

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

~~CIV 2013 404 000~~

IN THE MATTER OF

an application for judicial review under Part I of the
Judicature Amendment Act 1972

BETWEEN

MANGAWHAI RATEPAYERS AND
RESIDENTS ASSOCIATION, an incorporated
society having its registered office at 29 Alamar
Crescent, Mangawhai Heads Northland 0505

Applicant

AND

KAIPARA DISTRICT COUNCIL, a local
authority constituted pursuant to the provisions of the
Local Government Act 2002 having its principal
office at 42 Hokianga Road, Dargaville

Respondent

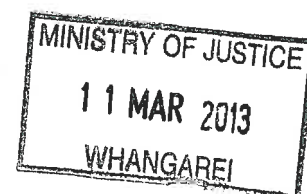
STATEMENT OF CLAIM SEEKING JUDICIAL REVIEW

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The applicant by its solicitor says:

PARTIES

Applicant

1. The applicant is an incorporated society under the Incorporated Societies Act 1908 (Number 223801).

2. The applicant was incorporated on 20 May 1968. The objects of the applicant are, inter alia:

(b) To foster the interests of, and further the progress of the Mangawhai district to the benefit of all ratepayers, residents and those who use its amenities on a permanent basis, and for those purposes to make representations to all local, regional and national bodies which may be in any way interested in, or with this district and the facilities therein, and generally do all such acts and matters as the Society might consider necessary for the proper development of facilities, amenities, and needs of this district and the people who dwell in or use said amenities.

3. Membership of the applicant is limited to any ratepayer or resident of the Mangawhai district or any person or persons who use its facilities and amenities on a permanent basis, being eighteen (18) years of age or over. The Mangawhai district comprises the area bounded to the north by Bream Tail and to the South by Pakiri Beach and running inland for a distance of approximately 12 Kilometres.

4. The applicant has 1018 current financial members who reside and/or own property in Mangawhai.

Respondent

5. The respondent is a territorial local authority constituted as a body corporate under the Local Government Act 2002 (LGA) in respect of the Kaipara district.

Relationship

6. Mangawhai is mostly within the Kaipara district and the members of the applicant are part of the community of that district.

7. Under the LGA the respondent has various purposes, roles and powers in respect of its communities, subject to compliance with the provisions of the LGA.
8. Under the Local Government (Rating) Act 2002 (LGRA) the respondent has powers to set, assess and collect rates to fund its activities, subject to compliance with the provisions of the LGRA and the LGA.

OVERVIEW - STATUTORY DECISIONS OF THE RESPONDENT TO BE REVIEWED

9. Over the period commencing from or about October 2005 to August 2012 (inclusive) the respondent purported to exercise powers under the LGA and LGRA to resolve to:
 - (a) Develop a new wastewater treatment plant and disposal scheme to serve Mangawhai – The Mangawhai EcoCare Project (subsequently renamed Mangawhai Community Waste Water System) (EcoCare) and to borrow money to fund its construction;
 - (b) Amend the scope of EcoCare, including to borrow more money to complete its construction; and
 - (c) Set and collect general and targeted rates; and
 - (d) Charge and collect development contributions,collectively referred to as “**the Decisions**”.
10. The Decisions were statutory powers of decision within the meaning of the Judicature Amendment Act 1972.
11. The Decisions comprise resolutions of the respondent and in this statement of claim are referred to by date only. The applicants rely on the full text of the resolutions, including any documentation referred to in such resolutions, as if pleaded in full in this statement of claim.

FIRST SET OF REVIEWED DECISIONS – ECO CARE (DEVELOPMENT AND BORROWING)

12. On 24 August 2005 the respondent resolved to:
 - (a) Accept an offer from EarthTech Consulting Limited (**EarthTech**) to design, construct and operate EcoCare;
 - (b) Accept an offer of a borrowing facility from ABN Amro New Zealand Limited (**ABN**) to a maximum of \$31,000,000 to fund the capital costs of development of EcoCare.
13. On 24 October 2005 the respondent resolved to confirm the direction of a draft statement of proposal for the purposes of s 83(1) LGA for EcoCare.
14. On 26 October 2005 the respondent executed a Project Deed agreement with EarthTech to design, construct and operate the Ecocare facilities. (**EcoCare Agreement**). The EcoCare Agreement was conditional on the necessary resource consents being obtained under the Resource Management Act 1991 for the construction and operation of EcoCare.
15. On 22 February 2006 the respondent resolved to adopt a statement of proposal for the purposes of s 83(1) LGA for EcoCare and to notify it for consultation under that Act as part of its proposed Long Term Council Community Plan 2006-2016 (**LTCCP 06-16**).
16. On a subsequent unknown date the respondent notified the statement of proposal for EcoCare and the LTCCP 06-16, in breach of section 84(3) and 97 LGA.
17. On 24 May 2006 the respondent resolved to:
 - (a) Adopt a proposal from Beca Limited (**Beca**) to manage the implementation of EcoCare;
 - (b) Approve, in principle, the purchase of land to be used for wastewater disposal as part of EcoCare.
18. On 7 June 2006 the respondent resolved to adopt the LTCCP 06-16, incorporating the statement of proposal for EcoCare as contained in the EcoCare Agreement and its funding impact statement, as from 1 July 2006.

19. On 25 October 2006 the respondent resolved to endorse a Deed Amendment to the Project Deed with EarthTech (**Modification 1**) and authorise the Chief Executive and Mayor to execute the document. Modification 1 doubled the scope of EcoCare, increased its capital cost of development and required changes to the funding regime previously committed to by the respondent for EcoCare.
20. On 26 September 2007 the respondent:
 - (a) received a report from its Chief Executive that the conditions on the EcoCare Agreement had been satisfied and resource consents obtained for EcoCare;
 - (b) resolved to adopt Modification 1, confirm the EcoCare Agreement and conclude negotiations with EarthTech and ABN to activate the necessary funding arrangements.
21. On 28 November 2007 the respondent authorised the execution of the EcoCare project documentation between it and EarthTech to give effect to the EcoCare Agreement incorporating Modification 1.
22. On 7 December 2007 the respondent executed the Amended and Restated Project Deed to give effect to Modification 1. It also executed loan facility agreements with ABN.
23. The respondent subsequently borrowed \$57,978,000.00 to fund EcoCare in accordance with the EcoCare Agreement incorporating Modification 1 (**EcoCare Borrowings**).
24. The decisions to proceed with EcoCare by committing to the EcoCare Agreement, Modification 1 and the EcoCare Borrowings would significantly alter the intended level of service provision for a significant activity undertaken by the respondent. The LTCCP 06 – 16 described EcoCare as a capital works programme of large significance and a strategic asset.
25. The decisions by the respondent to enter into the EcoCare Agreement and Modification 1 and to take on the EcoCare Borrowings were unlawful, *ultra vires* and/or invalid because they were each made inconsistently with the principles relating to local authorities in sections 14 and 101 of the LGA including because they were made prior:

- (a) to being explicitly provided for in the respondent's long term plan, contrary to s 97(2)(a) LGA;
- (b) to being included in a statement of proposal under s 84 LGA, contrary to s 97(2)(b) LGA;
- (c) to consultation with the community in accordance with the special consultative procedure, contrary to s 84 LGA.

First Claim for Relief:

- A. A declaration that the decisions to develop EcoCare by entering into the EcoCare Agreement, to adopt Modification 1 and to take on the EcoCare Borrowings were illegal and invalid.
- B. An order setting aside the decisions to enter into the EcoCare Agreement, to adopt Modification 1 and to take on the EcoCare Borrowings.
- C. A declaration that ratepayers are not liable for any debts illegally and invalidly entered into by the respondent, even if members of the respondent are so liable (for example under section 46).
- D. A declaration that it is contrary to the scheme and purpose of the LGA, and therefore illegal, for debts illegally and invalidly entered into by the respondent to be met by rates or other charges levied by the respondent on ratepayers and residents of Kaipara District.
- E. A declaration that any charge on its rates revenue given by the respondent as security for the EcoCare Borrowings is invalid and/or does not entitle the respondent or any receiver of the respondent to exercise the powers in s 115(2) LGA in respect of the EcoCare Borrowings.
- F. Costs against the respondent.

**SECOND REVIEWED DECISIONS –RATES AND LONG TERM PLAN
2012-22**

Rates for period 1 July 2006 to 30 June 2012

26. The respondent set and/or assessed general and targeted rates for payment by ratepayers of the Kaipara district as follows:
- (a) For the period 1 July 2006 to 30 June 2007 – by resolution on or about 28 June 2006 (**06/07 Rates**);
 - (b) For the period 1 July 2007 to 30 June 2008 – by resolution on or about 27 June 2007 (**07/08 Rates**);
 - (c) For the period 1 July 2008 to 30 June 2009 – by resolution on 25 June 2008 (**08/09 Rates**);
 - (d) For the period 1 July 2009 to 30 June 2010 – by resolution on 24 June 2009 (**09/10 Rates**);
 - (e) For the period 1 July 2010 to 30 June 2011 – by resolution on 25 June 2010 (**10/11 Rates**);
 - (f) For the period 1 July 2011 to 30 June 2012 – by resolution on 22 June 2011 (**11/12 Rates**);
27. The general and targeted rates set for the rating periods described in paragraph 25 included:
- (a) Mangawhai Uniform Targeted Rate (**MUTR**);
 - (b) Mangawhai Uniform Annual Charge (**MUAC**);
 - (c) Forest Owners Targeted Rate (**FOTR**);
 - (d) Maungaturoto, Station Village Volumetric Water Rate (**MVWR**);
 - (e) Other Wastewater Rates (**OWR**).
28. The MUTR in the 08/09 Rates, 09/10 Rates and 10/11 Rates was set on a basis not authorised by the LGRA.

29. The MUTR in the 08/09 Rates, 09/10 Rates, 10/11 Rates and 11/12 Rates was not set in accordance with the LGA.
30. The MUAC in the 09/10 Rates and 10/11 Rates was not set in accordance with the LGA.
31. The FOTR in the 06/07 Rates, 07/08 Rates, 08/09 Rates, 09/10 Rates and 10/11 Rates was set on a basis not authorised by the LGRA.
32. The FOTR in the 06/07 Rates, 07/08 Rates, 08/09 Rates, 09/10 Rates, 10/11 Rates and 11/12 Rates was not set in accordance with the LGA.
33. The MVWR in the 06/07 Rates, 07/08 Rates, 08/09 Rates, 09/10 Rates, 10/11 Rates and 11/12 Rates was set on a basis not authorised by the LGRA and not set in accordance with the LGA.
34. The OWR in the 06/07 Rates, 07/08 Rates, 08/09 Rates, 09/10 Rates, 10/11 Rates and 11/12 Rates was not set in accordance with the LGA.

Particulars of non-compliance with LGRA and LGA

35. The pleading “not authorised by the LGRA” in paragraphs 28 to 34 above includes failings by the respondent, inter alia, to comply with ss 16, 17, 18, 19, 23, 43, 45 and Part 4A of the LGRA.
36. The pleading “not authorised by the LGA” in paragraphs 28 to 34 above includes failings by the respondent, inter alia, to comply with ss 102 and 106 of the LGA.
37. The MUTR, MUAC, FOTR, MVWR and OWR for the years identified in paragraph 26 above were unlawfully set and are invalid.

Further Particulars – Draft Local Bill “Kaipara District Council (Validation of Rates and Other Matters) Bill”

38. On 26 February 2013 the respondent (via its appointed Commissioners) received a draft local bill known as the “Kaipara District Council (Validation of Rates and Other Matters) Bill” (**Validation Bill**) and resolved to pursue the Validation Bill as a “solution” to the “historical rating issues” affecting the respondent.

39. By its pursuit of the draft Validation Bill the respondent accepts that all of the rates described in paragraphs 28 to 34 above and set and/or assessed for the period 1 July 2006 to 30 June 2012 were set and/or assessed erroneously or invalidly.
40. The applicants rely on the Draft Validation Bill as if it were pleaded in full and rely on the reasons for validation in the Draft Validation Bill as reasons for its claim as to the invalidity of the said rates, even if not particularised herein.

Rates for period 1 July 2012 to 30 June 2013

41. The respondent set general and targeted rates for payment by ratepayers of the Kaipara district for the period 1 July 2012 to 30 June 2013 by resolutions on 27 June 2012 (**Interim 12/13 Rates**) and 29 August 2012 (**Final 12/13 Rates**).
42. The Interim 12/13 Rates were set as 20% of the 11/12 Rates. The portion of the 11/12 Rates associated with EcoCare, forestry and water charges were not authorised by the LGRA and the 11/12 Rates were therefore not set in accordance with the LGA (refer paragraphs 26 to 40 above)..
43. The Interim 12/13 Rates were therefore improperly assessed and set and are invalid.
44. The Final 12/13 Rates were not authorised by the LGRA and not set in accordance with the LGA.

Particulars of non-compliance with LGRA

45. The pleading “not authorised by the LGRA” in paragraphs 44 above includes failings by the respondent, inter alia, to comply with ss 23 and 45 LGRA.

Particulars of non-compliance with LGA

46. The pleading “not authorised by the LGA” in paragraphs 44 above includes failings by the respondent, inter alia, to:
- (a) adopt its annual report for the 2010/2011 year by 30 October 2011 and prior to the notification of its draft long term plan for 2012/2022 (**LTP 12-22**) on 28 April 2012;

- (b) comply with the special consultative procedure and decision making requirements of ss 82 and 84 LGA in considering the draft LTP 12-22;
 - (c) adopt LTP 12-22 on 29 August 2012 in accordance with s 93 LGA;
 - (d) otherwise comply with ss 102 and 106 LGA.
47. LTP 12-22 was therefore invalidly adopted and the Final 12/13 Rates were therefore improperly assessed and set, and are invalid.

Further Particulars – The Draft Validation Bill

48. On 26 February 2013 the respondent (via its appointed Commissioners) received the Draft Validation Bill and resolved to pursue Validation as a “solution” to the “historical rating issues” affecting the respondent.
49. By its pursuit of the Draft Validation Bill the respondent accepts that all of the rates described in paragraphs 28 to 34 above and set and/or assessed for the period 1 July 2006 to 30 June 2012 were set and/or assessed erroneously or invalidly.
50. The applicants rely on the Draft Validation Bill as if it were pleaded in full and rely on the reasons for validation in the Draft Validation Bill as reasons for its claim as to the invalidity of the said rates, even if not particularised herein.

Second Claim for Relief:

- A. A declaration that the rates set by the respondent for the period 1 July 2006 to 30 June 2013 are invalid.
- B. An order setting aside the rates resolutions for the period 1 July 2006 to 30 June 2013.
- C. An order setting aside any penalties charged by the respondent on any rate invalidly set for the 1 July 2006 to 30 June 2013 period.

- D. An order that all rates and penalties paid by ratepayers of the Kaipara district on the basis of rates invalidly set or assessed for the 1 July 2006 to 30 June 2013 are to be refunded.
- E. A declaration that LTP 12-22 was invalidly considered and adopted and is therefore defective.
- F. An order setting aside LTP 12-22 and directing the respondent to re-do LTP 12-22 in accordance with the LGA.
- G. Costs against the Respondent.

THIRD REVIEWED DECISION – DEVELOPMENT CONTRIBUTIONS

- 51. The respondent's 2009-2019 long-term council community plan included a policy on development contributions and financial contributions for EcoCare and roading at Mangawhai (**DC Policy**).
- 52. In adopting the DC Policy the respondent failed to comply with ss 102 and 106 LGA.
- 53. The respondent has collected development and financial contributions from ratepayers in reliance on the DC Policy.
- 54. On 26 February 2013 the respondent (via its appointed Commissioners) received the Draft Validation Bill and resolved to pursue Validation as a "solution" to the "historical rating issues" affecting the respondent as well as issues concerning the lawfulness of the DC Policy.
- 55. By its pursuit of the Draft Validation Bill the respondent accepts that the DC Policy was invalidly authorised.
- 56. The applicants rely on the Validation Bill as if it were pleaded in full and rely on the reasons for validation of the DC Policy in the Draft Validation Bill as reasons for its claim as to the invalidity of the DC Policy, even if not particularised herein.

Third Claim for Relief:

- A. A declaration that the DC Policy is invalid.

- B. An order setting aside the DC Policy.
- C. An order that all development or financial contributions paid to the respondent in reliance on the DC Policy are to be refunded.
- D. Costs against the Respondent.

This document is filed by Patrick James Kennelly, solicitor for the applicant.

The address for the service of the applicant is at the offices of Kennelly Law, First Floor, 12 Tamariki Avenue, Orewa.

Documents for service on the applicant may be left at that address for service or may be:

- (a) posted to the solicitor at PO Box 607, Orewa; or
- (b) sent by email to the solicitor at kennelly@kennellylaw.co.nz (provided that a hard copy of any email communication shall be sent contemporaneously by post).

and in either case copies to counsel at Matthew.Palmer@chambers.co.nz and littlejohn@quaychambers.co.nz