

**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

EVIDENCE OF CLIVE BOONHAM

Appellant

11 March 2022

Clive Boonham
25 Alamar Crescent
Mangawhai Heads
Mangawhai 0505

NOTE

My proposed amendments to the relevant amended provisions of Chapter 16 (as agreed by other parties) are included in Attachment 1 at the end of this document.

1. INTRODUCTION, QUALIFICATIONS AND EXPERIENCE

- 1.1 My full name is Clive Richard Gerald Boonham. My wife and I have had a holiday home in Mangawhai Heads since 2008, and we have lived here permanently since 2013.
- 1.2 I hold an LL.B (Hons) from Exeter University (UK). I was admitted to the bar in New Zealand as a Barrister and Solicitor in 1977. I worked for Butler White & Hanna as a law clerk then as a conveyancing solicitor from 1976 until 1981. I subsequently set up my own shop-front practice which became the Conveyancing Centre, Balmoral, Auckland. I retired from the practice some years ago. I no longer hold a practising certificate but I am still enrolled as a Barrister and Solicitor of the High Court of New Zealand.
- 1.3 Since 2009 have been concerned with the irregular decisions and actions of the Kaipara District Council (KDC), especially in respect of unlawful rates. I took the matter up with the KDC directly without any success. In 2010 I lodged legal submissions with the Office of the Auditor-General (OAG), but was again rebuffed. In late 2011 I made legal submissions to the OAG about the failure of the KDC to consult with the community on the proposal for the EcoCare wastewater scheme, as required by the Local Government Act 2002.
- 1.4 In early 2012 Nicola White (Deputy Auditor-General Legal) came to Mangawhai with her team and met with those of us who had challenged the KDC's actions. She apologised to us on behalf of the Auditor-General for having ignored our submissions. She also announced the OAG inquiry into the EcoCare scheme.
- 1.5 At about the same time the KDC commissioned a legal opinion from Simpson Grierson on the legality of certain rates and other decisions of the KDC. The report from Jonathan Salter stated that the rates in question and other decisions were in breach of the Local Government (Rating) Act 2002 and would be likely set aside by the High Court. Commissioners were appointed by the government. They refused to set the rates aside as they had not been declared to be unlawful by the High Court. As a last resort the Mangawhai Residents

and Ratepayer Association (MRRRA) filed a judicial review application in respect of the rating and other decisions. I was part of the MRRRA's legal panel. The commissioners immediately promoted a private bill in Parliament to retrospectively validate the unlawful actions and decisions. The KDC delayed the legal action by a strike-out application (dismissed with costs) but that enabled Parliament to rush through the legislation just before the substantive hearing in the High Court. The Kaipara District Council (Validation of Rates and Other Matters) Act 2013 recites 73 paragraphs of illegalities in its Preamble.

- 1.6 For many year I have published a website kaiparaconcerns.co.nz expressing my views on the actions and decisions of the KDC

Involvement in PC78

- 1.7 I was a submitter to PC78 and made submissions at the Panel hearing.
- 1.8 I am also an appellant in this Environment Court proceeding on my own behalf, but also as an informal representative of the Mangawhai community.

2. THE ISSUE BEFORE THE COURT

- 2.1 My Notice of Appeal raised several issues. Following mediation only one issue remains to be considered by the Court.
- 2.2 The issue is whether the proposed amendments to Chapter 16 of the Kaipara District Plan relating to the existing capacity or planned capacity of the Mangawhai wastewater infrastructure should be drafted more strictly to ensure that subsequent consenting can only proceed if there is either adequate existing capacity, or adequate capacity is planned and funded in a long term plan, or an amendment to a long term plan.

Brief background

- 2.3 Originally PC78 was proposed on the basis that the Mangawhai Community Wastewater Scheme (MCWWS) had the existing capacity to accommodate the Mangawhai Central development. This approach was supported by Mangawhai Central Limited (MCL) and the Kaipara District Council (KDC) and the expert consultants for those parties.
- 2.4 During the Panel hearing the submitters raised serious doubt as to the existing capacity of the MCWWS. As result the Panel sought further information from KDC on future planned capacity and its funding.

- 2.5 In its recommendation the Panel acknowledged the dispute over there being planned capacity, but accepted that there was sufficient planned capacity for the purposes of a plan change. The Panel expressed the view the issue of capacity could be dealt with at the subsequent consent stages. This is what I call the back-stop argument
- 2.6 I was present at the KDC Council meeting when the recommendation of the Panel PC78 was adopted. Several elected members who supported PC78 advanced the view of the Panel that capacity was not an issue at the plan change stage, because it would be dealt with at the subsequent consenting stages.
- 2.7 The issue of adequate wastewater capacity has now been deferred in the plan change process because there is a backstop. However, the loose drafting of the backstop provisions does not ensure that the issue of capacity, especially planned capacity, will be given due consideration at the later consenting stages.
- 2.8 The issue is very much alive because of the repeated statements of officers of the KDC and their expert consultants who adopt a colloquial meaning of the word “planned” in “planned capacity”. They suggest that “planned” simply means an intention or a commitment, and nothing more.

3. SCOPE OF EVIDENCE

- 3.1 In my evidence I address the existing capacity and the planned capacity of the MCWWS. Although the existing capacity is not strictly an issue before the Court, it is necessary consideration in that that planned capacity only becomes a relevant consideration if there is no existing capacity.
- 3.2 In preparing my evidence I have reviewed the various reports on the state of the MCWWS and the Mangawhai Effluent Reuse Project on the KDC’s website at:

<https://www.kaipara.govt.nz/services/water-services/wastewater/mangawhai-wastewater>

The most relevant report is:

- WSP Opus Mangawhai Community Wastewater Treatment Plant: Future Options Development 28 November 2019.
<https://www.kaipara.govt.nz/uploads/wastewater/MCWWS/2019-11-28%20Mangawhai%20Future%20Options%20Report.pdf>

- 3.3 I have reviewed the recommendation of the hearing Panel on PC78.
[filestream.ashx \(escribemeetings.com\)](#)
- 3.4 I have obtained relevant information from the KDC under the LGOIMA process.
- 3.5 I have reviewed the combined WSP/KDC report entitled “Mangawhai Community Wastewater System, Master Plan Strategy” dated 21 January 2022. [filestream.ashx \(escribemeetings.com\)](#)
- 3.6 In preparing my evidence I have reviewed the following:
- a) The evidence of Ms Davidson, the KDC’s acting General Manager Infrastructure Services.
 - b) The evidence of Steven Rankin, an expert engineering consultant for the KDC.
 - c) The evidence of David Badham, an expert planning consultant for the KDC.

4. MCL’S ACKNOWLEDGEMENT OF LACK OF WASTEWATER INFRASTRUCTURE

- 4.1 At a public meeting on 24 October 2019 to promote the Mangawhai Central development proposal (which I attended), MCL director Andrew Guest considered both the water supply and wastewater infrastructure issues. He acknowledged that MCL was responsible for establishing a water supply. However, in respect of wastewater he placed the burden on the KDC to provide wastewater infrastructure for the development. He suggested that a new sewerage system was needed and that the KDC would have to fix the issue. MCL would contribute by paying development contributions but the KDC had to face up to the situation.
- 4.2 This assessment of responsibility for providing wastewater infrastructure conflicted with both the District Plan and the KDC’s own Engineering Standards. Under the former, developers can only connect to the wastewater system if capacity is available. Under clause 7.1.1(a) of the Standards:

If the existing network does not have sufficient capacity at the nominated connection location to receive the number of sections or peak flows from the development, the Developer will either need to:

- *Design and construct an appropriately sized attenuating storage to reduce peak flows to level compatible with the network.*
- *Convey sewage to a different location in the network where adequate capacity exists.*
- *Pay for the required upgrade to the system*

The only option was for the KDC and MCL to enter into a joint development agreement for the provision of wastewater services to the development. Obviously MCL would be responsible for part of the funding.

- 4.3 For some unknown reason the KDC staff failed to follow this course. Instead they made the decision to assert that the MCWWS had adequate existing capacity to accommodate the Mangawhai Central proposal.

5. PC78 PROCESS

KDC's assertions of capacity

- 5.1 In a Memo of 20 October 2020 to David Badham & Alisa Neal, the KDC's consultant engineer Steven Rankin stated (with my underlining):

[Attachment 10 - Engineering Memo.pdf \(sharepoint.com\)](#)

We have met with KDC three waters staff and had discussions regarding the capacity of the plant and the feedback was consistent to that of the applicant that the plant does have capacity and they confirmed the scalable nature of the plant

Based on discussions with KDC and the WSP document provided, the existing MCWWS does have capacity and can be scaled to suit demand.

Mr Rankin's opinion:

Wastewater

Based upon discussions with KDC staff and the review of the documents provided to me as part of my assessment, it is my opinion that the existing wastewater treatment plant does have sufficient capacity to

cater for additional connections from either within, or outside the plan change area;

Note the vagueness of the opinion with capacity being asserted but with no quantification of that capacity beyond the ability to cater for additional but unquantified and unspecified connections.

- 5.2 In their section 42A report on behalf of the KDC, David Badham and Alisa Neal, planners of the KDC, stated: [Microsoft Word - PPC78 - s42A Report - Issue 5 - Final Draft \(sharepoint.com\)](#)

258 Having considered the opinions and conclusions of Mr Rankin and the provisions for wastewater in Chapter 16, our position is summarised as follows:

- We accept that there is sufficient capacity within the MCWS and that it can be upgraded to cater for additional demand in the future (should the need arise).*

Again, there is “sufficient capacity”, but for what?

MCL’s assertions of capacity

- 5.3 In his statement of evidence James Dufty, the engineering consultant for MCL stated: [10. FINAL James Dufty \(engineering\).pdf \(sharepoint.com\)](#)

Wastewater

The Council has confirmed during initial planning meetings that there is sufficient capacity in the wider network and at the treatment plant to provide for development of the PC78 site.

This is far more specific and relates directly to the existing capacity for the development of the PC78 site.

- 5.4 The opening legal submissions of Mr Gordon, Mr Mutch and Ms Ellis for MCL stated: [PC78 FINAL legal submissions on behalf of MCL.pdf \(sharepoint.com\)](#)

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.

5.5 With respect, that was not the case. There was no contrary expert evidence, as such, but submitters made available to the Panel the November 2019 WSP report which raised serious issues about the existing capacity of the MCWWS. <https://www.kaipara.govt.nz/uploads/wastewater/MCWWS/2019-11-28%20Mangawhai%20Future%20Options%20Report.pdf>

The KDC's and MCL's assertions of adequate existing capacity were put in doubt to such an extent that at the end of the first session the Panel requested further information from the KDC on future wastewater infrastructure planning and its funding. [Mangawhai Central Limited Plan Change 78 Direction \(Report from Council Officers\).pdf \(kaipara.govt.nz\)](#)

4. With respect to wastewater for the Mangawhai area we request officers provide a written report:

• What is the infrastructure planning being undertaken for wastewater disposal given the issues raised in the PC 78 hearing about whether or not there is disposal capacity or potential capacity in the existing scheme, or an alternative scheme, to accommodate further development within Mangawhai, including the additional capacity that would be enabled should PC 78 be approved as notified?

• In relation to the above bullet point, what are the funding decisions that have been made or are being contemplated by the Council in relation to the provision wastewater treatment/disposal (i.e. what has been committed and what is contemplated in the Council's Long Term Plan (LTP) or the next review of the LTP.

5.6 This request of the Panel is very relevant because it illustrates what needs to be established to prove that there is adequate planned capacity. The capacity has to be "enabled". There has to be funding decisions. And the information must be in a long term plan.

5.7 The further information was provided by Jim Sephton, KDC General Manager Structural Services. The information was vague and made general references to the proposed long term plan and future options and planning, but without providing a draft copy.

5.8 However, Mr Sephton did reveal the current capacity of the treatment plant:

1.2 For wastewater, the responses in summary are:

(a) The Mangawhai Community Wastewater Treatment Plant ("CWWTP") currently has 2411 connections with the immediate capacity for a total of 2800 connections, meaning there is currently

capacity for an additional 389 connections. [PPC78 Council Response to Hearings Panel Direction.pdf \(kaipara.govt.nz\)](#)

- 5.9 This surprising revelation that the treatment plant only had 389 connections left was an incontrovertible admission by the KDC that the treatment plant did not have enough existing capacity to cope with the requirements of the Mangawhai Central development. From this point on it became clear that KDC and MCL would have to rely on there being future planned capacity for the MCWWS.

Panel's Recommendation

Backstop argument

- 5.10 In paragraphs 160 the Panel considered the further evidence of Mr Sephton and decided at paragraph 162 that it represented the factual position and concluded:

163. Having considered the arguments made, we are satisfied that those particular aspects of the wastewater treatment plant are sufficiently "infrastructure ready" for the purpose of a plan change, recognising that somewhere along the way upgrades will be required and that further development will not be possible until such is given effect and that further development is to be largely funded by development contributions. The latter point is particularly important as the Plan Change only provides the structural framework for the development. The detailed applications, for subdivision for example, can only follow once and if the wastewater infrastructure (in this instance) is secured.

In other words, capacity is of lesser importance at the plan change stage because a lack of capacity will be caught at the subsequent consent stages

- 5.11 The Panel appears to have accepted a lesser standard of proof of capacity for a plan change, but strictly on the basis that any subsequent consent process would need to ensure that the wastewater infrastructure was "secured". The Panel referred to the Mangawhai Spatial Plan and its emphasis on infrastructure, planning, funding and financial planning. The underlining is by the Panel:

164. The MSP clearly signals this setting out under section 3.3 – Three Waters - Implications for the Kaipara District Plan: 71 Careful planning for additional three waters infrastructure and management mechanisms is required to avoid adverse effects on the physical and

natural environment. Financial planning is also required in order to avoid economic stress on the community and the Council.

Also, the funding and construction of infrastructure will need to be synchronised with population growth, in order to continue to meet the needs of the community. Any changes to the Kaipara District Plan to accommodate additional growth in Mangawhai need to be accompanied by infrastructure planning, funding and construction. It is expected that the cost of growth will be met by land developers and recovered through development contributions. (Underlining is our emphasis)

- 5.12 in respect of the disposal field the Panel accepted (at paragraph 166) that the 2019 WSP report and Mr Sephton's further information indicated the route to be taken, but that the matters were not yet secured. However, they were secured enough for a plan change. The Panel added:

168. We accept that not all the 'ducks are yet lined up', but they are sufficiently aligned for a plan change purpose.

6. POST PC78 PANEL HEARING

- 6.1 On 24 May 2021 Mr Waanders of the KDC confirmed – in response to a LGOIMA request – that the KDC was waiting for reports from WSP on the state of the MCWWS and:

We are developing a model that will inform Council as to the actual state of the existing network. This will also help plan for growth projects and upgrades. (Underlining added)

The reporting and modelling would be undertaken by WSP.

- 6.2 Despite the many reports on the state of the MCWWS over the years, it is clear that the KDC has little idea of the state of the MCWWS and its capacity. Once WSP had reported the KC would be in a position to make plans for capacity increases.

7. LONG TERM PLAN 2021/2031

- 7.1 Mr Sephton advised the Panel in his further information that the 2021/2031 LTP would include the planning and its funding to provide future wastewater

capacity to accommodate growth including Mangawhai Central. The LTP failed substantially to meet those requirements. The Consultation Document was a poorly drafted potpourri of options, aspirations, but very little planning, and even less funding. (Note: The Consultation Document has been removed from the KDC website but the part relating to Mangawhai Central can be found in the [LTP main document](#) on pages 14 and 15 under Wastewater.)

- 7.2 The Consultation Document included a timetable showing the Future of Mangawhai Wastewater. For the year 2021: “catchment study to inform on reticulation strategy and renewal”, “water reuse optioneering”, and “community engagement”. From 2021-2028: “upgrade network”, “increased treatment capacity”, and “increased disposal system”. These capacity improvements were to be available by 2028. In other words, there was to be a study of the state of the scheme, in line with Mr Waanders comments above, followed by “optioneering”, and then the planning and the consultation process for the capacity upgrades.
- 7.3 The Consultation Document refers to various “plans” for increasing capacity in the short term. These include disposing effluent to the golf course and increasing the size of the pipe from the treatment plant to the disposal field. However these are not plans in the legal sense but merely options that are being considered. The only plan in the document is for a balance tank. This is simply a large detention tank that stores wastewater before it enters the treatment plant. There are historic issues with the plant overflowing during peak holiday periods and during storms – the latter because of infiltration of rainwater into the reticulation pipes. The balance tank would collect the wastewater before it entered the treatment plant. Once the peak loading was over it would be fed into the treatment tank. The planning for this tank had been underway for over a year and the proposal and its funding have been approved by the elected members.
- 7.4 The only funding in the LTP for the capacity increases during the next ten years is \$10 million. As we shall see, this is completely inadequate to fund the capacity requirements to accommodate future growth.
- 7.5 There are also constraints on capital expenditure because of the debt limits imposed in the LTP. The charts on pages 39 and 40 of the adopted LTP show that the current external debt (for 2020/2021) is \$51.168 million. However, one of the key points of the Financial Strategy 2021-2031 (page 36) is:

To have net external debt capped at \$60 million.

That means that there is less than \$10 million freeboard for **ALL** KDC debt over the next 10 years. That will be impossible to comply with.

8. MASTER PLAN STRATEGY

8.1 This Master Plan Strategy (Strategy) was released on 02 February 2022. It is a joint document of WSP and the KDC which reports candidly on the state of the MCWWS, the issues of capacity, and the proposals for both long term capacity increases, along with short term measures to meet the approaching crisis in capacity. [Master Plan Strategy](#) – and [the KDC staff report on the matter](#), at page 14.

8.2 An explanation for the Master Plan Strategy is on page 5:

In 2020 WSP were commissioned to develop a wastewater network model. This is now calibrated based on measured flow, and now WSP are developing growth scenarios considering area and density of housing. These models will inform what additional capacity is needed, where and when across the system. This will enable options and costs to be developed with upgrades to the network occurring when needed in the future. All network strategy plans will be incorporated in the District Plan due end of 2022.

This confirms that the state of the scheme, its current capacity and the future required capacity, and funding, are still being considered.

Treatment plant capacity

8.3 Mr Sephton acknowledged in his further information to the Panel that at December 2020 the treatment plant had a capacity of 2,800 connections, of which 2,411 were already taken, leaving 389 available. That figure has now been updated. There were 2,502 connections at December 2021 leaving only 298 connections available. (Figures given by Sue Davidson at the Council briefing for the Master Plan Strategy on 02 February 2022 and confirmed in her evidence of 11 February 2022 at paragraph 4.3 .)

Disposal field

8.4 On page 8 of the Strategy it states:

Once growth reaches 3000 connections, a new disposal route is needed.

Based on the figures in the paragraph above there are only 498 connections still available before capacity is reached.

- 8.5 The options for new long term effluent disposal are considered on page 8. However: *“All disposal routes will require community engagement, options assessment and environmental assessment and resource consenting, so are expected to take 6-8 years before (they) can be operational.”* Clearly the KDC anticipates that once decisions are made on the appropriate capacity upgrades, the detailed planning will be included in an LTP as required by the KDC’s Significance and Engagement Policy. (See below paragraph 17.1)
- 8.6 The favoured long term option, because of cost, appears to be discharge to harbour or to sea.

Modelling

- 8.7 The modelling in the Strategy is based on there being 70 or 100 connections a year (foot of page 4). The 70 figure is not accurate and is probably based on development contributions collected rather than actual connections. The figure of 100 connections a year for normal growth is probably about right. (See paragraph 10.2 below)
- 8.8 The glaring omission in the modelling, and in the document as a whole, is the failure to mention or consider the capacity requirements of Mangawhai Central. It is the elephant in the room that is completely ignored.
- 8.9 In discussions Mr Gordon for MCL has argued that the omission is appropriate because PC78 has not been approved. It is not appropriate to plan for a development that may not proceed.
- 8.10 My response to that is that the Panel recommended the adoption of PC78 because of the assertions of the KDC and MCL that there was existing or planned capacity to accommodate the development. One cannot subsequently argue that the capacity required for Mangawhai Central cannot be considered in planning proposals because it has not been finally adopted.
- 8.11 In any case, MCL is proceeding with a development on the site under the existing provisions of Chapter 16. It has been underway for several years with various earthworks, subdivision and building consents having been granted. The building for the New World supermarket, the Bunnings store, the Mobil gas station, and other commercial buildings are well under way. The principal roading is also in place. Even if PC78 did not proceed, the Chapter 16 development with 500 lots would clearly go ahead. It should therefore be part of the modelling for future capacity.
- 8.12 As there is only one minor issue to be decided, it is clear that proposed development pursuant to PC78 will proceed. The modelling for future capacity

will therefore have to be reassessed. This means that the timelines on page 4 and 8 of the Strategy will have to be amended substantially.

- 8.13 The major concern with the modelling for future long term capacity is that it will not be operational for 6-8 years. (See the foot of page 7.) With only a very small number of connections available, there is going to be a crisis in capacity in the near future.

Short term flow management

- 8.14 The Master Plan Strategy considers Risk and Contingency on page 8. But it does so without any consideration of the effect that Mangawhai Central – or even the Chapter 16 development - will have on its modelling.
- 8.15 The Strategy acknowledges that growth may exceed capacity but proposes two strategies to cope with this. They are called Short Term Flow Management (page 5). One is the balance tank. Originally designed to cope with historic overflows of raw sewage during peak periods and storm events, because of looming capacity issues it has now been enlarged to provide storage for raw sewage. The sewage will be detained in the balance tank until capacity is available in the treatment plant. With the change of purpose the price has escalated from \$2.1 million to \$5.1 million. The planning for the balance tank has, so far, all been carried out in open council sessions. However I could not find any approval of the increase in price to \$5.1 million. Mr Bangma advised that it was approved by the elected members in a public excluded session.
- 8.16 The other short term flow management proposal is the disposal to the golf course option. On page 8 the strategy states:

The Mangawhai Golf Course provides around 450 more connections capacity on the disposal field.

The option is also considered on page 7. The document fails to explain that the proposal to discharge to the golf course is only an option at this stage. A report had been prepared and considered but there are outstanding issues with disposal being limited to summers, and environmental effects. Perhaps the major concern is lack of funding. \$1.5 million was allocated in the LTP but the cost is likely to be in excess of \$6 million. At this stage it is unclear if the proposal will go ahead.

- 8.17 Even if the golf course were to go ahead it would take several years to obtain the appropriate consents and complete the building work. On page 7 of the Strategy it suggests that the golf course option - if it proceeds - would not be available until 2024 at the earliest.

- 8.18 As it sits at present, there will be no long term planning for additional capacity until modelling is completed and options examined. Those long term plans will not become operational for 6-8 years. The only short term measure that is actually planned with funding secretly approved is the balance tank. That will probably not be operational until 2023. When it is operational it may serve as reservoir for raw sewage but that sewage will eventually have to pass through the treatment plant and ultimately to the disposal field. The question is: Will there be adequate capacity?

Funding

- 8.19 The issue of funding is passed over very lightly in the Strategy. It is mentioned briefly on page 8 under: *How do we fund this?* It states:

Funding to meet the costs of upgrade due to new development will be gathered by developer contributions.

This, of course, is not correct. The cost of upgrades are funded by KDC debt. Half of the interest on that debt is paid by ratepayers throughout the district through the general rate. The other half is capitalised. Development contributions are calculated to pay off the debt over 30 years.

- 8.20 KDC continues to misrepresent that capacity increases are funded by development contributions. At paragraph 4.14 of Ms Davidson's evidence:

4.14 However, the timing of upgrades to the MCWWS is a matter that must be determined very carefully. Undertaking upgrades "too early" (i.e. too far in advance of demand) creates a risk of the capital being expended ahead of when the investment is needed if growth is slower than predicted or does not occur. It also creates a risk of costs not being paid for by development contributions and instead being funded by the Council through debt, increasing debt levels.

This is completely incorrect. The capital cost of capacity increases must be funded either from reserves, which the KDC does not have, or through debt. That debt is repaid over 30 years from development contributions as properties connect to the scheme. In the case of Mangawhai Central it will take 15 to 20 year for all development contributions to be collected. (See paragraph 4.32 of Ms Davidson's evidence.)

- 8.21 The debt required to fund the proposed capacity increases in the Strategy is enormous. The November 2019 WSP report estimated at that stage that discharge to the ocean would be \$47 million (page 29), or discharge to the estuary \$26 million (page 26). The upgrade of the treatment plant would be \$20 million (Page 8 of the Strategy and page 10 of the Consultation Document

for the LTP.) There would be the upgrade of the rising main, which is not referred to in the Strategy. There is the cost of a new 12 km pipeline from the treatment plant to the Brown Road farm. This was referred to in the Consultation Document as an option – with “funding set aside” but not quantified or explained - but I am now advised that it may not proceed. The total cost of these long term capacity increases is in excess of \$60 million. In addition, the short term flow measures are going to cost \$5.1 million for the balance tank, and at least \$6 million plus for the golf course proposal, if it proceeds.

- 8.22 As it stands at present, only \$10 million dollars is allocated in the current LTP for the capacity increase over the next 10 years. That is not even enough to fund the short term fixes. There is also the cap on external debt that would have to be lifted.
- 8.23 The timelines on pages 4 and 10 of the Strategy indicate that the proposals for capacity increases will need to go through the community engagement process. Because of the significance of the proposals the community engagement will have to be through a long term plan or an amendment to a long term plan.
- 8.24 Ms Davidson indicates in her evidence that funding for capacity increases proposed pursuant to the Strategy will be included in an LTP. In respect of the golf course option:

4.26 In terms of funding, \$1.5 million in funding is currently committed in the LTP in relation to effluent disposal at the Golf Club. The Council has since received updated reports indicating that this is likely to be insufficient, and that the total cost is likely to be in the region of \$4.9-\$6 million. The Council will seek to amend the funding set aside in the LTP to make allowance for these increased costs, as part of its next LTP likely to be early 2023.

In respect of the 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 Provision has been made in the LTP for \$7.9m of expenditure towards a new disposal system and a further \$2.6m in 2032 with further investment provided for as part of the Infrastructure Strategy 2021-

2051.22 The amount of funding can be reassessed through the LTP process, if required, once there is greater certainty as to strategy and cost.

Given the amount of funding that will be needed, the LTP process will be required.

9. CAPACITY – EXISTING AND PLANNED

- 9.1 It is appropriate that I sum up the current situation in respect of current capacity and planned capacity in respect of the MCWWS.

Existing capacity

- 9.2 The treatment plant has 298 connections left. The disposal field has 498 connections left. These are KDC undisputed figures.

Planned capacity

- 9.3 There is no actual planned future capacity for the MCWWS. The Master Plan Strategy outlines the programme for assessing the state of the scheme, modelling, optioneering, finally formulating plans, approval by elected members, consultation with the community, consenting, procurement, construction etc through to operational in 6-8 years.
- 9.4 The decisions to be made by the KDC will trigger its Significance and Engagement Policy under the LGA 2002. (See paragraph 16.1 below.) This will require the proposal to be included in, and consulted through, a long term plan, or an amendment to a long term plan.
- 9.5 There is only one short term flow measure that has actually been planned in the legal sense. That is the balance tank. However, because the increase from \$2.1 million to \$5.1 million was approved in secret, it is unclear how it is to be funded.

10. RELEVANT ISSUES

- 10.1 These are matters that affect the issues of existing capacity and planned capacity.

Demand for capacity - *Normal annual growth*

- 10.2 The figures given by the KDC for the annual number of connections for normal growth vary widely, possibly because some figures are based on those who pay a development contribution. (Some properties that connect are not liable to pay a development contribution.) The most reliable figures for actual connections are those in Footnote 1 in Significant Forecasting Assumptions 2021-2031 in the 2021/2031 LTP. [FINAL Significant Forecasting Assumptions .pdf \(kaipara.govt.nz\)](https://www.kaipara.govt.nz/assets/Significant-Forecasting-Assumptions-2021-2031.pdf)

Actual connections to the Mangawhai wastewater scheme in 2018/19, 2019/20 and 2020/21 were respectively 89, 92 and an estimated 101 (based on 42 connections in 5 months Jul-Nov for 2020/21). This gives an average 94 new connections annually.

Demand for capacity - “connectable properties”

- 10.3 Over 500 properties in the MCWWS catchment area that are not connected to the wastewater network but are capable of being connected (i.e. service available) are charged a targeted rate. The connectable rate is 75 per cent of the connected rate. See Rating Tools in the [2021/2031 LTP](#) at page 78. These properties are defined as:

Properties capable of connection are defined as being within 30 metres of a public sewerage drain to which it is capable of being effectively connected, either directly or through a private drain.

- 10.4 These properties all have their own individual wastewater systems. The properties could be forced to connect to the MCWWS pursuant to the provisions of the Local Government Act 1974. However, I have been advised that Mayor Smith has promised not to exercise that right. This is rather strange considering that the KDC would be able to bill the full rate each year, plus it would receive a development contribution from each property and other charges as well. It was a fundamental principle underlying the EcoCare development that all properties in the catchment area should be obliged to connect to spread the cost of the investment. As Ms Davidson states in her evidence:

4.5 The Council requires all new development in urban Mangawhai to connect to the MCWWS, and encourages existing development to also connect, due to the improved environmental outcomes from connecting, and on the basis this will result in lower average costs.

It was also a philosophical principal that all those on private schemes should be compelled to connect to the MCWWS to ensure that Harbour remained pristine. As Ms Davidson states in her evidence:

4.2 The MCWWS was first commissioned in 2009 to service Mangawhai Village and Mangawhai Heads. The key driver for commissioning the scheme in 2009 was to reduce reliance on septic tanks, and improve the water quality of the Mangawhai Estuary.

- 10.5 With 500 plus properties being rated because they are “capable of being effectively connected” to the MCWWS, the reality is that with only 298 connections remaining - according to the KDC – many of those properties could not be connected even if they applied. There has to be a reason why the KDC is choosing to miss out on a sizeable chunk in development contributions and rates. The obvious one is that if those 500 properties were compelled to connect, the wastewater capacity crisis would become headline news.

Demand for connections – Mangawhai Central

- 10.6 The capacity required by Mangawhai Central – the number of connections – has never been revealed. Whilst there is a cap of 500 lots on the existing Chapter 16, there is no maximum number of lots under PC78. The figure of 1,000 connections has been adopted informally, although some experts suggest that there could be as many as 1,500 lots. The number of lots is, of course, an important consideration when assessing capacity, as is the number of lots serviced by a reticulated water supply. According to WSP the average inflow from a lot on a reticulated supply is 50 per cent greater than that on a lot serviced by harvested rainwater.
- 10.7 In summary, the number of connections required for Mangawhai Central is unclear.

Timeline for connections from Mangawhai Central

- 10.8 The anticipated timeline for the connections of the Mangawhai Central lots has also been a mystery. No information was available during the Panel hearing. It was not until the WSP report of 14 September 2021 that it was revealed on page 5: [https://www.kaipara.govt.nz/uploads/wastewater/MCWWS/2021-09-14%20Mangawhai%20Balance%20Tank%20Risk%20of%20Increasing%20Flows%20at%20TheIma%20Rd%20\(Outfall\)%20Pump%20Station,%20WSP.pdf](https://www.kaipara.govt.nz/uploads/wastewater/MCWWS/2021-09-14%20Mangawhai%20Balance%20Tank%20Risk%20of%20Increasing%20Flows%20at%20TheIma%20Rd%20(Outfall)%20Pump%20Station,%20WSP.pdf)

The Mangawhai Central Development, that has been through a plan change process to intensify the density of housing, is expected to bring up to 1,000 connections, and developers have informed KDC that they anticipate the first phases to occur soon. This may result in 200 connections per year.

- 10.9 As it has become obvious that there is a looming crisis in capacity, it appears that the figure above has been revisited. During the mediation session in December 2021 Mr Gordon provided figures that were very much lower than the figure provided by WSP. Mr Gordon has updated those figures because of the delay in PC78 and they now read:

2022/23 year 55 lots; 2023/24 year 60 lots and 2024/25 70 lots.

- 10.10 In her evidence Susan Davidson states:

4.32 In terms of MCL's intentions for the PC78 site, Mr Tollemache has indicated MCL has advised him that its estimated rate of connections are 55 connections in Year 1, 60 connections in Year 2 and 70 connections in Year 3. Beyond that MCL has provided no estimate of its likely rate of connections, although I note that at a rate of 50-70 connections per year it would take 15-20 years for the site to reach its estimated capacity of 1000 residential units, allowing time for planned upgrades to the MCWWS to take place.

- 10.11 The 15 to 20 years for the full development is way beyond what was represented to the Mangawhai community. It will also come as surprise to Foodstuffs, Bunnings and other commercial entities who were relying on a more immediate large population catchment for their stores.

Planned capacity - moving the goal posts

- 10.12 In the early stages of PC78 the KDC and MCL were comfortable asserting that there existed adequate capacity to accommodate the Mangawhai Central development. This was taken to mean the whole development of 1,000 or more connections. It was never specified and never questioned. It was accepted that the development would proceed at a substantial rate, more like the 200 connections a year advised by WSP late last year.
- 10.13 With challenges to the assertions of capacity, both existing and planned, and the realisation that there is a looming capacity crisis, MCL and KDC appear to have moved the goal posts by slowing down the proposed rate of connections as set out above. By slowing the rate of connections to 50 a year, by preventing the 500 connectable properties from connecting, by enlarging the balance tank to store raw sewage, and by proceeding with the golf course option, it could eke out sufficient capacity to enable KDC to assert that there exists adequate capacity for the Mangawhai Central *at the newly adopted rate of connections*. The problem is that this would be conditional on many things. And ultimately

there is going to be capacity crisis sooner or later unless capacity upgrades are planned, funded, consented, and constructed.

Demand for connections - Misrepresentation of base capacity

- 10.14 During the hearing the Panel asked the KDC if the 500 lots permitted under the current Chapter 16 were already allocated capacity in the MCWWS. The KDC responded in the positive. The Panel relied on this response in its recommendation:

142. As a reminder, we must accept that the infrastructure base case includes the 500 dwellings already provided for under the existing Estuary Estates chapter 16 ODP provisions. The relevant additional capacity for our consideration is the 500+/- extra dwelling units proposed by PC 78 above that base case figure.

- 10.15 The masterplan engineering report from McKenzie & Co (for MCL) also made the same mistake, again based on advice from the KDC:

[PPC78 Attachment 06 Engineering Report.pdf \(sharepoint.com\)](#)

It has been confirmed by KDC that the existing WWTP has been designed to allow for the full development of the various subzones under the Operative Estuary Estates Structure Plan.

Note that the wastewater plant was designed and built before Estuary Estates became part of the District Plan.

- 10.16 In his evidence of 11 February 2022 Mr Badham for the KDC states:

13.5 As outlined earlier in my evidence, the Site is already zoned for development provided for under the existing Estuary Estates Chapter 16 provisions of the KDP. Therefore, the infrastructure base case already includes the 500 dwellings anticipated by the status quo. The main relevant additional capacity for consideration is the 500+/- extra dwelling units proposed by PC78 above that base case figure.

These assertions are all wrong. In fact no allocation of capacity was made in respect of Chapter 16. The KDC operates a first come first served approach to wastewater connections. A permitted number of lots does not signify that infrastructure is available.

11. KDC's AND MCL's INTERPRETATION OF "PLANNED"

- 11.1 Both KDC and MCL have adopted an interpretation of the word “planned” in “planned capacity” that is far removed from the use of the word in a legal context. This is quite bizarre given PC78 is **plan** change under the RMA. It is a proposal to amend the Operative District **Plan**. The reference to “planned” wastewater infrastructure in a legal document must refer to legal planning that must be done according to the legislation, in this case the LGA2002. I find it hard to accept that KDC staff genuinely believe that “planned” in this context has any other meaning than planned according to law.
- 11.2 I discussed the issue several times with Jim Sephton the KDC General Manager Infrastructural Services. I challenged him that there was no actual wastewater planning in the 2021/2031 LTP. He disagreed and gave me an example. He said that the KDC was planning to have 5,000 connections by a certain date. To him the mere intention to do something constituted “planning”. That is the colloquial meaning of the word.
- 11.3 That meaning is reflected in the evidence that was recently filed by Sue Davidson, Steven Rankin, and David Badham. The relevant wording is underlined.

Sue Davidson’s evidence

- 11.4 Ms Davidson’s uses the word “planning” interchangeably with the word “intending” or the expressions “is committed to” or “is proposing”. This is illustrated in paragraphs 4.1, 4.6, 4.7, 4.12, 4.16, 4.18, 4.24, 4.28, 4.33.

Steven Rankin’s evidence

- 11.5 Mr Rankin relies principally on the evidence of Ms Davidson. He is more careful with his wording when he states:

5.5 Ms Davidson’s evidence addresses the Council’s commitment to these works

(b) The Council is committed to upgrading the capacity of the WWTP.....

However:

5.10 (b) The Council has committed to the continued operation and expansion of this infrastructure as subdivision and development proceeds to keep up with demand, and is planning for this;

David Badham’s evidence

11.6 *13.7 Ms Davidson has outlined that Council intends that all future urban growth in Mangawhai will be serviced by the MCWWS, and details the plans that are already underway to increase capacity. This includes reference to the WSP Report that I referenced previously. Ms Davidson concludes that Council is committed to progressively upgrading the MCWWS to service future growth in Mangawhai including that enabled under PC78.**

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

** The WSP report's modelling does not include any consideration of the PC78 proposed development or the current Chapter 16 development. Neither of those developments feature in any KDC proposals.*

11.7 There has to be considerable concern over the KDC's loose use of the word "planning". Senior KDC staff and its expert consultants are stating, as in Mr Badham's statement immediately above, that the KDC has a clear plan to upgrade the MCWWS to cater for additional demand in future. In other words there is already "planned capacity" as set out in the current wording of the amendments to Chapter 16. On that basis the KDC could now grant subdivision and building consents pursuant to the provisions amended by PC78.

12. CONTRADICTION EVIDENCE OF KDC'S EXPERTS AS TO CAPACITY

Steven Rankin's evidence

12.1 Mr Rankin acknowledges the need for capacity upgrades:

5.4 The WSP document outlines the current and future works at the MCWWS and the associated disposal options necessary to upgrade the capacity of the MCWWS in the future, in response to growth.

However, he contradicts himself:

5.10 Overall, my opinion is unchanged from the opinion I expressed in the Council level Hearing for PC78. Namely, in my view:

(a) From an engineering perspective, the wastewater infrastructure necessary to service the PC78 area exists, and can be upgraded;

These statements of Mr Rankin must be of great concern. He confirms his opinion expressed at the Panel hearing, as set out in paragraph 4.1 above. That opinion was open-ended: the MCWWS *does have sufficient capacity to cater*

for additional connections. His current statement refers directly to the proposed development under PC78:

...the wastewater infrastructure necessary to service the PC78 area exists,

That is despite the clear evidence that there are only 298 connections left in the treatment plant and only 498 left in the disposal field.

12.2 Of equal concern is Mr Rankin's opinion on future planned capacity:

5.10 (b) The Council has committed to the continued operation and expansion of this infrastructure as subdivision and development proceeds to keep up with demand, and is planning for this;

In other words there is already "planned capacity".

12.3 If Mr Rankin was employed by the KDC at the subdivision and building consent stages, and he adopted the opinion set out above, the current requirement for "adequate existing capacity or planned capacity" would be met.

David Badham's evidence

12.4 Mr Badham acknowledges the situation in respect of existing capacity and the need for future additional capacity:

13.6 The MCWWS currently has capacity for 2,800 connections with approximately 300 future connections remaining. With the number of connections anticipated based on past connections per annum, it is clear that the MCWWS will require upgrades to cater for not just the development anticipated by PC78, but also further development within the rest of Mangawhai.

However, his overall opinion is somewhat equivocal:

13.10 it is my opinion that:

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

This is a simplistic statement that means nothing and has no reference to adequacy or Mangawhai Central. Having made the unequivocal statement in 13.6, Mr Badham should have been consistent and stated that there is not adequate existing capacity for Mangawhai Central.

The opinion continues:

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

This is a sloppy and misleading use of the word “plan”. But, as in the case of Mr Rankin, Mr Badham’s opinion could be used to establish that there is “planned capacity” and subsequent consents could be issued.

- 12.5 In paragraph 13.10 (d) Mr Badham endorses the current wording of the wastewater capacity provisions and suggests that any future consents should be withheld unless capacity is “adequately demonstrated”. That raises the question of whether capacity was adequately demonstrated for Mr Badham to formulate the two arms of his opinion. It also raises the concern that at the future consent stages “adequately demonstrated” might simply mean, in a non-notified consent application, the unchallenged opinion of an expert witness.

13. MANGAWHAI MATTERS INCORPORATED

- 13.1 Mangawhai Matters Incorporated (MMI) have accepted the amendments to the Chapter 16 provisions and have withdrawn from this appeal. However, in their latest newsletter to members they express reservations about the wording of the provisions relating to subsequent consents. The newsletter states:

Once the Mangawhai Central plan change is approved a resource consent will be required for the development of each individual subdivision and it is unlikely these will be notified. However once the resource consents are approved the information can be obtained from the council. We are setting up a team to monitor that all the requirements in the plan change have been met and interpreted correctly. If not we will be asking for a judicial review.

This shows clearly that although MM has not supported my stance on this matter, it shares my misgivings that the wording of provisions might be misinterpreted by the KDC staff in considering non-notified consent applications.

14. MCL’s CONSENTS

- 14.1 MCL has obtained many consents for its proposed development under the existing Chapter 16 provisions. The consents align with the Mangawhai Central

proposed development but were granted under the existing Chapter 16 provisions.

- 14.2 It is highly relevant to the issue before the Court to see how the wastewater capacity issues were dealt with in the consent processes.

Supermarket consent

- 14.3 Mangawhai Central Limited applied for consent for a supermarket and main street development, including a subdivision, at 83 Molesworth Drive, Mangawhai. This consent is of special importance because it included the consent for a subdivision. The consent was granted by a Hearing Panel

- 14.4 In his statement of evidence James Dufty the engineering expert for MCL stated:

3.4 The Council have confirmed that there is sufficient capacity in the wider network and at the treatment plant to provide for the Proposal.

9.3 The Proposal can be serviced for stormwater, water supply and wastewater through a combination of public and private devices.

- 14.5 The KDC Section 42A report 28 April 2020 of Vishal Chandra, Planning Consultant for Kaipara District Council stated:

Infrastructure

9.124 The proposed infrastructure a for reticulated wastewater system is able t to service the proposed development as there is capacity within the Council treatment plant for the proposed loading. (Sic)

9.128 Council engineering expert, Prasad Sappa confirms all of infrastructure services acceptable. I adopt Mr Sappa's position, and confirm the proposed servicing appropriate which does not create downstream effects.

9.142 All proposed sites are able to be serviced with infrastructure including access, water supply for drinking and firefighting, stormwater and wastewater

- 14.6 The Engineering Assessment of Prasad Sappa Development Engineer Kaipara District Council stated:

6 Wastewater

The present Mangawhai waste water treatment plant have capacity to accept the propose loading from the development. (Sic)

- 14.7 In reaching its decision the Panel relied on the opinions of the expert witnesses:

34. Having reviewed the application material, in particular the reports from the applicant's 'technical' experts, the Council's section 42A report and technical memorandums from its experts and the Applicant's evidence, there is very little, and in some cases no, matters in contention between the experts.

- 14.8 This is an instance where a subdivision consent was granted on the basis of the assertions of expert witnesses as to wastewater capacity. Although this matter was publicly notified there were only three submissions, none relating to wastewater. If, in future, applications for consents are non-notified there is a likelihood that consents will be granted on the basis of experts' evidence that there is either existing capacity or planned capacity. There will no opportunity to rebut any assertions. The back-stop argument will be completely forgotten. That is why the capacity provisions must be tightened to ensure that future capacity is appropriately planned and funded.

- 14.9 The KDC Assessment Report for a consent for a Bunnings store (RM200102) on the Mangawhai Central site states:

Infrastructure

The proposed infrastructure for reticulated wastewater system is able to service the proposed development as there is capacity within the Council treatment plant for the proposed loading

- 14.10 The KDC Assessment Report for a consent for a Mobil service station (RM200156) states:

The engineering report prepared by McKenzie & Co Consultants Limited addresses these matters. The Assessment of Effects submitted in support of the application summarizes the conclusions of the report with respect to infrastructure and services as follows;

(The report) demonstrates that reticulated wastewater infrastructure can be established on the site to service the proposed development.

Council's Development Engineer, Prasad Sappa, has reviewed the application and concurs with the recommendations and conclusions of the McKenzie & Co Consultants Limited.

- 14.11 Several building consents have been granted as part of the development. Those consents are not available on the KDC website. I suspect that those consents have also been granted on the basis that the KDC confirms that there is adequate existing wastewater capacity or planned capacity.

- 14.12 Whilst the commercial buildings may obtain their water supply from rainwater harvesting, they will rely on the MCWWS for wastewater services. They will need to connect to the scheme. That will mean that as commercial buildings with staff and customers they will use up quite a number of the 298 connections that are left. The available capacity is fast running out.

15. REBUTTAL OF MR GORDON'S ARGUMENTS

PC78 has not been adopted

- 15.1 Mr Gordon argues that planning Mangawhai Central cannot take place until PC78 is adopted. That is a red herring. The issue before the Hearing Panel, and in all discussions and considerations, is whether there is existing or planned capacity for the MC development if PC78 is approved. There has to be adequate capacity before PC78 can be approved. MCL and KDC both asserted that there was existing capacity and planned capacity.

The development of a potential 500 lots under Chapter 16 is underway with consents and construction. That has not needed the adoption of PC78 and can proceed on the basis of an unamended Chapter 16. It is a development in fact, and yet it was ignored in the modelling for the Master Plan Strategy

In other words, you cannot argue before the Panel and the Court that there is adequate existing and planned capacity for the MC development, and then turn round and argue that there is no planned capacity because PC78 has not been adopted.

An LTP is a unilateral Council function

- 15.2 Mr Gordon has argued that a plan provision under the RMA cannot rely on a mostly unilateral Council function under the LGA2002, and that MCL would not like to put itself in that position. I point out that the process of development is largely a unilateral process with the local authority dictating what must happen. If there is no wastewater capacity the local authority can decline a development proposal, even if the development is already well advanced. A local authority is bound to comply with its District Plan, the RMA, the LGA2002, and any other legislation that affects it.
- 15.3 My concern is that the wording "planned capacity" does allow the KDC staff to unilaterally make decisions on what they consider to be an operational matter. The KDC staff have already asserted that there is existing capacity and planned

capacity, when in fact recent disclosures and the Master Plan Strategy make it clear that those assertions are not correct. Surprisingly, the evidence filed by the KDC confirms the original assertions. The requirements of “planned capacity” have, therefore, already been met. By requiring planning to be through a long term plan, there would be transparency, decision-making by the elected members, and consultation with the community. It also gives certainty to MCL that the proposed capacity has been properly planned and funded and will be available when it is required.

Clear evidence of commitment

- 15.4 Mr Gordon has argued that clear evidence of “commitment’ satisfies the “planned capacity” wording. He cites the comments of Ms Davidson in her evidence to support this view. With respect, such terminology has no place in the RMA or in the LGA2002. The expressed commitment by a local authority officer is meaningless and irrelevant. Both pieces of legislation contain provisions which set out how decisions are made and consulted on. They should be the only relevant consideration.

Strictly an RMA issue

- 15.5 Mr Gordon also suggests that provisions of the District Plan are an RMA matter and LGA requirements are not part of the RMA process. On that basis the word “planning” can only be used in its colloquial sense and not in any legal sense, including any reference to an LGA2002 process. It cannot cross the RMA boundary. I reject that. The RMA may dictate its own procedures but it does not dictate how compliance with the general law is to be achieved for proposed activities. All decisions and actions of a local authority are required to comply with natural justice and must meet the requirements of the LGA 2002, the Local Government (Rating) Act 2002 and many other enactments.
- 15.6 I refer to the discretion under *16.7.4 Discretions for Restricted Discretionary Activities*:

ee) Reticulated Water Supply which meets all relevant legislative requirements for drinking water (including firefighting, rainwater harvesting and water demand management (savings))*

“All relevant legislative requirements” refers to legislation outside the ambit of the RMA.

Long term plan

- 15.7 In negotiations Mr Gordon for MCL has advanced various arguments to support the wording “planned capacity” and to reject my suggested linking of planned capacity to a long term plan.

- 15.8 Mr Gordon has argued that, on examination of recent long term plans of the KDC, there is a lack of specificity in respect of funding for proposals. Accordingly such plans may not contain the detail that I am seeking.
- 15.9 I agree that the recent KDC long term plans fail to provide the details of planning and funding required by the LGA2002. The recent 2021/2031 LTP is a perfect example. The Consultation Document in respect of Mangawhai Central was a mish-mash of confused terminology, with a confusion between plans and options. The provisions in respect of funding were inadequate, confusing and at times misleading.
- 15.10 The requirements of the LGA 2002 in respect of LTPs are very specific. These are found in sections 93 to 97. The purposes of an LTP are set out in section 93 (6):
- (a) describe the activities of the local authority; and*
 - (b) describe the community outcomes of the local authority's district or region; and*
 - (c) provide integrated decision-making and co-ordination of the resources of the local authority; and*
 - (d) provide a long-term focus for the decisions and activities of the local authority; and*
 - (e) provide a basis for accountability of the local authority to the community.*
- 15.11 Section 93 (9) is important because it triggers the decision-making provisions of the Act and the provisions relating to significance.
- 9) A local authority must, in deciding what is appropriate for the purposes of subsection (8), have regard to—*
- (a) the provisions of [sections 77, 78, 79, 80, 81, 82, 83, 84, 96, 97, and 101](#); and*
 - (b) the significance of any matter; and*
 - (c) the extent of the local authority's resources.*
- 15.12 The importance of the consultation document is made clear by section 93B. Section 93C lists all the information that must be included in the Consultation Document.

15.13 Section 97 is pivotal.

(1) This section applies to the following decisions of a local authority:

(a) a decision to alter significantly the intended level of service provision for any significant activity undertaken by or on behalf of the local authority, including a decision to commence or cease any such activity:

The proposals in the Master Plan Strategy require a significant increase in the level of service of a significant activity – the MCWWS. On that basis subsection (2) is triggered:

(2) A local authority must not make a decision to which this section relates unless—

(a) the decision is explicitly provided for in its long-term plan; and

(b) the proposal to provide for the decision was included in a consultation document in accordance with [section 93E](#).

15.14 The advantage of an LTP is that it requires transparency. It requires decision-making on proposals by the elected members. It requires detailed consultation with the community. Importantly, one of its purposes in section 93(6) is to:

provide a basis for accountability of the local authority to the community.

15.15 In *Mangawhai Ratepayers' and Residents' Association Inc v Kaipara District Council* [2014] NZHC 1147 Heath J emphasised the need to comply with the LGA requirements:

[42] The facts on which the Auditor-General based her report, and on which I am asked to rely for the purpose of this decision, demonstrate that the Council failed to follow those processes when deciding if it should enter into contracts for the design, construction and financing of the wastewater treatment plant. The transparency of decision-making required by the special consultative procedure was lacking. One example is the exclusion of members of the public from a meeting at which the Council decided to execute relevant contractual documents. It is sufficient to say that the failures to comply with relevant statutory procedures were both manifold and serious.

[43] I am satisfied that the Association has made out a case for a declaration that the EcoCare agreements were entered into in breach of Part 6 of the Local Government Act and, therefore, unlawfully.

16. SIGNIFICANCE AND ENGAGEMENT POLICY

16.1 Any decision of the KDC in respect of wastewater capacity increases and their funding have to be considered under its Significance and Engagement Policy. The legislative requirements for the Policy are set out in section 76AA of the LGA2002

[Significance and Engagement 2020 Nov.pdf \(kaipara.govt.nz\)](#)

16.2 A decision to provide capacity increases at a total cost of at least \$50 million is a significant decision. It also triggers the requirements of section 97 because it is a decision to alter significantly the intended level of service for a significant activity. Under the Policy the MCWWS is defined as a strategic asset. That triggers the requirement for a special consultative procedure and a statement of proposal.

16.3 If the proposals in the Master Plan Strategy are pursued and options for capacity upgrades and funding are selected, no decision can be made on the proposed plans and funding until the Significance and Engagement Policy and the LGA2002 requirements are satisfied. The decisions are then made by the elected members and consulted with the community.

16.4 It is not legally possible for a local authority to sidestep those obligations by having its staff deal with the issue as an operational matter under the RMA.

17. TRANSPARENCY

17.1 Transparency by the KDC is vitally important when dealing with such a significant development. Transparency is achieved by ensuring that decision-making by the elected members and consultation with the community are all carried out pursuant to the requirements of the LGA 2002. This means that that all aspects of a proposal must be considered through a long term plan.

17.2 So far the Mangwhai Central development proposal has escaped the scrutiny of a long term plan. KDC staff have made most of the decisions relating to the development through the piecemeal granting of consents through RMA

processes. There has been no consideration of the proposal as a whole by the elected members or the community. Perhaps the biggest failure of the KDC is in respect of funding the debt that is incurred to create capacity. KDC adopts the mantra that additional capacity is paid for by developers or through development contributions. As stated above, that is misleading. Additional capacity is funded by debt. Certainly, the model is that the debt will eventually be repaid by development contributions, but that is generally over a 30 year period. Development contributions for the Mangawhai Central development will be spread over 15 to 20 years. In the interim 50 per cent of the interest will be paid through the general rate, paid by the district-wide community. The other 50 per cent will be capitalised – added to the principal.

- 17.3 KDC has serious issues with the setting of development contributions to repay debt. \$26 million of the original debt to construct the EcoCare plant was allocated to “future communities” to be paid through development contributions charged on properties connecting in the future. This historic debt was to be repaid over 30 years. Through a LGOIMA request I recently discovered that the KDC had miscalculated the calculation of the development contribution since 2013. This is what the KDC advised me on 17 March 2021:

The original debt relating to DC [development contributions] totalled \$20m to be recouped over 10-30 years (2022-2042) and \$6m to be recouped first 6 years (2013-2021). A total of \$26m. This is still the case, we haven't changed it in the model as we decided we can't recoup the \$26m over the next 4 years. This was an error relating to connections (originally advised there would be 5000 not the 2800 that has eventuated). We now know that the capacity will be reached in the next 4 years.

- 17.4 Because the KDC undercharged development contributions, the historic debt is still \$24.9 million as at 30 June 2021, although the [adopted LTP](#) at page 15 shows it as being \$28 million. The problem is that with the plant reaching capacity in the very near future there will be insufficient development contributions to repay the debt. All future development contributions will go to pay the new debt to fund the capacity increases. This means that the historic debt is “stranded” with no means of repayment.

- 17.5 In the same response the KDC explained its new model for repayment:

The debt prior to new additions in the LTP 2021-2031 (ie old debt) is scheduled to be recouped by 2042 and new capital expenditure in 2021-2031 be recouped by 2051 when we reach 4600 connections in total.

Not surprisingly, the new model has not been made public. Nor has the problem of the stranded debt.

17.6 I suspect that the KDC's aversion to future planned capacity having to be considered and funded through a long term plan is due to a concern that funding through debt and the provisions for repayment will be considered, and the secret of the stranded debt will be publicly revealed.

18. Summary

18.1 Mr amendments should be adopted because:

- A colloquial interpretation of “planned” to mean intention or commitment has no place in interpreting a legal document. It is semantic argument that has no merit in such an important issue.
- On the basis of statements from the KDC acting General Manager Sue Davidson and expert consultants there is already adequate “planned capacity” and further consents could now be issued on that basis. That is despite incontrovertible evidence that there is not adequate existing capacity and not adequate planned capacity.
- KDC and MCL have made continuing assertions of capacity that clearly contradict the facts. The interpretation they propose enables consents to be issued unilaterally by KDC staff on the basis of the same incorrect assertions. Consents have already been granted on that basis
- The back stop argument requires that there should be a much higher threshold of proof at the subsequent consent stage for establishing that there is in fact planned infrastructure. My amendments require the performance of statutory procedures that require full information, statutory decision-making and consultation.
- The acting KDC Manager infrastructure Services, Sue Davidson, states at paragraphs 4.26 and 4.31 of her evidence that once plans are finalised they will be included in a long term plan, along with funding, possibly in 2023. She emphasises the need for consultation with the community. That is only achieved through a long term plan.
- My amendments provide certainty for all parties. Once the proposal are in place and the plans proceed, and once funding is in place, the development can proceed with confidence. It is the sort of process that

the KDC should have undertaken when the proposed development was first presented to the KDC. Once the proposal had been considered and consulted in a consultation document or statement of proposal in an LTP it would have had secure foundations, the approval of the elected members and the community. PC78 would have been a formality.

- The Master Plan Strategy enables the KDC and MCL to get their ducks in a row. In a few months they will have a very good idea of the issues and capacity of the MCWWS and can plan the required remedial works and capacity increases. Funding is a huge problem. The delay gives the KDC the opportunity to resolve the issues of the stranded historic debt and the miscalculated development contributions. The proposed expenditure on capacity increases is way beyond the capacity of the KDC, especially in light of its huge historic debt. It will have the opportunity to negotiate a development agreement with MCL to share the funding costs. That is the only way that the proposal can proceed. A total financial package can be included with the plans for capacity increases and be finalised and approved through an amendment to the current LTP.
- Planned and funded capacity through a long term plan gives greater security to the developer and to a purchaser that capacity will actually be available and consents will be available. Vague intentions to provide capacity could end up with consents being declined if the capacity does not become available. See the evidence of Mr Badham at paragraphs 13.8 and 13.9 and Mr Rankin at paragraph 5.7.
- There is also the risk that consents may actually be granted on the basis of incorrect assertions of planned capacity. Houses could be built only to find there is no wastewater connection. In the recent case in Karaka a subdivision consent was granted, a building consent was granted, a house built, only to find that the anticipated water supply to Watercare was not available.
<https://www.stuff.co.nz/business/property/300219405/auckland-homeowner-struggling-as-water-meter-issue-delays-move-in-for-months>

Clive Boonham

11 March 2022

ATTACHMENT 1

PROPOSED AMENDMENTS OF CLIVE BOONHAM TO THE AGREED AMENDMENTS TO CHAPTER 16

NOTE: I do not know if the version of the agreed amendments is the latest version. The numbering may be wrong.

Agreed amendments in black.

Clive Boonham's proposed amendments in blue.

16.3.9.1 5)

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.

By ensuring that there is adequate existing infrastructure to service subdivision and development, or there is adequate planned and funded infrastructure to service subdivision and development that is included in a long term plan or an amendment to a long term plan.

LAND USE

16.7.4 Discretions for Restricted Discretionary Activities (eee)

"The capacity of the existing or planned reticulated wastewater network(s) to meet the servicing needs of the proposal.

Whether there is adequate existing wastewater infrastructure to service the proposed development, or there is 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.

16.7.4.1 Assessment Criteria (eee)

"Whether the proposed development or activity can be accommodated within the existing or planned capacity of the reticulated wastewater network and whether the servicing needs of the proposed development require upgrades to existing

infrastructure.”

Whether there is adequate existing wastewater infrastructure to service the proposed development or activity, or there is adequate planned and funded infrastructure to service the proposed development or activity that is included in a long term plan or an amendment to a long term plan.

SUBDIVISION

16.10.8.1 Matters Over Which Discretion is Restricted (ff)

“The capacity of the existing or planned reticulated wastewater network(s) to meet the servicing needs of the proposal.”

Whether there is adequate existing wastewater infrastructure to service the proposed proposal (subdivision?), or there is adequate planned and funded infrastructure to service the proposed subdivision that is included in a long term plan or an amendment to a long term plan.

16.10.8.2 Assessment Criteria for Restricted Discretionary Activities (f)

“Whether the proposed development or activity can be accommodated within the existing or planned capacity of the reticulated wastewater network and whether the servicing needs of the proposed development require upgrades to existing infrastructure.”

Whether there is adequate existing wastewater infrastructure to service the proposed development or activity (subdivision?), or there is adequate planned and funded infrastructure to service the proposed development or activity (subdivision?) that is included in a long term plan or an amendment to a long term plan.
