

REPORTS OF OFFICERS (CONFIDENTIAL)

Report Title:	Wirrabara Community Wastewater Management System (CWMS) – Funding Deed
Item No:	8.1
Date of Meeting:	19 July 2022
Author:	Sam Johnson, Chief Executive Officer
Attachments:	Track Change (proposed) Wirrabara CWMS Deed of Termination and Release

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, Director Community & Corporate Services, Brenton Daw, Director Infrastructure and Regulatory Services, and Kathryn Crisp, Executive Assistant, 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.

1. EXECUTIVE SUMMARY

This report seeks a decision of Council in relation to executing a funding deed as provided by the LGA (Local Government Association of South Australia) in relation to the Wirrabara CWMS.

2. RECOMMENDATION

That Council:

1. receives and notes the report;
2. approves the track change version of the 'Wirrabara CWMS Deed of Termination and Release' as attached to this report; and
3. authorises the Chief Executive Officer and Mayor to apply the Common Seal of Council to the attached proposed track change version of the 'Wirrabara CWMS Deed of Termination and Release' as attached to this report.

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.

Following a report in July 2021, Council resolved;

- 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.*

Following the above resolutions of Council, the CEO obtained an independent assessment report of the Wirrabara CWMS. The report as completed by Water Engineering Technologies (WET), whom are a commercial subsidiary of SA Water, was provided to Norman Waterhouse for further advice. Following multiple attempts to follow up with Norman Waterhouse, after no response nor advice was forthcoming, the CEO begun engaging directly with a representative of the LGA to work through the report. A

noticeable position was Council had incurred a number of costs in relation to the Wirrabara CWMS, of which was believe not to be fair and equitable for Council to incur. The CEO undertook a review of associated expenses with the Wirrabara CWMS since its commission, which resulted in \$233,088 being identified as costs incurred. These findings were presented to the LGA, and subsequently, have been approved by the LGA Board for reimbursement back to Council. This payment is expected to occur this financial year.

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 occasions in the past eighteen (18) 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 in 2020 identified that Council's 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.

Council has been liaising with the LGA over the past several months in relation to concerns over the Wirrabara CWMS project, and the involvement of the LGA throughout the build and construction phase of the Wirrabara CWMS system. This resulted in Council's CEO writing to the LGA indicating that Council was seeking compensation and potential legal action.

Council has received advice (email dated 1 June 2022 from Thomas McKellar, CWMS Program Officer at the LGA) advising that the LGA Board resolved the following at the May 2022 Board Meeting;

That the LGA Board of Directors:

- 1. approves the final payment of \$233,088 to the District Council of Mount Remarkable, subject to the DC Mount Remarkable agreeing that no further claims will be made and that this payment finalises the Wirrabara CWMS project.***

Following the above, a report was presented to the June 2022 Council meeting to provide an update on this matter.

Since the June 2022 Council meeting, Council has now received the proposed 'Deed' from the LGA. The Deed is attached to this report.

The attached funding deed has been provided to Council's lawyers to ascertain any implications to Council in the event that Council chooses to accept the offer and execute the deed as presented.

The advice is as follows;

I have reviewed and tracked-in, minor changes into the attached draft (Word version) of the LGA Deed, as provided by you in pdf form.

Note that I have included that late or non-payment of the identified amount is to be treated as a debt, meaning that the Council could, if necessary, commence debt recovery proceedings by way of court action.

The Deed does not contain any unusual or unexpected terms in seeking to achieve its objective of a payment by the LGA to the Council in exchange for the termination of the Subsidy Funding Agreement and the release by the Council, in favour of the LGA, from any (known or unknown) liabilities that currently exist or which are discovered in the future. Whilst such a Deed, ordinarily, includes provision that explicitly states that it may be pleaded as a defence to any future action taken by the Council against the LGA in respect of any matter within its contemplation, the fact that it does not include such provision does not prevent that being the inevitable response to any such action.

It is important that the Council understand that, in agreeing to enter into the Deed in order to receive the funds as identified in it, it is waiving its rights to take any legal action, now or in the future, in respect of its subject matter (i.e. the Wirrabara CWMS or, the 'Project' as defined). This is because the Deed provides that, other than in respect of the payment of the 'Outstanding Amount', it is unconditional in its operation. This means that even if post Deed

negligence on the part of the LGA, including through the actions of the then CWMS Programme Manager, were discovered, any purported cause of action against the LGA would be refuted by virtue of the existence of the Deed, in particular the release provisions.

Note that the Deed provides for execution under common seal. Therefore a matter specific Council resolution or a general resolution which supports the affixation of the common seal where a document evidences the exercise of a delegation, is required...

6. ANALYSIS OF OPTIONS

Option 1:

That Council:

1. receives and notes the report;
2. approves the track change version of the 'Wirrabara CWMS Deed of Termination and Release' as attached to this report; and
3. authorises the Chief Executive Officer and Mayor to apply the Common Seal of Council to the attached proposed track change version of the 'Wirrabara CWMS Deed of Termination and Release' as attached to this report.

This option enables Council to accept the proposed amended version of the Deed as attached to this report. In presenting this change back to the LGA, it may well be that the LGA decline or withdraw their offer as presented.

Option 2:

That Council:

1. receives and notes the report; and
2. Advises the Local Government Association of South Australia that Council rejects the offer as presented.

This option enables Council to note the Deed as accepted, and advise the LGA that Council is not prepared to sign the Deed in its current form.

7. RECOMMENDED OPTION

Option 1 is the recommended option.

8. POLICY IMPLICATIONS

8.1 Financial/Budget

Council will be the beneficiary of \$233, 088 in which it had not budgeted for (revenue). This will provide an increase to Council's overall financial position, and a direct contribution to Council's surplus/deficit position.

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.

Over the past months there have been significant system improvements, including water quality. It is expected that with appropriate irrigation upgrades (which should have been installed initially), that water may well be able to be reused for irrigation purposes on public parks as originally intended.

8.5 Stakeholder Engagement

Consultation has occurred with Council's legal advisors.

9. REPORT CONSULTATION

Discussion has been held with the Mayor.

10. REPORT AUTHORISERS

Sam Johnson	Chief Executive Officer
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