

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU**

IN THE MATTER OF	An appeal under Clause 14 of Schedule 1 of the Resource Management Act 1991
BETWEEN	CLIVE BOONHAM (ENV-2021-AKL-000061) Appellant
AND	KAIPARA DISTRICT COUNCIL Respondent
AND	MANGAWHAI CENTRAL LIMITED Applicant

**FINAL REPLY OF CLIVE BOONHAM IN RESPONSE TO THE REPLY SUBMISSIONS OF
MANGAWHAI CENTRAL LIMITED AND KAIPARA DISTRICT COUNCIL**

25 March 2022

Clive Boonham
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MAY IT PLEASE THE COURT:

1. INTRODUCTION

- 1.1 These submissions are my final reply to the submissions of Mangawhai Central Limited (MCL) and to the submissions of the Kaipara District Council (KDC) which in turn were in response to my submissions (Evidence) in respect of the sole issue before the Court.
- 1.2 That issue revolves around the wording of five provisions as proposed in the joint consent memorandum of the parties to the appeal by Mangawhai Matters Incorporated (ENV-2021-AKL-000062) dated 11 March 2022, and as sought by MCL with respect to the appeal by Mr Boonham (ENV-2021-AKL-000061).
- 1.3 Those five provisions are set out in Annexure A and are highlighted in orange. Mr Boonham's proposed amendments are in blue.
- 1.4 I will respond to the submissions of the MCL and the KDC separately

MCL'S SUBMISSIONS

2. MCL'S ABOUT-FACE ON FUNDING

- 2.1 In paragraph 1.6 of its submissions MCL states its current position on the capacity of the MCWWS and the source of proposed funding for capacity increases:
 - 1.6. There are three things Mangawhai Central Ltd ("MCL") agrees with Mr Boonham on:*
 - (a) A full build out of PC78 will, over time, require extension of the existing wastewater treatment and disposal operations.*
 - (b) The direct cost of the extensions will be for the developer(s).*
 - (c) The likely funding methodology will be a development agreement, as provided for in the Local Government Act 2002 ("LGA").*
- 2.2 This statement comes as a great surprise to me and, I am sure, to the other appellant and all section 274 parties. This is a completely new

and unheralded position by MCL on funding for the Mangawhai Central development. It is also a surprise - at the very last stage of the PC78 process - that MCL finally agrees with my assessment of the situation and acknowledges that funding for the PC78 build-out will “likely” be provided by the developer.

My position

- 2.3 I have consistently maintained that the MCWWS does not have the existing capacity to accommodate the demand for connections from the Mangawhai Central development proposal along with the average annual demand from other developments. To simplify the issue, the remaining 298 connections are insufficient to meet the current annual demand of 90 to 100 connections and the 1,000 connections required by Mangawhai Central.
- 2.4 I have consistently maintained that because of the clear lack of capacity in the Mangawhai Community Wastewater Scheme (MCWWS) that the KDC and MCL should have entered into a development agreement in the early years of the proposal whereby MCL provided capital funding for wastewater infrastructure to accommodate its development. This is required by the KDC’s Engineering Standards in such a situation.
- 2.5 With the release of the Master Plan Strategy on 02 February 2022, it has become clear to me that the KDC and the Kaipara community do not have the financial capacity to fund the considerable and expensive wastewater capacity upgrades that are necessary to meet both normal annual developments and the capacity required by the Mangawhai Central development.
- 2.6 I believe that the only way that the Mangawhai Central development can successfully proceed is if MCL enters into an agreement with KDC to provide capital funding for any necessary infrastructure.
- 2.7 I have also been aware throughout the PC78 process, to the point of receiving MCL’s submissions, that MCL had not indicated in any way that it would contribute direct funding to enable planning for capacity increases to proceed. By direct funding I understand that MCL is now going to provide capital funding for planned wastewater infrastructure. Prior to this point it was going to provide only indirect funding through the payment of development contributions as the build-out proceeded.
- 2.8 Because I was led to understand that the planning and funding for capacity increases were going to be the sole responsibility of the KDC,

my amendments to the wording of the relevant provisions were based solely on that situation.

MCL's position

2.9 During my close involvement with the Mangawhai Central development proposal since its inception, there has been no suggestion from either MCL or KDC that capacity funding would be provided directly by MCL. KDC and MCL have consistently maintained that the costs of the new infrastructure would be funded directly by KDC debt and paid indirectly through development contributions from MCL and its lot purchasers.

PC78 hearing

2.10 Originally, in their opening legal submissions of 20 November 2020¹ at the PC78 Panel Hearing, joint legal counsel for MCL adopted a position that the Mangawhai Community Wastewater Scheme (MCWWS) had the existing capacity to accommodate the whole of the proposed Mangawhai Central development.

Wastewater

9.31. The Council has confirmed that the current Mangawhai wastewater treatment plant can accommodate wastewater from the Proposal. While submitters' anxiety with respect to wastewater is entirely understandable, we submit that it is simply not an issue here and there is no contrary expert evidence.

2.11 This apparently irrefutable assertion was largely rebutted by submitters during the hearing. Consequently the Panel sought further information from the KDC on its planned capacity increases, along with funding, that were necessary to accommodate the Mangawhai Central proposal. Mr Sephton of the KDC provided details of the proposals of the KDC to increase capacity with the KDC providing the funding.

2.12 In their final legal submissions, of 3 February 2021², to the PC78 Hearing Panel, MCL's joint counsel took note of the evidence of submitters and the clear concern of the Panel about the current

¹ This document can be located on the KDC website at [Private Plan Change 78 - Mangawhai Central, Kaipara District Council](#). Scroll down to [Relevant Information](#), click on [Legal submissions uploaded Thursday 19 November 2020](#). Click on [PC78 Final legal submissions on behalf of MCL](#). (The submissions are misdescribed in the reference as "Final".)

capacity of the MCWWS. MCL changed its position on capacity and endorsed Mr Sephton's assertion of planned capacity to be provided and funded by the KDC:

8.2. With respect to wastewater, Mr Sephton's evidence confirms that: there is immediate capacity at the Mangawhai Community Wastewater Treatment Plant ("CWWTP") for 389 additional connections; and there is currently planned (including forecasted funding) capacity available to service all connections enabled by PC78.

2.13 MCL went further

8.2In other words, both planning and forecast funding are in place to deliver the necessary upgrades to the CWWTP to cater for the demands on the CWWTP associated with the full build-out of PC78.

The planning for upgrades and funding was to be provided by the KDC, and the planning and the funding was "in place" for the "full build-out of PC78".

2.14 MCL proceeded to clarify the situation and emphasise the importance of the planning and funding being incorporated in an LTP:

10.20. ... the Council has confirmed, including though Mr Sephton's evidence (outlined above), that infrastructure planning and funding for necessary wastewater treatment plant upgrades is in place or in train. Here, Mr Sephton's evidence points to the proximity of the 2021 and 2024 LTP rounds and the fact that these processes will respond to a higher degree of detail as that emerges (from this process)

If not actually "in place", the planning and the funding would be incorporated in the 2011 and 2024 LTPs.

2.15 In respect of the issue on appeal. It is important to note that MCL considered that the details of the planning and funding for the capacity increases would be incorporated in full detail in subsequent LTPs.

² This document can be located on the KDC website at [Private Plan Change 78 - Mangawhai Central, Kaipara District Council](#). Scroll down to Reconvened hearing, click on [Closing Legal submissions on behalf of MCL \(uploaded 16 February 2021\)](#).

Mediation

- 2.16 I cannot disclose what was discussed in mediation but I can point to the contents of the draft consent order that has now been filed with the Court for its consent (See part 3 of MCL's submissions.) At paragraph 3.2 of its submissions MCL refers to the mediation process and states that the wording of the relevant provisions "*has been the subject of extensive mediation and other discussions/negotiations*". And:

With respect to wastewater capacity issues, the provisions are founded in rigorous independent expert input, being the product of expert conferencing between the planning consultants for MCL, the Council, and Mangawhai Matters. Good faith efforts have been made, and amendments to provisions agreed to by MCL, to address wastewater concerns raised by Mr Boonham and Mangawhai Matters.

- 2.17 The end result of all this intensive mediation, expert conferencing, and good faith efforts is the expression "planned capacity". This is the requirement that needs to be satisfied to enable MCL to apply for subsequent consents.
- 2.18 Given the history of PC78, "planned capacity" suggests to me that there must be planning in place by the KDC for the capacity upgrades, along with details of the proposed funding.
- 2.19 I was not party to any of the mediation on this wording, so I can only base my views on the final outcome, the consent documents that was endorsed to by all the parties to the Mangawhai Matters appeal. That document is now in the public domain.
- 2.20 The parties who signed the consent order have, like me, been involved with the Mangawhai Central development proposal for many years. Also like me, they would be aware that the all future capacity increases were to be planned and funded by the KDC. There has never been any indication that MCL would contribute directly to the funding. It therefore seems that those parties all considered, when agreeing to the wording, that if there was not existing capacity then the KDC would provide planning and funding for additional capacity. This was summed up in the expression "planned capacity".

- 2.21 There is no indication in the wording of the provisions of any alternative source of funding, such as direct funding provided by a developer. If that had been the case the wording would no doubt have reflected that alternative source of funding.
- 2.22 I suspect that the other parties to the mediation will be surprised to read of the KDC's fundamental change of position on capacity. They may even feel that they were misled into agreeing to the wording of the wastewater provisions and would have changed that wording if MCL had made them aware of its new position on capacity.
- 2.23 It appears that MCL may have adopted its new stance to undermine the wording of my suggested amendments. Those amendments were based on my understanding, in common with all the other parties, that the issues of capacity were limited to existing capacity of the MCWWS or KDC's planned and funded future capacity increases. With its new, unheralded position, MCL can now claim:

4-8Oddly, the relief sought by Mr Boonham with respect to this policy dilutes the requirement that it is the development that must provide for necessary extensions or upgrades, which is a key component of the policy. In this respect the policy wording proposed by Mr Boonham is weaker and of less value to the community than the policy sought by MCL in ensuring the developer pays for necessary infrastructure extensions/upgrades.

Policy 16.3.9.1 5)

- 2.24 The concept of the developer paying for upgrades directly (rather than drip fed through development contributions) has been absent from every PC78 process over the number of years since the Mangawhai Central development was first mooted. While KDC and MCL both have remained silent on the issue for all those years and through all those processes, MCL now points to a provision in the consent order that, it claims, justifies its fundamental change of position on wastewater capacity. Paragraph 4.7 of MCL's submissions highlights Policy 16.3.9.1 5), which, it emphasises, was agreed to by all the parties to the Mangawhai Matters appeal. The Policy states:

By ensuring the infrastructure capacity necessary to serve subdivision and development is available, or that development provides for the necessary extensions or upgrades required to ensure sufficient capacity.

- 2.25 I read the Policy myself during mediation and could not understand it. The word *development* is used twice in two clearly different senses. I could not understand the expression “*development provides for the necessary extensions...*” As a result I included the provision in the five provisions that I suggest should be amended. I suspect that all of the other parties who signed the consent order would be hard pressed to explain the meaning of the Policy that they agreed to.
- 2.26 The word *development* is not defined in the RMA, but the expression *development capacity* is defined in section 30(5). It means “*the capacity of land for urban development based on the capacity to meet short to long term requirements*”, or based on the “*the provision of adequate development infrastructure to support the development of the land*”.
- 2.27 MCL has no problem in adopting an alternative meaning:

4.8. We submit that this is an appropriate and directive policy which clearly sets out that it is the responsibility of the development (i.e. the developer) to provide any extensions or upgrades that are needed to ensure sufficient wastewater capacity, and other infrastructure capacity.

Clearly sets out? MCL insists that the second “development” actually means “developer”. Surely if it meant “developer” it would have said so. In this context, and with reference to section 30(5) of the RMA, it would appear appropriate to assume that Policy 16.3.9.1 5) should read:

.... or that development [proposals] provide[s] for the necessary extensions

Even if we accept that, then the policy requires that the capacity is either “available”, or that the developer “*provides for the necessary extensions or upgrades required to ensure sufficient capacity*”. What does “provides” mean? Is it past tense, present tense or future tense?

“Availability” is objectively and independently assessable. How can one assess if the requirement of “the developer provides” has been met?

Summary

- 2.28 It is my view that MCL has misused the mediation process by obtaining the consent of parties to the amendments in the consent order based on the good faith negotiations in that mediation process, only for it to fundamentally change its position on the provision and funding of future capacity once the Boonham appeal is before the Court.
- 2.29 I am also critical of the MCL using the obscure wording of Policy 16.3.9.1 5), and adopting an implausible interpretation of the word “development”, as a type of wooden horse to try and establish that its newfound acceptance that the developer must fund the Mangawhai Central development are part of the agreed provisions.

3. MCL’S WORDING OF THE PROVISIONS

- 3.1 In its submissions MCL makes various claims in respect of its version of the relevant wastewater provisions as set out in the consent order.
- 3.2 MCL maintains in paragraph 3.2 that the wording “*has been the subject of extensive mediation and other discussion/negotiations*”. “*The provisions are founded in rigorous independent expert input, being the product of expert conferencing between the planning consultants for MCL, the Council, and Mangawhai Matters*”. “*Good faith efforts have been made, and amendments to provisions agreed to by MCL, to address wastewater concerns raised by Mr Boonham and Mangawhai Matters. This process has significantly bolstered the wastewater infrastructure provisions with respect to the concerns raised in Mr Boonham’s appeal.*”
- 3.3 Despite such commitment to the wording of the provisions, the end result – “planned capacity” - is very simplistic, open-ended and open to subjective interpretation by the KDC. In fact, as I pointed out in paragraph 12.1 to 12.5 of my submissions (Evidence), the KDC expert consultants (Steven Rankin and David Badham), in their evidence of 11 February 2022 filed in Court, are still making very broad assertions in

respect of MCWWS capacity. Mr Badham's expert opinion in his evidence states

13.10 It is my opinion that:

(a) Existing wastewater infrastructure exists in the form of the MCWWS;

(b) Council has a clear plan to upgrade the MCWWS to cater for additional demand in the future;

Such an opinion would tick the boxes of "existing capacity" and "planned capacity" in the provisions in question. Further consents could therefore be issued by the KDC even though the recent Master Plan Strategy released on 02 February 2022 paints a dismal picture of current capacity and acknowledges the current lack of planning for future capacity to meet future demands.

3.4 It is also of note that the version of the relevant provisions in the consent order only refers to "planned capacity". There is no mention of alternative funding such as through a development agreement now being raised by MCL. The absence of such an alternative in the consent order, after intense consultation in mediation, reinforces the view that MCL has changed its position on capacity proposals solely for the purposes of this appeal.

3.5 In paragraph 3.5 MCL maintains:

3.5 The comprehensive suite of PC78 wastewater provisions applying to the PC78 area amounts to a significantly more conservative and robust/responsible approach than in the operative Plan.

The issue before the Court is the wording of the 5 provisions only. The merits of the old Chapter 16 and the amended one are irrelevant. More specifically, the adoption of the expression "planned capacity" as a trigger to release subdivisional and other consents is not a robust or responsible approach for a local authority that is faced with such limited wastewater facilities and a demand for development that far exceeds its financial capacity to meet that demand.

3.6 MCL continues:

3.5 The PC78 approach acknowledges the fraught history of the Council's wastewater system and the concerns of residents (including Mr Boonham) and other parties (including developers like MCL) that history not be repeated and that costs be borne by developers.

The best way for the highly significant Mangawhai Central development proposal to proceed, in order to avoid the issues of earlier years, is for the capacity proposals and their funding to go through the requirements of the Local Government Act 2002 (LGA2002) including the decision-making and consultation required for such a significant proposal through the LTP process. Such a transparent process would avoid the pitfalls of the EcoCare debacle.

3.7 In paragraph 3.9 MCL states:

3.9. In addition, PC78 as sought by MCL includes bespoke financial contribution provisions which are the result of intensive negotiations with Mangawhai Matters and other parties. These provisions, coupled with the Council's ability to charge development contributions under the LGA, provide a "belts and braces" approach to ensure development under PC78 contributes its share of necessary infrastructure costs.

I find nothing in the wording of the provisions in issue before the Court that would justify the use of the description "bespoke". The expression "planned capacity" is completely open-ended and does not refer to developer funding in any way, whether it be through development contributions or through capital contributions pursuant to a development agreement. Interestingly, in the last sentence MCL again uses the word *development* in to mean *the developer*.

3.8 At paragraph 3.7 MCL sums up its assessment of the PC78 provisions:

Neither subdivision nor land use development creating demand for the Council's wastewater system can be undertaken without the issue of wastewater capacity being addressed.

The issue before the Court is whether the expression "planned capacity" ensures that the KDC will address the requirement sufficiently to ensure that planning and funding is actually in place to meet future demand.

- 3.9 Paragraph 3.8 states that the KDC has the ability to decline resource consents if planning is not in place, but the KDC is also free to adopt its own interpretation of what “planned” capacity means. Does an intention or commitment to provide capacity equate to planned capacity? As for the risk of the development stalling at the future consent stage, surely the whole point of providing a robust requirement for capacity upgrades is to ensure that there is actual planning in place to ensure that capacity is actually available to meet demand. Good intentions and commitment mean nothing from a legal point of view.

4. SEPARATE PROCESSES

- 4.1 The essence of MCL’s argument is to be found in paragraph 4.5 of its submissions:

4.5. Plan changes and resource consenting under the RMA, and the LTP process under the LGA, are separate processes. While the RMA and LGA processes should be integrated, they are distinct processes with their own legislative purposes and schemes.

- 4.2 In paragraph 4.6 MCL states:

4.6 ...we are aware of no legislative or policy requirement that long-term planning under the LGA must precede resource consenting under the RMA in the manner proposed by Mr Boonham.

There is no need for any legislative statement that defines the separate roles played by a local authority under the RMA and under the LGA 2002, or in fact any other legislation relevant to local authorities.

The separation of roles is implicit in the terms of the source legislation. The areas of operation of each enactment may be completely separate, or they may intersect. That depends on the situation. In respect of proposed developments, requirements of the RMA will be triggered, as will requirements of the LGA 2002, as will the requirement of the Building Act etc. In fact many enactment and other statutory requirement will run alongside each other, and sometimes intersect.

- 4.3 PC78 is clearly a plan change that proceeds under the RMA and its processes are dictated by the RMA. The proposed Mangawhai Central

development is enabled from a resource planning point of view by PC78.

- 4.4 The issue before the Court has no relevance to the plan change process under the RMA. By the agreement of all parties PC78 is proceeding. The only outstanding issue involves the wording of provisions that set out the wastewater capacity requirements for the issuing of subsequent consents.
- 4.5 it is my view that the expression “planned capacity” automatically triggers requirements under the LGA 2002 for planning and funding. It also triggers the need for compliance with the KDC’s Engineering Standards. It may trigger compliance with the KDC’s Significance and Engagement Policy.
- 4.6 It is no different to the requirements in respect of water supply capacity. Such wording triggers the need to comply with all legislation that governs water supply. As an example, Policy 16.3.9.1 28) states:

By ensuring that the following activities are serviced by water supply including reticulated water supply with adequate capacity to serve the scale and nature of development (in accordance with all relevant guidelines, the Code of Practice referenced in 16.1.6 and legislative requirement for drinking water) and opportunities for water demand management and rainwater harvesting:

- 4.7 in addition, we need to look at the larger picture and recognise that the proposed Mangawhai Central development, seen as a whole, is one of the most significant development proposals In Kaipara’s history. The MCWWS is a strategic asset. According to the recent Master Plan Strategy the scheme is close to reaching its capacity limits in respect of the treatment plant and the disposal process. There are also major upgrades needed for its reticulation network. The scheme needs temporary fixes – “short term flow management” - to resolve immediate capacity issue, but also long term capacity upgrades to double its current capacity to meet growth and accommodate Mangawhai Central. All this comes at a huge cost – possibly over \$60 million - which is beyond the financial capacity of the KDC and the community.
- 4.8 In brief, the RMA deals with the narrow confines of the plan change but the decisions in respect of providing the infrastructure and funding that

infrastructure are in the domain of the LGA 2002 and the KDC's Significance and Engagement Policy.

5. SECTION 31 RMA

- 5.1 The MCL submission refers to Section 31 of the RMA in footnote ³⁹ of its submissions. Section 31(1)(aa) sets out one of the functions of a local authority that is directly relevant to the issue before the Court:

“the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district”.

The definition of development capacity in section 30 includes reference to *“the provision of adequate development infrastructure to support the development of the land”*, with development infrastructure also being defined in section 30 as including wastewater.

Section 31(2) is also relevant:

(2) The methods used to carry out any functions under subsection (1) may include the control of subdivision.

- 5.2 In short, one of the statutory functions of the KDC in reviewing the objectives, policies and methods in Chapter 16 is to ensure that there is sufficient development capacity to meet the demand of the development under PC78.
- 5.3 In my view, the requirement in the five provisions for there to be “planned capacity” does not meet the threshold of ensuring that there is sufficient development capacity to meet the demand. It is open to alternative interpretations and needs to be expanded to refer to the LGA 2002 processes for planning and funding infrastructure.

6. NPS-UD

- 6.1 In paragraph 4.6 MCL considers the relevance of the provisions of the NPS-UD 2020 and whether they apply to a plan change. That enquiry is misdirected in that all parties have agreed that the PC78 can proceed without any specific requirements in respect of wastewater infrastructure and water supply. The issue before the Court is not whether PC78 will proceed, but how the provisions in respect of

wastewater capacity are to be worded to comply with KDC's function under section 31(1)(aa) of the RMA.

- 6.2 There is also some dispute about whether the NPS-UD applies to Mangawhai. Regardless of that, the provisions of the NPS-UD provide helpful guidelines in drafting provisions relating to wastewater infrastructure for proposed developments.

Objective 6: Local authority decisions on urban development that affect urban environments are:

(a) integrated with infrastructure planning and funding decisions;

This echoes the function of a local authority under section 31(1)(aa) of the RMA. It is simply a matter of drafting the relevant provisions to ensure that the required wastewater infrastructure is planned and funded so that it is available when needed.

- 6.3 The NPS-UD is of assistance in that it provides an expression – “infrastructure ready” - that is perhaps quite suitable for the situation. Sub clause 3.4 (3) of the NPS-UD defines *infrastructure-ready*:

3.4 (3) Development capacity is infrastructure-ready if:

(a) in relation to the short term [3 years], there is adequate existing development infrastructure to support the development of the land

(b) in relation to the medium term [3 to 10 years], either paragraph (a) applies, or funding for adequate infrastructure to support development of the land is identified in a long-term plan

(c) in relation to the long term [10 to 30 years], either paragraph (b) applies, or the development infrastructure to support the development capacity is identified in the local authority's infrastructure strategy (as required as part of its long-term plan).

Combining (a) and (b), and modifying it for wastewater, an ideal provision would be:

That there is adequate existing wastewater infrastructure, or funding for adequate wastewater infrastructure to support the development is identified in a long term plan.

This is very similar to my proposed amendment but it has the cachet of being derived from a statutory policy.

7. DEVELOPMENT AGREEMENTS

- 7.1 As stated earlier, the provisions in the consent order agreed to by the parties to the Mangawhai Matters appeal were consented to by those parties without any knowledge of MCL's fundamental change of position on the MCWWS capacity issue. It was understood at the time that future capacity would be planned and funded by the KDC through debt with development contributions repaying the debt. Likewise, my proposed amendments were based on the same understanding.
- 7.2 MCL is now arguing – based on its recent change of position on the provision of capacity – that my amendments are too narrow and do not provide for the “*policy sought by MCL in ensuring the developer pays for necessary infrastructure extensions/upgrades*”. (Paragraph 4.8 of MCL's submissions.)
- 7.3 In paragraph 4.9(a) MCL argues that the LGA2002 development agreement provisions are distinct and separate from planning and financial matters through the LTP process. Presumably that also applies to the KDC's Development Contribution Policy which includes provisions relating to development agreements.
- 7.4 The reality is that Mangawhai Central development, as a whole, is an issue of high significance and triggers the KDC's Significance and Engagement Policy and the provisions of the LGA 2002. The development as a whole has been considered and consulted on through the various LGA 2002 processes including inclusion in an LTP.
- 7.5 A development agreement does not sit in isolation. If a development agreement is negotiated then it is part and parcel of the planning of the infrastructure and the funding of the infrastructure that is required to provide the necessary capacity. It is therefore part of the package that has to be considered in the LTP.

8. MCL'S OTHER REASONS

- 8.1 These are listed in paragraph 4.9 of MCL's submissions. Paragraph 4.9(a) states that my proposed wording of the provisions would exclude the scenario where a developer provides direct funding. Certainly development agreements on their own do not need to be incorporated in an LTP, unless they trigger the Significance and Engagement policy. However, if they are part of the strategy to provide funding for the highly significant Mangawhai Central development they would be

included in the relevant statement of proposal. Any developer funding for the Mangawhai Central development would be included under my wording “adequate planned and funded infrastructure”.

- 8.2 In paragraph 4.9(b) MCL argues that the provisions of an LTP might be non-specific or to take effect later in the 10 year term and could cause unnecessary delays. This general comment ignores the fact that the provisions in question are in Chapter 16, as amended by PC78, and apply only to the Mangawhai Central development. The recent Master Plan Strategy makes it clear that once the state of the MCWWS is established and the options for capacity increases are finalised, the planning proposals will be incorporated into an amendment to the LTP. This process is vitally important if the urgently needed capacity is going to be available to meet future demand.
- 8.3 In paragraph 4.9(c) MCL provides a list of other processes that *provide a higher degree of certainty and timeliness than what is required under the wording Mr Boonham seeks*”. Those processes relate to individual situations that may arise. They are not relevant to the issue before the Court. We are only concerned with the wording of the 5 provisions of PC78 (amending Chapter 16) in respect of the Mangawhai Central development, and the need (spelt out in the Master Plan Strategy) for urgent planning and funding for that development.
- 8.4 The processes are, with my comments below:

(i) a consented or designated expansion/upgrade to the wastewater treatment infrastructure;

I do not understand what this means.

(ii) a Council Asset Management Plan or Infrastructure Management Plan (or equivalent);

Not relevant. In any case it is vague and open-ended (“or equivalent”) and does not specifically address the need for capacity for Mangawhai Central.

(iii) a development agreement with a private developer;

Direct funding from a developer for Mangawhai Central is covered by my suggested wording

(iv) a relevant Council resolution; and/or

This has no relevance to the requirements of Mangawhai Central. Matters of significance such as the Mangawhai Central development

proposal and funding require decision-making and consultation at the highest level, namely through and LTP.

(v) inclusion in an annual plan in accordance with the LGA.

As immediately above.

- 8.5 The suggestion of MCL in 4.9(d) that the KDC could veto a development, by deliberately not providing for infrastructure in an LTP, does not need a response. The whole purpose of tightening the wording of the provisions is to ensure that the needed capacity is available. The greater danger is that the KDC fails to plan appropriately for the required infrastructure and its funding, and there is insufficient capacity to meet the demand. The Mangawhai Central development, and all other developments, would come to a halt. That is the risk that is spelt out clearly in the Master Plan Strategy.
- 8.6 In respect of 4.9(e), the provisions in question have nothing to do with minor upgrades. They simply set the requirements that must be met before subdivision consents and other consents can be granted under Chapter 16.
- 8.7 In respect of 4.9(f), the provisions require that at the subsequent consenting stages the required infrastructure must be included and funded in an LTP. That is a clear requirement and the KDC must ensure that it acts in a timely manner not only to plan for the capacity increases but to ensure that the capacity will be available and operational when it is needed.
- 8.8 I do not understand the comment in 4.9(g). The purpose of my wording is to ensure that infrastructure upgrades are either in place or included in an LTP before subsequent consents can be granted.
- 8.9 I need to emphasis one point. PC78 and Chapter 16, as amended, are specific to the Mangawhai Central development. The extent of the development is fully known so capacity upgrades can be planned with certainty. Chapter 16 does not apply to other developments.
- 8.10 In respect of 4.10(a), PC78 may be dealt with by KDC staff as an RMA process under delegated powers. PC78 simply amends the provisions of the District Plan. However, planning and funding proposals for a highly significant development must to be dealt with through an LTP. To suggest that funding issues and capacity in respect of Mangawhai Central could be dealt with by KDC staff under delegated powers at the subsequent consent stage shows a complete lack of understanding of

the governance structure of a local authority, and a lack of awareness of the need to plan capacity well in advance of the need occurring. (According to WSP in the Master Plan Strategy it takes 6 to 8 years from planning to operational.)

- 8.11 In response to MCL's assertions in 4.10(b), I restate that RMA processes and LGA2002 processes run in parallel. Good governance is achieved by ensuring that KDC staff limit their delegated powers to RMA considerations. Likewise, the significant decisions involving planning and funding for the Mangawhai Central development must be considered by the elected members and consulted with the community through the LGA 2002 processes and inclusion in an LTP.

9. MCL'S POTENTIAL ALTERNATIVE (Paragraph 4.11)

- 9.1 I object to the use of the wording "planned capacity" on the grounds set out in my previous submissions (Evidence) and in these submissions.
- 9.2 I also object to the list of matters in paragraph 4.11 of MCL's submissions that could provide evidence of planned capacity. My reasons are stated in paragraph 8.4 above.
- 9.3 I note that the consideration of one or more of the matters is not compulsory – "could include". The list could be completely ignored. Likewise, the list is non-exhaustive, so the KDC staff could simply deem that a commitment to planning equates to evidence of planned capacity.
- 9.4 Again, MCL fails to understand that planning decisions and funding decisions (whether funding is provided by the KDC or the developer) for a proposed development of the significance of Mangawhai Central, are outside the scope of the RMA. Those decisions come within the ambit of the LGA2002 and that planning and funding must comply with the requirements of the legislation. The situation is no different to the water supply provision Policy 16.3.9.1 28) referred to in paragraph 4.5 above. The available water supply must comply with relevant guidelines, the Code of Practice, legislative requirement and opportunities for water demand management and rainwater harvesting.
- 9.5 We need to remind ourselves that the Hearing Panel recommended that PC78 should be adopted on the basis that water supply and

wastewater infrastructure for the development were not yet in place but that those issues could be resolved at the later consent stages. The appeal parties have all agreed that the issues of water supply and wastewater infrastructure should be deferred until the subsequent consent stages. We are now considering the appropriate wording to ensure that subsequent consents are not granted unless wastewater capacity is planned and funded. Loose wording is not sufficient. We need to ensure that the supply of water is available and compliant with all relevant requirements and legislation (which has been achieved), and that wastewater capacity is either available or planned and funded in compliance with the legislation (which had not been achieved).

KDC'S SUBMISSIONS

10. CRITICISM OF THE BOONHAM AMENDMENTS

- 10.1 Paragraph 4.4(a)(i) of KDC's submissions is a little difficult to follow. The amended provisions in Chapter 16 are not generally applicable provisions that apply to all developments. They are specific to PC78 and the Mangawhai Central development. The amended provisions set out the requirements for water supply and wastewater that must be satisfied before further consents can be issued for that specific development. A change of council is irrelevant. Subsequent amendments to the proposal in the LTP can be made. Whether that is through an annual plan or an LTP depends on the significance of the change.
- 10.2 I also struggle with the point raised in 4.4(a)(ii). The Mangawhai Central development is progressing with a substantial number of consents granted and roading and buildings well under way. All this development has been consented under the unamended Chapter 16. However, once PC78 is adopted, subsequent consents for subdivision and land use will not be granted unless there is compliance with the provisions in respect of water supply and wastewater capacity and funding that have been agreed to in the PC78 process.
- 10.3 I refer to paragraph 4.4(b). These are just general comments. They do not apply to this situation. The Master Plan Strategy outlines how the capacity requirements are to be dealt with. Once options are considered and decided on, planning for capacity upgrades will be under way along with funding information. The final proposal in the

LTP (or amendment) will indicate the various sources of the funding, whether it be from the KDC, the developer, or the government. If there are any subsequent changes to the proposal then it can be covered by an amendment to the LTP or included in an annual plan, depending on the significance of the change.

- 10.4 I agree that where existing capacity is able to be clearly demonstrated then further consents can be issued. The problem arises when there is insufficient existing capacity. In paragraphs 5.1 to 5.6 the KDC considers the various meanings and applications of the wording “planned capacity”. My concern about the ‘looseness’ of this expression is heightened by the KDC’s suggestion in 5.4 that it “*is committed to continuously upgrading the capacity of the MCWWS to service all growth in Mangawhai, including from Mangawhai Central*”. KDC clearly considers that a commitment to increase capacity equates to “planned capacity”.
- 10.5 I have formed the view that KDC’s reluctance to plan and fund capacity requirements through a long term plan, and its eagerness to advance capacity through informal processes, is because it wants to avoid the scrutiny that the LTP processes require. Decisions on planning capacity and its funding would have to be made by the elected members and consulted with the community. So far, the KDC has largely progressed the Mangawhai Central development through RMA processes, with KDC staff making all the decisions. KDC appears to be very keen to keep it that way and to avoid the informed scrutiny of the elected members and the community.
- 10.6 Later this year, according to the Master Plan Strategy, KDC will be advised by WSP of the capacity issues with the MCWWS. It will be fully informed on the capacity needed to meet capacity demands. It will be provided by WSP with the options for providing that capacity. It will also know where the funding is coming from, whether through debt or from developer contributions. Because of the urgency of the matter it will need to proceed with the planning process and consultation as soon as possible.
- 10.7 This is how Sue Davidson, General Manager, Sustainable Growth and Investment and the acting General Manager, Infrastructure Services at Kaipara District Council, relates the sequence of events in her Evidence of 11 February 2022 in respect of a new disposal option:

4.30 The Council has not currently decided which of these options it will pursue. This will require consultation with the

community, preparation of an options assessment, and an application for consent to be made for the Council's chosen option. The Council is conscious that this may be a lengthy process, and is committed to commencing engagement with the community on this later this year.

4.31 The amount of funding can be reassessed through the LTP process, if required, once there is greater certainty as to strategy and cost.

- 10.8 If the Boonham amendment is adopted by the Court then it is highly likely that the KDC will be obliged to comply with the requirements of the LGA2002 in respect of this significant proposal, and go down the LTP track. If the consent order version is adopted, or if alternative, more informal processes are permitted, as suggested by the KDC and MCL, it is highly likely that the all subsequent decisions will be made by KDC staff and the requirements of the LGA2002 in respect of significant decisions will be ignored.

11. KDC'S PROPOSED VERSION

- 11.1 In paragraph 6.1 the KDC sets out its proposed amendments:

(a) No changes be made to Policy 16.3.9.1.5, 16.7.4 Discretions for Restricted Discretionary Activities (eee), or 16.10.8.1 Matters Over Which Discretion is Restricted (ff).

(b) However, 16.7.4.1 Assessment Criteria (eee) and 16.10.8.2 Assessment Criteria (f) are amended in the manner shown in Annexure 1 to these submissions.

- 11.2 I do not agree with (a). This is the same as the consent order version
- 11.3 I do not agree with (b). The wording in the main body is too wordy and repetitive. The first "Whether the proposed...." Is acceptable but the second "Whether the servicing" is repetitive and meaningless. It leads nowhere. What if the servicing needs of the proposed developments require upgrades to existing infrastructure? What are the consequences?
- 11.4 The matters of consideration are too convoluted, too vague, and too subjective. They are not applicable to the very specific situation and requirements of the Mangawhai Central development under Chapter 16, as amended by PC78.

12. SECTION 32AA ANALYSIS

- 12.1 The objective of the amendment to the provisions in issue is to require the local authority to perform its statutory function in reviewing objectives, policies, and methods of Chapter 16 of its District Plan (PC78). In performing its statutory function the local authority must ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district. (Section 31(1)(aa) of the RMA).
- 12.2 The options currently available are the version of the provisions in the signed consent order, the Boonham version, the option suggested by MCL in paragraph 4.11 of its submissions and the option suggested by the KDC in its submissions.
- 12.3 The consent order version is too loose and is open to many interpretations. The matters of evidence of planned capacity in the MCL version are vague and open-ended and do not provide sufficient guidelines. The KDC versions are the same as the consent order version in respect of the three provisions. In respect of the other two provisions the new wording is repetitive, and the discretionary considerations do not requires the planning and funding to be in an LTP.
- 12.4 The Boonham version requires planning and funding to be included in an LTP. This efficiently and effectively meets the requirements of section 31(1)(aa) of the RMA, that the local authority's function is to ensure that there is sufficient development capacity to meet future demands.
- 12.5 The Boonham version requires there to be: *adequate planned and funded infrastructure to service the proposed development that is included in a long term plan or an amendment to a long term plan*. That is wide enough to embrace all proposals for the construction of the capacity increases, and funding from any source, including the developer. The LTP would simply provide details of the various funding sources that were being contributed to the development.
- 12.6 Section 18A of the LGA requires every person exercising powers and performing functions under this the RMA to take all practicable steps to

(b) ensure that policy statements and plans—

(i) are worded in a way that is clear and concise;

The Boonham version is clear and concise. The three other versions are vague and do not set out the appropriate guidelines for interpreting “planned capacity”.

13. CONCLUSION

- 13.1 The wording “planned capacity” agreed to by the parties to the Mangawhai Matters appeal in the consent document is too vague and open-ended.
- 13.2 The alternative amendments proposed by the KDC and MCL do not add any clarity or direction to the consent document version
- 13.3 The Boonham version is concise and clear in its meaning. It makes it clear that to ensure that capacity infrastructure for the significant Mangawhai Central development is lawfully planned and funded, it must be included in an LTP.
- 13.4 MCL’s recent decision to fund part of the capacity developments can be incorporated in the planning and funding proposal in an LTP.
- 13.5 The important point is that the provisions in issue are part of the PC78 amendments to Chapter 16 of the District Plan. They only apply to the Mangawhai Central development and its particular circumstances. They are no applicable to other developments.
- 13.5 An alternative amendment could be the one based on the definition of “infrastructure-ready” in sub clause 3.4 (3) of the NPS-UD that is set out in paragraph 6.3 above, namely:

That there is adequate existing wastewater infrastructure, or funding for adequate wastewater infrastructure to support the development is identified in a long term plan.

DATED this 25 day of March 2022 at Mangawhai Heads

“Clive Boonham”
