

INTERNAL AFFAIRS



Te Tari Taiwhenua

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

Initial Briefing to the Local Government and Environment Committee

29 July 2013

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1. Introduction

1. This briefing covers key issues and Departmental comment on the Kaipara District Council (Validation of Rates and other Matters) Bill (the Bill) for consideration by the Local Government and Environment Committee (the Committee).
2. The Bill is a local bill in the name of Mike Sabin, MP for Northland, and was referred to the Committee on 12 June 2013. It is due to be reported back to the House by the Committee by 12 December 2013.

2. Purpose of Bill

3. The purpose of the Bill is 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 the long-term plan and use of the special consultative procedure under the Local Government Act 2002 (the LGA02).

3. Historic background and context for Bill

Appointment of Review Team in Kaipara

4. In June 2012, at the request of the Council, the Minister of Local Government appointed a review team to inquire into the Council's governance processes, rate-setting practices and financial management. The review team reported to the Minister and the Council that the challenges facing the Council were beyond the elected members' ability to resolve and that there was a lack of appropriate capability within the Council organisation.

Appointment of Commissioners

5. On 6 September 2012, at the request of the Council, the Minister of Local Government appointed Commissioners under the LGA02 to replace elected membership of the Council until 17 October 2015, when a general election for the Council will be held. The Commissioners are John Robertson (Chair), Peter Winder, Colin Dale and Richard Booth. 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 Council¹.
6. Under their Terms of Reference the Commissioners were directed to:
 - conduct a review of the Council's financial strategy, plans, rating policies, and capability (including debt and asset management), to ensure financial resilience and equitable and sustainable funding;
 - undertake actions to enforce the payment of 2012/13 rates and any unpaid rates from previous years;

¹ New Zealand Gazette, No.110, 6 September 2012, Page 3155

- work with the Kaipara community and ratepayers and the Department of Internal Affairs to identify options for dealing with invalidly set rates and other legal compliance matters;
 - identify the capacity of the Mangawhai Community Wastewater Scheme, whether it is fit for purpose, and the ideal funding model for the scheme for the future. This work is to have regard to the findings from the Auditor-General's Inquiry into the Mangawhai Community Wastewater Scheme; and
 - carry out extensive community and iwi engagement to continue to rebuild confidence and trust in the Council.
7. The Commissioners have advised that they discussed options to resolve historic rating irregularities and other legal compliance matters with the Kaipara community, Mike Sabin MP, officials at the Department and the Minister of Local Government. 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

8. There is a particular community issue with the Mangawhai uniform targeted rate. The following provides background detail for the Committee.
9. 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 lump-sum amount over one or two years, or spreading payment over 25 years.
10. The decision to fund 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).
11. 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". Others have not paid for other reasons. This is creating ongoing difficulties for the Council both in regards to its financial management and community relationships. Appendix One summarises the scope of the situation in Mangawhai with respect to outstanding rates.

Wider forward strategy for Kaipara

12. 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 being implemented by the Commissioners 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.
13. The strategy aims to address the Kaipara District's debt (thereby reducing its exposure to interest costs), reduce expenditure and fund the Mangawhai Community Wastewater Scheme through 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.

4. Contents of Bill

What the Bill does

14. 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 to 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.
15. 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.
16. 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.
17. The Bill also validates irregularities under the LGA02 in relation to:
 - the development contribution and financial contribution policy in the 2009-2019 Long-term Council Community Plan;
 - the late adoption of the 2010/11 Annual Report; and
 - the late adoption of, and defects in, the special consultative procedure for the 2012-2022 Long-term Plan.
18. A summary of the procedural failings of the Council that the Bill addresses is attached as Appendix Two.
19. The effect of the Bill is that it puts the Council and ratepayers in the same position that they would have been in, had correct processes been followed and the rates set correctly.

Out of scope of the Bill

20. There are a range of historical issues in relation to the Mangawhai Community Wastewater Scheme that are not addressed by the Bill.
21. In October 2006, the Council decided to significantly expand the scope of the Mangawhai Community Wastewater Scheme and increase borrowings for the Scheme from approximately \$35 million to \$58 million, out of a total external

debt of \$85 million (refer to paragraph 9 of the Bill's preamble). The Council failed to consult the Kaipara community prior to making these decisions.

22. These following matters are outside the scope of the operative clauses of the Bill:
- the basis on which the Mangawhai Community Wastewater Scheme was commissioned and financed;
 - the decision to expand the Mangawhai Community Wastewater Scheme or increase borrowings for the scheme; or
 - the level of debt incurred by the Council or its debt management approach.
23. The Department notes that under section 112 of the LGA02 any obligation relating to the borrowing of funds is a protected transaction, and that under section 117 of the LGA02 every protected transaction is valid and enforceable despite any statutory or procedural irregularity.

5. Department of Internal Affairs comments

Purpose of Bill

24. There has been a tangled history of governance issues, irregular process, lack of consultation and controversial decision making by the Council. This Bill does not seek to address these wide ranging issues, nor does it mandate them. Rather, the Bill focuses on addressing a narrow range of historic procedural errors. The Department understands that the Bill is one aspect of a wider strategy being progressed by the Kaipara Commissioners to manage the Kaipara District into a financially feasible and functioning community, and as such considers the purpose of the Bill to be appropriate.

Alternatives to a local bill

25. Legislative change is the only practical way that all rates and penalties purportedly set under the Rating Act can be validated.
26. The Rating Act does provide for processes to set rates again, replace invalid rates and validate by Order in Council proceedings irregular in form or out of time. However, none of these provide a practical option to address the issues in Kaipara District. In addition, they would impose significant administrative costs and delays on the Council, which would be passed on to ratepayers.
27. Another option would be to leave the status of the rates uncertain. Without validation the Council will continue to have difficulties in collecting the incorrectly set rates and will continue to be vulnerable to challenges from its ratepayers over those rates. The continued uncertainty may also have negative impacts on the Council and the Kaipara community.
28. There is precedent for Parliament validating rating irregularities through local bills. The Tasman District Council (Validation and Recovery of Certain Rates) Bill is currently before the Committee. Prior to this there have been none since 1997.

Bill is considered warranted

29. The Department considers that this Bill gives effect to its intent and is warranted as:
- legislation is the only practical way that rates which were incorrectly set and assessed by the Council, can be validated;
 - the Bill is necessary to allow the collection of any unpaid rates and any penalties on unpaid rates;
 - the Bill will not alter the liability of ratepayers from what it would have been, had correct processes been followed by the Council;
 - the matters to be validated are procedural irregularities. These matters could have been dealt with in a way that was consistent with the Rating Act and the LGA02 and would have resulted in the same ratepayer liability had proper process been followed; and
 - all the services for which the rates were charged were provided by the Council.

6. Other Matters

30. The following two matters are relevant to the Bill but do not affect the rationale for considering the Bill.

Report of the Office of the Auditor-General

31. In March 2012 the Office of the Auditor-General (OAG) agreed to the Council's request to carry out an inquiry into the financial management, planning, and decision-making processes for the Mangawhai Community Wastewater Scheme. The terms of reference for the inquiry include a review of Audit New Zealand's role in auditing the Council's management of the scheme. The OAG has indicated that due to natural justice requirements, and the breadth and depth of issues arising from this process, it is unable to provide a date for the publishing of the report.

High Court proceedings for judicial review

32. Concerns are being voiced by the Kaipara community, about the Council's decision to significantly expand the Mangawhai Community Wastewater Scheme and the way the Council funded it. There is concern that the Bill will validate the Council's contentious decisions around the Mangawhai Community Wastewater Scheme.
33. On 20 March 2013 a High Court judicial review application was lodged by the Mangawhai Residents and Ratepayers Association. The proceedings are in relation to decisions made by the Council between October 2005 and August 2012 to:
- develop a new wastewater treatment plant and disposal scheme to serve Mangawhai and to borrow money to fund its construction;
 - amend the scope of the Mangawhai Community Wastewater Scheme, including to borrow more money to complete its construction;

- set and collect general and targeted rates; and
- charge and collect development contributions.

34. The last two bullet points are related to the contents of the Bill.

7. New Zealand Bill of Rights Act assessment

35. The Department has been advised that on 28 June 2013 the Ministry of Justice provided the Attorney-General with legal advice on the Bill. This advice assessed the consistency of the Bill with the New Zealand Bill of Rights Act 1990.
36. The Ministry of Justice concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990.

8. Next steps

37. Officials from the Department are available to act as advisors to the Committee on the Bill, as required.
38. The Department will prepare a summary of the submissions to inform the Departmental report.

Appendices

Appendix One: Summary of outstanding rates in Mangawhai

39. The Table below summarises the scope of the situation in Mangawhai with respect to outstanding rates. It covers the total number of rateable properties, and the number of properties owing rates (including penalties) for the years 2008 to 2012. It does not illustrate any disproportionately large one-off rates or penalties charged or owing on individual properties.

Table One: Mangawhai rates 2008 - 2012

| | Year | | | | |
|------------------------------------------------------------------------------------------------------|-----------|-----------|-----------|-----------|-----------|
| | 2012 | 2011 | 2010 | 2009 | 2008 |
| Total number of rateable properties in Mangawhai | 3842 | 3811 | 3628 | 3581 | 3385 |
| General Rate | 4,247,263 | 3,924,812 | 3,729,827 | 4,430,932 | 4,135,718 |
| Northland Regional Council Rate | 740,372 | 595,347 | 519,222 | 478,832 | 411,659 |
| Targeted Rates (Stormwater, Sewerage, Harbour Restoration, Forest Owners) | 2,007,375 | 1,911,219 | 1,322,067 | 491,694 | 427,918 |
| Targeted Capital (Wastewater) Rate | 437,215 | 1,546,797 | 2,178,917 | 783,884 | |
| Penalties | 214,710 | 171,742 | 176,075 | 125,208 | 92,896 |
| Total amount of rates charged (\$) | 7,646,935 | 8,149,917 | 7,926,108 | 6,310,550 | 5,068,191 |
| Total number of rateable properties owing rates as at 30 June for each year | 1093 | 550 | 572 | 597 | 495 |
| Cumulative total amount of rates (including penalties) owing as at 30 June for each year (\$) | 886,953 | 602,305 | 527,183 | 512,993 | 264,517 |
| Average amount owing per rateable property (\$) | 811 | 1095 | 922 | 859 | 534 |

Appendix Two: Summary of procedural failings by the Council

1. The Bill validates and declares lawful irregularities in the way in which Kaipara District Council purported to comply with certain provisions of the Local Government (Rating) Act 2002 (the Rating Act) and the Local Government Act 2002 (the LGA02).
2. The irregularities under the Rating Act were in relation to the way local authority rates were set and assessed during the financial years 2006/07 to 2011/12, including:
 - failure to set rates on a basis in accordance with the Rating Act, for example using factors to calculate targeted rates that were not identified in the relevant funding impact statement and/or in the Rating Act;
 - failure to assess some rates in accordance with section 43 of the Rating Act;
 - failure to set rates in accordance with the relevant provisions of the applicable funding impact statement;
 - failure to include some rates or required rating information in the Council's funding impact statement, as required by the Rating Act;
 - failure to include some of the information on rates assessment notices required under section 45 for the financial years 2006/07 to 2012/13; and
 - offering ratepayers the opportunity to elect to pay a targeted rate in relation to the Mangawhai Community Wastewater Scheme on a basis similar to a lump sum contribution scheme under Part 4A of the Rating Act without complying with Part 4A.
3. In relation to the targeted rate, the Bill validates the one-off Mangawhai wastewater targeted rate and enables some provisions and ratepayer protections that exist under the lump sum contribution provisions under the Rating Act. These are provisions that could have been used by the Council to achieve the same objectives.
4. The irregularities under the LGA02 relate to the way in which the Kaipara District Council purported to comply with requirements relating to the long-term plan and use of the special consultative procedure. The irregularities include:
 - continuing its policy on development contributions adopted in its 2006-2016 Long-term Council Community Plan in the Council's 2009-2019 Long-term Council Community Plan;
 - failure to adopt its 2010/2011 annual report within the time frame specified in section 98(3) of the LGA02;
 - failure to adopt its 2012-2022 Long-term Plan within the time frame specified in section 93 of the LGA02; and
 - failure to meet some of the requirements of section 83 of the LGA02 for conducting the special consultative procedure in relation to its 2012-2022 Long-term Plan.