

**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

REPLY SUBMISSIONS ON BEHALF OF MANGAWHAI CENTRAL LTD

18 March 2022

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MAY IT PLEASE THE COURT:

1. INTRODUCTION

- 1.1. The appeal by Clive Boonham (ENV-2021-AKL-000061) relates to the decision by Kaipara District Council to approve Plan Change 78 to the Kaipara District Plan (“PC78”). PC78 provides for a comprehensive mixed-use development in Mangawhai, on land already identified for development in the operative Kaipara District Plan.
- 1.2. On 11 March 2022 all parties¹ to the other appeal in this matter, the appeal by Mangawhai Matters Incorporated (“Mangawhai Matters”) (ENV-2021-AKL-000062), filed a joint consent memorandum and draft consent order with the Court providing for the resolution in full of the Mangawhai Matters appeal on the basis of an amended set of PC78 provisions.²
- 1.3. With respect to the appeal by Mr Boonham, the sole remaining issue is the the wording of certain provisions regarding “...*the timing of development in relation to existing and planned [wastewater] capacity*”.³ Directions of the Court dated 8 March 2022 recorded that all parties to Mr Boonham’s appeal consent to the Judge finalising the outstanding matters under s279(1) of the Resource Management Act 1991 (“RMA”), set out a timetable for the exchange of submissions by the parties, and vacated the hearing for Mr Boonham’s appeal. Mr Boonham has confirmed that there is “*only one minor issue to be decided*” in relation to his appeal.⁴ He has framed the outstanding issue as follows:⁵

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

¹ Mangawhai Matters Incorporated (Appellant); Kaipara District Council (Respondent); Mangawhai Central Ltd (Applicant); The New Zealand Fairy Tern Charitable Trust (s274 party); and Peter Rothwell (s274 party).

² The parties to the Mangawhai Matters appeal requested that the Court hold the memorandum and draft consent order on its file pending resolution/determination of Mr Boonham’s appeal.

³ As set out in Directions from the Court dated 8 March 2022.

⁴ Mr Boonham’s document dated 11 March 2022, paragraph 8.12.

⁵ Ibid, paragraph 2.2.

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.

- 1.4. Mr Boonham included as Attachment 1 to the document he filed on 11 March 2022⁶ the PC78 amendments he is seeking. They relate to five PC78 provisions.⁷
- 1.5. These submissions address this very limited outstanding issue relating to Mr Boonham's appeal. They respond to the document filed by Mr Boonham on 11 March 2022.
- 1.6. There are three things Mangawhai Central Ltd ("MCL") agrees with Mr Boonham on:
 - (a) A full build out of PC78 will, over time, require extension of the existing wastewater treatment and disposal operations.⁸
 - (b) The direct cost of the extensions will be for the developer(s).⁹
 - (c) The likely funding methodology will be a development agreement, as provided for in the Local Government Act 2002 ("LGA").¹⁰

⁶ The document filed and served by Mr Boonham on 11 March 2022 in accordance with the Court Directions dated 8 March 2022 is identified by Mr Boonham as a statement of "Evidence of Clive Boonham", as opposed to submissions. The document includes many references to statements of evidence that have been served by MCL and the Council, but which have not been (and will not be, under the current Directions from the Court which were agreed to by all parties) confirmed by the witnesses following them being sworn or making an affirmation. We submit that this goes to the weight that the Court should give to Mr Boonham's references to the statements of evidence. Mr Boonham's document also includes references to without prejudice discussions between the parties (for example in paragraph 10.9 of Mr Boonham's document relating to mediation discussions, and section 15).

⁷ Policy 16.3.9.1 5); land use restricted discretionary matter of discretion 16.7.4 eee) and assessment criterion 16.7.4.1 eee); subdivision restricted discretionary matter of discretion 16.10.8.1 ff) and assessment criterion 16.10.8.2 f).

⁸ Mr Boonham's document dated 11 March 2022, paragraph 10.13 for example.

⁹ Ibid, paragraphs 4.2 and 18.1 (bullet point seven) for example.

¹⁰ Sections 207A-F, LGA. Refer to Mr Boonham's document dated 11 March 2022, paragraph 18.1, bullet point seven.

2. BACKGROUND: THE OPERATIVE PLAN'S APPROACH TO WASTEWATER

- 2.1. Chapter 16 of the operative District Plan (Estuary Estates) already provides for a significant mixed use development on the PC78 site, including large business areas¹¹ and up to 500 residential units.¹² The operative Plan requires that all wastewater systems are connected to the Council's public reticulated wastewater system, except for Rural Residential Sub-Zone 6.¹³
- 2.2. With respect to development in those areas required to connect to the Council's reticulated system, we have not identified specific reference in operative Chapter 16 to the capacity of the Council's wastewater system as a relevant matter for consideration for resource consent applications.¹⁴ However, Chapter 16 cross references the operative Plan provisions for wastewater which apply throughout the District (Rules 13.14.6 and 14.13.6) which do refer to the capacity of the reticulated wastewater system and which are outlined below and included in **Annexure A** to these submissions.¹⁵

3. THE PC78 WASTEWATER PROVISIONS SOUGHT BY MCL (AND SUPPORTED BY ALL PARTIES TO THE MANGAWHAI MATTERS APPEAL)

- 3.1. The draft consent order filed by the parties to the Mangawhai Matters appeal on 11 March 2022 contains the full set of PC78 text and maps that have been agreed by those parties.
- 3.2. That agreed wording has been the subject of extensive mediation and other discussion/negotiations. With respect to wastewater capacity

¹¹ Refer for example to operative Kaipara District Plan Land Use Map 56A showing the extent of the operative Estuary Estates sub-zones.

¹² Refer operative Plan Policy 16.3.6.1 1) and Rule 16.8.2.2 relating to the 500 household unit cap.

¹³ Refer operative Plan Policy 16.3.9.1 4) and 16.4.4 c).

¹⁴ Although controlled activity assessment criterion 16.10.7.2 h) refers to the "*ability to connect to Council's reticulated wastewater system*" and restricted discretionary activity assessment criterion 16.10.8.2 f) refers to the "*nature of the connection to Council's reticulated wastewater system*". Other provisions refer to infrastructure and its timing more generally.

¹⁵ Refer to the cross references to the operative Plan provisions in 16.8.3 and 16.10.10.4 3.

issues, the provisions are founded in rigorous independent expert input, being the product of expert conferencing between the planning consultants for MCL, the Council, and Mangawhai Matters.¹⁶ Good faith efforts have been made, and amendments to provisions agreed to by MCL, to address wastewater concerns raised by Mr Boonham and Mangawhai Matters. This process has significantly bolstered the wastewater infrastructure provisions with respect to the concerns raised in Mr Boonham's appeal.

- 3.3. MCL considers the agreed wording should be preferred to the alternative wording now advanced by Mr Boonham.
- 3.4. Key PC78 objectives, policies and other provisions relating to wastewater – as sought by MCL and the parties to the Mangawhai Matters appeal – are set out in **Annexure A** to these submissions. The agreed set of provisions includes a suite of objectives; policies; and rules, including matters of discretion and assessment criteria, relating to wastewater.
- 3.5. The PC78 framework sought by MCL significantly strengthens the existing requirements in the operative Plan with respect to wastewater capacity issues. The comprehensive suite of PC78 wastewater provisions applying to the PC78 area amounts to a significantly more conservative and robust/responsible approach than in the operative Plan. The PC78 approach acknowledges the fraught history of the Council's wastewater system and the concerns of residents (including Mr Boonham) and other parties (including developers like MCL) that history not be repeated and that costs be borne by developers.¹⁷
- 3.6. In summary:
 - (a) PC78 objectives and policies provide for the following:

¹⁶ Refer the Planning Joint Witness Statement dated 15 December 2021.
²⁷ As asserted by Mr Boonham at paragraph 18.1, bullet point seven - wastewater capacity will likely need to be the subject of a development agreement between Council and the developer.

- (i) The provision of sustainable infrastructure networks that provide for properly serviced and orderly development.¹⁸
 - (ii) Ensuring the infrastructure capacity necessary to serve subdivision and development is available, or that development provides for the necessary extensions or upgrades.¹⁹
 - (iii) With respect to infrastructure funding, the PC78 financial contributions objectives and policies reinforce that the timing of subdivision and development within the PC78 area needs to be coordinated with the provision of infrastructure and that development must contribute its share of the growth-related costs of this infrastructure.²⁰
- (b) With respect to subdivision:
- (i) The most permissive activity status for subdivision under PC78 is restricted discretionary.²¹
 - (ii) A subdivision matter of discretion²² and assessment criterion²³ specifically address the capacity of the existing or planned wastewater network to meet the needs of the proposed development and whether infrastructure upgrades are required.
 - (iii) In addition, operative District Plan residential and business performance standards (13.14.6²⁴ and 14.13.6²⁵ respectively) are cross referenced in PC78²⁶ and require resource consent²⁷ if the written approval of the Council's asset manager is not provided to confirm that the Council's

¹⁸ Objective 16.3.9; and Policy 16.3.11.1 2).

¹⁹ Policy 16.3.9.1 5).

²⁰ Objective 16.3.10 and the policies at 16.3.10.1.

²¹ Subdivision Activity Table 16.10.5-1.

²² 16.10.8.1 ff).

²³ 16.10.8.2 f).

²⁴ Wastewater disposal performance standard (residential).

²⁵ Wastewater disposal performance standard (business, commercial and industrial).

²⁶ Refer to the activity table at 16.10.10.4 3 relating to subdivision.

²⁷ Subdivision activity table 16.10.5-1 provides that any non-compliance with the subdivision standards in Table 16.10.10.4. 3 is a discretionary activity.

wastewater system can be extended to service the proposal. Matters of discretion specifically address the capacity, availability, and accessibility of the Council's reticulated wastewater system, and the capacity of the treatment and disposal system.

- (c) With respect to land use matters:
- (i) Under PC78, in the residential zones two or more dwellings per site requires resource consent, with the most permissive activity status being a discretionary activity.²⁸
 - (ii) A land use matter of discretion²⁹ and assessment criteria³⁰ specifically address the capacity of the existing or planned wastewater network to meet the needs of the proposed development, whether infrastructure upgrades are required, and whether any demand for services and infrastructure at a cost to the wider community is avoided.
 - (iii) In addition, as is the case for subdivision (outlined above), operative District Plan residential and business performance standards (13.14.6 and 14.13.6 respectively) are cross referenced in PC78³¹ and require resource consent³² if the written approval of the Council's asset manager is not provided to confirm that the Council's wastewater system can be extended to service the proposal. Matters of discretion specifically address the capacity, availability, and accessibility of the Council's reticulated wastewater system, and the capacity of the treatment and disposal system.

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

²⁸ Activity Table 16.17.1-1 Residential Sub-Zone.

²⁹ 16.7.4 eee).

³⁰ 16.7.4.1 e) i) and 16.7.4.1 eee).

³¹ Refer to the activity table at 16.8.3 relating to land use.

³² Land use activity tables 16.7.1-1 (residential sub-zones) and 16.7.1-2 (business and service sub-zones) provide that any non-compliance with the development controls in Table 16.8.3 is a restricted discretionary activity.

subdivision, the usual first step in residential development, there is no permitted or controlled activity status available.

- 3.8. The Council has the ability to decline resource consents for subdivision/development, or to impose appropriate conditions of consent, if it is not demonstrated that there is sufficient capacity in the wastewater system or that the necessary planning for upgrades/extensions is in place. Ultimately, the Council can refuse connections to its wastewater system if there is insufficient capacity. Development is squarely at the developer's risk, which Mr Boonham acknowledges.³³
- 3.9. In addition, PC78 as sought by MCL includes bespoke financial contribution provisions which are the result of intensive negotiations with Mangawhai Matters and other parties.³⁴ These provisions, coupled with the Council's ability to charge development contributions under the LGA, provide a "belts and braces" approach to ensure development under PC78 contributes its share of necessary infrastructure costs.
- 3.10. In summary, the suite of PC78 wastewater provisions sought by MCL (and supported by all parties to the two appeals except for Mr Boonham) is comprehensive and appropriate.

4. MCL'S RESPONSE TO THE RELIEF SOUGHT BY MR BOONHAM

- 4.1. Mr Boonham seeks changes to five PC78 provisions relating to wastewater capacity.³⁵ These five provisions as proposed by MCL (and all parties to the Mangawhai Matters appeal) are identified in orange highlight in **Annexure A** to these submissions. Mr Boonham's proposed amendments, which are shown in blue in **Annexure A**, focus on the

³³ Refer to the document filed by Mr Boonham on 11 March 2022, for example paragraph 4.2 where Mr Boonham states: "[u]nder the [District Plan], developers can only connect to the wastewater system if capacity is available." See also paragraph 18.1, bullet point eight, for example.

³⁴ Objective 16.3.10 and the policies at 16.3.10.1 (addressed above). PC78 also cross references (at 16.11) to Chapter 22 of the operative Plan which relates to financial contributions generally.

³⁵ As set out in Attachment 1 to Mr Boonham's document dated 11 March 2022, these are: Policy 16.3.9.1 5); land use restricted discretionary matter of discretion 16.7.4 eee) and assessment criterion 16.7.4.1 eee); and subdivision restricted discretionary matter of discretion 16.10.8.1 and assessment criterion 16.10.8.2.

use of the term “planned” capacity in PC78 with respect to the Council’s reticulated wastewater network.

- 4.2. The key concern for Mr Boonham is that subdivision/development should not be authorised if there is not sufficient certainty regarding planned wastewater capacity. MCL accepts this and agrees. However, MCL considers that the framework proposed in PC78 as sought by MCL provides appropriate mechanisms and safeguards. The framework applying to wastewater capacity under PC78 is significantly more strenuous and robust than that applying throughout the wider District.
- 4.3. Mr Boonham’s amendments propose that for resource consents to be granted for development/subdivision there must be:
 - (a) adequate existing wastewater infrastructure; or
 - (b) adequate *“planned and funded infrastructure... that is included in a long term plan or an amendment to a long term plan”*.
- 4.4. In other words, Mr Boonham proposes that any necessary wastewater capacity extensions/upgrades are required to be “planned and funded” and included in a long-term plan (“LTP”) under the LGA before the approval of resource consent(s) for subdivision/development.³⁶ We submit this is not necessary, or consistent with the relevant legislative frameworks.
- 4.5. Plan changes and resource consenting under the RMA, and the LTP process under the LGA, are separate processes.³⁷ While the RMA and LGA processes should be integrated,³⁸ they are distinct processes with

³⁶ This appears consistent with Mr Boonham’s conception of how the development sought to be authorised by PC78 should have proceeded, being that it should have been fully planned and funded through the LGA LTP process before a private plan change request was made under the RMA (refer to Mr Boonham’s document dated 11 March 2022, for example paragraph 18.1 - bullet point six).

³⁷ Key LGA provisions relating to LTPs, including their purpose and content, are sections 93-97. In *Karaka Point Environs Residents Inc v Marlborough District Council* [2013] NZHC 2577 the High Court commented at [18]: *“The [LGA] sets out a detailed list of what must be covered by a Long Term Plan. It is a key policy document for a local authority, and reviews are obviously significant undertakings. The purpose of the exercise is for the local authority to decide what it is intending to do, and how it is going to fund those plans.”*

³⁸ Refer for example Objective 6(a) of the National Policy Statement on Urban Development 2020 which provides: *“Local authority decisions on urban*

their own legislative purposes and schemes. We have not been able to identify any judicial decisions regarding the relationship between the private plan change or resource consent processes under the RMA and the LTP process under the LGA in the specific context of the relief sought by Mr Boonham. However, they clearly serve distinct purposes and are subject to different statutory schemes. We submit that Mr Boonham’s proposed rigid requirement for the LTP process to precede the resource consent process (in all cases) is not appropriate. It conflates the requirements of the two pieces of legislation, confusing the different roles they play.

- 4.6. Although there are many instances where LGA provisions inform RMA processes, we are aware of no legislative or policy requirement that long-term planning under the LGA must precede resource consenting under the RMA in the manner proposed by Mr Boonham.³⁹ The National Policy Statement on Urban Development 2020 (“NPS-UD”) provides in clause 3.4(3) that “development capacity”⁴⁰ is “infrastructure-ready” in relation to the medium term or long-term if adequate infrastructure to support development of the land is identified in an LTP (among other things).⁴¹ However, that is in the limited context of that clause and the use of the relevant terms in the NPS-UD. The NPS-UD does not require that all necessary infrastructure upgrades must be identified in an LTP before a resource consent for development can be granted.⁴² It also

development that affect urban environments are: (a) integrated with infrastructure planning and funding decisions...” See also Policy 10(b) of the National Policy Statement on Urban Development 2020 which provides: “*Tier 1, 2, and 3 local authorities:... (b) engage with providers of development infrastructure and additional infrastructure to achieve integrated land use and infrastructure planning*”. However, refer to footnote 42 below regarding the application of the NPS-UD in the context of a private plan change.

³⁹ There is no requirement under s75 of the RMA, relating to the content of district plans, for plans to refer to LTPs under the LGA as proposed by Mr Boonham. For completeness, s31(1)(aa) of the RMA provides the following territorial authority function: “*the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district*”. The definition of development capacity in s30 includes reference to “*the provision of adequate development infrastructure to support the development of the land*”, with development infrastructure also being defined in s30 as including wastewater.

⁴⁰ As defined in NPS-UD clause 1.4.

⁴¹ NPS-UD 3.4(3).

⁴² Notwithstanding this, in *Eden-Epsom Residential Protection Society Inc v Auckland Council* [2021] NZEnvC 82 the Court held that the only NPS-UD objectives and policies that currently apply to a private plan change request

acknowledges the separate processes governing RMA planning and infrastructure provision by recognising that some development capacity may be “plan enabled”⁴³ but not “infrastructure ready”.⁴⁴

- 4.7. With respect to Policy 16.3.9.1 5), the wording sought by MCL (and agreed between all parties to the Mangawhai Matters appeal) is set out below:⁴⁵

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.

- 4.8. We submit that this is an appropriate and directive policy which clearly sets out that it is the responsibility of the development (i.e. the developer) to provide any extensions or upgrades that are needed to ensure sufficient wastewater capacity, and other infrastructure capacity. It complements the proposed PC78 provisions relating to financial contributions.⁴⁶ Oddly, the relief sought by Mr Boonham with respect to this policy dilutes the requirement that it is the development that must provide for necessary extensions or upgrades, which is a key component of the policy. In this respect the policy wording proposed by Mr Boonham is weaker and of less value to the community than the policy sought by MCL in ensuring the developer pays for necessary infrastructure extensions/upgrades.

- 4.9. Other reasons why we submit that the amendments sought by Mr Boonham (the relief sought) are not appropriate include the following:

- (a) The relief sought would preclude resource consents being granted in scenarios where a developer is willing or required to

are those that specifically refer to “planning decisions”, being Objectives 2, 5, and 7; and Policies 1 and 6 (refer in particular to paragraphs 20 and 29-30 of the Court’s decision). This does not include the NPS-UD objectives and policies relating to infrastructure (Objective 6 and Policy 10). Refer also to *Drive Holdings Ltd v Auckland Council* [2021] NZEnvC 159, in which the Court endorses the *Eden-Epsom* decision in the context of a resource consent application (see paragraphs 23-24).

⁴³ As defined in NPS-UD clause 3.4(1).

⁴⁴ For example NPS-UD clauses 3.25(1) (housing development) and 3.29(1) (business land development).

⁴⁵ Refer also to Annexure A to these submissions.

⁴⁶ Objective 16.3.10 and the policies at 16.3.10.1.

undertake and fund any necessary extensions/upgrades,⁴⁷ for example by way of:

- (i) a development agreement as provided for under the LGA;⁴⁸
or
- (ii) the developer proposing to (or being required to) fund and/or otherwise provide necessary infrastructure extensions/upgrades by way of financial contribution or other conditions of consent.

The above scenarios would appear to satisfy the concerns raised by Mr Boonham. In his document dated 11 March 2022 Mr Boonham explicitly identifies the development agreement option as “...*the only way that the proposal can proceed.*”⁴⁹ The LGA regime applying to councils entering into development agreements with developers (sections 207A-F) does not include the public consultation processes required for LTPs.⁵⁰ The LGA development agreement provisions provide a distinct process for developers to pay for infrastructure extensions/upgrades that is separate from the wider community strategic planning and financial matters addressed through the LTP process.

- (b) Under the relief sought by Mr Boonham, wastewater infrastructure upgrades or extensions that are included in an LTP, but which are perhaps expressed in non-specific terms, or provided for towards the end of a long term plan (8+ years away), and/or which may be subject to change through the LTP process, could satisfy the requirements of the provisions he seeks. In practice, therefore, Mr Boonham’s wording will not necessarily provide the certainty he appears to be seeking but could expose

⁴⁷ But where the relevant infrastructure is not planned and funded and included in an LTP.

⁴⁸ Refer to sections 207A-F of the LGA.

⁴⁹ Mr Boonham’s document dated 11 March 2022, paragraph 18.1, bullet point seven.

⁵⁰ Under s93(2) of the LTP councils must use the special consultative procedure set out in the LGA in adopting a long-term plan.

development to unnecessary delays when a development agreement might be concluded earlier in time.

- (c) The relief sought would preclude consents being granted where other forms of planning/funding for wastewater infrastructure extensions or upgrades are in place which may, in combination or alone, provide a higher degree of certainty and timeliness than what is required under the wording Mr Boonham seeks. This could include planning/funding by way of:
 - (i) a consented or designated expansion/upgrade to the wastewater treatment infrastructure;
 - (ii) a Council Asset Management Plan or Infrastructure Management Plan (or equivalent);
 - (iii) a development agreement with a private developer;
 - (iv) a relevant Council resolution; and/or
 - (v) inclusion in an annual plan in accordance with the LGA.
- (d) The relief sought could effectively provide the Council with a development veto, whereby appropriate development could be blocked simply by not including any necessary infrastructure upgrades/extensions in the LTP process.
- (e) The relief sought would mean that *any* upgrade or extension required to the Council wastewater system (regardless of the scale of the extensions/upgrades involved or how they are being funded) would be required to be specifically included in the LTP before consent could be granted for a proposal. Upgrades/extensions required could be minor depending on the nature and scale of a particular proposal. We submit this bottom-line is unwieldy and disproportionate.
- (f) The relief sought may mean that the LTP process (undertaken every three years)⁵¹ and the processes for its amendment (which

⁵¹ LGA s 93(3).

require the special consultative procedure set out in the LGA)⁵² are not responsive enough to keep pace with whatever upgrades to the wastewater system may be required from time to time.⁵³

- (g) The relief sought is likely to lead to process inefficiencies by requiring that, in every case, planning and funding for infrastructure upgrades be in place and included in an LTP in advance of resource consents for development that would require such infrastructure.

4.10. Overall, we submit that:

- (a) The PC78 provisions proposed by MCL include an appropriate framework to determine resource consents (including, if necessary, to decline to grant consent or impose relevant consent conditions, including financial contribution conditions) in order to address any wastewater infrastructure capacity/funding issues.
- (b) The amendments sought by Mr Boonham are unduly onerous, do not improve the PC78 framework applying to wastewater capacity issues, and are not appropriate. They unduly elevate the LTP process over other processes available under the LGA and RMA, thereby inappropriately constraining the good governance tools available to the Council.

MCL's potential alternative

4.11. If the Court is minded to make changes to PC78 to address Mr Boonham's concerns, MCL considers that a sensible option to assist plan users with the interpretation of the term "planned capacity" (as it is proposed to be used in the wording sought by MCL) and to provide additional certainty would be for an explanatory note to be added to the relevant PC78 provisions. An effective advice note could be cross referenced in the two assessment criteria where the term "planned capacity" is used (16.7.4.1 eee) and 16.10.8.2 f)),⁵⁴ providing a non-

⁵² Refer for example LGA s93(5), 93A, and 93D.

⁵³ The process and timing for funding determinations under the LGA was addressed briefly in *C P Group Ltd v Auckland Council* [2021] NZCA 587 at [21].

⁵⁴ By way of asterisk or similar.

exhaustive list of the matters that may constitute “planned” wastewater capacity for the purposes of those provisions:

Evidence of planned capacity could include one or more of:

- (1) *a consented or designated expansion/upgrade to the wastewater infrastructure;*
- (2) *an Asset Management Plan or Infrastructure Management Plan, or equivalent;*
- (3) *a development agreement with a private developer;*
- (4) *a relevant Council resolution; or*
- (5) *inclusion in a long-term plan or annual plan in accordance with the Local Government Act 2002.*

Section 32AA

- 4.12. With respect to s32AA of the RMA, MCL’s suggested advice note would not alter the substance of the PC78 provisions agreed between the parties to the Mangawhai Matters appeal. We submit that it would provide greater clarity and increased efficiency with respect to the use of the District Plan. Therefore, MCL considers that including the above advice note (or similar) in PC78 is an appropriate way to achieve the relevant objectives (including with respect to other reasonably practicable options; and the efficiency and effectiveness of the provisions, including their costs and benefits) should the Court be minded to include it.
- 4.13. Mr Boonham’s proposed amendments are not supported by an explicit s32AA analysis. MCL considers Mr Boonham’s proposed amendments would have significant costs, including through requiring the declining of resource consents for development in circumstances where wastewater infrastructure capacity issues may not warrant that course of action (thus preventing the sustainable and efficient use of natural and physical resources); and by requiring in every case that necessary infrastructure upgrades/extensions be included in an LTP before resource consents are granted under the RMA for a proposal requiring such additional infrastructure (thus resulting in potential inefficiencies).


The Council's proposal

- 4.14. Counsel for the Council has alerted us to an alternative proposal to be included in legal submissions on behalf of the Council. We understand the Council will be proposing to include further guidance regarding the interpretation of "planned capacity" through additions to assessment criteria 16.7.4.1 eee) and 16.10.8.2 f).
- 4.15. Unlike the relief sought by Mr Boonham, the Council's proposal does not provide that the inclusion of necessary wastewater upgrades/extensions in an LTP is the *only* method by which the requirements of the relevant provisions can be satisfied. Therefore, MCL would have no issue with the Council's approach being adopted, and accepts that it provides additional certainty should the Court prefer it.

5. CONCLUSION

- 5.1. In summary, MCL submits that the relief sought by Mr Boonham is not actually required to address his concerns as to wastewater capacity, and his amendments are inconsistent with the responsible governance options set out in the LGA and the spirit of the RMA's sustainable management purpose. The package of PC78 wastewater provisions agreed between the parties to the Mangawhai Matters appeal,⁵⁵ together with the advice note proposed by MCL or the additions to the relevant assessment criteria proposed by the Council, should the Court be minded to include them, are robust and fit for purpose to deal with wastewater capacity issues relating to PC78.

DATED this 18th day of March 2022



I M Gordon, S J Mutch, E J Ellis

Counsel for Mangawhai Central Ltd

⁵⁵ Refer to the PC78 provisions attached to joint consent memorandum dated 11 March 2022. The key wastewater provisions are attached to these submissions as **Annexure A**.

ANNEXURE A
KEY PC78 PROVISIONS RELATING TO WASTEWATER

Explanatory note

Set out below are key PC78 wastewater provisions, as proposed in the joint consent memorandum of the parties to the appeal by Mangawhai Matters Incorporated (ENV-2021-AKL-000062) dated 11 March 2022, and as sought by Mangawhai Central Ltd (“MCL”) with respect to the appeal by Mr Boonham (ENV-2021-AKL-000061).

Provisions highlighted in **orange** are those provisions that Mr Boonham seeks are amended (refer to the document filed by Mr Boonham on 11 March 2022).

The alternative provision wording sought by Mr Boonham in his document dated 11 March 2022 is set out in **blue** underneath the corresponding provision sought by MCL.

Provisions marked in **grey highlight** are operative Kaipara District Plan provisions that are cross-referenced in PC78 but which PC78 does not propose to amend.

1. PC78 WASTEWATER OBJECTIVES AND POLICIES (INCLUDING FINANCIAL CONTRIBUTIONS)

16.3.9 Utilities, Services and Infrastructure Objective

To ensure the provision of sustainable infrastructure networks that provides for properly serviced, and orderly development.

16.3.9.1. Policies

...

- 4) *By requiring that all wastewater systems be connected to Council's public reticulated (EcoCare) system*
- 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.*

[Mr Boonham wording:]

- 5) *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.

16.3.10 Financial Contributions Objective

1. *To ensure that the timing of subdivision and development of the Estuary Estates Structure Plan area is coordinated with the provision of infrastructure needed to serve the area and that development contributes its share of the growth related costs of this infrastructure*

16.3.10.1 Financial Contributions Policies

1. *By requiring development to make contributions at the time of subdivision and/or development (including at the building stage) to provide for infrastructure and reserves within Mangawhai as enabled by Rules 22.10, including 22.10.7 of the District Plan.*
2. *Ensure the proportion of costs associated with the provision of growth-related infrastructure arising from the development, such as provision of new, or upgrades or extensions to community facilities within Mangawhai as provided for under Rules 22.10.1, 22.10.6 and 22.10.7 are met by the development by imposing conditions on resource consents.*

16.3.11.1 Policies

...

- 2) *By ensuring that all subdivisions are able to be properly serviced and can avoid, remedy, or mitigate the effects of natural hazards.*

2. OTHER PC78 WASTEWATER PROVISIONS

16.7.4 Discretions for Restricted Discretionary Activities

Where an activity is a Restricted Discretionary Activity Council will restrict its discretion over the following matters (and as listed as being relevant to each activity in Table 16.7.4) when considering and determining an application for Resource Consent:

...

- e) *Infrastructure...;*

...

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

[Mr Boonham wording:]

eee) 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

...

e) Infrastructure

- i. Whether the proposal avoids creating any demand for services and infrastructure at a cost to the wider community.
- ii) The extent to which the proposal provides for sustainable infrastructure and servicing and in particular the supply of water.

...

eee) Wastewater Network Capacity

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.

[Mr Boonham wording:]

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.

16.8.3 Water Supply and Wastewater Supply

a) The following Rules shall apply as follows:

Sub-Zone	...	Wastewater Performance Standard
1		14.13.6
[DELETED]		
3		13.14.6
[DELETED]		
[DELETED]		
7		14.13.6

Chapter 13 – Residential

...

13.14 Performance Standards for All Residential Subdivision

Where activities do not comply with the Performance Standards in Section 13.14 the specific assessment criteria for the Standard infringed, contained within Section 13. 14 will need to be considered, in addition to the relevant Assessment Criteria under Rule 13.10, 13.11 or 13.12.

...

13.14.6 Wastewater Disposal

1. Where a Council reticulated wastewater system is available:

- (a) The written approval of Council's Asset Manager is obtained and provided with the application to confirm that the Council wastewater system can be extended to serve the subdivision; and
- (b) All allotments are provided, within their net site area, with a connection to the Council reticulated wastewater system; and
- (c) The reticulated wastewater system is designed and constructed in accordance with the specific requirements of the Council wastewater system; and
- (d) All water pipelines vested with Council shall be protected by an Easement in favour of Council.

...

Activity Status if the Activity does not meet the Performance Standard: Discretionary activity

Assessment Criteria:

Council will have regard to the following matters when considering an application for Resource Consent under this Rule:

- i. Whether the capacity, availability and accessibility of the reticulated system is adequate to serve the proposed subdivision;
- ii. Whether there is sufficient land available for wastewater disposal on site, minimum 2,000m² for unserviced sites;
- iii. Whether and the extent to which the application includes the installation of all new reticulation, and complies with the provisions of the Kaipara District Council Engineering Standards 2011 or has been confirmed as appropriate by Council's Engineer;
- iv. Whether the existing wastewater treatment and disposal system, to which the outfall will be connected, has sufficient capacity to service the subdivision;
- v. Whether a reticulated system with a gravity outfall is provided, and where it is impracticable to do so, whether it is feasible to provide alternative individual pump connections (with private rising mains), or new pumping stations, complete pressure, or vacuum systems. Note: Council consent to install private rising mains within legal roads will be required under the Local Government Act;
- vi. Where a reticulated system is not available, or a connection is impracticable, whether a suitable wastewater treatment or other disposal systems is provided in accordance with regional Rules or a discharge system in accordance with regional Rules

or a discharge permit issued by the Northland Regional Council;

- vii. Where a reticulated system is not immediately available but is likely to be in the near future whether a temporary system is appropriate. Note: Consent notices may be registered against Certificates of Title pursuant requiring individual allotments to connect with the system when it does become available;
- viii. Whether provision has been made by the applicant for monitoring mechanisms to ensure contaminants are not discharged to the environment from a suitable wastewater or other disposal system, together with any consent notices to ensure compliance;
- ix. The need for and extent of any financial contributions in accordance with Chapter 22: Financial Contributions to achieve the above matters;
- x. Whether there is a need for a local purpose reserve to be set aside and vested in Council as a site for any public wastewater utility for disposal or treatment purposes required to be provided;
- xi. The provision of practical vehicular access from a public road to and along any area vested with Council for waste water purposes; and
- xii. Whether the subdivision represents the best practicable option in respect of the provision that is made for the disposal of wastewater.

Note 1: General assessment of the Kaipara District Council Engineering Standards 2011 is undertaken as part of the assessment of the Subdivision Resource Consent application and conditions relating to compliance with any of these Standards may be applied to the Consent as part of the engineering approval.

Chapter 14 – Business: Commercial and Industrial

...

14.13 Performance Standards for All Business Subdivisions

Where activities... do not comply with the Performance Standards in Section 14.13 the specific assessment criteria for the standard infringed contained within Section 14.13 need to be considered. This will result in the activity being assessed as a Discretionary Activity.

...

14.13.6 Wastewater Disposal

...

1. **Where a Council reticulated sewerage system is available:**
 - (a) The written approval of Council's Asset Manager is obtained and provided with the application to confirm that the Council wastewater system can be extended to serve the subdivision;

- (b) All allotments are provided, within their net site area, with a connection to the Council reticulated wastewater system;
- (c) The reticulated wastewater system is designed and constructed in accordance with the specific requirements of the Council wastewater system; and
- (d) All water pipelines vested with Council shall be protected by an Easement in favour of Council.

Activity Status if the Activity does not meet the Performance Standard: Discretionary activity
Assessment Criteria:

Council will have regard to the following matters when considering an application for Resource Consent under this Rule:

- i) Whether the capacity, availability and accessibility of the reticulated system is adequate to serve the proposed subdivision;
- ii) Whether there is sufficient land available for wastewater disposal on site, minimum 2,000m² for unserviced sites;
- iii) Whether and the extent to which the application includes the installation of all new reticulation, and that it complies with the provisions of the Kaipara District Council Engineering Standards 2011 or has been confirmed as appropriate by Council's engineer;
- iv) Whether the existing wastewater treatment and disposal system, to which the outfall will be connected, has sufficient capacity to service the subdivision;
- v) Whether a reticulated system with a gravity outfall is provided, and where it is impracticable to do so, whether it is feasible to provide alternative individual pump connections (with private rising mains), or new pumping stations, complete pressure, or vacuum systems. Note: Council consent to install private rising mains within legal roads will be required under the Local Government Act;
- vi) Where a reticulated system is not available, or a connection is impracticable, whether a suitable wastewater treatment or other disposal systems is provided in accordance with regional Rules or a discharge system in accordance with regional Rules or a discharge permit issued by the Northland Regional Council;
- vii) Where a reticulated system is not immediately available but is likely to be in the near future whether a temporary system is appropriate. Note: Consent notices may be registered against Certificates of Title pursuant requiring individual allotments to connect with the system when it does become available;
- viii) Whether provision has been made by the applicant for monitoring mechanisms to ensure contaminants are not discharged to the environment from a suitable wastewater or

other disposal system, together with any Consent Notices to ensure compliance;

- ix) The need for and extent of any financial contributions in accordance with Part D: Chapter 22 Financial Contributions to achieve the above matters;*
- x) Whether there is a need for a local purpose reserve to be set aside and vested in Council as a site for any public wastewater utility for disposal or treatment purposes required to be provided;*
- xi) The provision of practical vehicular access from a public road to and along any area vested with Council for wastewater purposes; and*
- xii) Whether the subdivision represents the best practicable option in respect of the provision that is made for the disposal of wastewater.*

Note 1: *General assessment of the Kaipara District Council Engineering Standards 2011 is undertaken as part of the assessment of the subdivision Resource Consent application and conditions relating to compliance with any of these Standards may be applied to the Consent as part of the Engineering Approval.*

16.10 Subdivision Provisions

...

16.10.8.1 Matters Over Which Discretion is Restricted

Council has restricted its discretion over the following matters when considering and determining an application for Resource Consent:

...

- f) Public utilities;*
- ff) The capacity of the existing or planned reticulated wastewater network(s) to meet the servicing needs of the proposal.*

...

[Mr Boonham wording:]

- ff) Whether there is adequate existing wastewater infrastructure to service the proposed proposal (subdivision?) [sic], 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

Council will have regard to the following assessment criteria when considering and determining an application for Resource Consent:

...

- e) *Where staged subdivision is proposed, whether all necessary infrastructure, roading, utilities, public spaces and connections to service the proposed development will be established.*

...

- 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.*

...

[Mr Boonham wording:]

- f) *Whether there is adequate existing wastewater infrastructure to service the proposed development or activity (subdivision?) [sic], 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.*

16.10.10.4 Subdivision Design

...

16.10.10.4.3 Services

The following Rules shall apply as follows:

Sub-Zone	Wastewater Disposal
1				14.13.6
[DELETED]				
3				13.14.6

See above 14.13.6 and 13.14.6 in **grey highlight**