How the Far North District Council has administered rates and charges due from Mayor Wayne Brown's company, Waahi Paraone Limited

This is an independent assurance report about an inquiry carried out under sections 16 and 18 of the Public Audit Act 2001.

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Part 1
Introduction and conclusions

1.1 The Far North District Council (the Council) and the Mayor of the Council, Mr Wayne Brown, have been in dispute for some time about the rates and other charges owed by Mr Brown's company, Waahi Paraone Limited (the company). The rates and charges related to a subdivision developed by the company in Kerikeri. The issues involved in the dispute were legally and factually complex, and the two parties were unable to resolve them through normal processes or direct discussion. Mr Brown refused to pay some rates and charges for 2010/11 and 2011/12 until the matter was resolved.

1.2 In October 2011, Mr Brown and the Council each asked the Auditor-General to help resolve the matter. Mr Brown indicated that the company would pay any amount that we concluded was owed. Given the nature of the issues and the difficulty it was creating for both parties, we decided that it was appropriate to review the background to the dispute, form a view on whether the Council's actions in setting and collecting these rates and other charges were reasonable, and determine the amount that the company owed.

1.3 To complete this report, we:

- obtained background information and documents from the Council;
- prepared a draft summary of the background to the dispute based on those documents and checked that summary with the Council (Part 2 of this report);
- sent the revised draft summary of the background and our draft analysis and comment (Part 3 of this report) to Mr Brown for comment;
- received written comments on the draft from Mr Brown and met with him to discuss them;
- asked the Council further questions and received additional information and documents;
- prepared a revised draft of this report and sent it to the Council and Mr Brown for comment;
- requested further information from both the Council and Mr Brown on the amounts paid as development contributions;
- prepared a further revised draft of this report and sent it to the Council and Mr Brown for final comment;
- received comments from both parties; and
- completed the report in the light of those comments.

1.4 We concluded that the rates payments that the Council had been seeking were properly due. At 20 May 2012, the company owed the Council $19,302.82 in unpaid rates, made up of sewerage rates and penalties. Mr Brown paid this amount on 26 May 2012, after being advised of our conclusion in an earlier draft of this report.

1.5 We also concluded that the other charge that the Council had asked to be paid in September 2011 was properly due. This charge was the balance of an agreed $150,000

contribution towards sewage reticulation costs that had not yet been paid. In late May, the figures provided by the Council suggested that the amount still owing was $135,833.09. Mr Brown did not agree with the amount; he estimated that the amount was closer to $55,000.

1.6 We agreed to carry out further work to check the calculations. Because Mr Brown was travelling overseas for some weeks, he left a cheque with the Council for $55,754.72 as an interim step while we completed a final calculation. The Council did not bank this cheque because it was concerned that to do so could be seen as accepting this amount as a final settlement of the dispute and so might jeopardise its legal position. In any event, the cheque could not be banked because Mr Brown had not signed it.

1.7 It took some time for us to complete these final calculations because neither party had particularly clear or comprehensive records. It was also complex because the legal status of some of the future obligations to pay an amount is not particularly clear.

1.8 We concluded that incomplete information meant that neither amount was correct. Our best estimate of the amount that the company owed, as at 1 July 2012, is $76,487,09. This is the balance of the $150,000 that was originally due as contributions.

1.9 We note that the Council has gone outside normal processes several times and made unusual agreements. These decisions were made in good faith to help find solutions for Mr Brown, but they left the Council in a more uncertain position when things went wrong. With hindsight, these decisions may not have been wise. The Council has also made a number of administrative and calculation mistakes, which have contributed to the uncertainty about whether it was charging the correct amounts.

1.10 Mr Brown has told us and the Council that he would like the Council to remit the penalties that accrued on the rates while we carried out our review. We accept that the complexity of the issues, competing priorities for us and the Council, and the problems we had in obtaining accurate information from the Council and Mr Brown meant that our review took much longer than anyone expected. There is an argument that it would be appropriate for the Council to consider remitting the penalties that accrued between October 2011 and May 2012.

1.11 However, it is also relevant that the Council has spent a considerable amount of staff time and money on this dispute – much more than the total penalties. The Council must also consider how it would treat any other ratepayer who withheld rates for nearly two years, given that the normal legal obligation in the Local Government (Rating) Act 2002 is to pay rates and then dispute them. Under the Act, penalties will generally accrue if a person does not pay rates while they are disputed.

1.12 In the end, Mr Brown is entitled to ask the Council to remit some or all of the penalties that accrued while the rates were not paid. The Council has to consider his request against the criteria in the relevant policies that set out the legal basis on which remissions can be given. Although it is doubtful whether this situation fits within any of the criteria in the Council's policy statement on the remission of penalties, we note that the Council reserves a general discretion to remit rates and penalties in other situations.

Part 2
Background

The original subdivision consent and the condition on the agreed contribution for sewerage (2001-03)

2.1 In early 2001, the company sought to subdivide some land in Hone Heke Road in Kerikeri to create 72 lots. The company proposed that the subdivision would have its own sewerage disposal system and would not be connected to the Council's reticulated sewerage system. At that time, the land that the company proposed to subdivide was not within the existing or proposed area of benefit of the Kerikeri sewerage system.

2.2 Mr Brown, on behalf of the company, began negotiating with the Council in late 2002 about connecting the lots to the Council's reticulated system. At around the same time, a Council stormwater pipe from a neighbouring subdivision was discharging onto the land owned by the company. Mr Brown believed that the discharge was contaminating the company's land, because the discharge included septic tank effluent, and that the Council was responsible for this. Mr Brown and Council staff discussed the discharge. Lawyers acting for Mr Brown wrote to the Council advising that the company would take legal action against the Council for damages.

2.3 In August 2003, after some months of inconclusive correspondence, the Council and Mr Brown both agreed to proceed on the basis that the company's subdivision could be connected to the reticulated system at a rate of 12 lots in any year, subject to the company paying a contribution of $150,000 (the agreed contribution). The practical effect of the annual limit on connections was that the company could sell only 12 lots in any year. The 12-lot restriction was unusual. The Council's usual practice when it was unsure whether a system would cope with an increased number of connections was to decline the connections.

2.4 Mr Brown told us that he believed that the connection to the Council's system was an offer by the Council to avoid liability for the discharge. Documents show that the Council did not accept liability for any contamination and it specifically refused to take this into account when setting an appropriate contribution amount. It eventually accepted the sum of $150,000, but regarded this as lower than normal for that type of development. Although subsequent correspondence from Mr Brown shows that he has consistently maintained that this was an agreed settlement of his claim, documents from the Council make clear that this was not the basis on which it set the agreed contribution amount. Poor documentation and process has meant that these different perceptions have been able to persist.

2.5 The Council's district plan at that time did not include any provisions for financial contributions. However, in some circumstances, councils are able to include conditions in resource consents that have a similar effect to financial contributions under the transitional provisions of the Resource Management Act 1991. We note that, despite the uncertain legal basis for the agreed contribution and the parties' differing views on why the agreed

contribution was set at $150,000, it is clear that the company agreed to pay this amount for the connections to the Council's sewerage system.

2.6 The Council and Northland Regional Council granted subdivision consent to the company in December 2003. The consent contained a condition for sewerage connections that required the payment of "any contributions". Although not expressed clearly, it appears that this referred to the agreed contribution. The Council and the company have operated on the basis that this condition created a legally binding obligation for the company to pay $150,000.

2.7 Although the subdivision consent stated that the company could create 72 lots, only 43 lots have been created to date. Titles were issued to the 43 lots on 1 July 2006.

Agreement to stagger the payment of the agreed contribution and rates remissions (2004-06)

Development contributions

2.8 Although the connection limit meant that only 12 lots could be sold in one year, the agreed contribution was due to be paid in full before titles to the lots could be issued (and, therefore, before any lots could be sold). In 2004, it appears that Mr Brown became concerned about the effect having to pay the agreed contribution in advance would have on the cash flow of the company. He negotiated again with the Council. Mr Brown and the Council reached a further agreement to treat the agreed contribution as development contributions. The development contributions would have to be paid when the houses built on the lots were connected to the Council's system. This would spread the payments over time.

2.9 The intention of the agreement was that whoever owned the lot at the time it was connected to the Council's sewerage system would pay the contribution, rather than the company paying the agreed contribution for the entire subdivision upfront. If the company owned the lot at the time of connection, it would pay the development contribution. If the company had sold the lot before it was connected, then the new owner would pay the development contribution at the time of connection.

2.10 Mr Brown told us that at no time did he agree that the company would pay development contributions as such. Instead, he agreed that the company would pay the $150,000 over time, based on the current connection fee. However, the documentation from the time does not support this view. A letter dated 19 March 2004 from the Council to Mr Brown, which is the primary record of the arrangement, states that:

> *You have now requested that instead of paying the agreed financial contribution, the subsequent owners of each lot be required to pay the sewerage contribution by way of a development contribution as set out in Council's Development Contributions Policy adopted under the Local Government Act. The effect of this change would be to move the liability for the contribution from you, as the subdivider, to the owner at the time of building or connection to the sewerage services.*

Council has agreed to accede to your request which means that there will no longer be a requirement for you to pay the financial contribution for sewerage; instead the eventual owner will be required to pay a development contribution for sewerage at the time that they apply for connection to the Council services. It should be noted that the quantum of the contribution will be that which is set out in the Development Contributions Policy at the time the application is made.

2.11 There is some question about whether the Council was legally able to convert the agreed contribution to development contributions in this way. It is also unclear whether the Council could legally require the purchasers of these lots to pay these development contributions. However, the agreement was reached in good faith between the parties and transactions with purchasers have included an acknowledgement of an obligation to pay this charge. All parties appear to have been happy to proceed on this basis for some time.

Rates remissions

2.12 In 2006, the titles to the 43 lots in the subdivision were issued. This meant that all of the individual lots became rating units from 1 July 2006 and liable for rates. The Council had a policy on rates remission for lots created by multi-lot subdivision that were still owned by the developer. Under the policy, the developer did not have to pay the uniform annual general charge and some other targeted rates for three years. These targeted rates included rates for water, stormwater, and sewerage. However, the developer would still have to pay any other rates.

2.13 In 2004, when the Council and Mr Brown agreed that the owner of the lots at the time of connection would pay development contributions, they also discussed how the rates remission policy would apply to the company's subdivision. The Council agreed that, because the company could connect and sell only 12 lots in any year, the three-year period in the rates remission policy would be gradually phased in at the rate of 12 lots each year. This meant that the three-year remission period would run from the time the lots were able to be connected.

2.14 The first 12 properties that were able to connect to the system in 2006 would be eligible for rates remission for the 2006/07, 2007/08, and 2008/09 rating years while they were still owned by the developer. The next 12 properties that were able to connect in 2007 would be eligible for rates remissions for the 2007/08, 2008/09, and 2009/10 rating years, and so on for the remaining lots.

2.15 Mr Brown, on behalf of the company, applied for the remission of rates on the lots in the subdivision in July 2006. The Council granted the remission, and it came into effect from 1 July 2006. Under the policy that then applied, this meant that the first 12 lots would become liable to pay full rates from 1 July 2009.

Changes to the development contributions and rates remissions policies (2009)

2.16 Mr Brown was elected as Mayor of the Council in October 2007. In 2009, the Council made changes to the development contributions and rates remissions policies. The changes affected the company's subdivision.

2.17 At the time, we considered the effect of the Local Authorities (Members' Interests) Act 1968 on Mr Brown's ability to participate in the decision on the rates remission policies. We concluded that his interests in the various proposed rating decisions were effectively "interests in common with the public" because he was one of a number of commercial developers affected by the changes.

Development contributions

2.18 The change in 2009 increased the amounts set out in the development contributions policy. The development contributions payable for sewerage that applied to the lots in the company's subdivision increased from $3,584 to $5,580 per lot.

Rates remissions

2.19 In 2009, the Council amended its rates remission policy for lots created by multi-lot subdivisions that were still owned by the developer, extending the period of rates remissions for certain types of rates from three to six years. This extension did not apply to rates for water, stormwater, or sewerage. The rationale was that rates to fund utility services such as water, stormwater, and sewerage services enhance the development potential of the land and that sewerage services enable subdivisions to be developed.

2.20 The effect on the company of the change to the rates remission policy was that, from 1 July 2009, any of the first 12 lots in the subdivision still owned by the developer would have the uniform annual general charge and other selected rates remitted for another three years, but the lots became liable for water and sewerage rates. This meant that the total amount of rates payable on those first 12 lots would increase in 2009 and would increase again in three years' time when the remaining remissions expired. For the next 12 lots, the rates would increase from 1 July 2010 and again from 1 July 2013, and so on.

Payment of development contributions at a reduced rate by a purchaser of one lot

2.21 In 2004, the Council agreed with Mr Brown that the company or the purchaser of the lot would pay development contributions for sewerage at the time each lot was connected to the system, at the rate set out in the development contributions policy applying at the time of connection. In 2009, the rate payable increased from $3,584 to $5,580.

2.22 In July 2009, the company sold one of the lots. The company had not paid a development contribution because there was no building on the site and no connection to the Council system was then required. Under the arrangement between the Council and the company, the obligation to pay the development contribution fell on the purchaser, who would be

required to pay it at the time of connection. We have not been able to check whether the sale and purchase agreement made this clear to the purchaser.

2.23 When the purchaser applied for a building consent, the Council told her in a letter that a development contribution for sewerage would be payable at the rate then applicable. However, it appears that this letter was sent to the purchaser's agent and that this information may not have been communicated to her. She later applied for a Code Compliance Certificate. The Council refused to issue it until the development contribution had been paid.

2.24 The purchaser discussed the issue with Council staff and wrote to the Council, saying that Mr Brown had told her that all contributions had been paid. As a result, the Council agreed to reduce the contribution payable by the purchaser to the level set in the development contributions policy that applied before July 2009.

2.25 Council staff told us that Mr Brown challenged them about this decision, and told them that he had told the purchaser that she would have to pay the development contribution for sewerage.

Rates charged for 2009/10 and 2010/11

2.26 At the start of the 2009/10 rating year, eight of the 43 lots had been sold. The rates remission policy did not apply to the lots once they had been sold to a new owner. The company still owned four of the 12 properties that were able to be connected in 2006. These four had been receiving rates remissions for three years. At 1 July 2009, they became liable for water and sewerage rates. This meant that the amount of rates to be paid on those lots should have increased for the first time in the 2009/10 rating year.

2.27 The Council mistakenly did not include this change in the rates assessments notices and rates invoices issued to the company for the four lots in the 2009/10 rating year. This meant that the rates payable, as set out in the rates assessment notice on those four lots, were essentially the same as the previous year but included the increases that applied to the whole district. The Council realised the error early in the 2010/11 rating year but could correct it and charge the increased rates for those four lots only for that rating year. It could not correct the mistake for the previous year and so the mistake benefitted the company.

2.28 When the Council issued rates assessment notices for the 2010/11 rating year for the lots in the subdivision, the rates increased for 16 of the lots (the four from the previous year and the 12 lots that lost their remission of water and sewerage rates in 2010). This was when Mr Brown noticed that the rates on lots in the subdivision had increased. He began to question the reasons for the increases and started to withhold payments.

2.29 In August 2010, Mr Brown asked Council staff to explain why the company's rates had increased. Council staff told us that they looked into this issue and discovered that not all the remissions that Mr Brown's properties were eligible for were recorded on the rates assessments and invoices. Council staff reprocessed the rates assessments and invoices with the correct remissions applied. In October 2010, Council staff sent Mr Brown a schedule showing the changes that had been made. He again queried the increase in his rates. Council staff told him that the increases were due to the level of rates remissions

decreasing in line with Council policy. Mr Brown again queried the increase with Council staff and told them that the policy they had applied was not what the Council had agreed to.

2.30 Council staff told us that, from October 2010, they had many discussions with Mr Brown about the company's rates, but he remained of the view that the Council was rating the company incorrectly. The company did not pay the rates owing to the Council for the lots in the subdivision as well as those for other properties.

2.31 Council staff met with Mr Richard Ayton, a partner of Law North, in an attempt to resolve the issues. Law North had acted for Mr Brown and for the Council on different matters in the past. In this matter, Law North was not acting for the Council or Mr Brown, and Mr Ayton reaffirmed this at the start of the meeting. The meeting had been arranged in the hope that Mr Ayton might be able to explain the Council's position to Mr Brown. Mr Brown had drafted a letter about the issues in dispute that he wanted Law North to send to the Council on his behalf. We understand that Law North declined to do this. However, Mr Brown gave the letter to the Council anyway, without changing it. Its status was unclear because it was still written as if it were a letter from Law North. This created some confusion until Law North clarified that it did not act for Mr Brown.

2.32 In September 2011, the Council's lawyers, Kensington Swan, sent Mr Brown a letter setting out the rates that the Council considered the company was liable to pay, and seeking confirmation from Mr Brown that the company would pay them. The letter also set out the Council's view that the 2004 agreement to convert the agreed contribution into development contributions to be paid over time was inconsistent with the rules on development contributions and was not operating satisfactorily. The letter formally advised that the Council had decided to end this arrangement and that it now required payment of the agreed contribution of $150,000 (less any amounts already received as development contributions). The letter asked the company to make a formal arrangement to pay this sum.

2.33 In September 2011, Mr Brown paid most of the rates owing on his properties and those of the company for the 2009/10 rating year and 2010/11 rating year. He did not pay the sewerage rates for all properties for either year or any penalties. Nor did he pay the balance of the agreed contribution. Instead, Mr Brown approached the Auditor-General to ask us to carry out a review and provide some assurance over how the Council was administering the company's rates and the amounts being charged. At around the same time the Council also asked if we could assist.

Part 3
Our analysis and comment

3.1 Mr Brown raised several different concerns about the rates and charges the company was billed for. In summary, these were:

- the status of the agreed contribution or development contributions that were charged;
- the amount of any remaining liability for a contribution;
- whether the company should pay sewerage rates as well as some kind of contribution;
- the way in which rates remissions were applied to the sewerage rates on the subdivision; and
- whether the Council should charge the company the penalties that have accrued while the company has not paid its rates.

3.2 In this Part, we discuss each of these issues in turn, before making some general comments about the actions of the Council and Mr Brown.

The status of the agreed contribution

3.3 Based on the Council documents we have seen, Mr Brown is not contesting whether the company ought to pay some form of contribution for connecting the lots to the Council's sewerage system. Rather, the debate is about how and when payments are made, the overall amount, and who should pay.

3.4 The subdivision consent included a condition requiring the company to pay "any contributions". We understand this to mean the agreed contribution of $150,000 for connecting to the Council's sewerage system, which the Council and Mr Brown originally agreed would be payable.

3.5 We agree that the later agreement to convert the agreed contribution into development contributions was effectively an informal arrangement, with an uncertain legal basis. The Council went outside normal processes to help Mr Brown's subdivision to proceed. With the benefit of hindsight, this may not have been a wise decision because it left the Council in an uncertain position if the development did not proceed as expected. It also potentially creates problems for the Council when it seeks to collect development contributions from the purchasers of the lots.

3.6 Given the problems that eventuated with collecting the agreed contribution in this phased way, the Council decided in September 2011 to revert to the original approach. It told Mr Brown that it now required payment of the outstanding contribution of $150,000 (less amounts already paid).

3.7 The Council sought legal advice on its ability to proceed to recover the agreed contribution in this way before it took this step. We generally take the view that a public entity is acting reasonably if it seeks legal advice in complex situations, and acts in keeping with that advice. As a result, we are satisfied that it was reasonable for the Council to demand in September 2011 that the company make formal arrangements for payment of this sum.

The amount had been agreed as the overall contribution since 2003, and the informal arrangement to spread the payments had proved unworkable. The Council was entitled to try to end it and revert to the original agreement.

The amount of the agreed contribution still owing

3.8 We reached this conclusion in May 2012, and both parties accepted it at a level of principle. However, each party had quite a different view of what had been paid and what was still owing. In late May, the figures provided by the Council suggested that the amount still owing was $135,833.09. Mr Brown did not agree with the amount; he estimated that the amount was closer to $55,000.

3.9 We agreed to carry out further work to check the calculations. Because Mr Brown was travelling overseas for some weeks, he left a cheque with the Council for $55,754.72 as an interim step while we completed a final calculation. The Council did not bank this cheque because it was concerned that to do so could be seen as accepting this amount as a final settlement of the dispute and so might jeopardise their legal position, In any event, the cheque could not be banked because Mr Brown had not signed it.

3.10 We asked the Council and Mr Brown to provide us with information on what amounts had been paid by either the company or subsequent purchasers as development contributions. We also needed to establish which properties had been sold with obligations to pay the contributions in future. The information provided by each party did not match. We had to carry out a substantial amount of detailed work to review the transactions for each lot in the subdivision to reconcile the information, before we could calculate what had been paid and what was still owed. For some properties we have not been able to gather complete information.

3.11 The original agreement and consent condition required the company to pay a contribution of $150,000. We considered whether GST should be added to this amount. Development contributions usually attract GST, as do financial contributions under the earlier legislation. One of the Council's background documents at the time recognised that GST was usually charged on development contributions for equivalent subdivisions. However, none of the correspondence between the company and the Council has ever explicitly mentioned GST. We accept that, if GST is payable, it is included in the $150,000 sum that was agreed between the parties.

3.12 The company has so far paid $21,101.67 as development contributions.

3.13 The agreements for sale and purchase for eight of the lots that have been sold included a clause in which the purchaser acknowledged an obligation to pay the development contribution that would be due when the lot was connected. This is in keeping with the arrangement made with the Council to spread the payments. One of the owners of one of the lots has paid the development contribution of $6,417. The owners of another one of those lots have been invoiced for $6,417 for the development contribution.

3.14 For the other six lots that have been sold, the development contributions will be payable when a building consent is applied for. Although there is some legal uncertainty about the effectiveness of these arrangements, all the relevant parties have proceeded in good

faith on this basis. We considered it appropriate to assume that the new purchasers will honour the obligation in the sale and purchase agreements and pay these amounts in future. Although the exact amount to be paid will depend on the level of development contribution required at the time of connection, for the purposes of this calculation we have assumed that each will pay the amount currently required. Under the policy that came into force on 1 July 2012, that amount is $6,141. The amount in total that it is reasonable to assume will be paid in the future by the owners of these six lots is therefore $36,846.

3.15 Some sections have been sold without a clause passing on an obligation to pay the development contribution. For other sections, we have no information on whether such a clause was included. For one of these sections, the new owner paid a reduced development contribution of $2,731.24.

3.16 After deducting all these amounts (see Figure 1), we have calculated that the final balance owed is $76,487.09.

Figure 1
Our calculation of the balance owed by the company to the Council

Original amount owing		$150,000.00
Less amount already paid by the company	$21,101.67	
Less amounts paid by or invoiced to new owners of lots	$6,417.00	
	$6,417.00	
	$2,731.24	
Less amount to be paid by future owners	$36,846.00	
		$73,512.91
Balance owed		**$76,487.09**

Note: The Council has already invoiced the company for $5,897.13 in development contributions that have not yet been paid.

3.17 We assume that Mr Brown will now pay the balance owing, including amounts already invoiced. We note that it will be important for the Council to update its records to ensure that it does not charge development contributions on any of the lots that have not yet been sold.

Debate about the sewerage rates

3.18 Local authorities have different powers to recover different aspects of their expenditure on sewerage infrastructure:

- Under the Local Government Act 2002, a local authority can charge development contributions for sewerage so that the developer contributes to the extra capital costs a local authority incurs in providing a sewerage system because of growth created by the development.
- Under the Local Government (Rating Act) 2002, a local authority can charge rates for sewerage to recover the ongoing costs of the sewerage system – such as operation and maintenance.

3.19 Therefore, if a local authority charges both development contributions for sewerage and a sewerage rate, it is not recovering twice for the same service. The two Acts specifically enable local authorities to charge both in some circumstances.

3.20 The Council charges development contributions and sewerage rates. The Council has three sewerage rates, which are differentiated according to the availability of service. The Council website states that:

> ***Sewerage Availability Rate*** *– is charged on every rating unit or part of a rating unit not connected to the reticulated sewerage system but is within 30 metres of any part of reticulation and the Council is willing to provide a connection to the rating unit. The charge is the same throughout the district. This rate funds the availability of the supply to the landowner and like the other sewerage charges, contributes to the operating and capital costs of the schemes.*

3.21 In its 2010/11 Annual Plan, the Council said that it would not charge development contributions for sewerage for existing households or vacant sections where the sewerage availability rate is imposed when they connect to an existing public sewerage system. This would apply only where the existing household or vacant section was within the area of benefit of the system.

3.22 It took this step because, under the Local Government Act, development contributions can be charged on a development only if the effect of the development is to require new or additional assets or assets of increased capacity and, as a result of this, the council incurs capital expenditure to provide for that additional infrastructure. Lots that were already within an area of benefit of a sewerage system did not create a requirement for increased capacity in the sewerage system. Connecting the lot to the system did not require the Council to spend money on its infrastructure to cope with the connection and so there was no basis for charging a development contribution.

3.23 Mr Brown argued that the reverse of this reasoning should apply; the company should not be required to pay the sewerage rates for the lots in the subdivision when the relevant remission expired. That is, because the company had been or would be paying development contributions on the lots in the subdivision, the company should not also have to pay the sewerage rate.

3.24 Council staff disagreed with this argument for several reasons. The Council's main point was that the two payments are for different purposes, and both were relevant to this subdivision because it was not within an existing area of benefit at the relevant time. Since the Council's development contributions policy has been in place, where new lots are created as a result of subdivision and they are not within an existing area of benefit, it has been standard practice for the Council to require:

- a development contribution – for the increased expenditure on additional infrastructure that this creates;
- payment of the sewerage rate at the availability differential (that is, the rate that applied to properties that could connect to the system but were not in fact connected) until the lot was connected to the system; and

- payment of the sewerage rate at the connected differential (that is, the rate that applied to properties that were connected to the system) once the lot was connected.

3.25 We agree with Council staff. A property will attract a development contribution if, at the time of development, it is not within the area of benefit of an existing system but will require new infrastructure. The property will also, in due course, become liable for rates, to meet the costs of the ongoing operation and maintenance of the system. At the time of development, this subdivision was not within the area of benefit and so it was appropriate for contributions to be charged, as well as sewerage rates in due course. Mr Brown's argument did not provide a sound basis for the company to withhold payment of these rates or the balance of the agreed contribution.

Rates remissions

3.26 This aspect of the dispute is about when the rates remission policy stops applying to the subdivided properties. Mr Brown had reached an agreement with the Council about the staged implementation of the rates remissions on the company's properties in 2004. This agreement was unusual, but it was a logical consequence of the unusual and staged way in which the Council had agreed to connect the lots to the sewerage system.

3.27 At that time, the rates remission policy provided that the remissions applied for three years. In 2009, the Council extended the time the policy was to apply to six years, except for water, stormwater, and sewerage rates. There was some controversy associated with that decision and Mr Brown's role in it, including questions to us about the application of the Local Authorities (Members' Interests) Act 1968. We corresponded and met with him to discuss the issue at the time. Therefore, we know from our own work and files that Mr Brown was aware of the original and extended rates remission policy, at least in general terms.

3.28 In any event, the company receives annual rates assessment notices and invoices for the properties it owns in the same way as any other ratepayer. The Council told us that the rates assessment notice issued each year sets out the full rates for the property before any remission is applied. Each rates invoice then shows the assessed rates that are due, any credit resulting from applying the rates remission policy, and the amount now due for payment. These documents are the formal legal notice to each ratepayer of what they are required to pay each year. The legislation prescribes in detail the information that the Council must provide in each assessment and invoice.

3.29 Developers like Mr Brown, who own many separate lots or titles, can receive a large number of individual rates invoices. When Mr Brown was elected Mayor, he requested that the Council start providing people in his situation with a single summarised version of all their rates invoices, on the grounds that this was a more efficient business practice. Council staff told us that 12 ratepayers have taken advantage of this arrangement and now receive a summary along with the normal individual rates assessments and rates invoices.

3.30 The summary does not contain the same level of detail as the assessment notices and invoices. In particular, it does not set out information on remissions. Council staff also

expressed some concern to us about the risks of people relying solely on these summaries rather than reviewing the more detailed information in the assessments and invoices. We note that, if Mr Brown has been relying on the summary alone, this may have contributed to some of the confusion.

3.31 Based on the information we have seen, we have concluded that the Council has generally acted appropriately and in keeping with previous agreements reached with Mr Brown about how the rates remission policy would apply to the properties the company owns.

3.32 However, the Council has also made administrative mistakes in the way it has applied the remissions policies to the properties. The most significant of these was that the invoices for the 2009/10 rating year continued to apply the full level of rates remission to four lots, when the remissions period had expired for this first group of properties. The Council corrected the mistake in 2010/11 year, so that the remission reduced for 16 lots in that year (rather than being staged across two years). The result was that the overall rates increase in 2010/11 was larger than it would have been if the correct rates had been charged in 2009/10. The company benefitted financially from the Council's mistake.

3.33 We understand from Council documents that Mr Brown has argued that, because of the Council's error in the 2009/10 rating year, it should only charge the increased level of rates on the first four lots in the 2010/11 rating year, then on 16 lots in the 2011/12 rating year, and so on. Effectively, this suggestion is that the whole sequence of staggered reductions in remissions be postponed by a year, because the Council did not make the right change in the first year.

3.34 The chief executive told Mr Brown that this would effectively be an extension to the remissions period, and that the company would need to apply to the Council if it wanted to have the period of remissions extended for a further term. Council staff do not have the delegated authority to grant such an extension and so a decision would have to be made at a Council meeting. The company did not make such an application.

3.35 In our view, the Council must charge rates in keeping with the normal policy and existing approvals and assessments. The company benefited from the Council's mistake in 2009, but we could see no legal reason for the company not to be required to pay the sewerage rates for which it had been invoiced from 2010 onwards. There was no good basis for the argument that the Council's mistake in one year effectively added a year to the rates remission period for the rest of the subdivision.

3.36 After we advised Mr Brown of these conclusions on the rates and possible remissions, the company paid the sewerage rates for the lots in the subdivision for 2010/11 and 2011/12 – totalling $11,518.48 – on 26 May 2012.

Penalties

3.37 Mr Brown refused to pay the rates for the 2010/11 rating year for all his and the company's properties, not just those in the subdivision. Some of the rates were paid in September 2011, but not the sewerage rates. As a result, the company incurred penalties for late payment on those rates. When Mr Brown paid his and the company's rates in May 2012,

he also paid these penalties. At the same time, he asked for the portion of these penalties that had accrued while we were carrying out our review to be remitted.

3.38 The Council can decide to remit penalties, but, as a matter of law, it must do so in keeping with the Council's policies on remission of penalties and the Council's delegations of authority. The Council's policies require the ratepayer to make a written application for a remission. The policy on remission of penalties sets out criteria on which the Council can decide to remit a penalty. We consider it doubtful whether this situation fits within any of these criteria. However, the general policy also includes a discretion to remit rates in other circumstances:

> *Any application for a remission of rates in excess of that allowed under these policies must be made in writing to Council. It must set out in detail the reasons why the application is being made outside of the policies established under the Local Government (Rating) Act 2002.*
>
> *Council is under no obligation to approve any applications that do not comply with the established policies and Council's decision on the matter is final.*

3.39 We accept that the complexity of the issues, competing priorities for us and the Council, and the problems we had in obtaining accurate information from the Council and Mr Brown meant that our review took much longer than anyone expected. There is an argument that it would be appropriate for the Council to consider remitting the portion of the penalties that accrued between October 2011 and May 2012.

3.40 However, it is also relevant that the Council has spent a considerable amount of staff time and money on this dispute – much more than the total penalties. The Council must also consider how it would treat any other ratepayer who withheld rates for nearly two years, given that the normal legal obligation in the Local Government (Rating) Act 2002 is to pay rates and then dispute them. Under the Act penalties will generally accrue if a person does not pay rates while they are disputed. The Council will need to assess all of these factors when exercising its residual discretion.

General comments

3.41 We have confirmed that the Council's actions in relation to the company's rates and other charges were generally reasonable and in keeping with its normal legal and administrative responsibilities. The rates and charges that the Council sought were properly due, although there have been mistakes at times in individual calculations and notices and the application of the remission policies.

3.42 There have also been some unusual decisions, such as agreeing to connections to the scheme in stages; agreeing to spread the payment of the agreed contribution by treating it as a development contribution; staggering the application of the rates remission policy; and providing Mr Brown with a personal summary of his rates invoices. These decisions all benefitted Mr Brown and helped his company carry on with the subdivision. They may have seemed pragmatic at the time, but with hindsight they may not have been wise from the Council's perspective.

3.43 We also note that the Council has allowed a purchaser of one of the lots to pay a reduced development contribution. This conflicts with the agreement reached with Mr Brown that the amount of development contribution payable would be that set in the development contributions policy applying at the time of connection. The decision to require a reduced development contribution was pragmatic but does not appear to have had a strong policy basis.

3.44 In our view, making decisions in this way creates a risk for the Council that its decisions will be seen as arbitrary. The Council needs to ensure that it applies the original agreement and its policies consistently to owners of the lots – both the company and subsequent purchasers of the lots. Otherwise, it is open to "special pleading" on every decision.

3.45 Overall, we do not regard the Council's treatment of this subdivision as reflecting well on the quality of its administration.

3.46 We also consider that Mr Brown has been unwise in the way he has pursued this dispute. Mr Brown has used his Council Executive Assistant to follow up on his company's rating issues with Council staff. He has also written formally to the Chief Executive about the rating issues using mayoral letterhead and has regularly spoken and corresponded directly with other staff. In our experience, this type of blurring of roles is unwise and creates risk. We encourage Mr Brown to separate his personal and official roles more carefully in future and ensure that the capacity in which he is acting is always clear to Council staff. He must take care to ensure that Council staff do not feel under any pressure to treat him and his businesses in a different way because he is the current Mayor.

3.47 In future, if Mr Brown has concerns about the legality of the Council's approach or actions as they relate to his own interests, he must pursue those in the same way as any other ratepayer. This is a matter of law as well as principle. His role as Mayor does not create a shortcut for resolving legal or other disputes about rates. This may be frustrating to him, given his governance responsibilities and close working relationships with the relevant staff. However, it is important to avoid any perception that the Mayor is getting special treatment or that the normal legal obligations and procedures are applied differently for him. Clear separation between personal activities and interests and official activity is an important protection for any public office holder and the organisation they work for.