



**Submission on notified plan change**  
*Clause 6 of Schedule 1, Resource Management Act 1991*

Submission Number  
*Office use only*

Send your submission to reach us by **4pm on 17 September 2018**

To:

**Post:** The Chief Executive  
Bay of Plenty Regional Council  
PO Box 364  
Whakatāne 3158

**or Fax:** 0800 884 882

**or email:** [fanhead@boprc.govt.nz](mailto:fanhead@boprc.govt.nz)  
[info@whakatane.govt.nz](mailto:info@whakatane.govt.nz)

**Name of submitter:** Awatarariki Residents Incorporated (**Society**)

This is a submission on the whole of **Proposed Plan Change 17 (Awatarariki Fanhead) to the Bay of Plenty Regional Natural Resources Plan**

- 1 I **could not** gain an advantage in trade competition through this submission.
- 2 I **am** directly affected by an effect of the proposed change that adversely affects the environment.
- 3 The effect on the environment that I am directly affected by **does not** relate to trade competition or the effects of trade competition
- 4 The specific provisions of the proposed change that my submission relates to and the details of my submission are set out below.
- 5 I **wish** to be heard in support of my submission.
- 6 If others make a similar submission, I **will not** present a joint case with them at a hearing.

Signed:

Date 17 September 2018

**Rick Whalley**  
Chairperson of Awatarariki Residents Incorporated  
10 Clem Elliot Drive

**Rob Enright/ Ruby Haazen**  
Counsel for the Society

**Matatā**

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<b>Contact Person:</b> <i>[name and designation, if applicable]</i>	Rick Whalley Chairperson of Awatarariki Residents Incorporated  <b>Counsel Acting:</b> Rob Enright / Ruby Haazen Barristers Magdalene Chambers Level 1, 28 Customs St East Britomart Auckland e: <a href="mailto:rob@publiclaw9.com">rob@publiclaw9.com</a> e: <a href="mailto:rghaazen@gmail.com">rghaazen@gmail.com</a>		

**The specific provisions of the proposal that my submission relates to are:**

The Society's submission relates to the entire Plan Change 17 (Natural Hazards) to the Bay of Plenty Regional Natural Resource Plan (**PC17**).

**My submission is:**

Identified below.

**My reasons:**

Identified below.

**I seek the following decision from the local authority:**

- (1) As first preference, withdraw PC17; or delete PC17 under s85 RMA.
- (2) As second preference, amend the Plan Change to address the matters identified in this submission, including the general and specific submission points, and general and specific relief, outlined below.
- (3) In addition to (1) and (2), if PC17 is confirmed so that existing or future residential activities have prohibited status (or require resource consent) from 31 March 2021 (or any other relevant date) then a direction under s85 RMA that the Regional Council (or District Council as proponent) acquire each of the properties listed in NH3 under the Public Works Act 1981, subject to the written consent of each individual property owner or person with an estate or interest in the relevant land.

**GENERAL SUBMISSION POINTS**

- 1 This submission is separated into general and specific submission points. Relief sought relies on both general and specific submission points.
- 2 The Society has 25 members. All members are families that live permanently, have baches or vacant land within the properties identified as "High Risk" and listed in schedule NH3 (**Society properties or NH3 properties**) as follows:

	<b>Name and Address</b>
1	Leslie Hema, 11 Blue Ridge Drive, Taupo (12 Clem Elliott Drive)
2	Laurie Hema, 11 Blue Ridge Drive, Taupo (12 Clem Elliott Drive)
3	Ian Lockett, 5 Clem Elliott Drive, Matata
4	Tawai Lockett, 5 Clem Elliott Drive, Matata
5	Gerard Stuckey, 7 Pioneer Place, Matata
6	Joanne Stuckey, 7 Pioneer Place, Matata
7	Grant Wilkin, 16 Clem Elliott Drive, Matata
8	Maria Wilkin, 16 Clem Elliott Drive, Matata
9	Marilyn Pearce, 12B Clem Elliott Drive, Matata
10	Rob Pearce, 12B Clem Elliott Drive, Matata
11	Lyall Magee 14A and 14B Clem Elliott Drive, Matata
12	Puti Rowe, 5 Pioneer Place, Matata
13	Steven Rowe, 5 Pioneer Place, Matata
14	Wayne Irwin, 94 Arawa Street, Matata
15	Victoria Humphries-Irwin, 94 Arawa Street, Matata
16	Rick Whalley, 10 Clem Elliott Drive, Matata
17	Rachel Whalley, 10 Clem Elliott Drive, Matata
18	Pam Whalley, 10 Clem Elliott Drive, Matata
19	Rob Martin 6 Clem Elliott Drive, Matata
20	Mel Martin 6 Clem Elliott Drive, Matata
21	Greg Fahey 100 Arawa Street, Matata
22	P Fahey, 100 Arawa Street, Matata

23	Anne Smith, 7 Clem Elliott Drive, Matata
24	Michelle Beach 18B Clem Elliott Drive , Matata
25	Kerry Magee 18A Clem Elliott Drive

### **Community (social, economic, cultural) wellbeing**

- 3 All Society properties are zoned residential. Most were purchased prior to 2005; and all properties were purchased prior to first notification of PC17. Most families have intergenerational history of grandparents, parents and grandchildren living on site or spending holidays at Matatā.
- 4 Society members were affected by the 2005 event in different ways. Some lost all or part of their homes; some homes were not affected. They stayed on their land and-rebuilt their homes, sheds, garages, gardens and lives relying on the 2006 Building Act decision<sup>1</sup> and express or implied assurances from the District Council that mitigation measures such as engineering options would be pursued to address hazard risk. Some Society members were refused Building Act consents to build new permanent structures in 2016 however they still use their land for holidays, temporary accommodation, gardens and other residential uses.<sup>2</sup>
- 5 Residential homes in a residential zone lose existing use rights from 2021, and no reasonable future use is identified, with prohibited status for residential activities on “high risk” properties.<sup>3</sup> No compensation is offered meaning that PC17 involves “managed retreat” not “voluntary managed retreat”.
- 6 PC17 is an eviction notice from March 2021; it also has an immediate sterilising effect. Society members cannot build, borrow money, insure or sell their homes; they are environmental refugees on their own land. Compensation has not been offered by the Regional or District Council for removal of existing use rights and prohibiting residential activities.
- 7 PC17 does not assess what will happen to people’s homes located in high risk areas from 2021; it does not identify whether people will be evicted and homes bulldozed. If Council opts for “managed retreat” without compensation then Society members will own homes they cannot occupy and land they cannot use. This aspect of PC17 is not identified in cost-benefit analysis but is the logical consequence of prohibited status for residential activities.

<sup>1</sup> <https://www.boprc.govt.nz/media/752322/determination-2006-119-1.pdf>

<sup>2</sup> <https://www.boprc.govt.nz/media/752323/determination-2016-034-1.pdf>

<sup>3</sup> Whether properties identified in NH3 are “high risk” is contested by the Society but the terminology is used, for consistency with PC17. Jurisdiction to eliminate existing use rights of residential homes in a residential zone without compensation is contested by the Society.

- 8 Relevant to assessment of community wellbeing under s5 RMA and the statutory tests are:
- (a) delay by the District Council in requesting notification of PC17, relevant to assessment of whether there is tolerable risk, and, to the extent that risk exists, whether it can be managed in less intrusive ways than prohibiting residential activity;
  - (b) a shifting position by Council on the extent of tolerable risk and degree of urgency for intervention. The Society says that there has been no change in risk profile between the 2005 event and notification of PC17 in 2018. Instead the District Council has changed its view of what is acceptable risk and now claims urgency due to fatality risk<sup>4</sup>, but was content to delay PC17 and related PC1 to the district plan for a number of years pending changes to the regional plan framework;
  - (c) failure by the District Council to competently manage hazard risk over the 13 years taken to notify PC17. Residents have been given inconsistent assurances about whether risk is tolerable or credible; inconsistent or incomplete explanations for rejecting engineered alternatives to manage risk, entitlement to fair compensation, lack of certainty about what will happen from 2021 when evicted;
  - (d) Flawed engagement with the community resulting in inadequate assessment of effects;
  - (e) These factors are relevant to assessment of credible risk because societal and community views of risk influence what is considered “tolerable”.
- 9 The PC17 regime is contrary to sustainable management and social, economic and cultural community wellbeing. It adopts a risk avoidance by eviction regime, inconsistent with (or not giving effect to) Pt 2 RMA. It is a taking of property rights without compensation, an abuse of public power and contrary to sustainable management.

### **Statutory provisions**

- 10 PC17 is inconsistent with the relevant statutory provisions and Council’s statutory functions. It is not appropriate in terms of Pt 2, statutory functions and tests under sections 30, 31, 32, s32AA, ss63-68, s85 and 1<sup>st</sup> Schedule RMA. NH3 identifies the relevant properties directly affected by PC17. While there is a wider community interest in managing risk, affected property owners in the high risk zone merit greatest weight when evaluating appropriate outcomes under the statutory framework and the relevant “community” affected.

### **Validity and jurisdiction**

- 11 PC17 is unlawful and ultra vires Council’s statutory functions and powers:

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<sup>4</sup> Alleged fatality risk

- a. The relevant Regional Council statutory function is s30(1)(c)(iv) RMA. Council may control use of land for “avoidance **or** mitigation of natural hazards”. PC17 does not reflect this dual function. It is an avoidance regime, not a mitigation regime.
- b. PC17 overrides existing use rights under s10 RMA. This is unlawful and ultra vires Council’s powers absent payment of reasonable compensation for removal of those rights.
- c. Section 85 RMA imposes a direct or indirect fetter on abuse of public power by the Regional and District Councils. Removing people from their homes, revoking lawful occupation and residential activities under s10 RMA, without reasonable compensation, is an abuse of public power. It is contrary to public policy and relevant wellbeings and values in s5 and Pt 2 RMA. Lesser alternatives exist that manage or mitigate the hypothetical risks, without removing existing use rights.
- d. The Society says there is no jurisdiction to remove existing use rights for residential activities in a residential zone; alternatively, there is no jurisdiction, absent a requirement for reasonable compensation.

### **Planning instruments**

- 12 To the extent relevant, PC17 does not give effect to the NZCPS.
- 13 PC17 does not give effect to, or reflect, the relevant provisions of the Regional Policy Statement including (but not limited to):
  - (a) Objective 31 RPS and Policy NH1B require “avoidance or mitigation of natural hazards”. PC17 is an avoidance, not mitigation, regime. Other policies should be read in light of the objective which contemplates mitigation.
  - (b) As to policies NH2B & NH3B, identification of NH3 properties as high natural hazard risk is incorrect; alternatively, mitigation measures are available to reduce risk to tolerable levels. “Tolerable levels” is a qualitative; or qualitative and quantitative standard; and perspectives of homeowners as to what is acceptable risk are relevant to assessment of tolerable risk.
  - (c) Policy NH4 (urban development) has limited relevance; alternatively “managing” natural hazard risk does not require an avoidance (prohibited status) regime.
  - (d) Policy NH5B (“avoid increasing risk”) does not apply to existing use rights; and “encouraging” reduction of natural hazard risk does not require an avoidance (prohibited status) regime.

- (e) Policy NH6B arguably supports retention of existing homes that have functional need for their location and provide significant benefits to the relevant community of interest (owners and occupants of NH3 properties).
- (f) Policies NH7A, NH8A, NH13C involve identification and assessment of hazard, not prohibition of residential activities.
- (g) Policy NH12A (“promote”) is not directive for existing residential activities (“take into account..where practicable..” risk reduction measures).
- (h) PC17 is inconsistent with Policy NH14C (District Councils are to manage land uses outside the coastal marine area). The footnote is irrelevant to interpretation of the Policy because it is declarative of s30 RMA or has no statutory status.
- (i) Allowance should be made for residential activities specifically provided for by the Regional Policy Statement that inherently add to risk. Integrated management (30(1)(a) RMA) recognises that the establishment or continuance of residential activities in the coastal environment is provided for (albeit natural hazard risk needs to be managed).
- (j) The policy and rules framework, requiring that people and their communities avoid living in the subject properties at Matatā from 2021, is inappropriate and does not represent a reasonable response to the existing environment.
- (k) Subject to proof that the assessment of high risk is correct (not accepted or conceded by the Society) a regime that involves an alternative means of risk avoidance or risk mitigation is required. PC17 does not reflect that dual focus in the relevant RPS Natural Hazards provisions. To the extent that properties in NH3 fall within a “high risk” area, then RPS Appendix M identifies a number of options for management of natural hazards including high risk areas.

## **S85 RMA**

14 PC17 breaches s85 RMA because it makes the subject land owned by members of the Society:

- (a) incapable of reasonable use; and
- (b) places an unfair and unreasonable burden on the owners of that land;
- (c) residentially zoned and developed land will be unable to be used for residential purposes;
- (d) grounds for directions under s85(3A) are made out (deletion, modification, compensation) in the event that PC17 is confirmed in its notified form.



## **Alternatives**

- 15 PC17 does not allow for lesser interventions and alternatives such as:
- a. mitigation of hazard risk while enabling Society members to remain living in their homes;
  - b. adopting an information based approach to managing hazard risk;
  - c. adopting an event based approach (such as early warning systems) to managing hazard risk;
  - d. PC17 does not provide appropriate cost-benefit analysis of engineering options for management of landslide and debris flow risk;
  - e. PC17 does not appropriately address a combination of management systems to address hazard risk, to reduce high risk (to the extent that it exists) to medium or low risk. A combination of methods might include (but is not limited to) catchment management, monitoring and early warning systems;
  - f. PC17 does not evaluate the extent to which historic land uses (such as the adjacent Council operated quarry, farming and logging) contributed to or caused the 2005 event, but may not continue to present objective hazard risk; the extent to which responsible statutory bodies have failed to undertake catchment maintenance (including Department of Conservation as landowner, Regional Council and District Council); and whether these are relevant to assessment of alternatives to avoid or mitigate risk.

## **Hazard and Risk Assessment**

- 16 PC17 relies on imprecise modelling of risk of landslide and debris flow; imprecise modelling of probability of fatality or injury; and uncertain science as to assessment of risk to NH3 properties identified as “high risk”. PC17 relies on inadequate analysis of probability and consequence. Risk assessments are based on inadequate data sets and involve speculative or unfounded assertions of risk of fatality to Society members and their families. The risk assessment is uncertain but the consequences to Society members and their families are both certain and unfounded. Prohibited status is a disproportionate response given difficulties with the risk assessments.
- 17 Risk involves probability plus consequence. A different approach to acceptability of risk is required in relation to existing residential activity, as distinct from land use planning for future residential use. This is not reflected in the prohibited status regime for existing residential activities in the NH3 properties beyond 2021. As noted, “tolerable levels” is a qualitative; or qualitative and quantitative standard; and perspectives of homeowners as to what is acceptable risk are relevant to assessment of tolerable risk.

- 18 PC17 adopts Australian Geomechanics Standards<sup>5</sup>, that include significant qualifiers as to relevance and application for existing use scenarios where sensitive users already occupy land identified as subject to potential hazard, and reasonably available alternative methods exist for hazard mitigation. It is uncertain whether the Australian Guidelines are the most appropriate standard to apply. The Guidelines relevantly state:

***“9 Reliability of landslide zoning for land use planning***

***9.1 Potential sources of error***

***9.1.1 Description***

*There are a number of potential sources of error in the zoning process. These include:*

- Limitations in the landslide inventory upon which the susceptibility and hazard zones maps are based.
- Limitations in the stability of temporal series. For example the relationship between the triggering factor (e.g. rainfall) and the frequency of landslides may change if the area is deforested.
- Limitations in the level of detail available of topography, geology, geomorphology, rainfall and other input data.
- Model uncertainty, meaning the limitations of the methods used to relate the inventory, topography, geology, geomorphology and triggering events such as rainfall to predicting landslide susceptibility, hazard and risk.
- Limitations in the skill of the persons carrying out the zoning.

*It must be recognised that landslide zoning is not a precise science and the results are only a prediction of performance of the slopes based on the available data. In general, intermediate or advanced level zoning will be less subject to error than preliminary level zoning with each done at a suitable zoning map scale.”*

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<sup>5</sup> Journal and News of the Australian Geomechanics Society Volume 42 No 1 March 2007

## GENERAL RELIEF

19 Based on the matters outlined in this submission, the Society seeks the following relief:

- (1) As first preference, withdraw PC17; or delete PC17 under s85 RMA.
- (2) As second preference, amend the Plan Change to address the matters identified in this submission, including the general and specific submission points, and general and specific relief, outlined below.
- (3) In addition to (1) and (2), if PC17 is confirmed so that existing or future residential activities have prohibited status (or require resource consent) from 31 March 2021 (or any other relevant date) then a direction under s85 RMA that the Regional Council (or District Council as proponent) acquire each of the properties listed in NH3 under the Public Works Act 1981, subject to the written consent of each individual property owner or person with an estate or interest in the relevant land.

## SPECIFIC SUBMISSION POINTS & SPECIFIC RELIEF:

Specific provisions		Details of submission: whether you support or oppose the specific provisions or wish to have them amended		
Page No	Reference (e.g. Objective, Policy or Rule number)	Support / Oppose	Decision Sought Say what changes to the plan change you would like Give precise details	Include reasons for your views
2	Objective NHO4	Oppose	Withdraw PC17; or  Amend NH04 by adding: (a) “while providing for the economic, social and cultural wellbeing of owners and occupants of properties listed in NH3”	PC17 does not promote sustainable management, is unlawful or breaches the statutory framework. Refer General Reasons above.

2	Policies NH P6, P7, P8	Oppose P6, P7, P8	<p>Withdraw PC17; or</p> <p>Amend NH P6 by deleting the words:</p> <p>“..using the methodology set out in Australian Geomechanics Society – Landslide Risk Management 2007.</p> <p>Amend NH P7 by deleting the words:</p> <p>“..by ensuring existing residential land uses retreat from the high risk hazard area as soon as reasonably practicable.”</p> <p>Delete NH P8</p>	PC17 does not promote sustainable management, is unlawful or breaches the statutory framework. Alternative methodologies may be appropriate. Refer General Reasons above.
2	Rule NH R71	Oppose	<p>Delete NH R71; or</p> <p>Delete NH R71 and replace with a rules regime that enables continued occupation of the properties identified in NH3, without requirement for resource consent.</p> <p>Methods and rules regime may include the following. These are listed as alternatives, but a rules regime may include a combination of these. Amending PC17 to include the rules and other methods listed below may require additional issues, objectives and policies to be included in PC17 to ensure vertical and horizontal integration within the Regional Plan:</p> <p>(a) No restrictions on existing use rights for properties identified in NH3. Mitigation options limited to non-regulatory or non rule-based methods to avoid and manage</p>	PC17 does not promote sustainable management, is unlawful or breaches the statutory framework. Refer General Reasons above.

			<p>hazard risk such as educative or early warning systems; and/or</p> <p>(b) A grandparenting regime for properties listed in NH3:</p> <ul style="list-style-type: none"> <li>(i) permitted status for existing use rights for residential activities for properties in NH3 from 2021;</li> <li>(ii) controlled status for any increase or change in character, intensity and scale of existing residential activities in properties listed in NH3 from 2021;</li> <li>(iii) As alternative to (i), delete prohibited status and substitute controlled status for residential activities for properties identified in NH3 from 2021. Limit controlled status criteria to presence of early warning detection system or equivalent for credible landslide or debris flow events; and/or</li> </ul> <p>(c) Methods (which may include rules) that require the District Council to establish a hazard identification and monitoring regime to provide an early warning system for owners and occupants of the properties in Table NH 3 in the event of a credible landslide or debris flow event; and/or</p> <p>(d) Without prejudice to grounds stated and above relief, if the decision-maker decides that prohibited status is appropriate having regard to the statutory criteria, then introduce an environmental compensation and offsetting regime that involves payment to owners of properties</p>	
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			<p>identified in NH3 of reasonable compensation for loss of existing use rights and inability for continued occupation of residentially zoned land. This will require</p> <p>(e) Introducing rules and other methods that require payment of reasonable mitigation, environmental offsetting and/or environmental compensation by the Regional and/or District Councils to the owners of the properties identified in Table NH3 as a consequence of the intended prohibited status rule for existing use rights for residential activities. Such a rules regime may require <i>Augier</i> undertakings by the Regional or District Council to be enforceable; or may involve condition precedents for the rules framework (and change in activity status of residential activities) to be triggered.</p> <p>(i) Methods for calculation of mitigation, offsetting and/or environmental compensation are to reflect recognised valuation principles that apply under the equivalent Public Works Act processes;</p> <p>(ii) Absent any financial compensation or offsetting regime, the prohibited status rule does not have effect by 2021 (or any other relevant date);</p> <p>(iii) A new Method that requires annual competent peer review by qualified persons in relation to PC17 assumptions about management of acceptable risk</p>	
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3	Table NH3	Oppose	<p>from landslide or debris flow, with ability to revisit the rules regime and prohibited status based on the findings of the peer review.</p> <p>(f) Delete or amend Table NH3 to reflect that the alleged areas of High Risk are not accurate or appropriate.</p>	PC17 does not promote sustainable management, is unlawful or breaches the statutory framework. Refer General Reasons above.
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