BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

I MUA I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision No. [2020] NZEnvC 215

IN THE MATTER	of an appeal under Schedule 1 to the Resource Management Act 1991
BETWEEN	AWATARARIKI RESIDENTS INCORPORATED (ENV-2020-AKL-000064) Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL First Respondent WHAKATĀNE DISTRICT COUNCIL Second Respondent

Court:	Chief Judge D A Kirkpatrick Commissioner A C E Leijnen Commissioner J A Hodges
Hearing:	at Whakatāne on 15 December 2020
Appearances:	R Enright and R Haazen for the Appellant M Hill for the first respondent A Green for the second respondent
Date of Decision:	15 December 2020
Date of Issue:	21 December 2020

DETERMINATION OF THE ENVIRONMENT COURT

A: By consent Plan Change 17 to the Bay of Plenty Regional Natural Resources Plan is amended to extend the time by which the property at 10 Clem Elliott Drive, Matatā, must be vacated to 31 March 2022.

B: The relief sought in the appeal is otherwise refused.

C: There is no order as to costs.

REASONS FOR MAKING ORDERS BY CONSENT

[1] The background to this matter is fully set out in the report dated 26 March 2020 of the respondent Councils' hearing commissioners. That report contains the decision which is the subject of this appeal. By s 290A of the Resource Management Act 1991 we are required to have regard to that decision. We have found the report to be comprehensive and helpful, clearly setting out the reasons of the hearing commissioners for their decision.

[2] We do not repeat the contents of the report except to the limited extent necessary to assist readers to gain some understanding of the context in which the Court is now making orders by consent to conclude this appeal. In the ordinary course of making orders by consent to settle appeals before this Court it is unusual to set out this context but the circumstances of this matter and the nature of the plan changes make it desirable that we do so.

Background

[3] On 18 May 2005 a storm triggered a debris flow of approximately 300,000 cubic metres in the catchment of the Awatarariki Stream at the western end of the settlement at Matatā in the Bay of Plenty. That debris flow caused significant damage to land, buildings and transport infrastructure: 27 homes were destroyed, 87 other properties were damaged, and the state highway and the railway line were cut. The total value of the damage was estimated to be $20 million. Fortunately, there were no fatalities.

[4] The return period of that storm was initially thought to be around 200-500 years, but further analysis recalculated the return period as being between 40-80 years. Those periods are a method of expressing the probability of an event occurring, but the method can be misleading in suggesting that there will a gap between such events when in fact such events could occur in quick succession. The hearing commissioners found that future debris flows in the catchment could be expected to occur as a result of any future storm known to be capable of generating them, so that the risk is both significant and as certain as any natural phenomenon can be. The hearing commissioners also noted that there is clear evidence of previous debris flows having occurred at Matatā.

[5] Various investigations were made to see how the risk of future debris flows could be avoided or mitigated. Following an independent review in 2012, the Council resolved

not to proceed with an engineered solution. A hazard and risk assessment in 2015 identified that the risk to life and property on parts of the debris flow area was high. In 2016, the Ministry of Business, Innovation and Employment concluded in terms of the Building Act 2004 that because of the high probability that loss of life could occur, houses should not be permitted to be built there. On that basis it was concluded that the area is subject to a significant natural hazard which precludes any form of permanent occupation.

[6] A programme of managed retreat was subsequently determined to be the most effective measure to reduce risk. Important components of the programme are the changes to the Whakatāne District Plan and the Bay of Plenty Regional Natural Resources Plan which are the subject of this appeal. The essence of the plan changes is to require the residents of the debris flow area to vacate their homes by 31 March 2021 and to prohibit future occupation of the area.

[7] It is fair to say that the time it had taken between 2005 and the notification of the Plan Changes has been a very difficult one for everyone involved, most particularly the owners and occupiers of land in the debris flow area. There are a number of issues that have arisen during that time and while it will not be helpful to rehearse those in this determination, it is appropriate to acknowledge how significant the stress of the whole process has been on the residents.

The Plan Changes

[8] Plan Change 1 to the District Plan identifies an area on the fanhead of the Awatarariki Stream as the Awatarariki Debris Flow Policy Area which is divided into areas identified as high, medium and low risk. The high risk area is proposed to be rezoned from residential to coastal protection with effect from 31 March 2021, in which residential activity is proposed to be a prohibited activity, as are other activities with the exception of transitory recreational use of open space. This will only affect future use of the area.

[9] Plan Change 17 to the Regional Plan was requested by the District Council to include provisions for the Debris Flow Policy Area in the chapter of the Regional Plan dealing with natural hazards. Importantly, the plan change includes a proposed rule NH R71 that would make the use of 18 parcels of land, comprising 21 specified properties, for a residential activity a prohibited activity from 31 March 2021. This status under the regional plan would override and have the effect of terminating any existing use rights for residential activities on that land after that date. We are told by counsel for the District

Council that this is the first time that such a proposal to terminate existing use rights has been before the Court.

[10] The District Council requested this change to the Regional Plan because it does not have any power to alter existing use rights arising under s 10 of the RMA. The Regional Council, under s 30(1)(c)(iv) of the RMA, has the function of controlling the use of land for the purpose of avoiding or mitigating natural hazards. Under s 63(1) of the RMA, the purpose of a regional plan is to assist a regional council to carry out any of its functions in order to achieve the purpose of the RMA. A regional council may make rules under s 68(1) for carrying out its functions under s 30(1)(c). Under s 10(4) of the RMA, s 10 does not apply to any use of land that is controlled under s 30(1)(c). It is by that combination of functions and powers that the Regional Council may terminate existing use rights.

[11] We add that any regional rule which has the effect of altering or terminating existing use rights in relation to land remains subject to all of the controls under the RMA in relation to the making of rules, including the requirement under s 68(3) for the regional council to have regard to the effect on the environment of activities and the requirements under s 32 to examine the appropriateness of any rule by, among other things, identifying other options for achieving the relevant objectives, assessing the efficiency and effectiveness of the rule for achieving such objectives, identifying and assessing the benefits and costs of anticipated effects and assessing the risk of acting or not acting if there is uncertain or insufficient information.

[12] Provisions of plans must give effect to the relevant regional policy statement. The Bay of Plenty Regional Policy Statement includes the following particularly relevant provisions:

a) Objective 31: *Avoidance or mitigation of natural hazards by managing risk for people's safety and the protection of property and lifeline utilities*

b) Policy NH 3B: *By the application of Policies NH 4B and NH 12A, achieve the following natural hazard risk outcomes at the natural hazard zone scale*: (a) In natural hazard zones subject to High natural hazard risk reduce the level of risk from natural hazards to Medium levels (and lower if reasonably practicable); …*

c) Policy NH 12A: *Promote the natural hazard risk outcomes set out in Policy NH 3B by: (a) Providing for plans to take into account natural hazard risk reduction measures including, where practicable, to existing land use activities, …*

[13] A further consideration in making rules under the RMA is the possible application of s 85. While s 85(1) of the RMA declares that an interest in land is deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in the RMA, the remainder of s 85 goes on to provide for a process for assessing whether a plan provision would render an interest in land incapable of reasonable use and places an unfair and unreasonable burden on any person who has such an interest. Any such person may challenge a rule on that basis.

[14] As set out in the report of the hearing commissioners, a further method being implemented by the Councils and the Crown is in the form of a voluntary managed retreat programme, including funding for the acquisition of high risk properties. While not forming part of either plan, this programme is clearly an integral component of the approach to managing the natural hazard at Matatā.

The Appeal

[15] The appeal by the Awatarariki residents is against both Plan Changes. Among the reasons for the appeal, as lodged, were:

a) A challenge to the lawfulness of the Plan Changes, including that there is no jurisdiction to remove existing use rights in this way;

b) That the plan changes are contrary to Part 2 and s 85 of the RMA;

c) That the plan changes are an abuse of public power, inconsistent with the statutory functions of the Councils', have adverse impacts disproportionate to the risks being managed and are inappropriate, inefficient or ineffective in terms of s 32 of the RMA;

d) Challenging the assessments of adverse effects and of risk on which the hearing commissioners made their decision; and

e) Failing to address reasonably available alternatives.

[16] The relief sought by the Society was for the Plan Changes to be withdrawn under Schedule 1 or deleted under s 85 of the RMA. Alternatively, the Society sought amendments to address their concerns including, without limitation, allowing residential activity to continue on high risk properties.

[17] We understand that there have been extensive discussions and negotiations

between the residents and the Councils. The agreements that they have reached will amount to compromises in order to settle the appeal and to address their interest. In particular, we record that at the hearing of the proposed consent orders, counsel for the appellants expressly did not dispute the jurisdictional basis for such orders. On that basis we do not venture further into any examination of those matters.

[18] The hearing of the appeal was set down for the weeks of 7 and 14 December 2020. On 15 October 2020, the parties advised the Court that only one of those weeks would be needed, so the fixture for the week of 7 December 2020 was vacated with the hearing to start on 14 December 2020. On 3 November 2020 the parties advised that agreement had been reached on a basis on which the appeal could be settled. The basis of the settlement comprised:

a) Agreement by all but one landowner to enter into the voluntary managed retreat programme and sell their properties to the District Council;

b) The one remaining property owner resigning from the Society;

c) One property owner, the Whalleys, seeking an extension of time to be able to occupy their property for a further year.

[19] The presiding Judge convened a judicial telephone conference on 6 November 2020 so that the manner in which this settlement might be documented could be discussed. At that conference it was agreed by all parties that it would be appropriate to have a brief hearing of the proposed settlement at Whakatāne. The need for a hearing was in light of the significance of the issue of terminating existing use rights by use of a change to a Regional Plan, the extensive publicity that the event at Matatā and subsequent processes had had and the importance of enabling members of the Society to have access to the process by which any consent order would be made.

Evidence

[20] Prior to the hearing, the councils filed and served the following evidence:

a) The affidavit of Peter Lindsay Blackwood sworn on 23 November 2020;

b) The joint affidavit of Christopher Ian Massey and Timothy Reginal Howard Davies affirmed on 23 November 2020; and

c) The joint affidavit of Craig Barry Batchelar and Gerard Matthew Willis sworn on

23 November 2020.

[21] We also received a joint affidavit sworn by Rick Whalley, Rachel Whalley and Pamela Whalley sworn on 3 December 2020.

[22] Mr Blackwood is an engineer with over 40 years' experience in central and regional government environmental and civil engineering around New Zealand, specialising in rainfall and flood frequency (including the effects of climate change), river hydraulics and catchment and costal engineering. He has examined the environment at Matatā and the surrounding area in detail. He concludes that the rainfall threshold for severe weather warnings are highly likely to be exceeded between 15 December 2020 and 21 March 2022 between 1 and 5 times.

[23] Dr Massey is a principal scientist at the Institute of Geological and Nuclear Sciences with over 20 years' experience in the investigation and analysis of landslides and slope stability in New Zealand and overseas. Dr Davies is a professor in the School of Earth and Environment at the University of Canterbury, Christchurch, with over 20 years' experience in researching debris-flow behaviour and management in New Zealand and overseas. They conclude that while the probability of detecting a heavy rain event is given by the Meteorological Service of New Zealand as between 83 and 93%, the probability that a missed event could be large enough to trigger a debris flow is likely to be relatively small, of the order of 1×10^{-3} or 0.1%. They also note that the risk reduction afforded by an early warning system is unlikely to be by an order of magnitude, so that the annual individual fatality risk might remain greater than 1×10^{-4} or 0.01% and therefore be greater than the risk tolerability threshold specified in the Bay of Plenty Regional Policy Statement.

[24] Mr Batchelar is a planning consultant with 35 years' experience, including particular experience in planning for natural hazard risk management. Mr Willis is a planning consultant with 30 years' experience in New Zealand and overseas, including developing provisions addressing natural hazards in the RPS. They concluded that extending time for occupation of the debris flow area would not generally give effect to the regional policy statement, but also that further litigation of the plan changes would likely mean that termination of occupation would be delayed by as much as a year. A compromise of allowing a one year extension for one property, while not ideal, would in their opinion not be contrary to reducing the risk to an acceptable level as soon as practicable and would shorten the overall timeframe for reducing risk in the area. On that basis, they concluded that an extension for the Whalley property would not materially

affect the degree to which the plan changes give effect to the RPS. They helpfully set out proposed amendments to Plan Change 17 to do this.

[25] The joint affidavit by the Whalleys helpfully explained their position, including the background to their house and to their involvement in the processes addressing the 2005 event. They explained the basis on which they were willing to settle their involvement in this appeal and in particular how an extension to the time for vacating their property would work and how they would provide for their safety during that period. We refer to this evidence further in our assessment of the proposed extension.

Extension of time for 10 Clem Elliott Drive

[26] As well as settling the appeal in relation to both plan changes, the parties seek an amendment to them to enable the property at 10 Clem Elliott Drive to be used by the Whalley family for a further year, until 31 March 2022.

[27] The house at 10 Clem Elliott Drive was built by Pamela and the late Rick Whalley as their "forever home" in the early 1990's, and it is where they retired together. It is a special place for Mrs Whalley, in particular, for reasons that include it is where her late husband died and it is her wish to spend her remaining days in the house.

[28] The period since the debris flow occurred has been a period of great uncertainty and stress for the Whalley family, as for other property owners and residents of the area. Up until 2012 a range of engineered mitigation options were being considered by the District Council and six property owners were allowed to rebuild their homes during that time. They say that they were assured that there was no predetermined agenda to remove them from their homes because of risks associated with future debris flows.

[29] It was Mrs Whalley's wish to spend her remaining days in the house and resulted in an appeal against the Council decision. Agreement was reached by all parties to the appeal that the Whalley family could continue to live in the house for a period one year beyond 31 March 2021.

[30] The evidence before us was that extending the date on which prohibited activity status and the termination of existing use rights for the Whalley property would occur, while not ideal, would not be contrary to the principle that reducing risk to an acceptable level should occur as soon as practicable and that early resolution of the appeal with regard to other properties would shorten the timeframe for reducing risk in all other cases.

[31] In addition, the Whalley family has an early warning system in place which

enables them to evacuate the house if there is a severe weather or tsunami warning. They have safely evacuated on four previous occasions of severe weather conditions. The Whalley family has also entered into an agreement with the District Council which provides that they must permanently vacate the property within seven days if they fail to evacuate in the event of a severe level warning.

[32] The Whalley family have acknowledged that they have chosen to remain in occupation of the property at their own risk and have agreed to indemnify both Councils against any claim for any injury or damage they or members of their family may suffer as a result of the debris flow hazard.

Evaluation and determination

[33] We are satisfied that in terms of the statutory provisions we have referred to and the purpose of the plan changes before us, both the District Council and the Regional Council may include the proposed provisions in their respective plans. We are also satisfied that the circumstances at Matatā justify such plan provisions. Whether the issues raised by this appeal may arise in any other place will depend on the circumstances of the case and we do not presume to set out any reasoning which will necessarily apply to any other case.

[34] In respect of the proposed extension for the property at 10 Clem Elliott Drive, we conclude that a better overall risk reduction outcome will be achieved by confirming such an extension of the effective date to 31 March 2022. We are satisfied that the extension is unlikely to be significantly longer than the time it may take for the appeal to be heard and determined and for a reasonable period being allowed for moving after a final decision were issued. Accordingly, we are satisfied that in the circumstances, the proposal gives effect to Objective 31 and Policy NH 3B of the Bay of Plenty Regional Policy Statement.

[35] This is an unusual case where there are special circumstances that provide grounds for an exception to be made to the general provisions of the plan changes.

[36] In terms of both plan changes we note that the appropriateness of the provisions are agreed by all counsel appearing for the parties and that accordingly the requirements of s 32 and of Part 2 of the RMA are being appropriately addressed. We see no reason to doubt those views and will make the orders as sought by consent.

[37] We congratulate the parties on reaching an agreement on this. We understand

how difficult it would have been for everyone involved given the stresses of the circumstances and the novel issues being dealt with through the district and regional plan.

[38] We accordingly determine and direct that Plan Change 17 to the Bay of Plenty Regional Natural Resources Plan be amended as follows:

a) By inserting a new rule as follows:

NH R72 Prohibited – Residential Activities subject to High Risk Debris Flow on the Awatarariki Fanhead at Matatā after 31 March 2022

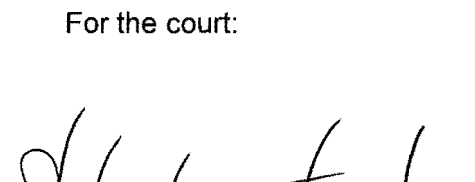
From 31 March 2022, the use of land for a residential activity is a prohibited activity on Allot 322 TN of Richmond (10 Clem Elliott Drive, Matatā)

b) By amending Table NH 3 by deleting the sixth item referring to Allot 322 TN OF Richmond – 10 Clem Elliott Drive, Matatā.

[39] In all other respects, the relief sought in the appeal is refused.

[40] In accordance with the usual practice in relation to plan appeals, there is no order as to costs.

For the court:



D A Kirkpatrick
Chief Environment Court Judge