

To: His Worship the Mayor and Councillors
From: Chief Executive
Subject: **Shared Waters Management Company Proposal**
Meeting Date: 27 March 2018
File Reference: 200-04-01

1 EXECUTIVE SUMMARY

Council considered a report on the Shared Waters Management Company (SWMC) proposal at its meeting on 19 December 2017. The motion to proceed with the proposal was lost 6-7, with no alternative motion put forward.

The Mayor received a letter from Mr Peter Findlay in January 2018, asking Council to re-visit the proposal, failing which he may commence judicial review proceedings against Council. The grounds of challenge are that Council has failed to meet its statutory obligations under sections 10 and 17A of the Local Government Act 2002 (LGA), in relation to the delivery of the waters service.

A Council resolution is also required in order to complete the consultation process which Council undertook jointly with Hamilton City Council on the proposal.

Council considered these matters at a workshop on 20 February followed by a report at the Council meeting on 27 February 2018, when the letter from Mr Findlay was received. A Council resolution was passed directing the Chief Executive to prepare a report for the March Council meeting. The purpose of this report is to ensure that a recommendation is passed to form a resolution which will complete the consultation process, consider the requirements of section 17A LGA and provide direction for Council.

Council now has the opportunity either to:

- Make a recommendation to not proceed with the proposal to form a SWMC, and for no change to the current governance, funding and delivery of water services arrangements, with the decision and reasons recorded in a resolution; or

- Make a decision to approve in principle the establishment of a SWMC but subject to conditions, the principal one being the joining of other councils, following indications from Central Government that larger entities are advisable.

2 RECOMMENDATION

- a) *The report of Garry Dyet, Chief Executive be received;*
- b) *In order to complete the consultation process on the proposed Shared Waters Management Company pursuant to section 82 and to meet the requirements of section 17A of the Local Government Act 2002, Council resolves:*
 1. **not to proceed** to establish a Shared Waters Management Company with Hamilton City Council at this stage, but to continue with the current governance, funding and service delivery arrangements for water service, having carried out a review of the service pursuant to section 17A;

For the reasons that:

- *Council considers that the current service delivery model in Waipa District meets the current and future needs of communities for good-quality local infrastructure, local public services and the performance of regulatory functions in a way that is most cost-effective for households and businesses*
- *The consultation process resulted in only 5 submissions from Waipa District residents which does not indicate support for change*
- *Council has concerns that Waipa District will be the smaller party in the proposed Shared Waters Management Company and prefers to retain the current level of decision making and oversight of the service which it currently has. There are also concerns with how cost sharing for operational costs will work and impact on Waipa residents*
- *Council is aware that there may be action or reform taken by Central Government following on from the Havelock North enquiry and rather than risk incurring the establishment costs of a Shared Waters Management Company only for further change to be required, a more prudent approach is to work with the Local Government commission and Department of Internal Affairs and share learnings from the development of the proposal*
- *Council believes that there are still opportunities to work collaboratively with other neighbouring Councils*
- *Council has concerns about whether or not any of the proposed savings will be realised and in any case, has already put in place policy changes to realise its share of the debt optimisation savings which make up a quarter of the total projected savings for Waipa in the Cranleigh report*

- *Waipa District Council has allowed for sufficient capital and operating costs in the waters area in the long term plan to meet current and future regulatory, environmental, public health and growth requirements..*

OR

- 2. To approve in principle the establishment of a Shared Waters Management Company (with Waipa District Council and Hamilton City Council as founding shareholders) subject to the matters set out below:**

2.1 To delegate to the members of its Waters Governance Group responsibility to:

a. Commence discussions with other Waikato local authorities with a view to them joining the proposed Shared Waters Management Company;

b. Approach the Crown for support in funding the establishment of the Shared Waters Management Company;

c. Develop and agree with Hamilton City Council the terms of the establishment of the Shared Waters Management Company (being terms appropriate to a company with multiple local authority shareholders) for approval by Waipa District Council and Hamilton City Council , including:

i. the constitution, statement of intent, letter of expectation, shareholders' agreement, and shareholders' forum,

ii. the transition process and establishment plan (including project management, oversight and governance),

iii. the costs of transition and establishment,

iv. the cost sharing framework;

2.2 To direct the Waters Governance Group to engage as appropriate with the Government and the Local Government Commission;

2.3 To direct the Waters Governance Group to regularly report its progress to Council;

2.4, to allocate and approve the expenditure of a total budget of \$450,000 to support the development of the final detail of the Shared Waters Management Company on the proviso that this funding is met from external resources; and

2.5 That the Waipa District Council will make a final decision to establish and become a shareholder in the Shared Waters Management Company only –

a. On agreement being reached on all the matters set out in recommendation 2.1c above; and

b. On receiving confirmation that at least two other councils (other than Hamilton City Council) will take the necessary steps to become shareholders.

c. Further funding for establishment and set up costs for the SWMC has been confirmed from external sources other than direct Council funding.

For the reasons that:

- *The Minister of Local Government has clearly signalled that, based on the recommendations of the Havelock North Drinking Water Inquiry, the status quo for the supply of drinking water cannot continue. Local Government has been encouraged to find alternative water service delivery solutions which address the concerns raised by the Board of Inquiry and which are acceptable to local communities; noting that whilst the Inquiry is focused on water services, waste water and storm water services are just as relevant*
- *Inviting other Councils to join the proposed Shared Waters Management Company increases scale, addresses the concerns raised by the Board of Inquiry and provides for decision-making across a broader range of stakeholders*
- *The Shared Waters Management Company offers substantial financial benefits to Councils over the medium to long-term compared with the status quo*
- *The proposed Shared Waters Management Company will provide regional benefits through collaboration and working together. The proposed Shared Waters Management Company is scalable and has lower barriers to entry for other local authorities than an asset owning Council Controlled Organisation (CCO). This means that the door is open for other Councils to subsequently join and benefit from the scale and specialisation that the Shared Waters Management Company will achieve*
- *The proposed Shared Waters Management Company offers considerable non-financial benefits to Councils. In particular, it will improve the resilience of Councils and provide an effective way of ensuring that all participating Councils have the specialised and expert staff that are required to meet the needs of our communities both now and in the future*
- *The proposed Shared Waters Management Company will provide a sound way of positioning and supporting Councils to respond to the challenges they face, including the delivery of significant capital works programmes, responding to rapid population growth, and the stronger regulatory requirements that are expected following the Havelock North inquiry*
- *The proposed Shared Waters Management Company is a proportionate response to the findings of the Havelock North inquiry, which is intended to mitigate the necessity for Government to impose a potentially less palatable solution*
- *The proposed Shared Waters Management Company provides significant benefits without being exposed to the considerable risks associated with the transition to a full asset owning CCO*

- *Establishing a Shared Waters Management Company best meets the obligations of the local authorities under s10 of the Local Government Act 2002 (LGA) because it balances the democratic decision-making (within each Council) with the cost-effective delivery of good quality infrastructure*
 - *Establishing a Shared Waters Management Company meets the requirements of Section 17A LGA, which requires Councils to consider the most cost effective arrangement for meeting the needs of its communities for good quality local infrastructure*
 - *While Council is comfortable with the current levels of service, it is required by section 17A LGA to consider the **future** needs of communities. It might appear that there is no burning platform for change, but the proposal for a SWMC is to anticipate ongoing growth and meeting demand as well as building resilience to protect communities. Resilience to avoid water supply issues and public health issues are key drivers for change*
 - *The views expressed through the consultation process did not raise issues or concerns that were considered sufficient to negate the benefits that the Councils identified*
 - *A key recommendation of the Havelock North Board of Inquiry was for Central Government to seriously consider the aggregation of water supply services. In order to encourage a voluntary response, it may be possible to gain agreement to financial support*
 - *Continuing to explore the SWMC proposal is a better outcome than being involved in litigation.*
- c) *To approve the expenditure of an additional FIFTY THOUSAND DOLLARS (\$50,000) to reflect costs incurred in the current financial year to date, to be funded from cash surplus.***

3 OPTIONS AND ASSESSMENT

Consultation process

The investigation of the Shared Waters project and council controlled organisation (CCO) has extended over a number of years. In October/November 2017 Waipa District Council and Hamilton City Council (HCC) undertook formal joint consultation on a proposal to form a Shared Waters Management Company (SWMC).

The Statement of Proposal for the SWMC identified the benefits in terms of cost efficiency and resilience, which are mandatory, relevant considerations.

After considering submissions, the joint hearing panel made a unanimous recommendation with reasons to proceed with the proposal. Hamilton City Council voted in favour of the proposal.

Council considered the recommendations from the joint hearings panel in a report from the Deputy Chief Executive, David Hall at its meeting on 19 December 2017. The recommendations in relation to the proposal were moved and seconded, then voted on as a single motion and without any amendments being moved. The motion was lost, with one of the consequences being that there is no Council resolution to complete the consultation undertaken in accordance with the Local Government Act 2002 (LGA). Section 82 expressly requires that those who presented views in the course of consultation be provided access to a clear record for relevant decisions made and explanatory material relating to them.

A further step in the consultation and decision making process is required which is why this matter is brought before Council again with a view to obtaining a resolution to complete the consultation process. The resolution should record the reasons for the Council decision which can then be made available to submitters.

Potential judicial review

The Mayor received a letter Mr Peter Findlay dated 15 January 2018 with regard to Council's proposal for a Shared Waters Management Company (SWMC). Mr Findlay was a submitter on the proposal (in support) and has requested that Council reconsider its decision to not proceed with a SWMC, failing which he is considering commencing judicial review proceedings in the High Court.

Mr Findlay has stated that he intends to seek a judicial review of the Council decision on the grounds of a failure by Council to act in accordance with statutory obligations under sections 10 and 17A LGA. The relevant parts of these sections are set out in full in the Supporting Information section of the report.

Section 10 relates to the purpose of local government and for the need for local authorities to meet the current and future needs of communities for good-quality local infrastructure, local public services and the performance of regulatory functions in a way that is most cost-effective for households and businesses. Good quality is defined as efficient, effective and appropriate to present and future anticipated future circumstances.

The requirements of Section 10 flow through to Section 17A which relates to the delivery of services and details the situations where a service delivery review is required. This covers looking at the governance, funding and delivery arrangements for the service. Councils are required to complete reviews of a service if there is a significant change of service being considered, or contracts due to expire then these factors can also trigger the need for a review.

In practice, most councils have been undertaking these reviews for years, but section 17A was introduced (and took effect in August 2014) to encourage councils to seek greater effectiveness and efficiencies in service delivery through exploring collaborative mechanisms for the delivery of services.

The LGA provides for various options to deliver services, whether in-house, by a Council Controlled Organisation (CCO), a joint owned CCO, or delivery by another council or person or agency. It also requires that local authorities complete their first review of their services by August 2017. With this in mind and with the delivery of water services being significant, staff commenced the work required to undertake a review in this area soon after Section 17A came in to force. A number of reports have been commissioned from experts which informed the review and which demonstrated high risk with continuing with the current model and which recommended service delivery for waters should be through a shared arrangement.

Options

The Chief Executive notes that the motion was lost on the SWMC proposal at the December Council meeting and that he is required to follow the direction set by Council. However when a motion is lost and no new motion is proposed (in accordance with Standing Orders), the position remains the status quo and no new direction has been set to follow.

It is not uncommon to remain with the status quo however in this case there are other requirements to consider such as the incomplete consultation process and the need for Council to make a decision in relation to the requirements of section 17A LGA. Aside from these significant statutory requirements, there is also the risk that a judicial review presents and the request from Mr Findlay to consider.

A key role of the Chief Executive is to provide advice to Council and staff advice has not changed since the recommendations on the SWMC were first put to Council last December. The Chief Executive advice was based on a wide range of expert information in a series of reports. The advice is even more critical following on from the further developments and this now includes advising Council to re-visit this matter. This is because a resolution of some form is required both to satisfy the consultation requirements (s82 LGA) and Council's obligations under section 17A LGA. This will also satisfy Mr Findlay's request for Council to re-visit its decision. For these reasons, some of the recommendations considered by Council at its meeting on 19 December 2017 have also been included in section 2 of this report. There are no restrictions on Council re-visiting this matter.

Two alternative resolutions have been provided, either to decline the formation of the SWMC or to approve it in principle. Either option will result in a decision or decisions which conclude the consultation process and the service delivery review. Both alternatives include reasons, which will provide some protection against challenge.

The second option, to approve the SWMC in principle, now provides an opportunity to work with other councils. It is intended that Waipa will liaise with other councils while the details of the constitution, shareholders agreement and establishment plan are being developed. Following the release of the Havelock North Inquiry report, this model may be of interest to other councils.

The Statement of Proposal for the proposed Shared Waters Management Company which was provided for the joint consultation process explicitly contemplates other councils joining. This also fits with the Government's apparent goal of encouraging larger aggregation of water suppliers, as recently alluded to by the Minister of Local Government. However because the recent consultation process was focused on a joint Hamilton City –Waipa District council controlled organisation the founding and initial shareholders of the SWMC must be Hamilton City Council and Waipa District Council. This does not inhibit other councils from joining immediately thereafter.

A final decision will still be required from both Waipa District Hamilton City Councils before the SWMC is formally established. This is required in order to agree the details of the establishment arrangements of the SWMC such as the constitution and shareholders' agreement.



GARRY DYET
CHIEF EXECUTIVE

1 Statutory and policy requirements

Legal and regulatory considerations

Local Government Act 2002

s.10 Purpose of Local Government

“(1) The purpose of local government is –

- (a) to enable democratic local decision-making and action by, and on behalf of, communities; and*
 - (b) to meet the current and future needs of communities for good-quality local infrastructure, local public services and performance of regulatory functions in a way that is most cost-effective for households and businesses.*
- (2) In this Act, **good-quality**, in relation to local infrastructure, local public services and performance of regulatory functions, means infrastructure, services, and performance that are –*
- (a) efficient; and*
 - (b) effective; and*
 - (c) appropriate to present and anticipated future circumstances.’*

s.17A Delivery of services

- (1) A local authority must review the cost-effectiveness of current arrangements for meeting the needs of communities within its district or region for good-quality local infrastructure, local public services, and performance of regulatory functions.*
- (2) Subject to section (3), a review under subsection (1) must be undertaken –*
 - (a) In conjunction with consideration of any significant change to relevant service levels; and*
 - (b) Within 2 years before the expiry of any contract or other binding agreement relating to the delivery of that infrastructure, service, or regulatory function; and*
 - (c) At such other times as the local authority considers desirable, but not later than 6 years following the last review under subsection (1).*
- (3) Despite subsection (2)(c), a local authority is not required to undertake a review under subsection (1) in relation to the governance, funding, and delivery of any infrastructure, service, or regulatory function –*
 - (a) To the extent that the delivery of that infrastructure, service, or regulatory function is governed by legislation, contract or other binding agreement such that it cannot reasonably be altered within the following 2 years; or*
 - (b) If the local authority is satisfied that the potential benefits of undertaking a review in relation to that infrastructure, service, or regulatory function do not justify the costs of undertaking the review.*

- (4) A review under subsection (1) must consider the options for the governance, funding and delivery of infrastructure, services, and regulatory functions, including, but not limited to, the following options:
- (a) Responsibility for governance, funding and delivery is exercised by the local authority;
 - (b) Responsibility for governance and funding is exercised by the local authority, and responsibility for delivery is exercised by –
 - (i) A council-controlled organisation of the local authority; or
 - (ii) A council-controlled organisation in which the local authority is one of several shareholders; or
 - (iii) Another local authority; or
 - (iv) Another person or agency;
 - (c) Responsibility for governance and funding is delegated to a joint committee or other shared governance arrangement. And responsibility for delivery is exercised by an entity or person listed in paragraph (b)(i) to (iv).
- (5) If responsibility for delivery of infrastructure, services, or regulatory functions is to be undertaken by a different entity from that responsible for governance, the entity that is responsible for governance must ensure that there is a contract or other binding agreement that clearly specifies –
- (a) The required service levels; and
 - (b) The performance measures and targets to be used to assess compliance with the required service levels; and
 - (c) How performance is to be assessed and reported; and
 - (d) How the costs of delivery are to be met; and
 - (e) How any risks are to be managed; and
 - (f) What penalties for non-performance may be applied; and
 - (g) How accountability is to be enforced.

S82. Principles of consultation

- (1) Consultation that a local authority undertakes in relation to any decision or other matter must be undertaken, subject to subsections (3) to (5), in accordance with the following principles:
- (a) that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons;
 - (b) that persons who will or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local authority;
 - (c) that persons who are invited or encouraged to present their views to the local authority should be given clear information by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented;
 - (d) that persons who wish to have their views on the decision or matter considered by the local authority should be provided by the local authority with a reasonable opportunity to present those views to the local authority in

a manner and format that is appropriate to the preferences and needs of those persons:

- (e) that the views presented to the local authority should be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration:*
 - (f) that persons who present views to the local authority should have access to a clear record or description of relevant decisions made by the local authority and explanatory material relating to the decisions, which may include, for example, reports relating to the matter that were considered before the decisions were made.]*
- (2) A local authority must ensure that it has in place processes for consulting with Maori in accordance with subsection (1).*
 - (3) The principles set out in subsection (1) are, subject to subsections (4) and (5), to be observed by a local authority in such manner as the local authority considers, in its discretion, to be appropriate in any particular instance.*
 - (4) A local authority must, in exercising its discretion under subsection (3), have regard to—*
 - (a) the requirements of section 78; and*
 - (b) the extent to which the current views and preferences of persons who will or may be affected by, or have an interest in, the decision or matter are known to the local authority; and*
 - (c) the nature and significance of the decision or matter, including its likely impact from the perspective of the persons who will or may be affected by, or have an interest in, the decision or matter; and*
 - (d) the provisions of Part 1 of the Local Government Official Information and Meetings Act 1987 (which Part, among other things, sets out the circumstances in which there is good reason for withholding local authority information); and*
 - (e) the costs and benefits of any consultation process or procedure.*
 - (5) Where a local authority is authorised or required by this Act or any other enactment to undertake consultation in relation to any decision or matter and the procedure in respect of that consultation is prescribed by this Act or any other enactment, such of the provisions of the principles set out in subsection (1) as are inconsistent with specific requirements of the procedure so prescribed are not to be observed by the local authority in respect of that consultation.*