

REPORTS OF OFFICERS (CONFIDENTIAL)

Report Title:	Legal Advice - Wirrabara Community Wastewater Management System (CWMS)
Item No:	8.1
Date of Meeting:	20 July 2021
Author:	Sam Johnson, Chief Executive Officer
Attachments:	Council's Notice to Property Owners dated 9 September 2015

Confidentiality Clauses:

That pursuant to Section 90(2) and (30)(h) of the Local Government Act 1999, the Council orders all persons present, with the exception of Sam Johnson, Chief Executive Officer, Jacqui Kelleher, Manager Administrative Services, Craig Mudge, Manager Corporate Services, Brenton Daw, Manager Infrastructure and Regulatory Services, and Ebony Rodda, Manager Community and Economic Development, be excluded from the meeting as Council considers that the requirement for the meeting to be conducted in a place open to the public has been outweighed in circumstances where the Council will receive and consider legal advice.

(for resolution after consideration of the matter)

That in accordance with Section 91(7) and (9) of the Local Government Act 1999, Council orders that report item 8.2 Wirrabara Community Wastewater Management System (CWMS), attachments, discussion and minutes having been considered in confidence under Section 90(2) and 3(h) of the Act be kept confidential and not available for public inspection on the basis that it contains legal advice. This order is to remain in force until the conclusion of legal proceedings, notwithstanding that it will be reviewed annually in December- of each year.

1. EXECUTIVE SUMMARY

This report seeks a decision of Council in relation to engaging legal representation in respect to a claim for compensation for the contractual failure of the construction of the Wirrabara Community Wastewater System.

2. RECOMMENDATION

That Council:

1. receives and notes the report;
2. engages Norman Waterhouse to represent Council to pursue legal proceedings against Wallbridge Gilbert Aztec and Mercater Pty Ltd in relation to the failed works jointly undertaken in 2015 to construct the Wirrabara Community Wastewater Management System (CWMS); and
3. requests the Chief Executive Officer to provide regular updates up to and including the conclusion of the legal proceedings.

3. RELEVANT CORE STRATEGIES/POLICIES

DCMR Community Plan 2021-2031

5.1 Maintain & Enhance Roads, Storm water, Footpaths & Associated Infrastructure

5.2 Conduct Sound Asset Management

5.3 Provide Quality Services

5.4 Improve the Efficiency and Effectiveness of Council Services

6.3 Enact Strong Governance

6.4 Provide Financial Sustainability

4. BACKGROUND

Council became aware in 2021 that construction of the Wirrabara CWMS in 2015 was not undertaken and finalised to the required standard and ultimately are non-compliant with requirements as set out in an executed contract with Mercater Pty Ltd (Mercater) and Wallbridge Gilbert Aztec (WGA).

Initial assessments to quantify the monetary loss incurred by Council as a result of the failed works can only be estimated at this time, and more detailed assessments are currently being undertaken to determine the costs incurred by Council. This also includes the appointment of an independent third party (Australian Quality Water Centre) whom have been recommended by the LGA (Local Government Association of South Australia). This assessment will provide a qualified independent review of the current system, identifying failings in the current system and potential design and construction errors. This report will help form the basis for proposed litigation.

Preliminary discussions with an initial advice from Stephen Williams (Principal, Norman Waterhouse Lawyers) is that Council should give serious consideration to pursuing legal action for compensation and the grounds that the combined design, construction and supervision of the project have resulted in a project has been fundamentally “completed” to a satisfactory standard.

Given the elements of the claim (design, construction and supervision) involve two parties, Mr. Williams has advised that Council will almost certainly need to take proceedings against both Mercater (construction of the CWMS) and WGA (supervisors appointed to ensure the project was completed as per the contract) in relation to the Wirrabara CWMS.

5. DISCUSSION

In 2015 Council approved a proposal for the construction of a CWMS at Wirrabara in accordance with regulations 7-9 of the South Australian Public Health (Wastewater) Regulations 2013, Part 2 “Establishment of Community Wastewater Management Systems”.

The proposal included construction of gravity CWMS drains with a connection point installed at the boundary of each relevant property, or edge of easement where these apply, to enable the property owner to connect to the scheme. Main drains collect the sewage from each property with landowners’ on-block private connecting pipes bypassing

existing septic and sullage tanks and connecting directly to each landowner's connection point.

From there, the sewage is pumped via the public pump stations to a wastewater treatment plant at the Wirrabara Waste Transfer Station site on Wilds Road. Winter storage of treated water is in an open pond opposite the Transfer Station on Wilds Road, some 100m from the road, on land purchased by Council specifically for that purpose.

The treated water was reportedly intended to be used principally for irrigating the Town Oval, to assist Council to meet its water conservation objectives, and to save the cost of mains water. Unfortunately, due to the failings of the project, the Town Oval has been watered with untreated water since the inception of the system. This is in direct contravention of health regulations, of which have been disclosed to the appropriate regulatory bodies.

Council, the designers and the LGA funding agency provided advice on solar power for certain pumps, in order to minimise the carbon footprint of the scheme.

The project costings were reported to Council as:

- budgeted capital cost of the scheme, using tendered prices - \$4,110,000
- Council's capital contribution (fixed) - \$528,000
- estimated annual operating, managing and financing cost - \$55,000

The Local Government Association covered capital cost differences through the State Government Subsidy Scheme.

Since inception of the Scheme there have been constant system failures. This includes pump failure, pipe failure and in recent cases, the overall system including the appropriate levee banks appear to be in need of additional works.

Upon investigation of why pumps continue to fail, and why pipes continue to crack, it was made evident that the location in which the current system is built being a former waste landfill site, provides the ground to be potentially unstable causing the system to sink. In doing so, this means the tanks move lower in to the ground along with associated infrastructure creating pipes to crack and break, and also pump failure.

There have been occasion in the past twelve (12) months in which total pump failure has resulted in Council contracting sewage pump trucks to continually pump the system tanks to allow the system to continue without any back flow.

For a system that is not that old, Council has been spending more than what is considered appropriate in maintenance and upgrades to this system.

Council late 2020 identified that Councils overall management of CWMS across the Council area was causing concern. As a result, a casual employee with prior waste management experience and SA Water experience was brought in for three (3) days per week to undertake a system review. This identified many areas of concern across all four (4) of Council's CWMS systems.

It is proposed that the report and evaluation from Australian Quality Water Centre be presented to Council upon completion.

A copy of the Council's notice sent to property owners (dated 9 September 2015) is at Attachment 1.

6. ANALYSIS OF OPTIONS

Option 1:

That Council:

1. receives and notes the report;
2. engages Norman Waterhouse to represent Council to pursue legal proceedings against Wallbridge Gilbert Aztec and Mercater Pty Ltd in relation to the failed works jointly undertaken in 2015 to construct the Wirrabara Community Wastewater Management System (CWMS); and
3. requests the Chief Executive Officer to provide regular updates up to and including the conclusion of the legal proceedings.

This option enables the Council to seek compensation for the failed CWMS at Wirrabara.

Option 2:

That Council receives and notes the report.

This option enables Council to note the matters of concern, however take no further action at this time in respect to legal proceedings and litigation against the parties considered responsible for system failures.

7. RECOMMENDED OPTION

Option 1 is the recommended option.

8. POLICY IMPLICATIONS

8.1 Financial/Budget

Legal costs anticipated are in the vicinity of \$10,000 - \$30,000. These costs can be accommodated in the 2021/22 budget. These costs are also sought to be recovered in any proposed litigation matters brought against the other parties. It is possible that costs may not be in this vicinity, however Council need to be aware that should the parties in which Council is seeking to take appropriate legal action against may choose to dispute and could result in formal court proceedings.

8.2 Legislative/Risk Management

Risk Management is considered at serious risk. The system is considered not operating appropriately, and failure of the system can result in serious physical and environmental impacts.

8.3 Staffing/Work Plans

Nil.

8.4 Environmental/Social/Economic

Physical environmental and social impacts would be the result of a total system failure. Should the system fail, including the appropriate levee banks, this would result in the product stored within the system being inappropriately discharged through the nearby area. Members should note that the system is currently located at one of the higher points of the township of Wirrabara.

8.5 Stakeholder Engagement

Consultation has occurred with Council's legal advisors Norman Waterhouse.

9. REPORT CONSULTATION

Discussion has been held with the Mayor.

10. REPORT AUTHORISERS

Sam Johnson	Chief Executive Officer
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