

**IN THE ENVIRONMENT COURT  
AT AUCKLAND**

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

**IN THE MATTER** of an appeal pursuant to Clause 14 of Schedule 1 of the  
Resource Management Act 1991

**BETWEEN** **CLIVE BOONHAM**  
(ENV-2021-AKL-000061)

**Appellant**

**AND** **KAIPARA DISTRICT COUNCIL**

**Respondent**

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**REPLY SUBMISSIONS ON BEHALF OF KAIPARA DISTRICT COUNCIL  
REGARDING WORDING OF PROVISIONS RELATING TO “PLANNED  
WASTEWATER CAPACITY”**

**DATED 18 MARCH 2022**

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**MAY IT PLEASE THE COURT:**

**1. INTRODUCTION**

**1.1** These legal submissions are filed on behalf of the Kaipara District Council (**Council**) in relation to Mr Boonham's appeal (ENV-2021-AKL-000061) against the Council's decision on Private Plan Change 78 (**PC78**).

**1.2** As the Court will be aware:

- (a) Mr Boonham's notice of appeal originally raised a wide range of issues, and sought that PC78 be declined.
- (b) However, at a judicial conference for this appeal on 7 March 2022 Mr Boonham confirmed that his sole remaining issue relates to the wording of wastewater capacity provisions in PC78, and in particular provisions referring to "planned wastewater capacity".
- (c) As a result of this indication the Court issued directions:
  - (i) vacating the timetable for exchange of evidence and hearing of this appeal;
  - (ii) directing that this matter be decided "on the papers" under section 279(1)(e) of the Resource Management Act 1991 (**RMA**), following an exchange of legal submissions; and
  - (iii) directing that Mr Boonham file legal submissions setting out his "*wording for those clauses and his reasoning for the changes*" by 11 March 2022 and the Council and Mangawhai Central Limited (**MCL**) file reply submissions "*setting out their preferred wording and the reasons for that preference*" by 18 March 2022, and Mr Boonham then lodge final reply submissions by 25 March 2022.<sup>1</sup>

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<sup>1</sup> These directions were made at the Judicial Conference on 7 March 2022 and subsequently recorded in an email from the Court dated 8 March 2022.

- 1.3** On 11 March 2022 Mr Boonham filed and served a document described as "Evidence of Clive Boonham", raising a wide range of matters (including matters of evidence) but ultimately including proposed changes to the provisions.
- 1.4** These legal submissions are filed on behalf of the Council, in reply to Mr Boonham's statement of evidence.
- 1.5** These submissions are structured as follows:
- (a) Part 2 of these submissions identifies the scope of the plan provisions in issue.
  - (b) Part 3 of these submissions responds briefly to issues raised by the fact that Mr Boonham has filed a statement raising various matters of evidence, and also referred to evidence that was exchanged by the Council and MCL but is not before the Court.
  - (c) Part 4 of these submissions responds to Mr Boonham's suggested changes to the provisions.
  - (d) Part 5 of these submissions outlines alternative wording proposed by the Council, and the reasons for those changes.
  - (e) Part 6 of these submissions is the Conclusion.

## **2. THE PROVISIONS IN ISSUE**

- 2.1** At the judicial conference on 7 March 2022 the Court directed that the Council identify to the Court and parties all clauses in PC78 relating to "the timing of development in relation to existing and planned [wastewater] capacity".
- 2.2** Counsel for the Council subsequently advised the Court and parties that there are four provisions in PC78 relating to this.<sup>2</sup>
- 2.3** Two of these provisions relate to land use matters, being:

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<sup>2</sup> See email of counsel for the Council dated 7 March 2022 at 9:48pm.

- 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.”*
- 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 developed require upgrades to existing infrastructure.”*

**2.4** The other two provisions relate to subdivision, being:

- 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.”*
- 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.”*

**2.5** In addition, Mr Boonham has identified he considers Policy 16.3.9.1.5 should be amended. This policy does not refer explicitly to the “planned capacity of the reticulated wastewater network”. It provides:  
*“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.”*

**3. MR BOONHAM'S STATEMENT OF EVIDENCE DATED 11 MARCH 2022**

**3.1** As outlined above, the Court directed Mr Boonham file legal submissions limited to "...[his] wording of those clauses and his reasoning for the changes".

**3.2** Despite these directions, on 11 March 2022 Mr Boonham filed a lengthy document described as the "Evidence of Clive Boonham".

**3.3** In his statement of evidence Mr Boonham raises issues in respect of wide range of matters including, but not limited to:

- (a) The capacity of the Mangawhai Community Wastewater Scheme (**MCWWS**).
- (b) Statements allegedly made on behalf of KDC and MCL in relation to the capacity of the MCWWS at the Council hearing for PC78 and as part of without prejudice correspondence between the parties.<sup>3</sup>
- (c) The Council's consultation on its Long Term Plan.
- (d) The Council's Mangawhai Community Wastewater System Master Plan Strategy.
- (e) The Council's setting of development contributions and debt levels.
- (f) Mr Boonham also refers in his statement of evidence to statements made in various paragraphs of the written statements of evidence-in-chief served by MCL on 17 December 2021, and the Council on 11 February 2022. However, these statements of evidence are not before the Court.

**3.4** In relation to this, the Council respectfully submits that:

- (a) There appears to be some confusion on Mr Boonham's part in relation to the nature of this process.<sup>4</sup>
- (b) While Mr Boonham would be entitled to advance matters of evidence, and the Council and MCL to respond with rebuttal evidence in the normal way if the timetable for exchange of evidence was still in place, that is no longer the case. The Court has instead directed this matter be decided by an exchange of legal submissions and a hearing on the papers.

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<sup>3</sup> Refer to section 15 of Mr Boonham's statement.

<sup>4</sup> The Council notes that while Mr Boonham states he no longer holds a current practicing certificate, he states he has a law degree and practiced law for a number of years with a specialty in conveyancing. See paragraph 1.2 of Mr Boonham's statement of evidence.

**3.5** Mr Boonham's proposed wording changes to the provisions are nonetheless clearly set out at **Attachment 1** to his evidence. The key reasons in support of his proposed wording changes appear to be set out in paragraph 18 of his statement of evidence.

**3.6** The Council's response to Mr Boonham's proposed changes to the wording of the provisions is set out below.<sup>5</sup>

#### **4. THE COUNCIL'S RESPONSE TO MR BOONHAM'S PROPOSED CHANGES TO THE WORDING OF THE PROVISIONS**

**4.1** The Council understands from Mr Boonham's indications at the judicial conference on 7 March 2022 and from his statement of evidence that:

(a) He has no issue with the references in the provisions to the "existing capacity" of the wastewater network.

(b) However, the references in the provisions to "planned capacity" are, in his view, not sufficiently certain, and could allow for land use or subdivision consents to be granted on the basis of proposed upgrades to the MCWWS that while "planned" in a general sense, have not yet, in his view, been properly committed to, or funded by the Council.<sup>6</sup>

**4.2** In Attachment 1 to his statement of evidence Mr Boonham indicates he seeks that provisions 16.3.9.1.5, 16.7.4(eee), 16.7.4.1(eee), 16.10.8.1(ff) and 16.10.8.2(f) all be amended so that rather than referring to "planned capacity" the provisions instead refer to there being: *"...adequate planned and funded infrastructure to service the proposed [development or activity, or subdivision] that is included in a long term plan or an amendment to a long term plan"*.

**4.3** The Council acknowledges the importance of decisions relating to the planning and funding of upgrades to the MCWWS, and the need to ensure the timing of these is co-ordinated with subdivision and development in Mangawhai.

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<sup>5</sup> The Council does not respond to the matters of evidence raised by Mr Boonham, as that goes beyond the scope of the Court's directions.

<sup>6</sup> See paragraph 18.1 of Mr Boonham's statement of evidence.

**4.4** However, the Council does not support Mr Boonham's proposed amendments to the provisions. In the Council's respectful submission, Mr Boonham's proposed changes will not provide the assurance he seeks, and give rise to the following issues:

(a) Where funding has been provided for in the Long Term Plan for an infrastructure upgrade or works this does not (necessarily) guarantee that the infrastructure upgrade will take place as:

(i) The Long Term Plan covers a period of 10 years, and is reassessed every three years. A Council's commitment to projects can change, particularly if a new Council is voted in following local body elections, resulting in funding being changed or withdrawn. In addition, funding in the Council's Long Term Plan can be altered through the Council's Annual Plan process.

(ii) Funding can also be included for infrastructure upgrades that have not yet been designated or obtained resource consent. Obviously, if consent is not obtained, then, notwithstanding that funding has been committed, those projects will not be able to proceed.

(b) Lastly, infrastructure upgrades can also be provided for outside of the Long Term Plan. For example, by way of a condition of consent requiring the developer to undertake the works, the Council taking a financial contribution, or through a development agreement. In addition, funding for infrastructure upgrades may also be provided, from time to time, by Central Government. Where infrastructure is provided for in this way, it sits outside of the Long Term Plan and would accordingly not be captured by Mr Boonham's proposed wording.

## **5. THE CHANGES TO THE PROVISIONS PROPOSED BY THE COUNCIL**

- 5.1** The Council understands it is common ground between the parties that there should be the ability under the PC78 provisions to grant consent to subdivision or land use consents where this would exceed the existing capacity of the reticulated wastewater network, but could be accommodated by “planned” increases in the capacity of the wastewater system.
- 5.2** The issue raised by Mr Boonham is essentially what is meant by “planned capacity”, and whether the references currently in the provisions to “planned capacity” are sufficiently clear when the Council (or on appeal the Environment Court) comes to make decisions on applications for land use or subdivision consent.
- 5.3** In the Council’s submission, it is not unusual for subdivision of land use consent to be granted in circumstances where the infrastructure needed to service that development is “planned” but has not yet been built.
- 5.4** As set out in the Council’s Long Term Plan, the Council is committed to continuously upgrading the capacity of the MCWWS to service all growth in Mangawhai, including from Mangawhai Central.<sup>7</sup>
- 5.5** In addition, subdivision or development, particularly of a larger scale, is often staged over many years.
- 5.6** Where subdivision or land use consent is to be granted based on “planned capacity”, as his Honour noted at the judicial conference, the issue then becomes whether there is the ability under the plan provisions to impose appropriate conditions of consent. For example, a condition limiting the ability to build on subdivided lots, or to occupy development until sufficient infrastructure, including wastewater infrastructure, is in place.
- 5.7** In the Council’s submission, no changes are required to Policy 16.3.9.1.5 (referred to by Mr Boonham). Nor are any changes required to 16.7.4 Discretions for Restricted Discretionary Activities (eee), or 16.10.8.1 Matters Over Which Discretion is Restricted (ff) both of which are appropriately broad.

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<sup>7</sup> See pages 14, 320 and 462 of the Council’s Long Term Plan 2021-2031.

**5.8** However, on reflection the Council considers greater specificity could be provided in the assessment criteria for subdivision and land use consent to more plainly identify the assessment that is required when “planned capacity” is relied on (rather than just referring in the assessment criteria to “planned capacity” in a general sense).

**5.9** In the Councils submission, the matters to be referred to in the assessment criteria, to enable an appropriate assessment of whether there is planned capacity to be made include:

- (a) The steps that have been undertaken to progress planned upgrades of the reticulated wastewater network, including whether any necessary resource consent and or designation(s) have been obtained.
- (b) The likely timing of these planned upgrades to the reticulated wastewater network, in relation to the timing of the proposed development or activity for which consent is sought; and
- (c) Whether funding is committed for the planned upgrades of the reticulated wastewater network. Noting that this funding could be committed in a Long Term Plan or Annual Plan in accordance with the Local Government Act 2002, or through other alternative funding mechanisms such as development agreements, through the Council imposing a financial contribution, or (possibly) funding provided by Central Government.

**5.10** The Council has proposed changes to the wording of 16.7.4.1 Assessment Criteria (eee) and 16.10.8.2 Assessment Criteria (f) to address these matters. The Council’s proposed wording is set out at Annexure 1 to these reply submissions, with changes shown in underlining.

## **6. CONCLUSION**

**6.1** The Council respectfully submits, for the reasons set out in these submissions, that:

- (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.

**DATED** this 18<sup>th</sup> day of March 2022 at AUCKLAND



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W M Bangma  
Counsel for Kaipara District Council

**Appendix 1 to the Council's Reply Submissions: Proposed changes to the wording of 16.7.4.1 Assessment Criteria (eee) and 16.10.8.2 Assessment Criteria (f)**

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. With respect to the consideration of what constitutes planned capacity, this includes the consideration of the extent to which:

- The steps undertaken to progress planned upgrades of the reticulated wastewater network (including any necessary consenting and or designation(s)) are in place, and the likely timing of the planned upgrades in relation to the proposed development or activity; and
- Funding is committed for the planned upgrades of the reticulated wastewater network in a Long Term Plan or Annual Plan in accordance with the Local Government Act 2002, or through other alternative funding mechanisms such as development agreements, or the Council imposing a condition of consent requiring a financial contribution.

16.10.8.2 Assessment Criteria (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. With respect to the consideration of what constitutes planned capacity, this includes the consideration of the extent to which:

- The steps undertaken to progress planned upgrades of the reticulated wastewater network (including any necessary consenting and or designation(s)) are in place, and the likely timing of the planned upgrades in relation to the proposed development or activity; and
- Funding is committed for the planned upgrades of the reticulated wastewater network in a Long Term Plan or Annual Plan in accordance with the Local Government Act 2002, or through other alternative funding mechanisms such as development agreements, or the Council imposing a condition of consent requiring a financial contribution.