

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

AND

IN THE MATTER **of Private Plan Change 78 by Mangawhai Central Limited
to the Operative Kaipara District Plan 2013.**

2 February 2021

MEMORANDUM 3 OF SUBMITTER CLIVE BOONHAM TO THE HEARING PANEL

1. I am filing this memorandum with the Panel to comment on the way in which the Panel's requests of 28 November 2020 for further information from the KDC and supplementary evidence from the applicant have been dealt with. I also comment on the further evidence of the parties and the amendment to PC78 proposed by the applicant.
2. I objected to the scope of the Panel's request in my Memo of 15 January 2021.
3. The Panel responded to my Memo on 20 January 2021 rejecting my arguments. The Panel took the view that they were able to make the request the information from the KDC. The Panel invited the views of the applicant, the KDC, and Mangawhai Matters on the issue.
4. The Panel did not afford me the opportunity to respond to their arguments. Consequently I filed Memorandum 2 on 26 January 2021 setting out my views on the stance taken by the Panel.

FURTHER INFORMATION

5. I took the opportunity to include in Memorandum 2 further information on the current capacity of the MCWWS and information on the planning and funding decisions of the KDC in respect of future capacity of the MCWWS. This was to counter and rebut the further information provided by Mr Sephton on 18 December 2018 on those issues.

6. In respect of wastewater, PC78 relied solely on confirmation from the KDC that the MCWWS has capacity, at present, for the loading from Mangawhai Central. Mr Tollemache's statement of evidence of 6 November 2020 stated:

9.21 As outlined in the evidence of Mr Dufty, council has confirmed that capacity is available and upgrades can be undertaken to the wastewater treatment plant as necessary.

7. Mr Dufty stated in his statement of evidence of 6 November 2020:

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

Misrepresentations by the KDC

8. It is my view, based on all of the information available so far, that the officers of the KDC misrepresented the current capacity of the MCWWS, and that their statements were accepted and endorsed by all expert witnesses for the applicant and the KDC without any investigation.
9. During the hearing I referred to the "secret" 2019 WSP report and other reports to KDC council meetings which highlighted the shortcomings of capacity in the MCWWS plant and disposal field and the urgent need for an increase in capacity to accommodate normal incremental growth. It was presumably because of the doubt raised about the KDC and applicant's stance on capacity that the Panel sought further information.
10. In his further information Mr Sephton acknowledged that there were only 389 connections left in the MCWWS, confirming that the capacity is at crisis point. However Mr Sephton also made vague assertions about there being planning proposals and funding proposals for increased capacity in the new 2021 LTP and the Infrastructure Strategy.
11. Again these assertions are not correct. There is no planning in either of those documents for a future increase in capacity, nor the provision of funding for the major upgrades and new disposal field. There will be no consultation with the community on increased capacity because there are no plans for the future. In fact Mr Sephton confirmed in his further information that KDC does not want to overinvest in future capacity and will respond to demand based on applications for building consents. The KDC seems oblivious to the fact that for major issues of capacity there is a 6 year gap between planning and the actual provision capacity. (Sourced from the 2019 WSP report and the Mangawhai Spatial Plan.)

Memorandum 2

12. I was so concerned with the KDC misleading the Panel and the other parties that I included in Memorandum 2 a commentary on 16 other reports on the MCWWS that the KDC staff have kept secret from the community and, I suspect, even from the elected councillors. Those reports paint a dire picture of the state of MCWWS and of the failure of the KDC staff to heed the advice of their experts and make firm planning decisions to anticipate future capacity.
13. The reports show that the KDC has deferred fixing issues with the plant, catalogued in another WSP report, and is only attending to problems as they arise. The balance tank has been needed to respond to peak overflows since 2018 but is only being undertaken during 2021. The reports from KDC staff acknowledge that it has adopted a “DO MINIMUM approach to upgrades or issues and is seeking to eke out capacity by increasing efficiencies.
14. It seems probable that the KDC has kept the reports secret so that there is no evidence before the hearing of the true situation in respect of the MCWWS’s current capacity. I believe it is unlikely that any of the consultants who opined on the current capacity of the MCWWS in PC78 were given any access to the historic and current reports.
15. I anticipated that Memorandum 2 would be circulated by the Panel to all parties so they could be aware of the true facts relating to capacity. It was also important that the new information from the reports, which I acquired after the hearing was adjourned in November 2020, was available to the Panel.
16. The Panel advised during the hearing that it could only make a decision on the facts placed before the Panel. It was therefore absolutely essential that the truth about the capacity of the MCWWS should be placed before the Panel to rebut the incorrect statements from the KDC.

Response of the Panel to Memorandum 2

17. I received a note from the KDC PC78 agency on 26 January 2021 concerning Memorandum 2:

The panel have advised they will address this at the hearing.
18. Memorandum 2 was not included on the KDC PC78 page along with all the other submissions. It has not been sent to the other parties or submitters. I have to wait until the hearing to hear its fate. That singular treatment for the further information that I have provided makes me suspect that it is going to be disallowed by the Panel on the technicality that I was not invited by the Panel to

make further submissions. I note that technical non-compliance with requests from the Panel has not stopped both parties providing information out of time and not in accordance with the requests from the Panel.

KDC's final submissions

19. On 29 January 2021 the KDC forwarded to all parties and submitters:

The Council's supplementary legal submissions addressing a range of matters requested by the Panel for the Council to respond to;

20. In fact I suspect that these submissions are copies of the final submissions of the KDC which are to be heard at the reconvened hearing after the applicant has presented its further evidence.
21. In their evidence Messrs Rankin, Osborne, Riley, Delaney and Collins express their support for the evidence and conclusions of the respective experts in the earlier hearing. Mr Rankin similarly states in his further evidence that he agrees with all the evidence and conclusions of Messrs Dufty, Williamson and Leahy.
22. In short, all the expert witnesses still state that the MCWWS has, at present, capacity for the loading from Mangawhai Central. They are unmoved on that issue despite the evidence that I presented relating to the 2019 WSP report. I was also hoping that my Memorandum 2 would be made available to the expert witnesses so they could review the historical reports on capacity and perhaps adjust their opinions on capacity.

Section 42A report authors

23. David Badham and Alisa Neal also provided further evidence which appears to be an update on their section 42A report. They cite and comment on the various statements of evidence that they have perused since the hearing was adjourned. In respect of wastewater they state at 3.1 *"that Mr Sephton on behalf of Council has provided further clarity regarding infrastructure and funding for wastewater in Mangawhai"*.
24. With due respect that is not correct. Mr Sephton made vague assertions about infrastructure and funding in his further information, but could not reveal any details that were to be included in the 2021 LTP and the Infrastructure Strategy. The reality, evident from the drafts of those documents, is that no planning or funding decisions for the major capacity issue of the MCWWS will be included in the 2021 LTP. There is only a Road Map which will look at options for the future but no decisions will be made at this stage.

25. The evidence continues:

3.2 Mr Rankin has reviewed Mr Sephton's statement and further statements made by Mr Dufty prior to and at the hearing. He has agreed with the conclusions reached.

3.3 We rely on the statement from Mr Sephton and the expert opinions of Messrs Dufty and Rankin. On this basis, our conclusion reached in the s42A with regard to wastewater is unchanged and no further modifications to the PC78 provisions are necessary in our opinion

26. Of course the various statements of evidence that are referred to and commented on do not include Clive Boonham's Memorandum 2 because that document had not been put in evidence. If that document had been circulated by the Panel then the authors of the 42A report might have reached a different conclusion.

SUPPLEMENTARY EVIDENCE

27. The Panel's direction of 27 November 2020 granted leave for certain expert witnesses of the applicant to provide "supplementary evidence" no later than Friday 18 December 2020.

28. Whilst the expression 'supplementary evidence' was used, the Panel made it clear that in fact it required 'further information' with a very narrow scope:

The purpose of the supplementary evidence as set out in the Memorandum [of Mr Gordon], with which we agree, is "...not for the purpose of providing new evidence. Rather, it is intended to provide further information regarding matters raised at the hearing, to assist the Panel and the parties to understand the conclusions reached by the above experts, and/or to clarify certain matters

29. The expert witnesses referred to were:

- *Mr Jon Williamson (water supply);*
- *Mr James Dufty (engineering);*
- *Mr Ian Munro (urban design); and*
- *Mr Mark Tollemache (planning).*

30. In summary:

- *"Further information" was to be provided "regarding matters raised at the hearing, to assist the Panel and the parties to understand the conclusions reached by the above experts, and/or to clarify certain matters". That means*

that the information had to relate to a matter raised at the hearing and and to explain the conclusions reached by the stated experts on that matter.

- Only the witnesses named could provide further information.
- The information had to be provided by 18 December 2020

Proposed amendment to PC78

Mr Jon Williamson (water supply)

31. Mr Williamson provided his supplementary evidence on 18 December 2018. The evidence presented was not further information as required by the Panel but completely new evidence relating to a proposal to take surface water from newly identified catchment areas. It also included a new proposal to store the captured water in a reservoir and create a completely new reticulation system.
32. Mr Williamson attempted to bring the new proposal within the scope of the direction of the Panel by stating:

3. In my evidence, I provide a summary of the surface water supply investigations/assessment undertaken and my key conclusions. The majority of this material existed in November at the time I wrote my evidence in chief and was used by me to reach the conclusions set out in that statement
33. Mr Williamson's evidence pointed to various catchment areas that could be used for the new proposal both within the MCL property and adjacent to it. They were "*potential water supplies*" and flow information etc was provided for each location. It is not clear how the water in adjacent properties was to be accessed. It was stated that there was "*an abundance of high-flow harvestable surface water that could service MCL's reticulated network water requirements*". There were case studies of two locations, neither of which was subsequently used. There was no case study for the Unnamed Stream. Mr Williamson concluded with:

In addition, there are additional surface water resources available in the surrounding areas that could also be utilised if additional water was required.
34. The reference was to "*potential water supplies*" with several possible locations identified. In addition, there were additional surface water resources that could be used. It is scarcely a proposal that gives one confidence that MCL has secured a definite and secure water supply for Mangawhai Central.

Mr James Dufty (water supply)

35. In his supplementary evidence Mr Dufty gave details of the proposed new water reticulation network (3.1). Again, this was not further information regarding a matter raised at the hearing, but completely new evidence about a new proposal

Mr Mark Tollemache

36. Mr Tollemache also provided his supplementary evidence on 18 December 2020. He was completely upfront about the new water supply proposal being outside the scope of PC78 and therefore outside the scope of the Panel's request for further information :

11. Water Supply

Further to the supplementary evidence of Messrs Williamson and Dufty, I propose amendments to PC78 to provide for a reticulated water supply network to service the entire Residential Sub Zone 3A. This is an additional amendment to that proposed in my evidence in chief (Attachment 1 dated 6 November 2020) where IRD and retirement facilities would be subject to discretions requiring a reticulated water supply network. (Emphasis added)

Mr Williamson (water supply)

37. Mr Williamson provided a Second Statement of further information on 28 January 2021. Not only was the information outside the time limit imposed, it included new evidence of water consents obtained from the NRC. It is part of the amendment to PC78 proposed by Mr Tollemache. Again, Mr Williams provided no detail of the new proposal, just a confirmation that water rights had been secured

Mr Bangma (legal submissions)

38. The applicant, through Mr Tollemache, acknowledged that the new proposal for a reticulated water supply was an amendment to PC78, but it did not seek the Panel's endorsement of the amendment. It was left to Mr Bangma, acting for the KDC to take up that issue. In his legal submissions of 29 January 2021 Mr Bangma sought a decision from the Panel on whether there is scope to consider an amendment to PC 78 in respect of the proposed reticulated water supply. He states at 2.3 that:

(a) PC78, as notified, did not include any provisions requiring the provision of reticulated water supply

39. With respect, there is no doubt that the application included detailed information on the proposed water supply. As result it triggered a substantial number of submissions from the community, being one of the major issues of concern.

40. The amendment, as quoted by Mr Bangma above, is an abbreviated version of the actual proposed amendment. His description omits that the amendment actually means that water for the reticulated water supply is to be taken from local streams, not from the bore or harvested water. It also needs larger reservoir storage and a higher level of treatment. That is a fundamental change.
41. Despite the case law quoted by Mr Bangma, the point is that submitters presented compelling evidence of the applicant's inadequate proposals for water supply to meet the requirements of Mangawhai Central, particularly in relation the provision of bore water and harvesting rainwater. Proposals in respect of accessing water from the Tara Creek or other streams and providing a reticulated supply were not considered as a feasible source of water in PC 78 and were not pursued. As a result submissions on that issue were not triggered. It cannot be said that the relief was "reasonably and fairly raised" in submissions. Mr Bangma cites various comments from submitters but they simply use the word "water" in a general sense and nothing more.
42. To paraphrase the comment of Kós J referred to in 2.10(b) of Mr Bangma's evidence, it would be a remarkable proposition that if a single submitter mentioned the word "water" in a submission then the applicant could use it as a Trojan horse to amend a plan change in any respect in relation to water supply and leave all submitters "speechless" – without any right to submit on the new proposals.
43. The proposed amendment does "not reasonably fall within the ambit of the plan change" (in the words of Kós J) because the option for a water supply drawn from streams was not a major consideration. Again to use the words of Kós J, it was not "on" PC78 and it was not considered in the section 32 report. It is an unanticipated addendum.
44. The proposal for Mangawhai Central to draw its water from the Mangawhai Estuary tributaries is anathema to the community. If such a proposal had been included in PC 78 it would have triggered a tidal wave of submissions. If the amendment is allowed then the community as a whole would have been denied the opportunity and the right to make submissions on a fundamental matter.

Lack of information

45. The original Statement of Mr Williamson of 18 December 2020 in respect of taking water from streams was very light on information on the method of extraction of the water, conveyance of the water, treatment of the water, and reticulation of the water. Even the location of the water rights is not available. The only

reference is to coordinates in the geodetic datum which is beyond the understanding of the community.

46. The right to draw water does not mean that the necessary supply of water will be available. I note that in the consent the right to take water is limited by conditions relating to the flow before taking the water and the flow after taking it. The severe drought conditions facing Northland could impact on the flow available.
47. I note from Mr Williamson's submission of 18 December 2020 that the unnamed stream has a catchment area of 1.05 square kilometres. That means that other properties are in the catchment area. There may therefore be issues with competing rights to take the water. The proposed amendment to PC78 directly affects persons who have not been afforded the opportunity to make submissions.

Who is the "water supplier"?

48. It appears that it is to be a private water supply. It will mean that Mangawhai Central will have a water supply completely separate to the provision of water for the rest of Mangawhai.
49. Which entity will be responsible for establishing the supply? Which entity will continue to manage the supply once Mangawhai Central is established? Who will have the obligation to comply with the Resource Management (National Environmental Standards for Sources of Human Drinking Water) Regulations 2007, and the proposed amendments to those standards? What of the Three Waters legislation? Who will be a *water supplier* under the Water Service Bill now before the select committee? Who will be responsible for meeting the onerous obligations under that Bill, once it is enacted?

<https://legislation.govt.nz/bill/government/2020/0314/latest/LMS374663.html>

50. The only information supplied in Mr Tollemache's amendments to PC78 of 18 December 2020 is the following vague proposition:

11.It is understood that this network would likely be developed privately by the applicant, and could be managed through a utility company.

51. The Panel sought further information from the KDC on infrastructure planning and funding for water supply/water security. It now appears that, at the eleventh hour, the applicant seeks to amend PC78 and provide a water supply itself. It has stated, with incredible brevity in Mr Williamson's final report, that it has just obtained water rights to take water from unnamed streams in locations which have not been identified and very little more. There is no detailed information on

its proposed private water supply scheme, no consideration of how it is going to be managed and how it will comply with both current and proposed legislation. Water supply is a vital issue in the PC78 application, and that means water security. This last minute effort does not create any confidence in the applicant's proposal to provide security of water supply for Mangawhai Central.

KDC's obligations

52. The KDC has confirmed through Mr Sephton's further information that it has no planning in place, and no intention, to provide any reticulated water supply to Mangawhai Central or Mangawhai in general.
53. Nevertheless, the KDC will need to comply with its obligations in respect of water supply under the LGA 2002 in its current form and it will also have to comply with the Water Services Act once it is enacted. The new legislation will impose obligations on the KDC to oversee the supply of water. These obligations are summarised in the Explanatory Note at the commencement of the Bill

Relationship to Local Government Act 2002

The Bill contains new responsibilities for territorial authorities to ensure that their communities continue to have access to drinking water, understand the risks to ongoing access, and plan to ensure that services continue to be available. The Bill also places new responsibilities on territorial authorities when supplies fail or are at risk of failing. These provisions recognise the role that territorial authorities play in providing drinking water to their communities, and are contained in an amendment to the Local Government Act 2002 that will—

- *require territorial authorities to assess every 3 years the access that communities in their district have to drinking water services, and consider its implications for local government planning requirements:*
- *require territorial authorities to work with a supplier, consumers of a supply, and Taumata Arowai to find a solution if drinking water services fail, or are at risk of failing, and ensure that consumers continue to have access to drinking water services—whether provided by the territorial authority itself, or by another supplier.*

Clive Boonham

Mangawhai Heads

02 February 2021