

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

IN THE MATTER of the Resource Management Act
1991 (**RMA**)

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

**RESPONSE BY COUNSEL FOR BAY OF PLENTY REGIONAL COUNCIL
IN RELATION TO ISSUES ARISING CONCERNING PLAN CHANGE 17**

17 March 2020

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MAY IT PLEASE THE PANEL

Introduction

1. Counsel's role at hearing was to assist the Regional Council in its reporting and decision making capacity in relation to legal issues arising concerning Plan Change 17 to the Bay of Plenty Natural Resources Plan (**PC17**).
2. Counsel's role is not to advocate for PC17, which is a private plan change requested by Whakatāne District Council, which was accepted rather than adopted by the Regional Council.
3. During the hearing, the Panel inquired as to why the Regional Council accepted rather than adopted the PC17.
4. The Panel correctly acknowledged that these reasons are not relevant to the matter the Panel is required to determine. It has no jurisdiction to revisit the Regional Council's decision to accept PC17.
5. However, those reasons provide useful context and for that reason they are summarised at para 4.10 of the Reporting Officer's report.¹
6. These submissions will address the following matters arising during the hearing which relate to PC17:
 - 6.1 Incorporation by reference of AGS 2007 risk assessment methodology;
 - 6.2 Request to order disclosure of draft GHD Report;
 - 6.3 Regional Policy Statement (**RPS**) "division of responsibility".
7. Counsel has read the closing submissions for Whakatāne District Council and adopts them to the extent they address matters relating to the above issues. These submissions will not repeat those points.

Incorporation by reference

8. This issue is addressed in Counsel's memorandum dated 4 March 2020 entitled *Clarification of issue relating to incorporation by reference*

¹ S.42A Report dated 20 December 2019.

(Counsel's Memorandum) and those submissions are not repeated here.

9. The Panel's questions arising from Counsel's Memorandum were directed at whether the reference to "plan", in relation to alternative recognised risk assessment methodologies in Appendix L of the RPS, must mean an operative plan. If so, the "sequencing issue" raised (but discounted) in Counsel's Memorandum comes into play.
10. This issue is addressed in the District Council's closing submissions and is not repeated here, except to acknowledge that those submissions are supported by the following context.
11. The words "*included in a regional, city or district plan*" used in Appendix L to refer to an alternative recognised risk assessment methodology were inserted by a decision on a submission by Whakatāne, Ōpōtiki and Kawerau District Councils.
12. The notified version of Change 2 to the RPS referred to "*Use of a recognised risk assessment methodology approved by the Chief Executive of the Regional Council.*" The three Councils' submission sought deletion of the reference to the Chief Executive and replacement with "*Use of a recognised risk assessment methodology that is evaluated as being more appropriate than the default methodology through the plan making (Section 32) or resource consent process (Section 88) ...*"²
13. The submission was "accepted", although reworded in the Decisions Version to reflect the current wording: "*included in a relevant regional, city or district plan or is recognised in the consideration of a resource consent application.*"³

² Council Decisions on Provisions, Version 8.0, 1 October 2015, at pp 197-198: <https://cdn.boprc.govt.nz/media/470860/proposed-change-2-natural-hazards-to-the-bay-of-plenty-regional-policy-statement-council-decisions-on-provisions-with-submissions-and-further-submissions-1-oct-2015.pdf>

³ Council Decisions - Track Changes, 30 September 2015, Version 8.0a, p35 <https://cdn.boprc.govt.nz/media/470861/proposed-change-2-natural-hazards-to-the-bay-of-plenty-regional-policy-statement-track-changes-v-80a-30-september-2015-pdf1.pdf>

14. This demonstrates that the Regional Council's original intention (reflected in the notified plan) in providing for approval of alternative risk methodologies was to provide for a simple process of approval of an alternative methodology provided it was "recognised". The focus was not on the process for approval, but rather whether the methodology was recognised.
15. The submission by the three Councils sought a more robust process involving an assessment through a s.32 or resource consenting process, rather than executive approval. Notably, the submission did not seek approval or endorsement by way of inclusion in an "operative" plan, which is an operational matter rather than an evaluative process.
16. The submission of the three Councils was accepted, with the Decisions Version providing for two alternative processes for approval of an alternative risk methodology: a planning one, or a consenting one. It follows that the reference to "plan" was intended to encapsulate a planning *process* rather than the final outcome of that process (being an operative plan).
17. In relation to the wording recommended by the Reporting Officer to address the procedural issue identified in Counsel's Memorandum,⁴ it is noted that Counsel for Awatarariki Residents Association Inc. (**ARI**) appropriately conceded, when questioned by the Panel, that the recommended amendments to Policy NH6 would be "permissible" and it would be "over-reach" to categorise them as substantive given they merely propose to cross-reference Appendix L of the RPS as follows:

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 2007.⁵

Withholding the Draft GHD Report

18. Counsel for ARI submitted orally to the effect that the Hearings Panel is a Commission of Inquiry and therefore can require release of an earlier

⁴ Relating to incorporation by reference where a plan change has been accepted rather than adopted.

⁵ Supplementary s42A Planning Report by John Olliver dated 4 March 2020.

draft of the GHD Limited Report (prepared by Greg Kotze and internally reviewed by Andrew Leventhal) (**Draft Report**).

19. The Panel is aware that the Draft Report has been withheld by the Regional Council under the Local Government and Official Information Act 1987 on various grounds relating to confidentiality and the risk of prejudice to the supply of similar information. In short, it is considered fundamental that council officers are able to explore options with experts in a confidential manner, including through the development of draft documentation.
20. The decision to withhold the Draft Report is the subject of an ongoing investigation by the Ombudsman's office⁶ and the Ombudsman has not yet made any recommendation to the Regional Council regarding the matter.
21. The request by ARI that the Panel rely on its own powers to direct release of the Draft Report is problematic for various reasons:
 - (a) It is arguably an abuse of the process of the Office of the Ombudsman (which is governed by the Ombudsmen Act 1975) given it would pre-empt the finding of the Ombudsman's investigation;
 - (b) It would breach the confidentiality associated with the Draft Report, which was prepared as a working draft and not intended for public release.
22. The Hearing Panel is not a Commission of Inquiry as suggested by Counsel for ARI. Rather, certain provisions of the Commissions of Inquiry Act 1908 (**CIA**) apply to its proceedings.⁷ This includes the discretion to "receive as evidence any ... document ... that in its opinion may assist it to deal effectively with the subject of the inquiry, *whether or not it would be admissible in a Court of law.*" [emphasis added] (s4B, CIA).
23. This provision allows the Panel to *receive* evidence which would not otherwise be admissible in court, such as hearsay. It is not a power to

⁶ Complaint by Rachel Whalley on behalf of Awatarariki Residents Incorporated (complaint 499033).

⁷ Section 41(1), RMA.

require a party to produce documents. Notably, the Panel has not been given the power of investigation found in s4C of the CIA, which would enable it to require a person to produce documents.

24. The Panel also has the discretion to “request”, from anyone heard or represented at the hearing, any information that is “*relevant and reasonably necessary*” to determine the application (s.41(4), RMA). However this is not a power to require disclosure. Should the Panel request the Regional Council to disclose the Draft Report, it would be entitled to refuse that request, and would do so in order to protect the confidentiality associated with that document and to preserve the integrity of the Ombudsman’s investigation.
25. Counsel for ARI also orally requested a two stage hearing, with the second stage to follow release of the Draft Report. This request appears to be a response to speculation that the Draft Report may undertake site specific risk assessments of particular properties, being the solution sought by ARI. Without waiving any right to withhold the Draft Report, the Regional Council can confirm that the Draft Report does not undertake this type of property specific assessment.

Division of responsibility

26. Counsel for ARI submits that RPS Policy NH14C is “*advisory or declaratory of jurisdiction*” and provides no policy support for the “*planning overreach*” contemplated by PC17.⁸
27. It is not the purpose of the RPS to provide detailed policy support for specific methods proposed by the Regional Council in order to carry out its functions under the Act.
28. That is the purpose of a regional plan (s.63(1)), which is why regional councils are empowered to prepare a plan at any time to deal with particular circumstances arising in relation to their functions, such as risks from natural hazards (s65(c)).
29. Rather, the “policy” purpose of the RPS is directed at the achievement of integrated management of resources at a regional scale (s59).

⁸ Legal submissions for ARI dated 4 March 2020, para 17, final bullet.

30. In this case the RPS policies are appropriately directed at the integrated management of resources, by directing how the shared territorial and regional functions of hazard management are to be integrated to best effect.
31. It is for the regional plan (in this case through PC17) to contain the functional policies to assist in implementing this “division of labour”.
32. Counsel endorses the closing submissions by Counsel for the District Council on this issue, which refer to the express support in the RPS for the Regional Council promulgating rules which extinguish existing use rights (footnote to Policy NH 14C).
33. This was not an afterthought. It reflects clear and detailed reasons in the Decisions on Submissions, which record an intention to recognise *“that the regional council has responsibility for making rules about existing uses [which] reflects the regime established in the RMA ... making rules about natural hazards and existing uses is a function of only the regional council.”*⁹
34. In this case the RPS acknowledges the ability of the Regional Council to control land use for the avoidance or mitigation of natural hazards by overriding existing use rights and confirms that the allocation of responsibilities under RPS Policy NH14C does not remove that power. Notably, it recognises that the exercise of that power should be through a plan change process, which is what has occurred through PC17.
35. Counsel for ARI appeared to suggest, in discussions with the Panel, that PC17 does not “*give effect to*” the RPS because the relevant RPS policies are not sufficiently directive as to require the Regional Council to extinguish existing use rights through a prohibited activity.
36. The obligation for the Regional Natural Resources Plan (through PC17) “*to give effect to*” the RPS (s.67(3)) means “*to implement*” its provisions.¹⁰ It does not mean that PC17 cannot go further than what the RPS directly provides for so long as, in so doing, it does not conflict with, or preclude implementation of, the RPS.

⁹ Above, note 2, at p 151.

¹⁰ *EDS Inc. v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

37. The natural hazard policies in the RPS clearly contemplate a “division of labour” for natural hazard management between territorial and regional authorities, based on recognised risk assessment methodologies. They also clearly contemplate the Regional Council relying on its powers to extinguish existing use rights. They do not need to go further and direct how this should occur, ie through a prohibited activity status.
38. Taken together, as they are intended to be, PC1 and PC17 implement the integrated approach to natural hazard risk contemplated by the RPS. Both PC1 and PC17 therefore give effect to the RPS.

DATED 17 March 2020



M H Hill

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