

**BEFORE AN INDEPENDENT PANEL APPOINTED BY THE ROTORUA  
DISTRICT COUNCIL**

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

**AND**

**IN THE MATTER** Proposed Plan Change 2:  
Pukehangi Heights to the Rotorua  
District Plan under Part 5, Sub-Part  
5 – Streamlined Planning Process  
and Schedule 1 Part 5 of the RMA

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**LEGAL SUBMISSIONS ON BEHALF OF SUBMITTER BAY OF PLENTY  
REGIONAL COUNCIL**

**22 September 2020**

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## Introduction

1. Bay of Plenty Regional Council (**BOPRC**) wholly supports the underlying purpose of Proposed Plan Change 2: Pukehāngi Heights (**PC2**) to enable residential and rural development, and to create additional residentially zoned land for Rotorua. BOPRC's involvement is to ensure that, in achieving its purpose, PC2 does not unintentionally exacerbate the existing known flooding issue in the downstream Lower Utuhina Catchment.
2. It is relatively unusual for the Regional Council to get involved in a District Plan Change, unless there are matters which directly engage its functions under the RMA, or where the plan change does not clearly or fully give effect to the Regional Policy Statement (**RPS**). BOPRC has worked hard to resolve matters with Rotorua Lakes Council (**RLC**), as evidenced by the significant engagement between the parties including expert caucusing and ongoing joint modelling. Despite best efforts in this case, the following circumstances have led to BOPRC's participation at this hearing, in particular:
  - 2.1 The complex nature and existing high flooding risk in the receiving environment;
  - 2.2 The plan change proceeding prior to the completion of the catchment wide mitigation and modelling work; and
  - 2.3 The lack of an existing stormwater master plan covering the development area based on the results of modelling, an existing comprehensive stormwater consent,<sup>1</sup> or detailed stormwater mitigation secured to manage increased flood risk on the downstream catchment.
3. These circumstances have been compounded by the nature of the streamlined planning process with its compressed, fixed timeframes and no right of appeal – this is the one shot we have to get this right.

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<sup>1</sup>We note in contradiction to the legal submissions on behalf of RLC (para 14) it is our understanding that that a comprehensive stormwater consent has not been granted in respect of the Utuhina Catchment, nor does the current application include the area under PC2.

## **Nutrient Management**

4. In addition to its concerns around stormwater management, BOPRC also wishes to see some further amendments to PC2 to in relation to Nutrient Management. The specific amendments, as well as the background and reasons for them, are outlined in the statement of evidence of Joanne Watts, Senior Planner in the Freshwater Policy team at BOPRC. These legal submissions do not address Nutrient Management, they focus on stormwater and flooding.

## **Regional Council's position**

5. BOPRC's position can be summarised as follows:
  - 5.1 The Utuhina Catchment which forms the receiving environment is complex and has a long history of flooding which continues to the present day.
  - 5.2 The Lower Utuhina has a high existing flood risk and there is no room to accommodate additional run off and increased peak discharges within the receiving environment arising from PC2.
  - 5.3 The PC2 area sits above the Lower Utuhina catchment, and therefore if not managed carefully has the potential to exacerbate the existing flooding issues in the downstream receiving environment.
  - 5.4 The results of modelling show that PC2 will unacceptably increase the flooding risk in the lower Utuhina catchment without mitigation. It has been challenging throughout the modelling process to identify a feasible solution that adequately mitigates downstream risk.
  - 5.5 Given this, a precautionary approach is appropriate in this particular context.

- 5.6 The modelling parameters adopted by the BOPRC to ascertain the effects of PC2 are appropriate. This has been agreed by all experts.<sup>2</sup>
- 5.7 The Greater Utuhina Catchment Model which has been used by RLC to model flooding effects of PC2 was developed to address flooding issues within, and identify mitigation options for, the wider catchment. This wider catchment study is still ongoing and has yet to be completed.
- 5.8 RLC has chosen to proceed with its plan change prior to the Greater Utuhina wider catchment work being completed. While it is entitled to do so, it will be critical to ensure that PC2 provides a robust framework to enable cumulative assessment of the effects of new development on the downstream catchment. This will involve an assessment of flood risk, and appropriate mitigation to address that risk, being required under PC2.
- 5.9 Only one potential mitigation option has been modelled and tested to adequately mitigate the potential effects of PC2 on flooding downstream. This relies on utilising detention stormwater ponds within the PC2 Development Area (Onsite mitigation). Given this option is the sole basis upon which RLC has demonstrated PC2 can adequately mitigate downstream flood risk, BOPRC consider that implementation of this option needs to be reflected in the planning provisions.
- 5.10 We note that experts for RLC have advised that the Minister's expectation of 790 dwellings from PC2 can still be delivered even with the increase in land required for the enlarged onsite detention ponds utilised in option 15.
- 5.11 Any opportunities that do exist in the downstream Utuhina catchment to manage flood risk are necessary to provide for the increased flooding effects of future climate change and future infill within the downstream catchment itself. Options that

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<sup>2</sup> Joint Witness Statement para 12(b).

limit further adaptation in the future should not be locked in<sup>3</sup> – especially when it has been identified that the flood mitigation can be undertaken within the PC2 Development area.

- 5.12 PC2 is the appropriate stage in the planning process to effectively manage stormwater and to address the cumulative flooding effects of new development in Pukehāngi Heights in an integrated manner.
- 5.13 BOPRC do not consider the current PC2 provisions adequately mitigate the risk of flood effects on the downstream environment.
- 5.14 The future master stormwater plan process outlined by RLC is not specific nor certain enough to be relied upon to deliver mitigation solutions for PC2. Details provided are vague – we know it is only a city wide “blue sky” process, without certainty that Phase 2 detailed investigation will even proceed let alone deliver a timely alternative mitigation solution for PC2.
- 5.15 For these reasons BOPRC’s support for the Plan Change is subject to the inclusion of appropriate amendments to the Plan Change to address potential flooding effects on the downstream environment as proposed in the evidence of BOPRC’s Regional Integrated Planner Nathan Te Pairi.

### **Relief sought**

6. Nathan Te Pairi has drafted a set of proposed amendments to the PC2 provisions which should ensure that the potential downstream stormwater effects of PC2 will be adequately mitigated. These are both lawful and appropriate, and outlined and explained in detail in his statement of evidence.
7. A copy of these provisions were provided to RLC on the 15<sup>th</sup> September, the day after the final results of further modelling became available to BOPRC demonstrating that there was a mitigation option which could adequately address the potential flooding effect of PC 2 on the downstream environment.

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<sup>3</sup> In line with MfE Guidance – Preparing for Future Flooding, A Guide for Local Government in New Zealand 2010.

8. It is acknowledged that these amendments could be further refined, or there may be other mechanisms to achieve the same outcome. BOPRC is open to further evolution of these proposed amendments, provided that they address the core principles behind the amendments (which are not adequately addressed in the current provisions) as follows:

8.1 PC2 should rely wholly on mitigation measures within the PC2 development area (Onsite mitigation);

8.2 Mitigation outside the PC2 development area (Offsite mitigation) and deferring mitigation to an uncertain future City wide SMP process are inappropriate in the circumstances of this case;

8.3 Provisions must:

(a) Ensure mitigation addresses the cumulative effects of future subdivision on the downstream environment through the development of a Stormwater Management Plan (**SMP**) for the entire PC2 Development Area prior to subdivision;

(b) Ensure cumulative effects of PC2 are considered comprehensively and in an integrated manner at the subdivision stage. This is best achieved by involving the Regional Council at consenting stage to ensure subdivision applications are considered and if appropriate determined together with applications for discharge consents from BOPRC;

(c) Include specific performance measures and design criteria for future stormwater mitigation necessary to provide certainty.

8.4 Flexibility for mitigation within the PC2 Development Area (Onsite) is supported provided:

(a) Downstream effects can be managed comprehensively;

- (b) Any future mitigation design is based on a similar suitably rigorous approach as that undertaken in current modelling by BOPRC /RLC; and
- (c) BOPRC approval is required for future mitigation proposals.

## **Evidence**

9. The following expert briefs have been filed on behalf of BOPRC:

### *Nutrient Management*

9.1 Ms Joanne Watts, Senior Planner, Freshwater Policy Team at BOPRC. Her evidence:

- (a) Reviews the proposed PC2 nutrient management provisions and recommends some amendments to further strengthen / clarify the PC2 provisions and to better align with BOPRC's proposed Plan Change 10;<sup>4</sup> and
- (b) Recommends adoption of a comprehensive nutrient management / land use assessment to inform consideration of options to address nitrogen shortfall and assess the appropriateness of agriculture on the Pukehāngi Slopes.

### *Stormwater*

9.2 The following experts have provided evidence on behalf of BOPRC addressing the stormwater issues:

- (a) Mr Mark Ivamy, Senior Natural Hazards Planner for BOPRC. His evidence:
  - (i) Reviews the natural hazard risk assessment for PC2; and

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<sup>4</sup> Proposed Plan Change 10 – Lake Rotorua Nutrient Management to the Bay of Plenty Regional Natural Resources Plan.

- (ii) Explains the basis for the adoption of the RCP 8.5 scenario in modelling to account for potential climate change.
- (b) Mr Peter Blackwood; Principal Technical Engineer for BOPRC, whose evidence will confirm the appropriateness of the application of a 1% AEP design rainfall and adoption of a design 72 hour nested storm as the basis for modelling PC2 effects;
- (c) Mr Philip Wallace, director of River Edge Consulting Limited. His evidence:
  - (i) Outlines the hydraulic modelling undertaken to assess the flooding effects of PC2 and discusses these results; and
  - (ii) Explains why there is no room in the Lower Uthina Catchment to accommodate additional run off and increased peak discharges from PC2;
- (d) Mr Peter West, Consulting Engineer and director of Blue Duck Design Ltd. His evidence:
  - (i) Outlines the hydrological modelling undertaken, and explains why the rainfall scenarios included in modelling were appropriate and necessary; and
  - (ii) Explains why it is necessary that any future mitigation design adopts a similarly rigorous approach to assess the flooding effects of PC2;
- (e) Ms Kathy Thiel-Lardon, Senior Environmental Engineer for BOPRC. Her evidence;
  - (i) Details the significant existing flood risk in the Uthina Catchment and issues with the Regional Council's Lower Uthina Flood Protection assets;

- (ii) Assesses the stormwater effects of PC2, concluding that including mitigation Option 15 (which utilises onsite detention ponds), PC2 adequately mitigates potential downstream flooding effects;
  - (iii) Makes recommendations for future mitigation within the PC2 Development Area (Onsite mitigation);
  - (iv) Outlines why flexibility for future mitigation outside the PC2 Development Area (Offsite mitigation), and deferral to future, uncertain District wide planning processes, is not appropriate in this particular case; and
  - (v) Explains why it is essential for PC2 to prescribe performance standards and design criteria for future stormwater mitigation and that the suggested amendments by Nathan Te Pairi are appropriate and necessary;
- (f) Mr Nathan Te Pairi, Planner BOPRC. His evidence:
- (i) Addresses planning matters relating to stormwater and natural hazard risk; and
  - (ii) Recommends additional amendments to PC2 which he considers to be necessary to ensure the potential stormwater effects of PC2 on the downstream catchment are adequately and appropriately mitigated.

### **Legal principles**

10. The following legal principles are relevant:

#### *Managing Natural Hazard Risk - Flooding*

10.1 Control of the use of land for the avoidance or mitigation of natural hazards is within the powers of both regional and territorial councils and an area where there is a degree of

overlap between them.<sup>5</sup> In rezoning the land under PC2 to provide for future residential development, RLC in accordance with its functions under s31 RMA, is required through its plan to include appropriate provisions to enable the control of the actual or potential effects of this future development for the purpose of avoiding or mitigating flooding.<sup>6</sup> This requires management of effects both within the Development Area and on the existing receiving environment.

- 10.2 Given this area of overlap, it is appropriate and necessary that this risk is managed and controlled in an integrated manner between the Regional and Territorial Authorities.<sup>7</sup> Therefore the amendments to PC2 recommended by Nathan Te Pairi, which would ensure the involvement of BOPRC in future PC2 stormwater management processes and the integrated assessment of consent applications to comprehensively manage stormwater and flooding issues is both lawful and appropriate.

#### *MfE Flood Guidance*

- 10.3 In relation to managing stormwater and flood risk, the Ministry for the Environment's Guideline in relation to future flooding is relevant.<sup>8</sup> Those of particular relevance to this case are:

- (a) **Take a precautionary approach:** means taking account of the level of risk, using existing knowledge, and accounting for uncertainties. In addition the RPS also expects councils to apply a precautionary approach when developing District Plans;<sup>9</sup>
- (a) **Select options that allow for future adaptation:** Avoid making decisions that will make it more difficult to manage climate change flood risks in the future, in

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<sup>5</sup> Power for Territorial Authorities comes from s31(1)(b) RMA, Regional Council from s30(1)(c)(iv), See *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189.

<sup>6</sup> RMA s74(1)(a).

<sup>7</sup> In line with RPS Policy IR 3B and the Regional Council's overall function of integrated management of the resources of the region (RMA, s30(1)).

<sup>8</sup> MfE Guidance – Preparing for Future Flooding, A Guide for Local Government in New Zealand 2010 page 28-29.

<sup>9</sup> Policy IR 1B.

particular, avoid decisions that lock in options that limit future adaptation;

- (b) **Use progressive risk reduction:** New developments should not be exposed to nor increase flood risk over their lifetime; and
- (c) **Adopt an integrated sustainable approach:** Based on the robust evaluation of options, costs and benefits over time and across the community.

*Cumulative effects and Integrated manner*

10.4 the RPS and the RMA also require regard to be had to the cumulative effects of the proposal.<sup>10</sup> The RPS also further requires adoption of an integrated approach to resource management.<sup>11</sup> This is particularly relevant here where there exists an overlapping function. In addition, proposals to develop land under PC2 can also affect wider regional responsibilities in relation to the greater Kaituna catchment including flood protection assets.<sup>12</sup>

*Onsite mitigation is appropriate in this case*

10.5 It is acknowledged that there is no RMA duty to internalise effects within the boundary of an activity. The question to what extent it is appropriate for an activity to internalise its effects is a question of what is reasonable in each particular case.<sup>13</sup>

10.6 In this case, given the existing high risk receiving environment, the limited capacity for additional offsite mitigation, and the need for any additional capacity to be used for future adaptation and infill development, on balance it is reasonable in the circumstances of this catchment that PC2 should require stormwater mitigation to be provided onsite. Furthermore, the one mitigation option which has been modelled and tested to

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<sup>10</sup>RMA s3 defines effects to include “any cumulative effect which arises over time or in combination with other effects”. RPS, Objective 10, and Policy IR 5B, see Statement of Evidence of Nathan Te Pairi for more details.

<sup>11</sup> RPS Policy IR 3B, see Statement of Evidence of Nathan Te Pairi for more details.

<sup>12</sup> RMA s30(1)(e) and s30(1)(ii).

<sup>13</sup> *Winstone Aggregates v Auckland Regional Council* A049/2002 at [33].

adequately mitigate the potential effects of PC2 on flooding downstream utilises onsite detention ponds.

- 10.7 This approach is also consistent with MfE Guidance to adopt a precautionary approach and to avoid locking in options that limit further adaptation in the future.<sup>14</sup>

## **Conclusion**

11. BOPRC support PC2 subject to the amendments as set out below.

### *Stormwater*

12. BOPRC supports PC2 provided it can adequately address flooding risk. The current PC2 provisions do not achieve this. The BOPRC therefore request the Panel adopt and include the amendments to PC2 as recommended in the evidence of Nathan Te Pairi, or similar provisions, would achieve this outcome.

### *Nutrient Management*

13. BOPRC request the Panel adopt and include the amendments to the Nutrient Management provisions of PC2 as recommended in the evidence of Joanne Watts.

**DATED** 22 September 2020

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<sup>14</sup> Ministry for the Environment Guidance: Preparing for Future Flooding: A Guide for Local Government in New Zealand 2010, pg 28.