4}$  risk contour will have a limited impact on the outcomes for residents as relevant dwellings are still encompassed by the  $10^{-4}$  risk contour (and indeed a substantial proportion of properties are within the  $10^{-3}$  risk contour).
- 9.3. It was also suggested that the lack of fatalities in 2005 showed that the risk assessment was overly conservative. The evidence of McSaveney, Davies, Hind and Farrell was consistent that luck had a large part to play in the absence of fatalities or serious injuries in the 2005 event. Luck cannot be relied upon in a future event.

## **10. RAINFALL RETURN PERIODS AND TAKING INTO ACCOUNT CLIMATE CHANGE**

- 10.1. The evidence of Mr and Mrs Whalley criticised the evidence of Mr Blackwood in relation to the allowances the latter had made for climate change. Mr and

Mrs Whalley have no expert qualifications on these matters and their comments are selective and misleading.

- 10.2. Mr and Mrs Whalley stated<sup>9</sup> that Mr Blackwood's focus has been on rainfall amount with no explanation as to the likelihood and frequency of rainfall akin to the 2005 event occurring again. This is not correct as return periods were presented in Mr Blackwood's evidence.<sup>10</sup>
- 10.3. Mr and Mrs Whalley stated<sup>11</sup> that "Within region differences are documented where coastal areas of Bay of Plenty by 2090, coastal and south-eastern areas may receive 10 percent less rain than they do now", citing a Bay of Plenty Regional Council factsheet. However, this potential 10 percent decrease is clearly only for annual rainfalls, and certainly not a prediction in respect of intense storms.
- 10.4. Mr and Mrs Whalley contended<sup>12</sup> that Mr Blackwood had not addressed regional differences in projected climate change effects and had not included discussion of the detailed mean precipitation rate compared with the 4 climate change scenarios for Bay of Plenty documented in the full IPCC 5th Assessment Report which shows a decrease in rainfall in spring and no significant increase in the other seasons. Reference to seasonal impacts is misleading as it is well accepted that impacts due to global warming on mean seasonal or annual precipitation rates are completely different to impacts on storm rainfalls. The storm rainfalls predictions are accurately inherent in the High Intensity Rainfall Design System (HIRDS) Version 4 used in the Matata Flooding 18 May 2005: Meteorology Update.<sup>13</sup>
- 10.5. Mr and Mrs Whalleys' evidence quoted the Ministry for the Environment's website which states *"There is large natural variability in extreme rainfall frequency in the Bay of Plenty from year to year and decade to decade. According to the most recent projections, the Bay of Plenty is not expected to experience a significant change in the frequency of extreme rainy days as a result of climate change."* This unreferenced statement needs to be compared to the detailed and up to date HIRDS predictions presented in Mr Backwoods

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<sup>9</sup> Evidence of Mr Whalley, paragraph 35

<sup>10</sup> Evidence of Mr Blackwood, see for instance table one and paragraph 10.6

<sup>11</sup> Evidence of Mr Whalley, paragraph 39

<sup>12</sup> Evidence of Mr Whalley, paragraph 37

<sup>13</sup> Appendix 2 to Mr Blackwood's evidence

evidence. They specifically apply to BOP locations and the data for Tarawera at Awakaponga.

- 10.6. In addition, the October 2019 NIWA report “Climate Change Projections and Impacts for the Bay of Plenty Region”, concludes at section 6.5:

There is good evidence that storms originating from the sub-tropics in the summer that impact on the Bay of Plenty have more intense circulation that is likely to lead to stronger winds, greater storm surge and higher rainfall accumulations. Evidence for such changes in other seasons is less clear. However, there is also good evidence that heavy rainfall associated with storms increases in all seasons with global warming, particularly in winter, likely associated with the increased moisture carrying capacity of a warmer atmosphere.

## **11. EARLY WARNING SYSTEMS**

- 11.1. Mr and Mrs Walley’s evidence contended that “This recent evidence demonstrates that an early warning system will work at Awatarariki in reducing risk”. This is factually incorrect. In submissions for ARI, counsel modified this position to EWS “may” work. The key barriers to the effective operation of an early warning system are the lack of compliance with warnings combined with an inability to evacuate when the hazard presents, and that some people will choose to stay, particularly after one or more false alarms. Dr Massey’s evidence stated that:

- a. in the more realistic scenario, it could be that up to 80% of the people in the hazard zone are still present when the hazard occurs, especially if most people cannot run or evacuate due to flooding.<sup>14</sup>
- b. Given the uncertainties associated with a debris flow EWS, adopting an EWS as the means to mitigate the risk to people living on the fan is, in his opinion, not aligned with taking a precautionary approach required by section 1.7 of the RPS.<sup>15</sup>

- 11.2. The expert evidence before the Panel is that early warning systems are not an effective mitigation measure either on their own or in combination with other measures and no such system is proposed by the District Council.

## **12. GHD REPORTS AND CALLS FOR PROPERTY BY PROPERTY ASSESSMENT**

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<sup>14</sup> Evidence of Mr Massey, paragraph 7.38

<sup>15</sup> Evidence of Mr Massey, paragraph 1.3

- 12.1. The case for ARI placed considerable weight on the draft and final GHD reports in its call for a property by property assessment. On closer analysis these reports do not support the ARI case.
- 12.2. There is no great mystery as to the draft GHD report. It is entirely appropriate to not release early drafts of reports that have not been peer reviewed as doing so may result in unfounded doubt being placed on peer-reviewed conclusions. Moreover, the release of such material would undermine the appropriate process of consideration of drafts. In any event, the ARI request for this report is part of an ongoing Ombudsman's Office investigation with the Regional Council.
- 12.3. As to the final GHD report, the express limitations of this report are relevant as to context:<sup>16</sup>

The Debris flow risk assessment was undertaken while the RPS natural hazards provisions were being formulated but before they were made operative. Based on the risk being evaluated as "high", land use controls have been proposed to give effect to the RPS policy direction. The question has arisen: is the degree of policy response proposed (prohibiting residential activity) in excess of what is required (to reduce risk from high to medium and lower if reasonably practicable)?

It is GHD opinion that this question is better addressed by way of independent planning and policy expertise.

- 12.4. The GHD report therefore must be read in tandem with Mr Willis' assessment<sup>17</sup> and other planners' evidence that the appropriate scale for natural hazard risk assessment is the natural hazard zone. This is what the RPS anticipates. In addition, the expert evidence before the Panel is that a property by property approach is unworkable in terms of drafting efficient and effective plan rules that can be appropriately enforced.
- 12.5. Counsel for ARI accepted that the personal characteristics of occupants could not properly be used as a basis for plan rules but contended that local topography and the characteristics of individual dwellings could be used as factors in a property by property assessment.
- 12.6. As to the behaviour of debris flows and characteristics of the individual dwellings, the evidence of Professor Davies and Dr McSaveney was that:

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<sup>16</sup> GHD Report page 3  
<sup>17</sup> Appendix 5 of s42A report



- a. Topography has a limited impact on the distribution of debris on the fan and;
  - b. Boulders on properties may provide more material for the debris flow rather than materially impeding its flow; and
  - c. It cannot be guaranteed that the next event will behave the same as the previous one.
- 12.7. A property by property approach to risk assessment is inconsistent with the expectations of the RPS and the evidence before the Panel.
- 12.8. On a related note, it was suggested that natural hazard lines be amended to align with property boundaries. The District Council does not support this approach. Coastal hazard zones (erosion and inundation) that have existed in the Operative Plan and are depicted by lines crossing through sites, have been in place for many years without issue. The evidence of Mr Batchelar was that the rules can properly apply to activities in parts of properties that are subject to natural hazard risk.

### **13. CATCHMENT MANAGEMENT**

- 13.1. Mr Baker and Matata Action Group gave statements setting out concerns that catchment management had not been adequately investigated. It was asserted that forestry slash was a significant contributor to the debris flow event in 2005 and accounted for the large amount of woody debris that accompanied the rock and sediment.
- 13.2. The catchment assessments undertaken by Professor Davies and Dr Phillips provide substantial evidence that forestry slash was not a significant factor for the debris flow event in 2005. It appears that Mr Baker and Matata Action Group had not taken the opportunity to read this evidence. In addition, Mr Baker's photos of recent forestry slash bear no resemblance to the native trees present on the fan post the 2005 event as shown in the photos in Mr Farrell's evidence.<sup>18</sup>

### **14. DECISION MAKING OPTIONS**

- 14.1. A number of decision making options were raised as hypotheticals during the hearing, including:

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<sup>18</sup> Evidence of Mr Farrell at paragraph 5.7

- a. Declining PC1 as unnecessary given the effect of the Building Act determination;
- b. Folding the PC1 medium risk area into the high risk area;
- c. Whether prohibited activity is justified;
- d. Issuing an interim or “unless” decision;
- e. Some form of ‘sunset’ clause on PC 17.

14.2. Each of these scenarios is addressed in turn.

**PC 1 is necessary and appropriate**

14.3. While PC1 mirrors the effect of the Building Act determination, this does not make it unnecessary or inappropriate. It is common to have overlapping regulatory functions under the RMA and Building Act. If there were no plan change the risk assessment by T & T would apply to regulation of development of the area with no First Schedule process. PC 1 has provided desirable transparency and annotation of the hazard areas on the District Plan maps provides relevant and useful information which is required by the RPS. PC 1 also provides certainty on what activities can reasonably occur on the Awatarariki debris fan, having regard to the high risk.

14.4. The “Do nothing Option”<sup>19</sup> was covered in the s32 report and not found to be the most appropriate option:

Option 1 (Business as Usual) does not reflect the actual natural hazard risk that is present and is inconsistent with the RPS and other District Plan provisions. Successful implementation of hazard risk management outcomes relies on the general requirements of the Building Act and RMA that apply to building and subdivision only and does not deal with risk reduction.

14.5. The proposed Coastal Protection Zone provides the most appropriate plan provisions having regard to the sustainable long term use of the area.

**Medium risk area**

14.6. It was suggested that the medium risk area served little utility and could be folded into the high risk area. First, this is a substantive change which is without scope in terms of the submissions made on the Proposed Plan Changes. Secondly as to the merits, in responses to questions, Mr Batchelar’s

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<sup>19</sup>

Retaining Residential Zoning with no natural hazard management

evidence was that extending the logic of including the  $10^{-5}$  risk contour in the High Risk area would suggest extending the medium risk area out, rather than folding it into the High Risk area. Again, this change would be without scope. Moreover, extending the high risk area would encompass two more properties which would create inconsistencies with the VMR programme and PC17.

### **Prohibited activity**

- 14.7. Counsel for ARI submitted that there is no substantive policy support from the RPS for the use of prohibited activity status in PC1 and PC17. Counsel submitted that prohibited status should be reserved for specific circumstances where materially justified and referred to the examples in the decision **Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development** [2008] NZRMA 77 (CA).
- 14.8. As addressed above at 6.9 and 6.10, there is clear policy support for the Proposed Plan Changes in the specific directive policy NH3B. In **Coromandel Watchdog** the Court of Appeal overturned the High Court and Environment Courts' decisions and held that local authorities do not need to consider that an activity be forbidden outright, with no contemplation of any change or exception, before prohibited activity status is appropriate. Instead, a local authority can use the prohibited activity status for activities for which, having undertaken the processes required by the RMA, it could rationally conclude that prohibited activity status was the most appropriate status (and the Court accepted as valid, several examples of this). The examples in **Coromandel Watchdog** are not exhaustive and it is submitted that the District Council's evidence has demonstrated a compelling case that prohibiting activities other than the limited permitted activities in proposed rule 18.2.6.3 is most appropriate and materially justified. A lesser activity status would be inappropriate and hold out false hope consent for other activities, including residential activities, could be granted.

### **Interim or “unless” decision**

- 14.9. Counsel for ARI submitted that the Hearing Panel could issue an interim decision to allow for the commissioning of a report into a property by property approach and to allow a two stage hearing. For the reasons addressed above, a property by property approach is an inappropriate response. Counsel did not identify what power pursuant to which such a report would be commissioned.

If reliance is placed on section 41C(4) then it is submitted that the grounds for commissioning a report under this section are not made out.

- 14.10. Counsel for ARI also suggested that an “unless” decision might be issued such that the approval of the plan changes was contingent on the purchase of residents properties. Such a decision would have internal tensions as it would acknowledge that the risk to life on the fanhead is unacceptable and at the same time allow residential activity to remain until such time as landowners choose to sell. This is submitted to be an unnecessary situation given the generous package on offer to all landowners under the VMR.

#### **Sunset clause**

- 14.11. A further alternative that appeared to be suggested was that a ‘sunset clause’ could be imposed such that current residents could continue to reside in the High-Risk area but further or future residents would be prohibited. No submission sought such an approach and allowing for a sunset clause would not integrate with the VMR. The more fundamental issue with a sunset clause approach is that the next debris flow event could happen at any time. Dr McSaveney advised the Commissioners that he inspected the catchment several weeks after the 2005 event and the debris load had already built up in the stream bed such that a debris flow of similar magnitude could occur at any time. In combination with the uncertain behaviour of a debris flow on the fanhead, and the lack of any risk reduction mitigation, this continued risk is not tolerable.

**A Green / R Ashton**

Counsel for the Whakatane District Council

Annexure - Christchurch District Plan - Table 5.6.1.1a

Activity	Cliff Collapse Mgmt Area 1	Cliff Collapse Mgmt Area 2. For exceptions, refer to Rule 5.6.1.2	Rockfall Mgmt Area 1. For exceptions, refer to Rule 5.6.1.2	Rockfall Mgmt Area 2. For exceptions, refer to Rule 5.6.1.2	Mass Mvmt Mgmt Area 1	Mass Mvmt Mgmt Areas 2 & 3	Remainder of Port Hills and Banks Peninsula Slope Instability Mgmt Area
Key: P = Permitted; RD = Restricted Discretionary; D = Discretionary; NC = Non-complying; PR = Prohibited.							
a. <u>Subdivision</u>	PR1/NC1*	NC2	NC3	RD1	NC4	RD2	RD3
b. <u>Earthworks</u> except where specifically provided below in Rule 5.6.1.1	PR2	NC5	NC6	RD4	NC7	RD5	Refer to relevant chapters within zone and/or district wide provisions applying to the <u>sites</u> within this area
c. <u>Hazard mitigation works</u> or hazard removal works, including <u>earthworks</u> associated with those works unless provided for in d	PR3	NC8	RD6	RD7	NC9	RD8	RD9
d. <u>Hazard mitigation works</u> to protect <u>infrastructure</u> including <u>earthworks</u> associated with those works	RD10	RD11	RD12	RD13	RD14	RD15	RD16
e. Demolition of <u>buildings</u>	RD17	RD18	RD19	RD20	RD21	RD22	P1
f. <u>Repair and maintenance of existing infrastructure</u> , including <u>minor upgrading of the existing electricity network</u>	P2	P3	P4	P5	P6	P7	P8
g. <u>Earthworks</u> associated with activities listed in f above	C1	C2	C3	C4	C5	C6	P9

Activity	Cliff Collapse Mgmt Area 1	Cliff Collapse Mgmt Area 2. For exceptions, refer to Rule 5.6.1.2	Rockfall Mgmt Area 1. For exceptions, refer to Rule 5.6.1.2	Rockfall Mgmt Area 2. For exceptions, refer to Rule 5.6.1.2	Mass Mvmt Mgmt Area 1	Mass Mvmt Mgmt Areas 2 & 3	Remainder of Port Hills and Banks Peninsula Slope Instability Mgmt Area
h. Upgrading of existing <u>infrastructure</u> or development of new <u>infrastructure</u> (where there is a functional need to locate in the overlay), including <u>earthworks</u> associated with these works.	RD23	RD24	RD25	RD26	RD27	RD28	Refer to relevant chapters within zone and/or district wide provisions applying to the <u>sites</u> within this area
i. Retaining walls which are both less than 6m <sup>2</sup> in area and less than 1.8 metres in height including <u>earthworks</u> associated with those works.	RD29	RD30	RD31	P10	RD32	P11	P12
j. <u>Signage</u> and fencing for warning or excluding the public, including post holes associated with those works.	RD33	P13	P14	P15	P16	P17	Refer to relevant chapters within zone and/or district wide provisions applying to the <u>sites</u> within this area
k. <u>Hazard mitigation works</u> and associated <u>earthworks</u> and planting in accordance with the Port Hills Parks and Tracks Reopening Process (dated 19 December 2012)	NC10	P18	P19	P20	NC11	P21	P22

Activity	Cliff Collapse Mgmt Area 1	Cliff Collapse Mgmt Area 2. For exceptions, refer to <u>Rule 5.6.1.2</u>	Rockfall Mgmt Area 1. For exceptions, refer to <u>Rule 5.6.1.2</u>	Rockfall Mgmt Area 2. For exceptions, refer to <u>Rule 5.6.1.2</u>	Mass Mvmt Mgmt Area 1	Mass Mvmt Mgmt Areas 2 & 3	Remainder of Port Hills and Banks Peninsula Slope Instability Mgmt Area
l. <u>Recreation activities</u> within parks and <u>reserves</u> and associated <u>park management activities</u> , including grazing and track repair.	NC12	P23	P24	P25	NC13	P26	Refer to relevant chapters within zone and/or district wide provisions applying to the <u>sites</u> within this area
m. Farm buildings and farm tracks, including <u>earthworks</u> associated with these works.	NC14	NC15	RD34	RD35 except that farm tracks up to 2 metres wide shall be permitted.	NC16	RD36	Refer to relevant chapters within zone and/or district wide provisions applying to the <u>sites</u> within this area
n. Any <u>building</u> or structure not listed in activities a. to m. of <u>Rule 5.6.1.1</u>	PR4	NC17	NC18	RD37	NC19	RD38	Refer to relevant chapters within zone and/or district wide provisions

Activity	Cliff Collapse Mgmt Area 1	Cliff Collapse Mgmt Area 2. For exceptions, refer to <u>Rule 5.6.1.2</u>	Rockfall Mgmt Area 1. For exceptions, refer to <u>Rule 5.6.1.2</u>	Rockfall Mgmt Area 2. For exceptions, refer to <u>Rule 5.6.1.2</u>	Mass Mvmt Mgmt Area 1	Mass Mvmt Mgmt Areas 2 & 3	Remainder of Port Hills and Banks Peninsula Slope Instability Mgmt Area
							applying to the <u>sites</u> within this area
o. Any other activity not otherwise listed in this table.	NC20	NC21	NC22	RD39	NC23	RD40	Refer to relevant chapters within zone and/or district wide provisions applying to the <u>sites</u> within this area

1. Any resource consent application arising from C1-6, or RD1-RD40 set out in Rule 5.6.1.1 above shall not be limited or publicly notified.

\* Prohibited where site subject to proposed subdivision is solely located within Cliff Collapse Management Area1; non-complying activity where it is proposed to subdivide off land within Cliff Collapse Management Area 1 from an area of land not within Cliff Collapse Management Area 1.