

**INTERNAL AFFAIRS**



*Te Tari Taiwhenua*

**Kaipara District Council (Validation of Rates and Other Matters) Bill**

**Report of the Department of Internal Affairs to the Local Government and Environment Committee**

**15 October 2013**

**Confidential until the Bill is reported back to Parliament**

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## **1. Introduction**

The Kaipara District Council (Validation of Rates and Other Matters) Bill (the Bill) seeks to validate historic procedural irregularities by the Kaipara District Council (the Council) relating to:

- requirements for setting and assessing rates under the Local Government (Rating) Act 2002 (the Rating Act) between 2006/07 and 2011/12; and
- requirements for long-term plans, use of the special consultative procedure and annual reports under the Local Government Act 2002 (the LGA02).

This report is based on consideration of the Bill and the written and oral submissions received by the Local Government and Environment Committee (the Committee). It includes discussion of specific issues arising in submissions and matters on which advice was requested by the Committee at various meetings to hear evidence on the Bill.

### **Department conclusion**

The Department considers that progressing the Bill, with some amendment for clarification, is the most practical and cost effective option to address historical rating irregularities for the district of Kaipara as a whole.

The Department considers the most important criteria for assessing validating legislation are identification of the public interest and the extent, if any, to which people will be adversely affected. In this case, any other alternative, such as reimbursement of irregular rates or the status quo, will result in greater future costs to the Council and therefore to ratepayers than if the original rates are validated under the Bill.

Rates and penalties could have been correctly set to result in the same rates liability for each ratepayer and the same revenue for the same purposes as those to be validated by the Bill. The volume of irregularities to be validated occurring over many years, rather than the nature of them, has made this a significant matter.

It would be unfair to the majority of ratepayers who have paid their rates to reimburse or waive penalties on unpaid rates that are to be validated. Additional expenses would also be generated. Most Kaipara ratepayers have paid their rates on time, and are currently meeting additional costs imposed by those who are refusing to pay rates.

The Bill does not remove the right of parties to bring proceedings. The accountability of parties would not be affected by the passing of the Bill.

There has been a history of governance, process and consultation issues and controversy surrounding decision making by the Council. The Bill does not seek to address these wide ranging issues, nor does it mandate them. However, the Bill will bring some level of certainty and a possible conclusion to some of these matters.

The Bill is one aspect of a wider strategy being progressed by the Commissioners to manage the Kaipara District into a financially feasible and functioning community.

## 2. Historic context for Bill

The historical context for the Bill was set out in the Department's initial briefing to the Committee dated 29 July 2013 and is summarised below.

### *Appointment of Commissioners*

Commissioners were appointed by the Minister of Local Government under the LGA02 on 6 September 2012, at the request of the Council.

For the term of their appointment the Commissioners are the local authority for the Kaipara District, with all the functions, responsibilities, duties and powers of the Council<sup>1</sup>.

On 18 December 2012 Commissioners formally resolved to progress a local bill to resolve the historic rating issues and other legal compliance matters.

### *Community response to Mangawhai uniform targeted rate*

Between 2008/09 and 2011/12 the Council levied a one-off targeted rate for capital costs on properties as they connected to the Mangawhai Community Wastewater Scheme. The amount of the rate varied between \$7,088.35 and \$7,742.10. The Council offered ratepayers the choice of paying this as a lump-sum amount, spreading payment over two years, or spreading payment over 25 years.

The decision to fund part of the debt for the Mangawhai Community Wastewater Scheme in this way, and the amount of the rate, was within the jurisdiction of the Council. However, the procedures for setting and assessing the targeted rate were not followed correctly. The Bill validates the procedural errors made (refer to paragraphs 20 - 23 of the Bill's preamble).

Some Mangawhai ratepayers are of the view that they should not be liable for invalid rates or for penalties on invalid rates, and have withheld payment accordingly in a "rates strike".

### *Wider forward strategy for Kaipara*

The Commissioners have indicated that the intention to resolve historical rating issues and other legal compliance matters through the Bill is one essential component of a wider forward strategy for Kaipara District. The strategy aims to manage Kaipara District into a feasible financial position, to establish sustainable funding and rating models for the future and to rebuild confidence and trust in the Council.

The balance of the Mangawhai Community Wastewater Scheme will be funded through development contributions and general rates over the whole of the Kaipara District. The financial components of the strategy will be implemented through amendments to the 2012-2022 Long-term Plan.

The implications of the Bill on future rates for the District are covered in Part 8 of this report.

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<sup>1</sup> New Zealand Gazette, No.110, 6 September 2012, Page 3155

### **3. Legislative context for Bill**

#### **a) An overview of how rates should work - the legislative framework for local authority rates**

In order to assist consideration of the issues raised by the Bill, the information below provides a general description of the legislative framework under which local authorities exercise their powers to set and assess rates on properties in their district or region.

The key piece of legislation is the Rating Act. This is a largely technical Act that sets out the powers that local authorities have in respect of rates. The LGA02 provides the general accountability framework that governs the exercise of powers under the Rating Act. The Rating Valuations Act 1998 regulates the determination of rateable values for properties and related matters.

The basic steps in chronological order required to be undertaken by a local authority under the legislative framework are as follows:

- i Public consultation on draft long-term (10 year) plan containing:
  - proposed budgets for groups of activities in each year;
  - proposed revenue and financing policy that describes how expenditure is to be funded (e.g. using rates, user charges, loans etc); and
  - proposed funding impact statements for each year identifying specific funding mechanisms including different types of rates
- ii Long-term plan adopted
- iii Public consultation on draft annual plan containing:
  - proposed budgets for groups of activities for year; and
  - proposed funding impact statements for year
- iv Annual Plan adopted
- v Rates resolution setting rates in accordance with funding impact statement in adopted annual plan
- vi Assessments sent to ratepayers describing the liability resulting from applying the rates set by the local authority to the valuation and other rateable characteristics of each property (rating unit). Identifies what is funded by each rate
- vii One or more invoices sent to ratepayers requiring payment of proportion of rates

The general characteristics of the rates that can be set by a local authority are as follows:

<i>General rates</i>	Assessed on the rateable value of every property in the district. May be set at different rates in the dollar for different categories of property, for example categories based on use, location etc. Used to fund district wide public services of general benefit etc.
<i>Uniform Annual General Charge</i>	A set amount per property, or per separately used part of a property, in the district. Used to fund district wide public services of general benefit etc.
<i>Targeted rates</i>	Can be calculated on rateable value, as a set amount per property or per separately used part of a property, or a range of other factors. Can be targeted to particular areas or particular categories of property. Used to fund services/expenditure that benefit particular groups.

## **b) Clarification of the current legal status of rates to be validated**

It is important as context for understanding the Bill, and for considering some of the points raised in submissions, to recognise the current legal status of the rates that the Bill seeks to validate.

It is clear that the Council did not fully comply with legislative requirements in setting and assessing the rates that are the subject matter of this Bill. It is possible that a Court could decide that the extent and nature of non-compliance is sufficient to determine that some or all of the rates were not validly made and are invalid. It is also possible that a Court could, in relation to some of the identified irregularities, determine that the non-compliance is not fatal to the validity of the rates.

The Bill seeks to remove uncertainty about whether the rates are valid or not but the decision to seek validation, and any decision by Parliament to enact validating legislation, does not entail accepting or determining that the rates are invalid. The rates cannot be known to be invalid, and cannot be treated as invalid, until a Court determines that they are. The rates are effectively presumed to be valid until the Court rules them otherwise. This is recognised in section 60 of the Rating Act that states:

<i>Section 60 Invalidity of rates not ground for refusal to pay rates</i>	A person must not refuse to pay rates on the ground that the rates are invalid unless the person brings proceedings in the High Court to challenge the validity of the rates on the ground that the local authority is not empowered to set or assess the rates on the particular rating unit.
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### **c) Scope of Bill and implications for possible amendments**

The Department notes that the Clerk of the Committee has been asked to clarify the scope of the Bill which will determine the limits on the type of amendments that the Committee can recommend to the Bill.

The Department's understanding is that, in respect of a Local Bill, scope is determined by both the content of the Bill as introduced and the content of the public notice of intention to introduce the Bill required by Standing Orders.

It is the Department's understanding that the scope of this Bill is limited to validation of historical rates, policies and plans and ancillary matters. It is therefore likely that the Bill cannot deal with issues relating to other governance decisions by the Council or their consequences. This precludes the inclusion of any provisions dealing with the design and commissioning of the Mangawhai Community Wastewater Scheme or the debt incurred by the Council in relation to that scheme.

It is also likely that the scope of the Bill precludes the inclusion of provisions directing or empowering the Council in relation to how it assesses rates in the future or how it administers the future collection of rates that are subject to the Bill.

Scope issues may therefore significantly limit the options available to the Committee in dealing with the issues raised in submissions on the Bill. The Department's understanding of the scope limitations is reflected in our discussion of issues and options in this report. However we emphasise that there are likely to be significant grey areas and that we are not experts in this field. The Committee may wish to seek further advice from the Office of the Clerk on whether particular proposals could be dealt with within the scope of the Bill.

## 4. Content of Bill

The Bill validates and declares lawful irregularities in the way in which the Council purported to comply with certain provisions of the LGA02 and the Rating Act between 2006/07 and 2012/13. This includes validating the Mangawhai uniform targeted rate set by the Council for 2008/09 to 2010/11. The irregularities under the Rating Act were in relation to the way local authority rates were set and assessed.

In particular the Bill:

- validates rates that were purportedly set and assessed by the Council between 2006/07 and 2012/13;
- validates all penalties added to any validated, unpaid rates;
- declares all money received by the Council, in relation to the validated rates and penalties, to be lawful; and
- provides that any unpaid rates or penalties, in relation to the above, may be lawfully recovered by the Council.

In respect of the Mangawhai uniform targeted rate set by the Council for 2008/09 to 2010/11 for the Mangawhai Community Wastewater Scheme, the Bill seeks to validate requirements to pay amounts in line with proposals on which the Mangawhai community was consulted in 2006.

Note that additional costs resulting from a subsequent decision to extend the Mangawhai Community Wastewater Scheme will be funded through development contributions, and from general rates over the whole of the Kaipara District.

The Bill also validates:

- the development contribution and financial contribution policy in the 2009-2019 Long-term Council Community Plan, which was not reviewed in accordance with LGA02 requirements;
- the 2010/11 Annual Report, despite its adoption after the deadline in the LGA02; and
- the 2012-2022 Long-term Plan, despite:
  - its adoption after the statutory deadline; and
  - defects in the special consultative procedure undertaken in respect of the Plan.

## **5. Overview of submissions on the Bill**

The Committee received a total of 157 written submissions plus supplementary submissions on the Bill. The Committee heard oral evidence from 77 submitters in both Maungaturoto and Wellington.

133 submissions were opposed to the Bill.

24 submissions were in support of the Bill. One of these submissions was signed by 88 additional people.

Comments in this report on submissions as they relate to each clause of the Bill are a high level summary and a representation of the wide ranging and comprehensive points raised by submitters across a number of clauses. Numbers of submitters attributed to commenting on each clause are based on the Department's analysis of submissions.

Detailed Department comment on the submission from the Mangawhai Ratepayers and Residents Association (MRRA) is included in this report in Part 7.

The full submissions have been made publically available on the Parliamentary website.

### **Submissions in opposition to the Bill**

Key recurring themes raised in submissions in opposition to the Bill were:

- there has been a lack of engagement and consultation by the Commissioners with the community on the Bill and that a way forward needs to be negotiated with ratepayers;
- the elected Council, Commissioners, Council staff, banks, the Office of the Auditor General (OAG) and central Government ought to be held to account for their role in Kaipara's situation;
- the Bill should not be progressed while Court proceedings are underway;
- the Bill should not be progressed until the OAG Report is released;
- retrospective legislation is undemocratic;
- many of the Council's actions were illegal, resulting in rates that could not have been made legally. The errors were not minor or procedural;
- penalties should not be payable on rates that were illegal at the time;
- the rates strike is an intentional "last ditch" action by ratepayers to draw the attention of central Government to the issues in the Kaipara District and penalties should not be payable on these unpaid rates; and
- the rates in Kaipara are unaffordable and unsustainable.

## **Submissions in support of the Bill**

Key recurring themes raised in submissions in support of the Bill as follows:

- if the Council continues to remain under financial pressure it will impact on infrastructure and roading which are required to operate businesses, agriculture and other economic activity;
- the Bill will allow the Council to move from out of the financial pressure it is under;
- the logistics of any other form of redress are beyond any reasonable process and potentially more unjust;
- rates are being used to provide services to people who are not paying their rates under the rates strike;
- the Commissioners have said that in all cases the rates in question could have been set if the Council followed correct procedure; and
- despite the issues of the past, the District needs to progress and move forward.

## **6. Schedule of advice requested by the Committee**

### **Advice provided by the Department**

At its meeting of 8 August 2013, the Committee requested advice on the amount of validation legislation that has been passed in the past 30 years. This was provided to the Committee on 19 August 2013.

At its meeting of 26 August 2013, the sub-Committee requested advice on why the 2012/13 rates were included in the Bill. This was provided to the Committee on 17 September 2013.

At its meeting of 5 September 2013, the Committee requested advice on the rates levels for sample houses in Mangawhai and how these compare with rates levels for properties in some similar coastal areas of New Zealand. This was provided to the Committee on 17 September 2013.

### **Advice included in this Department Report**

At its meeting of 22 August 2013, the Committee requested advice on points that the Mangawhai Ratepayers and Residents Association made in its written submission. This is covered in Part 7 of this report.

At its meeting of 22 August 2013, the Committee requested advice on the projected rates for an average house in the Kaipara District and how this might be affected if historic rates were and were not validated. This is covered in Part 8 of this report.

At its meeting of 26 September 2013, the Committee requested advice on the assessment of cost, month by month, of delaying the Bill. This is covered in Part 9 of this report.

### **Advice provided by the Clerk of the Committee**

The Department notes that the Clerk of the Committee is advising the Committee on matters of scope and whether it would be within scope for the Bill to deal with matters associated with, but distinct from, those matters being validated in the Bill, for example the application of protected transactions under section 117 of the LGA02. Brief Department comment on this matter is included in Part 3(c) of this report.

## **7. Advice on Mangawhai Ratepayers and Residents Association submission**

### **a) Could rates to be validated have been made legally?**

The Department's advice is that the rates and penalties of identical effect to those to be validated could have been correctly set. Had they been correctly set, they would have resulted in the same rates liability for each ratepayer and would have been used for the same purpose.

The Mangawhai Ratepayers and Residents Association (MRRA) submits that an exception clause be inserted in the Bill that says "nothing in the Act validates any decisions of the Council that could not have been made according to the law at the time it was made". Its submission states that such a clause would ensure that ratepayers are not retrospectively penalised for not complying with rates demands that were illegal at the time they were made.

The Committee has sought advice on the claim in submissions of the MRRA that some of the rates covered by the Bill could not have been made in a lawful manner. This assertion is contrary to the claim by the promoters of the Bill that the irregularities are technical and the same outcomes could have been achieved by rates that were fully compliant with the law. The submission of the Council included, as its first attachment, a table describing each of the rates covered by the Bill, the nature of non-compliance in each case, how that rate could have been set correctly, and the services funded.

The issue of whether the irregular rates could have been set correctly is in part a semantic one. Many of the irregularities relate to the way the rates were described in the Council's funding impact statement, or its rates resolution, or both. To the extent that the rates as described in those documents could not have been legally set, the MRRA is correct.

The Council's submission, however, takes a more pragmatic approach. It demonstrates that the Council could have properly set rates that resulted in the same rates liability for each ratepayer as the irregular rates, and which generated the same revenue for the same purposes as those rates.

In the Department's assessment, the distribution of liability for particular rates, and the uses to which revenue from those rates are put, are the essential attributes of any rate.

In this context, the main impact of the irregularities identified in respect of the rates covered by the Bill has been to prevent ratepayers having a clear and accurate picture of the rates proposed in consultation documents. This in turn will have limited the ability of those ratepayers to participate on an informed basis in consultation processes, which may have influenced the final decisions about rates. This erosion of ratepayer's rights and opportunities is regrettable, but it cannot be undone.

## **b) Ability to pursue Court proceedings and protect any relief**

The Department's advice is that we do not support including a provision in the Bill explicitly protecting any relief that may be granted by the Court in the current proceedings.

A request from some submitters, including the MRRA, seeks that, if the Bill is to proceed, it should include a provision explicitly protecting any relief that may be granted by the Court in the current proceedings. Submitters cite a number of recent precedents for the inclusion in legislation of provisions protecting the outcome of judicial decisions.

The MRRA submits that a savings clause be inserted in the Bill that says "The proceedings between the Mangawhai Ratepayers and Residents Association and the Kaipara District Council may be continued or settled as if this Act had not been enacted". Its submission states that this clause will preserve the ability of the MRRA to pursue its legal proceedings for judicial review that were filed on 11 March 2013.

The Department notes that there are older, but more directly comparable, examples of similar provisions amongst the rates validation legislation that was the subject of our preliminary advice of 29 August 2013. That advice noted that the Invercargill City Council (Differential Rating Validation) Act 1986 validated matters that the Court of Appeal had found to be invalid before the legislation was initiated. The Act included provisions that protected the relief that had been ordered by the Court to ratepayers who were party to those proceedings.

Even more similar to the current Bill is the Thames-Coromandel District Council (Whitianga Lump Sum Validation) Act 1996 which validated matters that were the subject of a High Court challenge at the time the Bill was introduced and which appear to have been unresolved at the time of enactment. The Act contains a provision stating that it does not affect the rights of parties to any proceedings commenced before the legislation was introduced.

There are, however, significant differences between the circumstances surrounding the 1996 Act and the current Bill. The first is that the Thames-Coromandel District Council decided to seek validation legislation in response to the initiation of Court proceedings. The records indicate that the key motivation in seeking validation was to prevent an adverse Court finding leading to widespread unravelling of its funding arrangements. In contrast, the MRRA initiated legal proceedings after the public notice of the Council's intention to seek validating legislation.

A second key difference is that the litigation in the Thames-Coromandel case was initiated by a very small number of ratepayers that were directly, and adversely, affected by the rating issues in question. The identification and protection of any relief that the Court might subsequently grant to those litigants was a potential cost, but not a crippling one, to the finances of that Council. In contrast, the legal challenge to the Kaipara rates is being taken by the MRRA, which is not itself a ratepayer, and which is seeking amongst other

things an order that all rates invalidly set during 2005/6 to 2012/13 be refunded to all ratepayers in the District. Ring-fencing that potential outcome would effectively defeat the purpose of the Bill.

### **c) Penalties on unpaid rates**

The Department's advice is that we support the validation of all penalties that would have been lawful had they been added to valid rates.

A number of submitters, including the MRRA, have requested that if the Bill proceeds it should not validate the imposition of penalties on unpaid rates that were invalid at the time they were made. The MRRA submits that clause 6 of the Bill, which validates penalties on specified rates, be deleted. Two broad types of argument have been advanced in support of this request:

- the argument that ratepayers should not be penalised for refusing or failing to pay rates that were invalid or illegal; and
- the argument that ratepayers should not be penalised for refusing to pay rates as part of a civil disobedience or "whistleblower" campaign to highlight the governance and financial management problems of the Council.

The Committee has asked the Department to provide advice on options for the treatment of penalties under the Bill.

Penalties under the Rating Act must be set by the local authority at the time of its rates resolution. A council may resolve to apply penalties (of up to 10 per cent) which are added to the amount of rates owed:

- on rates that are not paid by the due date (or a later date set by council); and
- on unpaid rates from previous years, at six monthly intervals.

Penalties on rates serve two purposes, as an incentive to payment of rates and to cover the cash-flow costs incurred by the local authority as a result of non-payment of rates.

In respect of the first argument advanced in support of the request not to validate penalties, the Department has already noted in Part 3(b) of this report that:

- the rates in question are not, at present, invalid or illegal pending any Court decision on this issue; and
- section 60 of the Rating Act is explicitly clear that alleged invalidity does not detract from the legal obligation to pay rates.

In respect of the second "whistleblower" argument, the Department notes that:

- although promoted earlier, the "rates strike" called by the MRRA commenced at around the same time as the Review Team was appointed

by the Minister of Local Government in June 2012 to investigate the governance and management issues at Kaipara District Council;

- given the range of actions that have now been taken to address concerns it cannot be argued that there is still a need to continue to withhold rates;
- we understand that the Council waived the penalty on outstanding rates imposed at the start of the 2012/13 rating year, in recognition of its commitment to addressing historic rating irregularities;
- most Kaipara ratepayers have paid their rates on time, and are currently meeting additional costs imposed by those who are refusing to pay rates; and
- ratepayers who have refused to pay rates have had, or could have had, a benefit from the use of those funds since the due date. It is inequitable that “whistleblowers” acting ostensibly in the public interest be able to retain that benefit at a cost to other ratepayers.

## 8. Impact of Bill on future rates

At its meeting of 22 August 2013, the Committee requested advice on the projected rates for an average house in the Kaipara District and how this might be affected if historic rates were and were not validated. The Committee authorised the Department to seek this information from the Council.

The Council's detailed response is attached to this report as Appendix One and attachment to Appendix One. The response consists of:

- a letter to the Department setting out the information sought and the methodology and assumptions used by the Council to generate its detailed response; and
- three attached tables detailing the results of applying four scenarios to average rates per property in different use categories, and to selected sample properties across the Kaipara District, with and without penalties.

### High level summary of Council's response

The four different scenarios applied by the Council are:

- *Scenario 1* includes projected rates for the 2014/15 year based on the 2012-22 Long Term Plan projections for that year. The critical assumptions are that the rates irregularities included in the Bill are validated without significant delay and that rates arrears are repaid in a timely manner.
- *Scenario 2* assumes that the rates are not validated, that the Council has been required to refund the \$17 million (including GST) of rates affected by the irregularities to the ratepayers who paid them, and that this had been completed in March 2014. All associated costs and revenue requirements would need to be recovered by the Council in the 2014/15 year, in addition to the ongoing revenue needs reflected in Scenario 1.
- *Scenario 3* assumes that rates are validated as in scenario 1 but that the Council is required to waive or refund all penalties on irregular rates. This therefore models the fiscal and administrative impacts associated with waiving/refunding penalties, in addition to the revenue requirements identified under scenario 1. The Council's letter notes that it is not possible to accurately separately identify penalties relating to irregular rates except on a property by property and year by year basis. If this scenario eventuated, this process and associated administrative costs are estimated at approximately \$80 (excluding GST) per property.
- *Scenario 4* is effectively a combination of scenarios 2 and 3 i.e. it assumes the Council is required to refund all rates affected by irregularities and all penalties on those rates. The additional cost is estimated at slightly less than the sum of those under those scenarios, because there would be some administrative savings.

### *Impact of non-validation on rates*

The modelling reflected in relation to scenario 2 provides an indication of the potential consequences for ratepayers of not validating rating irregularities as proposed in the Bill.

The key components of the calculation are:

- refund of \$17.031 million (inc GST) to the historical ratepayers of 4812 properties;
- additional rates on the same properties to recover revenue (net of GST) of \$17.171 million comprising:
  - \$14.986 million (refunded sum less GST); plus
  - estimated \$385,000 (excl GST) in administrative costs; plus
  - estimated \$800,000 in interest costs over the period between refund and full repayment.

The net effect of this on sample properties is demonstrated in the attachment to Appendix One. In summary:

- residential and commercial properties in Mangawhai that had paid the full capital contribution to the wastewater scheme would get a refund (on average) of \$5,065 but their 2014 rates would (on average) be \$5,408 higher. Where the ratepayer entitled to the refund remains the ratepayer for that property they would be \$343 worse off. However, where the property has changed hands the original ratepayer would receive a windfall of \$5,065 while the new ratepayer would have to pay an extra \$5,408.
- residential and commercial properties in Mangawhai that paid a first instalment (\$676) of capital contribution to the wastewater scheme in 2013/14 would get a refund (on average) of \$1,853 but their 2014 rates would (on average) be \$2,151 higher, a difference of \$298.
- residential, commercial and industrial properties in some other parts of the Kaipara District would have varying effects, depending on which targeted rates they were liable:

<b>Location</b>	<b>Average Refund</b>	<b>Average Increase</b>	<b>Difference</b>
Dargaville	\$2,320	\$2,586	+\$266
Maungaturoto	\$5,208	\$5,799	+\$591
Te Kopuru	\$2,590	\$2,888	+\$298
Kaiwaka	\$4,422	\$4,928	+\$506
Glinks Gully	\$4,310	\$4,805	+\$495

- However, apart from forestry land in Maungaturoto, residential and commercial properties in other parts of Kaipara and lifestyle and dairy

properties throughout the district (including in Mangawhai) would be unaffected.

#### *Impact of requirement to waive/refund penalties*

The Council has also estimated (scenario 3) the impact on the projected 2014/15 rates of a requirement to waive or refund penalties on irregular rates.

The Council has estimated the total value of penalties on irregular rates up to June 2014 as \$738,000. This is revenue that has been committed and would need to be recovered. In addition, the Council estimates a total administrative cost of calculating refunds of penalties on a property by property basis at \$385,000, and the interest costs at \$40,000. The additional revenue required would therefore be of the order of \$1,163,000 (excluding GST).

The Council has modelled the impact of recovering this cost from the same 4812 rating units that were liable for irregularly set rates. The result is an average additional rate of between \$218 and \$402.

#### **Departmental Comment**

The Department believes the information and modelling undertaken by the Council provides a useful indication of the complexity and cost of any attempt to undo and then redo the irregular rates as an alternative to validating them. It also provides a useful estimate of the potential impact of requiring (explicitly or implicitly) penalties on irregular rates to be waived.

For the most part we consider the assumptions and methodology used by the Council in these calculations to be appropriate. We note, however, that there are alternative approaches to the recovery of the additional costs associated with the refunds of rates modelled in scenario 2 and with the waiver/refund of penalties under scenario 3. The Council's modelling reflects an assumption that the administrative and interest costs in each case should be met only by those properties that had been liable for the irregular rates. In our view a case could be made for those costs to be spread across all ratepayers in the district.

If this approach were taken:

- in scenario 2, the properties that received the refunds would be charged the same amount in additional rates; and the 2014/15 rates across all ratepayers would need to increase by an additional 3.23 per cent to meet the administration/interest costs. It would be up to the Council to determine how the increase was distributed across ratepayers.
- in scenario 3, the 2014/15 rates across all ratepayers would need to increase by an additional 4.26 per cent to meet the costs of waiving/refunding penalties.

Given the already high rating levels within Kaipara District and the increases required in 2014/15, these impacts would be quite significant. Original ratepayers who have since sold their properties would be the only parties that would be better off.

## **9. Cost of delaying progress of the Bill**

At its meeting of 26 September 2013, the Committee requested advice on the assessment of cost, month by month, of delaying the Bill. The Committee authorised the Department to seek this information from the Council.

The Council's detailed response is attached to this report as Appendix Two.

The Council's response notes that if the Council does not have certainty concerning the enactment and content of the Bill by 31 December 2013, it will face costs associated with the need to amend its long-term plan and refinance its current debts. The Council estimates the direct costs of uncertainty continuing past that date at \$530,000 per month as follows:

- approximately \$450,000 per month in lost New Zealand Transport Agency Funding;
- approximately \$50,000 in increased debt renewal costs; and
- approximately \$30,000 per month in working capital costs being interest costs associated with cashflow issues.

In addition the Council advises that it would incur an additional one-off cost of \$400,000 for a long-term plan amendment required to authorise a reduction in service levels necessitated by lost roading funding.

The Council also notes that any delays in the enactment of the Bill will impose indirect costs, included prolonging and aggravating divisions within the Kaipara community.

## **10. Other Matters**

### **a) Relationship of the Bill with Court proceedings**

A number of submissions have submitted that the Bill should be discharged or that the further passage of the Bill should be delayed pending the outcome of High Court proceedings brought by the MRRA against the Kaipara District Council. These submissions have cited fundamental constitutional principles relating to the separation of the judicial and legislative arms of Government, and the protection of the right of citizens to seek redress through the Courts.

The Department notes that Court proceedings were not initiated by the MRRA until after the Council had given notice of its intention to promote the Local Bill. In addition, the statement of claim lodged by the MRRA refers to and in part relies on the content of the published proposed local Bill.

The Department received Crown Law advice on consideration of the Bill by the Committee while the Court proceedings are underway. This was provided to the Committee after privilege was waived by the Attorney-General.

### **b) Relationship of Bill with Report of the Office of the Auditor General**

The Committee heard evidence from the Office of the Auditor General on 26 September 2013 in a closed and confidential session.

## 11. Summary of recommended changes to the Bill

The Department of Internal Affairs (the Department) recommends that the Bill be amended as follows:

Clause	Recommendation
1	<b>AGREE</b> to retain clause 1 without amendment.
2	<b>AGREE</b> to retain clause 2 without amendment.
3	<b>AGREE</b> to amend clause 3 by omitting paragraph (g).
4	<b>AGREE</b> to retain clause 4 without amendment.
5	<b>AGREE</b> to retain clause 5 without amendment.
6	<b>AGREE</b> to amend clause 6 to ensure that only penalties that would have been lawful had they been added to valid rates, be validated.
7	<b>AGREE</b> to retain clause 7 without amendment.
8	<b>AGREE</b> to retain clause 8 without amendment.
9	<b>AGREE</b> to retain clause 9 without amendment.
10	<b>AGREE</b> to retain clause 10 without amendment.
11	<b>AGREE</b> to retain clause 11 without amendment.
12	<b>AGREE</b> to amend clause 12 to remove the suggestion that the 2012-22 Long-term Plan is invalid because it was adopted after the statutory deadline.
13	<b>AGREE</b> to amend clause 13 to remove the suggestion that the 2011-12 Annual Report is invalid because it was adopted after the statutory deadline.
14	<b>AGREE</b> to amend clause 14 to provide that nothing in the Bill affects the right of any party to bring proceedings against any person arising out of, or in connection with, any action or omissions associated with matters validated by this Bill.

## 12. Clause by clause analysis

### Clauses 1 and 2 - Introductory clauses

Clause 1 contains the title of the Bill and clause 2 contains its commencement date.

#### Submissions

There were no substantive submissions received on clause 1 or 2. There were suggestions made for alternative titles for the Bill.

#### Officials' comment

Clause 1 gives the Bill the title of "Kaipara District Council (Validation of Rates and Other Matters) Bill. This clause meets its purpose. The Department recommends no change to clause 1 of the Bill.

Clause 2 refers to the Bill coming into force on the day after the date on which it receives Royal assent. This clause meets its purpose. The Department recommends no change to clause 2 of the Bill.

#### Recommendations

**AGREE** to retain clause 1 without amendment.

**AGREE** to retain clause 2 without amendment.

## Clause 3 - Purposes

Clause 3 gives the purposes of the Bill, which in summary are:

- clauses 3(a) to (e) - to validate the specified rates and penalties; to make lawful all money received in relation to the specified rates and penalties; to authorise the Council to recover any unpaid specified rate and penalties; to validate the Mangawhai uniform targeted rate between 2008/09 to 2010/11 and any subsequent years; and to validate information contained in rates assessments between 2006/07 to 2012/13;
- clause 3(f) - to validate acts or omissions of the Council relating to the 2006 development contributions policy, the late adoption of the 2011/12 annual report and the 2012-2022 long-term plan and the special consultative procedure for the 2012-22 long-term plan;
- clause 3(g) - to validate any other actions or omissions of the Council relating to the financial years 2006/07 to 2012/13.

## Submissions

Four submitters specifically commented on clause 3(g) submitting that is far too wide, is a catch-all and is draconian. Others noted that it could encompass the wrongful or illegal actions by the Council regarding matters that have nothing to do with rates and that it could have unintended consequences.

There were three other strong themes from submitters that were not strictly about the purpose but related to mandate for the Bill and its progress, consultation on the Bill by Commissioners, accountability of the Council, central Government, lenders and the OAG, and the timing of progress of the Bill in relation to the Court proceedings and the release of the Report of the Office of the Auditor General.

### *Consultation by Commissioners on the Bill*

Sixty-two submitters were strongly of the view that the Commissioners had failed to engage with the community, consult on the Bill or work with the community on alternative options to the Bill.

Two submitters said that the Commissioners have kept ratepayers fully informed through a variety of avenues and are establishing relationships with community groups through out Kaipara.

### *Accountability*

Eighty-one submitters were strongly of the view that the consequences for incompetent actions and unlawfully incurred debts by the Council should not rest solely with ratepayers. Those who had a level of responsibility should be held to account. Typical comments were:

- The OAG failed to protect the people's interests.
- If the Council has operated within the LGA02 then the Government is responsible and should pay compensation. If the Council operated outside

of the LGA02 there should be a full investigation into who is responsible and they should be held to account.

- It would be unfair to ratepayers for Parliament to erase the wrong doings and incompetence of the Council and lack of action of the Auditor General and Minister of Local Government.
- The real issues are how can an admittedly incompetent council borrow so much money, illegally, with no concerns from the lenders, or the auditors.
- The Office of the Auditor General signed off the yearly audits apparently failing to question the extreme levels of debt accruing even after they were informed by members of the community of the illegal nature of those loans.

### *Progress of the Bill*

Seventy-five submitters were strongly of the view that the Bill should not be progressed by Parliament while Court proceedings are underway and/or before the release of the Report of the OAG.

Reasons cited were fundamental constitutional principles relating to the separation of the judicial and legislative arms of the Government, and the protection of the right of citizens to seek redress through the Courts.

Further, the findings of the Court and the findings of the OAG ought to be used to inform consideration of the Bill by the select committee.

### **Officials' comment**

Clause 3 (a) to (f) set out the purposes of the Bill as intended. The Department recommends no changes to clause 3 (a) to (f) of the Bill.

The Department notes that as part of the purpose, clause 3(g) does not have the effect that an operative clause would have of validating actions or omissions of the Council. As such, clause 3(g) serves no particular function and its appearance may be misleading. The Department recommends that Clause 3(g) be deleted.

The Department has made comment on the relationship of the Bill with Court proceedings and with the Report of the OAG in Part 10 of this report.

### **Recommendations**

**AGREE** to amend clause 3 by omitting paragraph (g).

## **Clause 4 - Interpretation**

Clause 4 provides for the definitions to terms as they are used within the context of the Bill.

### **Submissions**

There were no submissions received on clause 4.

### **Officials' comment**

The Department considers clause 4 to be appropriate for its purpose and recommends no changes.

### **Recommendation**

**AGREE** to retain clause 4 without amendment.

## **Clause 5 - Validation of specified rates**

## **Clause 9 - Validation of specified rates assessments**

Clauses 5 and 9 are the operative clauses which validate the specified rates and the relevant rates assessments despite the failure of the Council to comply with the Rating Act. These clauses declare the specified rates, the relevant rates assessments and the actions of the Council in setting, assessing and recovering the specified rates to be, and to always have been, lawful.

### **Submissions**

#### *The retrospective aspect of validation*

Seven-three submitters were strongly of the view that retrospective legislation is fundamentally wrong, unfair and undemocratic. Some submitters were of the view that it was justified in the case of genuine, technical errors.

Generally these submitters considered it was wrong and unjust that illegal actions should be made legal, and particularly repugnant in the case of deliberate illegality.

Some submitters stated that retrospective legislation offends constitutional principles and the rule of law, and while constitutionally Parliament is supreme there is a presumption against retrospective law. Section 7 of the Interpretation Act and section 24 of the Bill of Rights Act were quoted.

#### *Actions of Council in setting, assessing and recovering specified rates*

Eighty-five submitters who opposed the Bill had strong views about one of more of the following:

- The rates to be validated could not have been set legally. A typical being that “the Bill says that all matters are technical errors of a minor nature and could have been achieved by lawful means, but many were things the Council was not allowed to do and were ultra vires”.
- There is a need for a rates strike. A typical comment being that “we have always been law abiding and mindful of our rates obligations, however we do not believe it is in our best interests to continue paying rates until the rating issues and the Mangawhai Community Wastewater Scheme issues are resolved. The only communication from Council is regarding unpaid rates and that they will take us to Court to ensure payment is made”.
- The severe rates increases and lack of services provided cannot be justified. A typical comment being that “my rates have gone from \$897.40pa in 2011/12 to \$2,198.45pa in 2013/14 with no alterations to any services”.

One submission in support of the Bill, signed by 88 additional people, submitted that residents are angry that the rates they are paying are being used to provide services to those residents who are not paying theirs and that

this is corrosive to the district. Further, they understand that 60% of non ratepayers live outside the district and are not affected by the reduced level of service due to the financial pressure that withholding rates causes.

Another submission in support of the Bill made the point that non payment by some ratepayers placed increased financial constraints on economic growth through further rate increases on business, shareholders and staff who live in the district.

#### *Alternatives to validation of specified rates*

Twenty-four submitters made strong assertions that the alternatives to a validation Bill have not been considered, while some questioned whether Commissioners explored other possible options.

The main alternative put forward was genuine engagement and an accord with ratepayers. Variations to this were meaningful consultation enabling the community to work as a partner with the Council and the Government agencies for an integrated solution that a Bill then supports.

Some of these submitters made suggestions as to alternatives to resolving the situation facing the Kaipara District Council and its ratepayers including asset sales; recovery from those responsible; longer term debt repayment plans with a better intergenerational mix; economic development initiatives in the region to encourage growth; Government assistance; cost reductions; larger increases in development contributions for future subdivisions; alternative capital raising programmes such as ratepayers loans.

Five submitters supported the Bill as the fairest, most practical and least expensive option to resolve outstanding issues.

#### **Officials' comment**

The specified rates and penalties to be validated could have been correctly set. Had they been correctly set, they would have resulted in the same rates liability for each ratepayer and would have been used for the same purpose. In addition, refer to Department comment in Part 7(a) of this report.

The Bill represents the most financially feasible and practical option for the district for addressing historic irregular rates.

The Department considers clauses 5 and 9 to be appropriate for their purpose and recommends no changes.

#### **Recommendations**

**AGREE** to retain clause 5 without amendment.

**AGREE** to retain clause 9 without amendment.

## Clause 6 - Validation of penalties

Clause 6 is the operative clause that validates and declares lawful the penalties added to the specified rates.

### Submissions

There were two broad submitter themes with regard to penalties.

Forty-one submitters were strongly of the view that to validate a penalty for non-payment of a rate that was unlawfully set is unjust and an affront to natural justice, vindictive or abhorrent and that these provisions should be removed from the Bill.

A further nine submitters specifically referred to penalties on rates withheld under the rates strike as being particularly unfair and undemocratic given the rates strike was an organised call to action and a voice to raise concerns, which have now been justified.

### Officials' comment

The Department supports the following points included by the Council in its requested information to the Department regarding penalties on withheld rates:

- there is a need to ensure that those who have paid their rates on time or have paid penalties in the past are not treated unfairly relative to those who continue to withhold their rates;
- the Commissioners have consistently advised ratepayers who are withholding rates that penalties are being applied;
- the non-payment of rates is creating significant additional financial and other costs for the Council. It would be inappropriate that these costs be carried by the majority of ratepayers who are paying their rates on time;
- given the range of actions that have now been taken to address concerns it cannot be argued that there is still a need to continue to withhold rates.

In addition, refer to Department comment on penalties in Part 7(c) and 3(a) of this report.

Clause 6 validates and declares lawful penalties added to the specified rates. The Department recommends that this clause be clarified to ensure that only penalties that would have been lawful had they been added to valid rates, be validated. This will exclude validating any penalties that are themselves irregular.

### Recommendation

**AGREE** to amend clause 6 to ensure that only penalties that would have been lawful had they been added to valid rates, be validated.

## **Clause 7 - Payment of specified rates declared lawful**

## **Clause 8 - Recovery of unpaid specified rates or penalties declared lawful**

Clauses 7 and 8 follow on from the validation of specified rate and penalties in clauses 5 and 6. In relation to the validated rates and penalties these clauses provide for:

- all money received by the Council to be lawful; and
- all money owing to the Council as at the commencement of the Act to be lawfully payable and recoverable.

### **Submissions**

As flow on consequences from the operative validation provisions in clauses 5 and 6, there was no submission specifically in relation to these clauses.

Some submissions, in relation to the payment of penalties, suggested a period of respite, for example three months, for payment of outstanding rates. This would have implications for the provision in clause 8 that penalties are recoverable as the date of commencement of the Act, which is the day after the Bill receives Royal Assent.

### **Officials' comment**

Information on the cost of delaying the progress of the Bill has been provided by the Council, as requested by the Committee, and is summarised in Part 9 of this report. These costs would also apply to a varying degree with regard to delaying commencement of part or all of the Act.

The Department considers that clauses 7 and 8 meet their purpose and recommends no changes.

### **Recommendation**

**AGREE** to retain clause 7 without amendment.

**AGREE** to retain clause 8 without amendment.

## **Clause 10 - Validation of one-off targeted rate or 25-year targeted rate for Mangawhai uniform targeted rate**

Clause 10 provides for the validation and enforcement of the one-off targeted rate or 25-year targeted rate for Mangawhai uniform targeted rate, in relation to the election of the number of years over which the rate is to be paid off.

### **Submissions**

A large number of submitters held strong views on matters surrounding and leading up to the Mangawhai uniform targeted rate, including that:

- the decision made without consultation by the Council to extend the Mangawhai Community Wastewater Scheme was illegal;
- the debt incurred by the Council to pay for the extension is illegal, the rates to pay for the debt are therefore illegal and ratepayers should not be responsible for this debt;
- the application of protected transaction provisions under the LGA02 is incorrect, misleading and makes a mockery of the intent of these provisions; and
- the Mangawhai Community Wastewater Scheme is inadequate or not fit for purpose.

As referred to in the Departments comment on scope of Bill in Part 3(c) of this report, the scope of the Bill precludes the inclusion of any provisions dealing with the design and commissioning of the Mangawhai Community Wastewater Scheme or the debt incurred by the Council in relation to that scheme.

### **Officials' comment**

Between 2008/09 and 2011/12 the Council levied a one-off targeted rate for capital costs on properties as they connected to the Mangawhai Community Wastewater Scheme. The amount of the rate varied between \$7,088.35 and \$7,742.10. The Council offered ratepayers the choice of paying this as a lump-sum amount, spreading payment over two years, or spreading payment over 25 years.

In respect of the Mangawhai uniform targeted rate the Bill seeks to validate requirements to pay amounts in line with proposals on which the Mangawhai community was consulted in 2006.

The decision to fund part of the debt for the Mangawhai Community Wastewater Scheme in this way, and the amount of the targeted rate, were within the jurisdiction of the Council. However, the procedures for setting and assessing the targeted rate were not followed correctly. Clause 10 validates the procedural errors made.

Note that the balance of the Mangawhai Community Wastewater Scheme will be funded through development contributions and general rates over the whole of the Kaipara District. The financial components of the strategy will be implemented through amendments to the 2012-22 Long-term Plan.

The Department considers clause 10 to be appropriate for its purpose and recommends no changes.

**Recommendation**

**AGREE** to retain clause 10 without amendment.

## **Clause 11 - Validation of continuation of policy on development contributions and financial contributions in 2009-2019 long-term plan**

The development contribution policy and the financial contribution policy in the 2009-2019 Long-term Council Community Plan were not reviewed in accordance with LGA02 requirements.

Clause 11 provides for the Council's policy on development contributions and financial contributions in relation to the Mangawhai Community Wastewater Scheme and to Mangawhai roading, to be valid and lawfully adopted in its Long-term Community Council Plan for 2009-2019.

### **Submissions**

There were no submissions received on clause 11.

### **Officials' comment**

The Department considers clause 11 to be appropriate for its purpose and recommends no change.

### **Recommendation**

**AGREE** to retain clause 11 without amendment.

## **Clause 12 - Validation of long-term plan**

The 2012-2022 Long-term Plan was adopted after the statutory deadline in the LGA02 and there were defects in the special consultative procedure undertaken in respect of the Plan.

Clause 12 provides for the Council's 2012-2022 Long-term Plan to be valid and declared to be lawfully adopted by the Council.

### **Submissions**

Ten submitters held strong views that the 2012-22 Long-term Plan was steeped in irregularities and is not valid. As the 2013/14 draft Annual Plan is based on there being a valid long-term plan, the annual plan and the funding impact statement are also invalid. Therefore the Council has no power to set, assess or collect rates.

The submitters also held strong views on the quality of the financial projections in the long-term plan, the high level of rates generated and the financial feasibility of the Council.

### **Officials' comment**

The 2012-22 Long-term Plan was prepared during the period in which the former Council was grappling with addressing the consequences of revelations about the Council's financial position, the investigation by the Ministerial Review Team and, finally, the appointment of Commissioners. The late adoption of the report on 29 August 2012 can be seen as a compromise between the need to provide a robust basis for the operation of the Council and the need to authorise the setting of rates for 2012/13. We note that the plan was significantly amended by the Commissioners this year.

As noted in our supplementary advice of 17 September 2013 to the Committee in relation to the Council's 2012/13 rates, the Department does not accept that the adoption of a long-term plan after the statutory deadline invalidates the plan, and is aware of legal advice to this effect. We note that there have been a number of instances where, for one reason or another, councils have adopted long-term plans after the statutory deadlines. If councils that had, for any reason, failed to meet the statutory deadline were then precluded from adopting a valid plan at a later date, this would effectively cripple such councils and prevent them from acting.

We also consider that the defects in the consultative process relating to the draft long-term plan would be highly unlikely to lead the Courts to rule that the plan was not valid.

The Department's view is that it is desirable that clause 12 be amended to remove the suggestion that the adoption of a long-term plan after the statutory deadline means that the plan is invalid. Preliminary discussions with Parliamentary Counsel Office have indicated that this might be achieved by replacing the validation terminology with wording by which Parliament "confirms the validity" of the long-term plan, rather than validating it.

**Recommendation**

**AGREE** to amend clause 12 to remove the suggestion that the 2012-22 Long-term Plan is invalid because it was adopted after the statutory deadline.

## **Clause 13 - Validation of annual report**

The 2010/11 Annual Report was adopted after the statutory deadline in the LGA02.

Clause 13 provides for the Council's Annual Report for 2010/11 financial year to be valid and declared to be lawfully adopted by the Council.

### **Submissions**

There were no submissions received on clause 13.

### **Officials' comment**

For similar reasons as apply in respect of the long-term plan, the Department believes it is desirable to remove the suggestion that a local authority's annual report cannot be adopted after the statutory deadline.

### **Recommendation**

**AGREE** to amend clause 13 to remove the suggestion that the 2011-12 Annual Report is invalid because it was adopted after the statutory deadline.

## **Clause 14 - Council's right to bring proceedings unaffected**

Clause 14 provides that nothing in the Bill affects the right of the Council to bring any proceedings against any person arising out of, or in connection with, any actions or omissions validated by the Bill.

### **Submissions**

Approximately eighteen submitters, plus an additional 88 who signed a submission, commented on this clause.

Most of the comments reflected understanding, or reassurance from the Commissioners, that the clause confirms the right of Council to bring proceedings against any person or company.

Several of these submitters were of the view that clause 14 should be extended to cover the rights of all other parties and in particular ratepayers and residents to bring proceedings.

### **Officials' comment**

The Department considers that this clause is unnecessary in a strictly legal context. The Bill deals solely with the current and future legal status of certain rates, and other official documents. It does not and can not affect the criminal or civil liability of any person for any historical action or decision including those associated directly or indirectly, with those rates and documents.

The clause does, however, have an important symbolic value in providing clarity and reassurance that the Bill does not affect any such liability or limit the scope of any legal redress that may be sought. The importance of such clarity was emphasised during oral submissions by concerns that the scope of the clause was too limited and that the wording would preclude legal redress being available to any party other than the Council.

The Department considers that the clause should be retained but should be amended to avoid any suggestion that it is only the ability of the Council to seek legal redress that is protected. In this regard we note that any proceedings against former members of the Council under sections 46 and 47 of the LGA02 would be initiated by the Attorney-General on behalf of the Crown.

The Department also notes that the current wording of clause 14 refers to "...actions and omissions validated by this Act." As noted above, we believe this is technically incorrect and it may have contributed to submitters concerns that criminal or negligent behaviour was itself being validated. This could be remedied by amending the phrase to read something like "...actions and omissions associated with matters validated by this Act."

The Department therefore recommends that Clause 14 be amended to provide that nothing in the Bill affects the right of any party to bring proceedings against any person arising out of, or in connection with, any action or omissions associated with matters validated by the Bill.

**Recommendation**

**AGREE** to amend clause 14 to provide that nothing in the Bill affects the right of any party to bring proceedings against any person arising out of, or in connection with, any action or omissions associated with matters validated by the Bill.

### **13. Bill of Rights Act assessment**

The Ministry of Justice provided the Attorney-General with legal advice on the Bill on 28 June 2013. This advice assessed the consistency of the Bill with the New Zealand Bill of Rights Act 1990.

The Ministry of Justice concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act 1990.

A copy of the full assessment is attached as Appendix Three.

**APPENDIX ONE AND ATTACHMENT TO APPENDIX ONE: Impact of Bill on future rates**

See attached documents

## **APPENDIX TWO: Cost of delaying progress of the Bill**

Advice from the Kaipara District Council to the Department of Internal Affairs

2 October 2013

Mark Batt  
Policy Manager  
Department of Internal Affairs  
PO Box 805  
**Wellington 6140**

Dear Mark

### **Kaipara District Council (Validation of Rates and Other Matters) Bill**

Please refer to your email dated 27 September 2013 concerning the above.

In your email you have asked for an “assessment of the cost, month by month, of delaying the bill including interest on rates not paid and activities delayed”.

In responding to this question the Council assumes that it is being raised within the context of the Kaipara District Council (Validation of Rates and Other Matters) Bill (“the Bill”) being passed into law in its present form and that the only issue to be addressed relates to the costs of it being delayed for a period of time. The response provided to this question does not consider the costs that would be associated with changes being made to the provisions within the Bill or it not being passed into law at some stage.

#### **Context**

Addressing the historical rating irregularities is identified as an explicit priority for the Commissioners to address in their terms of reference. Given the level of rates involved (ie \$17.013 million) and the level of rates which are currently being withheld it is important from a financial perspective that the issue be resolved quickly and efficiently. If the Council is to be able to provide the services needed by its community then it must be able to collect the rating revenue needed to fund those services. Without certainly as to whether it can collect the rates set the Council will need to severely restrict the provision of services to the detriment of all ratepayers.

Shortly after their appointment the Commissioners went through a process of analysing the options that exist for addressing the historical rating and other legal issues that confront the Council. The promotion of a Local Bill was identified as being the most practical and cost effective way of addressing the issues which are included in this Bill. There are a number of other historical irregularities and legal risks which are not included in the Bill and are being

managed through other mechanisms such as the Auditor-General Inquiry and the work that will follow its release.

In promoting the Bill the Council has worked in the hope that it would be possible to have it passed into law by December 2013. This is some twelve months after the initial decision to proceed with development of a Local Bill and is also an important milestone date by which decisions in relation to the initiation of a number of other actions (eg a further review of the Long Term Plan) would need to be taken if it were to become clear that this date was not achievable. A number of these implications are discussed below.

### **NZ Transport Agency Subsidy**

To reduce the financial impacts of the higher level of rate arrears the Council has delayed a number of works and in particular roading capital works projects until the issues can be resolved. Note that roading capital works constitute 75% of the Council's total capital works programme.

While this reduction in works can be sustained for a short period of time the level of deferrals is such that the Council has had to defer some \$9 million of projects which equates to the equivalent of a full year's roading capital expenditure. The Council expects to receive approximately \$5.4 million of NZ Transport Agency (NZTA) funding on these works. Obviously, the level of works being delayed continues to increase month by month.

Council operates on a three yearly funding programme from the NZ Transport Agency with the current three-yearly cycle ending in June 2015. If it cannot complete the budgeted three year work programme before 30 June 2015 then it will lose the NZTA funding on any uncompleted works.

If the Bill is passed by the end of December then the Council expects that it will need to complete the equivalent of two years of capital works within the last twelve months of the current funding cycle. It believes that this level of work, while being a significant stretch for the resources that it has should be achievable. The size of the backlog of works would obviously increase for each month that the Bill is delayed beyond the end of December. The Council doubts that it would be able to complete the additional works that are scheduled to be completed after December 2013 on top of the twelve months of capital works that have already been delayed. This creates the very real risk that the Council would lose NZTA funding on the works which were not able to be completed. This equates to approximately \$450,000 per month.

### **Long Term Plan Amendment**

The deferral of a significant level of roading expenditure is having an impact on the level of service that the Council is currently able to deliver. While the deferral of expenditure can be sustained for a short period of time the Council is now getting to the point where the level of works delayed is becoming significant and affecting the levels of service that the Council is able to deliver. As such there is a statutory requirement (refer section 97, Local Government

Act 2002) for the Council to promote an amendment to its Long Term Plan. Any such amendment should be proposed in conjunction with the 2014/15 Annual Plan so that the reduced service levels can be reflected in the budget and works programme for that year.

The Council is currently well advanced with the development of its 2014/15 Annual Plan and was looking to have it completed before 31 December so that it could be publicly notified early in the 2014 calendar year. If the Bill was not to be passed into law by 31 December then the Council would need to quickly advance work on the development of an amendment to its Long Term Plan so that it could be publicly notified in early 2014. The Council would ideally need an indication of the likelihood of this not occurring by the end of October 2013.

The Council estimates that the additional direct costs associated with promoting an amendment to its Long Term Plan at this stage would be in the order of \$400,000. In addition to the direct costs of an amendment there will also be an indirect cost of reductions in service levels for the community as a whole.

### **Debt Renewal Programme**

The Council currently has \$77.5 million of external debt. Of this \$52.9 million relating to the Mangawhai Community Wastewater Scheme is due to expire in July 2014. This debt currently carries a very favourable interest rate margin of 55 points (or 0.55%) as it was put in place prior to the global financial crisis.

A typical local authority refinancing this debt from the banking sector today would expect to pay a margin in the order of 150 – 190 points (ie 1.5 – 1.9%) or some \$503,000 - \$715,000 more in interest per annum. The same local authority accessing borrowing from the LGFA could expect to pay in the order of 80 – 90 points (0.8 – 0.9%) or \$132,000 - \$185,000 in extra interest per annum. For the Kaipara District this difference in interest costs would equate to a district wide rates increase of between 1.5 and 2.1% per annum.

The lack of certainty relating to the validity of the historical rating irregularities of \$17.013 million plus the issues associated with the current non-payment of rates are factors that create a significant level of uncertainty around the Council's financial position. These risks limit the range of institutions from which the Council can borrow and increase the cost of such borrowing beyond that faced by a typical local authority.

It had been the Council's intention to join the Local Government Funding Agency (LGFA) as a guaranteeing local authority and then source new debt funding to replace this \$53 million of debt through the Agency leading up to its expiry. The advice that the Council has received is that it is unlikely that the LGFA would accept entry of the Council while the current risks remain. This means that the Council will need to continue to access borrowing via the banking sector at an increased cost, relative to what it would have otherwise had to pay. It is therefore seen as important that the Bill is passed so that the Council can access the LGFA in a timely manner.

Given the timeframes involved with joining the LGFA and the risks that currently exist with its borrowing profile it is seen as important that the Council look to gain certainty as to its options for renewal of this debt early in the 2014 calendar year. If uncertainty remains about the passage of the Bill at this stage then the costs of replacing the \$53 million of debt can be expected to increase beyond the rates that would otherwise apply.

### **Direct Costs**

At present Council estimates that there is some \$4.5 million in rates being deliberately withheld. This balance is increasing by approximately \$300,000 per month.

Given the financial risks facing the Council the Commissioners have directed officers to delay capital works projects and make other savings to ensure that the level of Council debt does not increase. As a result it is not paying additional direct interest on these funds other than to the extent to which it has had to return the GST payable on these rates. There is, however, a significant opportunity cost in the value of the works that are not able to be completed and/or higher financing costs to the extent that these funds could have been used to improve Council cashflow and reduce short term borrowing had they been collected. It is difficult to estimate these costs.

### **Community Confidence**

As indicated in the Council submission on the Bill a number of ratepayers are withholding their rates as a protest against the actions of the Council.

The actions of a minority, who are withholding rates as a protest, while the majority of ratepayers continue to meet their rating responsibilities, is creating a 'them and us' divide within the community. Those who are paying their rates question why they should subsidise those who are not. They also acknowledge the steps that have already been and/or are being taken by the Commissioners and central Government to address the mistakes of the past while also moving forward with building a strong and capable organisation that can serve the district with distinction in the future.

The Commissioners see the passage of the Bill as an important part of the package of measures that they are taking to address the problems facing the Council and Kaipara district. Any delay with the passage of the Bill will only prolong the healing process that is needed and create additional unnecessary costs. It will also distract the Commissioners away from the other tasks that they need to complete before their term ends in October 2015.

### **Summary**

The passage of this Bill is a critical part of the package of measures needed to address historical failings while building a strong Council that can serve its community well in the future.

As indicated above it had been hoped that it would be possible to have the Bill passed into law before 31 December 2013 as this represents a critical date on which the Council would

need to initiate alternative plans such as the promotion of an amendment to the Long Term Plan and renewal of the debt due to expire in July 2014. The financial costs associated with this timetable not being achieved, or at least the Council not having a high level of certainty that the Bill will be passed shortly after that date, could be summarised as follows:

<b>Additional Cost Factor</b>	<b>Financial Estimate</b>
Loss of NZ Transport Agency Funding	\$450,000 per month
Increased Debt Renewal Costs	\$50,000 per month
Working Capital Costs	\$30,000 per month
Long Term Plan Amendment	\$400,000 one off cost

In addition to the direct financial costs there are also a number of indirect costs associated with any delay in the passage of the Bill. The longer that there is uncertainty relating to how these issues are to be addressed the more opportunity there is for divisions within the community to grow and the more Council resource needs to be diverted into dealing with historical issues.

In looking at the Parliamentary programme for the remainder of this calendar year and in considering the steps that are yet to be completed the Council is concerned that a 31 December timetable for passage of the Bill will not be able to be achieved unless the Select Committee report back during mid October. The Council accepts that this timetable is challenging. Given the implications, as outlined in this letter, of the Bill not being passed into law this year, or shortly thereafter, we would encourage the Committee to progress its deliberations on the Bill with a degree of urgency. If the Bill were to be reported back to the House by late October or early November at the latest with a strong recommendation that it be passed into law then it could still be possible for the Council to avoid a number of the additional costs discussed in this letter.

If you have any further queries regarding the information contained in the letter please do not hesitate to contact me.

Yours faithfully

Steve Ruru  
**Chief Executive**

## **APPENDIX TWO: Bill of Rights Act assessment**

Publically available on the website of the Ministry of Justice

<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/kaipara-district-council-validation-of-rates-and-other-matters-bill>

### **Kaipara District Council (Validation of Rates and Other Matters) Bill**

28 June 2013

Attorney-General

#### **Legal Advice**

#### **Consistency with the New Zealand Bill of Rights Act 1990: Kaipara District Council (Validation of Rates and Other Matters) Bill**

1. We have considered whether the Kaipara District Council (Validation of Rates and Other Matters) Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). The Bill is a Local Bill in the name of Mike Sabin MP. The Bill was introduced into the House of Representatives on 4 June 2013. It received first reading, and was referred to the Local Government and Environment Committee on 12 June 2013.

2. The main purpose of the Bill is to validate specified rates set and assessed by Kaipara District Council for the financial years 2006/2007 to 2012/2013 inclusive and any consequent penalties. The assessment of the specified rates was made in contravention of the Local Government (Rating) Act 2002.

3. The Bill also:

- validates the Long-Term Council Community Plan for 2009–2019, which failed to comply with the requirements of the Local Government Act 2002;
- validates the annual report for 2010/11 and the Long-Term Plan for 2012–2022, which were adopted later than the statutory deadline in the Local Government Act 2002; and
- validates the use of the Special Consultative Procedure in adopting the Long-Term Plan, which did not comply with the requirements of the Local Government Act 2002.

4. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we note that one effect of the Bill is to validate penalties previously imposed for non-payment of rates. The penalties in question are administrative, rather than criminal, and do not engage s 26(2) of the Bill of Rights Act (which prohibits retroactive criminal penalties).

Jeff Orr  
**Chief Legal Counsel**  
**Office of Legal Counsel**

**Disclaimer**

In addition to the general disclaimer for all documents on this website, please note the following: This advice was prepared to assist the Attorney-General to determine whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 in relation to the Kaipara District Council (Validation of Rates and Other Matters) Bill. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect of this or any other matter. Whilst care has been taken to ensure that this document is an accurate reproduction of the advice provided to the Attorney-General, neither the Ministry of Justice nor the Crown Law Office accepts any liability for any errors or omissions.