Form 5 Submission on Plan Change 1 to Whakatāne District Council

Clause 6 of Schedule 1, Resource Management Act 1991

To:

The Chief Executive Whakatāne District Council	**By email:** fanhead@boprc.govt.nz info@whakatane.govt.nz

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

This is a submission on the **whole** of Whakatāne District Plan - Plan Change 1: Awatarariki Fanhead, Matatā.

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
Matatā

Rob Enright/ Ruby Haazen
Counsel for the Society

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

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

The Society's submission relates to the entire Whakatāne District Plan - Plan Change 1: Awatarariki Fanhead, Matatā (**PC1**).

My submission is:
Identified below.

My reasons:
Identified below.

I seek the following decision from the local authority:

(1) As first preference, withdraw PC1; or delete PC1 under s85 RMA.

(2) As second preference, amend PC1 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 PC1 is confirmed so that residential activities in the Awataraiki High Risk Debris Flow Policy Area (**high risk**) have prohibited status (or require resource consent) then a direction under s85 RMA that the District Council acquire each of the high risk properties 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 high risk areas as follows:

	Name and Address
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 PC1. 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[1] 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. [2]

5 PC1 adopts a default prohibited status approach, with a limited range of permitted and restricted discretionary activities that largely relate to passive recreation and public access. The zoning rules are inappropriate for properties currently zoned residential and used for residential purposes. Permitted activities are limited to passive recreation including public access which does not reflect the privately held ownership of properties in the high risk areas. No reasonable future uses are identified for use of the land as private land.[3] No compensation is offered meaning that PC1 involves "managed retreat" not "voluntary managed retreat".

6 PC1 has an immediate sterilising effect on properties identified as high risk. 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 District Council for intended prohibition of residential activities.

7 Matters relevant to assessment of community wellbeing under s5 RMA and the statutory tests include:

[1] https://www.boprc.govt.nz/media/752322/determination-2006-119-1.pdf
[2] https://www.boprc.govt.nz/media/752323/determination-2016-034-1.pdf
[3] Whether properties are "high risk" is contested by the Society but the terminology is used, for consistency with PC1. Jurisdiction to eliminate existing use rights of residential homes in a residential zone without compensation is contested by the Society.

(a) delay by the District Council in requesting notification of PC1, 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 PC1 in 2018. Instead the District Council has changed its view of what is acceptable risk and now claims urgency due to fatality risk[4], but was content to delay PC1 and related PC17[5] 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 PC1. 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".

8 The PC1 managed risk regime is contrary to sustainable management and social, economic and cultural community wellbeing. It adopts a risk avoidance regime, inconsistent with (or not giving effect to) Pt 2 RMA. It is a taking of property rights without compensation, abuse of public power and contrary to sustainable management.

Statutory provisions

9 PC1 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 1st Schedule RMA.. While there is a wider community interest in managing risk, affected property owners in the high, medium and low risk areas merit greatest weight when evaluating appropriate outcomes under the statutory framework and the relevant "community" affected.

[4] Alleged fatality risk
[5] Notified by the Regional Council at the District Council's request

Validity and jurisdiction

10 PC1 is unlawful and ultra vires Council's statutory functions and powers:

a. Council's statutory functions include control use of land for "avoidance **or** mitigation of natural hazards" (s31(1)(b)(i) RMA). The approach adopted to the high risk areas do not reflect this dual function. It is an avoidance regime, not a mitigation regime.

b. Section 85 RMA imposes a direct or indirect fetter on abuse of public power by the District Council. Rezoning existing residential land 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.

c. It is inappropriate or unlawful to include a blanket prohibited status rule where all activities are prohibited unless identified as permitted or restricted discretionary.

Planning instruments

11 To the extent relevant, PC1 does not give effect to the NZCPS.

12 PC1 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". PC1 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 properties as high 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 in the high risk areas.

(d) Policy NH5B ("avoid increasing risk") does not apply to existing dwellings; 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.

(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) 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).

(i) The policy and rules framework, requiring that people and their communities avoid living in high risk properties is inappropriate and does not represent a reasonable response to the existing environment.

(j) 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. PC1 does not reflect that dual focus in the relevant RPS Natural Hazards provisions. To the extent that properties are (as a matter of fact) "high risk", then RPS Appendix M identifies a number of options for management of high risk areas.

(k) PC1 is not vertically and horizontally aligned with the operative District Plan including (without limitation) Chapter 18.1: Objective Haz1 (avoid or mitigate natural hazards); Policy 9 (manage the margins of streams to reduce the risk of damage from debris flow affecting townships).

S85 RMA

13 PC1 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) RMA are made out (deletion, modification, compensation) in the event that PC1 is confirmed in its notified form.

Alternatives

14 PC1 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. PC1 does not provide appropriate cost-benefit analysis of engineering options for management of landslide and debris flow risk;

e. PC1 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. PC1 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

15 PC1 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". PC1 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.

16 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 identified as high risk. 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.

17 PC1 relies on Australian Geomechanics Standards[6], 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

[6] Journal and News of the Australian Geomechanics Society Volume 42 No 1 March 2007

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."*

GENERAL RELIEF

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

(1) As first preference, withdraw PC1; or delete PC1 under s85 RMA.

(2) As second preference, amend PC1 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 PC1 is confirmed so that residential activities in high risk areas have prohibited status (or require resource consent) then a direction under s85 RMA that the District Council acquire each of the high risk properties 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	3.2.5 Awatariki Debris Flow Policy Area 3.7.25	Oppose	(a) Withdraw PC1; or (b) Delete 3.2.5 and delete amendment to 3.7.25; or (c) Reclassify high risk areas as medium/low risk areas.	PC1 does not promote sustainable management, is unlawful or breaches the statutory framework. Refer General Reasons above.
3	Policies 18, 19	Oppose Policies 18, 19	(a) Withdraw PC1; or (b) Delete Policies 18 & 19; or (c) Delete reference to high risk areas; or (d) include new policy that requires provision for social, economic and cultural wellbeing of owners and occupants of properties in the high, medium and low risk areas.	PC1 does not promote sustainable management, is unlawful or breaches the statutory framework. Alternative methodologies may be appropriate. Refer General Reasons above.

3	Rule 18.2.6.3 , 18.2.6.4, 18.2.6.5	Oppose	Delete Rules 18.2.6.3, 18.2.6.4 & 18.2.6.5 and retain the activity status under the relevant Residential zone.	PC1 does not promote sustainable management, is unlawful or breaches the statutory framework. Refer General Reasons above.
3	Activity Status table 3.4.1.1	Oppose change to prohibited status	Amend PC1 to include methods and rules regime identified below. These are listed as alternatives, but a rules regime may include a combination of these. Amending PC1 to include the rules and other methods listed below may require additional issues, objectives and policies to be included in PC1 to ensure vertical and horizontal integration: (a) No restrictions on residential activities for high and medium risk properties. Mitigation options limited to non-regulatory or non rule-based methods to avoid and manage hazard risk such as educative or early warning systems; and/or (b) A grandparenting regime for high and medium risk properties: (c) permitted status for residential activities for high risk properties where residential activity was established prior to notification of PC1; (d) controlled status for any increase or change in character, intensity and scale of existing residential activities in high risk properties; (e) As alternative to (i), delete prohibited status and substitute controlled status for residential activities for high risk properties. Limit controlled status criteria to presence of early warning detection	PC1 does not promote sustainable management, is unlawful or breaches the statutory framework. Refer General Reasons above.

			system or equivalent for credible landslide or debris flow events; and/or (f) 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 high risk properties in the event of a credible landslide or debris flow event; and/or (g) 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 high risk properties of reasonable compensation for changing residential activities to prohibited status. (h) Introducing rules and other methods that require payment of reasonable mitigation, environmental offsetting and/or environmental compensation by the District Council to the owners of high risk properties as a consequence of the intended prohibited status rule for residential activities. Such a rules regime may require *Augier* 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. (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; (j) Absent any financial compensation or offsetting regime, the prohibited status rule does not have effect; (k) A new Method that requires annual competent peer review by qualified persons in relation to PC1 assumptions about management of acceptable risk from landslide or debris flow, with ability to revisit the rules regime and prohibited status based on the findings of the peer review.	
5	Chapter 21 Definitions of High Risk, Medium Risk, Low Risk policy areas	Oppose	(a) Delete High, Medium, Low risk areas; or (b) Amend high risk areas to medium or low risk; or (c) Identify Awatarariki Policy Area as a natural hazard area, but do not state whether risk is high, medium or low.	PC1 does not promote sustainable management, is unlawful or breaches the statutory framework. Refer General Reasons above.
5	Advice Note 18.2.6.2	Oppose	Delete amendment to advice note.	PC1 does not promote sustainable management, is unlawful or breaches the statutory framework. Refer General Reasons above.
6	Other Methods 18.7.1	Oppose	Delete amendment to methods.	PC1 does not promote sustainable management, is unlawful or breaches the statutory framework. Refer General Reasons above.

N/A	Planning Maps	Oppose	(a) Reject amendment to planning maps; or (b) Delete high risk and substitute with medium or low risk areas; or (c) Identify Awatarariki Policy Area as a natural hazard area, but do not state whether risk is high, medium or low.	PC1 does not promote sustainable management, is unlawful or breaches the statutory framework. Refer General Reasons above.