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## Inquiry into procurement of work by Westland District Council at Franz Josef



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# Inquiry into procurement of work by Westland District Council at Franz Josef

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# Auditor-General's overview

E ngā mana, e ngā reo, e ngā karangarangatanga maha o te motu, tēnā koutou.

This report concerns a decision of the Westland District Council (the Council) to carry out work at Franz Josef to protect the town's wastewater treatment plant from flooding. The work was carried out on an urgent basis and resulted in the construction of a new 700-metres-long stopbank on the bank of the Waiho River.

In this report, we acknowledge the serious nature of the flood risk the Council was dealing with, and the motivation of the elected members who were driving the decision to act in the community's best interests.

However, we have serious concerns about what was done in this case.

Our concern is not that the Council decided it needed to do something to address the flood risk. Our concern is about the way the Council went about making that decision, the apparent confusion or disagreement among the elected members about what had been agreed, and about the way the decision was subsequently carried out.

We also have serious concerns about the extent to which some of the elected members lost sight of the fact that their role is to govern, not manage, and that their drive to get things done needed to be balanced by an understanding of the importance of doing things right.

This report identifies numerous examples of poor decision-making and poor procurement practice. They include the lack of any proper risk analysis or consideration of alternative options, the failure to seek expert advice on either the immediacy of the flood risk or whether building a stopbank was the right response, an inadequate planning and procurement process for a project of this type and scope, an apparent disregard for legislated decision-making requirements, and a failure to consult those affected by the work until the work was already under way.

Underlying all these concerns is a fundamental question about whether the construction of a stopbank was authorised in the first place. Council records show an agreement to carry out maintenance on an existing flood embankment, not to construct a new stopbank.

## **What Westland District Council did**

Faced with what some of the elected members believed to be an imminent flood risk, the Council decided to carry out urgent maintenance work on a floodbank to protect the town's wastewater treatment plant from flooding. At the same time, it decided to carry out work to address ongoing non-compliance with the plant's

discharge consent. This work involved spending an estimated \$1.3 million of public money.

As it turned out, rather than carrying out maintenance work on the floodbank, the Council effectively built a new stopbank. The proposed work to address compliance issues with the wastewater treatment plant was not carried out at all, although we understand it was completed later.

### **What was wrong with what Westland District Council did**

The decision that urgent work was needed was based on an assessment by two of the elected members that the wastewater treatment plant was in imminent danger of flooding. That assessment was effectively endorsed by the Council as a whole without confirmation from anyone with relevant expertise and without any expert review of the Council's proposed response.

Potential contractors were identified and approached by one of the elected members using his business and personal connections, rather than by Council staff following a procurement process suitable for a project of this size and significance to the community.

Work then began on constructing the stopbank without any plans being drawn up, without any engineering input, without consulting with affected parties, and without considering the effect constructing a stopbank might have on the flood risk posed by other parts of the river.

Not only did the Council not seek advice from any external experts, it did not properly involve its own staff until work was already under way.

The first stage of the work was carried out without any clear contracting arrangements in place, and without any certainty about who was responsible for managing the work on the ground or for matters such as health and safety, compliance with the Resource Management Act 1991, or quality control.

The lack of proper contracting arrangements for the first stage of the work means it is uncertain what recourse the Council will have, if any, if the stopbank fails due to a design or construction flaw.

When some of the elected members tried to raise concerns about the scope of the work, aspects of the Council's decision-making process (such as the lack of involvement of Council staff), and disquiet in the community about perceived conflicts of interest, these concerns were effectively dismissed or minimised.

All of this is unacceptable.

## What Westland District Council should have done

The decision to take steps to prevent the town's wastewater treatment plant from flooding was a decision the Council was entitled to make. However, before making that decision:

- The Council should have got advice, from either its own staff or appropriately qualified external advisers, about whether its concerns about an imminent flood risk were valid.
- Assuming the concerns were valid, the Council should have got advice from suitably qualified advisers on whether a stopbank was an appropriate and cost-effective solution. This was particularly important because a decision had not yet been made about whether the wastewater treatment plant would remain at its current site in the long term.
- The Council should have considered, or sought advice on, its decision-making obligations under the Local Government Act 2002 – in particular, the requirement to assess the significance of the decision, to weigh up the costs and benefits of other options, and to consider the views of those likely to be affected by, or interested in, the decision.
- The Council should have considered, or sought advice on, whether it needed consent for the work, or any part of it, under the Resource Management Act and the extent to which the proposed work could legitimately be classed as emergency works under that Act.
- All of the elected members needed to have a clear understanding of the rationale for the decision and the scope of the work that was being contemplated.

For councils, these sorts of decision-making requirements are not just a matter of common sense. They involve both legal and good practice requirements. As with any public organisation, a council is exercising public powers. It is the essence of the rule of law that public powers must be exercised in accordance with the law.

In the case of councils, being able to demonstrate that decisions are made lawfully and for the benefit of the community is all the more important because a council is collecting and spending the community's money, and because the only opportunity the community has to influence who makes decisions on its behalf is at local government elections every three years.

The discipline imposed by the decision-making requirements of the Local Government Act is therefore essential in holding councils to account. These requirements are, in effect, the building blocks for democratic and responsible

decision-making in local government. Bypassing them where they are perceived to be unnecessary or inconvenient is not an option.

### **Why we do not accept Westland District Council's justification**

The justification we have been given for much of what happened is that the work was urgent and elected members had to step in because Council staff were not available.

We do not fully accept either of these arguments. In particular, we are concerned at the extent to which the sense of urgency appears to have clouded good judgement.

There is no doubt that the wastewater treatment plant was at risk of flooding. It had flooded the year before, with serious consequences for the town. But the Council had no expert basis for assuming that history was about to repeat itself or that, if it was, a stopbank was the most appropriate or cost-effective solution to the problem.

Even if we accept that the concerns about an imminent flood risk were valid, it does not justify the approach the Council took. Building a new stopbank – if that is, in fact, what the Council agreed to do – is not a “quick fix”. It requires careful planning, engineering expertise, a clear understanding of resource consent requirements, and consideration of the effect that building a new stopbank would have on an already volatile river. All of these crucial steps were missing.

### **Why the end does not justify the means**

The question of whether the construction of a stopbank was properly authorised and whether it was the right thing to do, is no longer of any practical relevance. The stopbank has been built and, although several of the elected members voiced their concerns at the time, the Council, in effect, endorsed the decision to build it.

We acknowledge the genuine motivation of all of the elected members we spoke to, to try to address their concerns about the flood risk to the wastewater treatment plant in what they believed to be an efficient and cost-effective manner.

The point has also been repeatedly made to us that, so far at least, the stopbank has achieved its intended purpose of protecting the wastewater treatment plant from flooding.

However, none of this makes what the Council did right. The end does not justify the means.

A council that is contemplating spending \$1.3 million of public money to construct a reasonably significant piece of infrastructure needs to be able to show that the decision to spend the community's money was based on something more than an assessment of risk by two of the elected members, and that all those who had a right to be involved were properly involved in the decision-making process.

It is the essence of good governance that a governing body can demonstrate to its stakeholders that a decision has been well made and their money has been well spent.

In this case, unfortunately, the Council can do neither.

Nāku noa, nā,

A handwritten signature in black ink, appearing to read 'JMR Ryan', with a stylized flourish at the end.

John Ryan  
Controller and Auditor-General

1 March 2019

# 1

## Introduction

### Why we carried out an inquiry

- 1.1 On 5 July 2017, Westland District Council (the Council) approved work for the Franz Josef wastewater treatment plant (the wastewater plant) at an estimated cost of \$1.3 million. The work was described as maintaining the flood embankment and developing a new infiltration gallery. The infiltration gallery is the part of a wastewater plant through which wastewater is filtered before discharging into the environment.
- 1.2 Within days of the decision, concerns were raised about the Council's procurement of the work and whether the Council had appropriately managed any potential conflicts of interest.
- 1.3 These concerns came from members of the public, Franz Josef business and community groups, and others in the local government sector. The concerns included the Council not following a proper procurement process, awarding a contract without a tender process, and one of the elected member's business or personal connections having influenced the choice of contractors.
- 1.4 These types of concerns can undermine trust and confidence in a Council's decision-making processes. After making initial enquiries with the Council, we decided a formal inquiry was necessary to better understand what happened.

### What our inquiry covered

- 1.5 In our terms of reference, we said that we would look at the Council's procurement of the work for the wastewater plant, including:
  - how the Council determined that emergency works were needed;
  - the procurement and contract management practices adopted by the Council for the work;
  - how any potential conflicts of interest were managed; and
  - any other related matter that the Auditor-General considers it desirable to report on.
- 1.6 Our inquiry has focused on the work directly connected to the Council's decision on 5 July 2017.
- 1.7 The Council has been working to address problems with wastewater management in Franz Josef for some time. This has included considering options for replacing or upgrading the wastewater plant and, at one point, running a procurement process to identify a preferred provider for a particular option that was ultimately not pursued by the Council. This work is outside the scope of our inquiry and we have not investigated it. However, this report does refer to aspects of this work where it provides important context for our inquiry.

## What we did

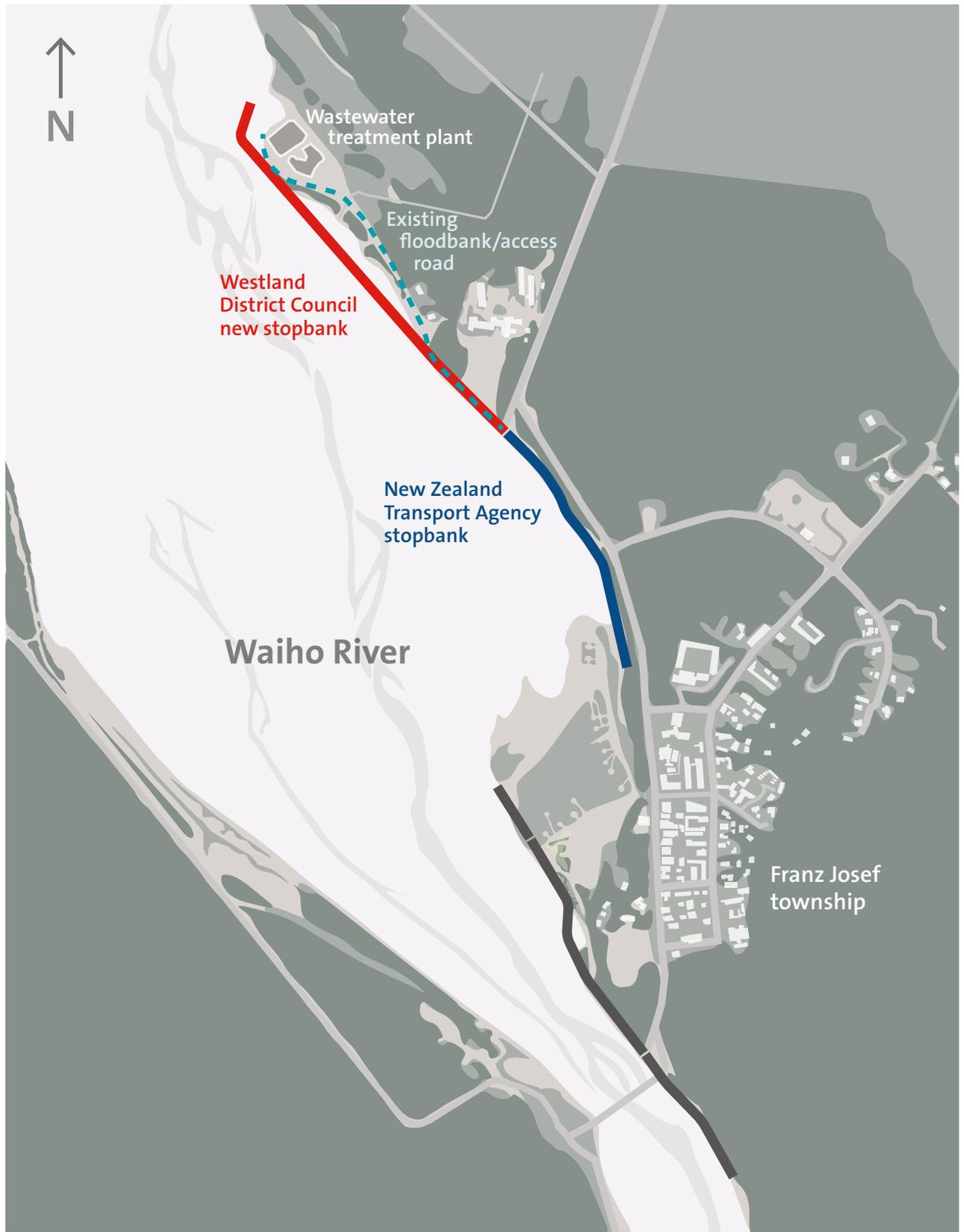
- 1.8 We travelled to the West Coast and met with several elected members of the Council (including Mayor Bruce Smith and Councillor Durham Havill), senior Council staff, and the Chief Executive of the West Coast Regional Council (the Regional Council). We also visited the wastewater plant site at Franz Josef.
- 1.9 We met with or spoke to other key individuals, including the General Manager of Westroads Limited (a wholly owned subsidiary of the Council), the Council's Acting Chief Executive, who was in the role from April to November 2017, and the Council's former Chief Executive, who ended her term in April 2017.
- 1.10 We also received and reviewed information from the Council, Westroads Limited, and the New Zealand Transport Agency (NZTA).

## Structure of this report

- 1.11 In Parts 2 and 3, we provide background information about the wastewater plant, why it is at risk of flooding, and why it needs to be upgraded. We also explain the complex situation that the Council was facing in making decisions about upgrading the wastewater plant because of uncertainty about the long-term future of Franz Josef at its current location.
- 1.12 In Parts 4 and 5, we describe what happened in the days leading up to the Council's decision to carry out urgent work at the wastewater plant, and the decision itself, which was made at an extraordinary meeting of the Council on 5 July 2017.
- 1.13 In Part 6, we describe what the work involved, how it was carried out, and some of the issues that arose along the way. In Part 7, we briefly outline the contracting arrangements the Council entered into for the work. We have provided summaries or observations about our findings at the end of each of these Parts.
- 1.14 In Part 8, we summarise the end result of the work, how much it cost, and where things currently stand with regard to a replacement wastewater plant. In Part 9, we summarise our overall findings.

## Westland District Council's new stopbank along the Waiho River

This map shows the new stopbank that Westland District Council built, which is next to the existing New Zealand Transport Agency stopbank.



## Background

- 2.1 Our inquiry was into a decision made by the Council to carry out work to protect the Franz Josef wastewater plant from flooding by the Waiho River.
- 2.2 The wastewater plant was built in the late 1970s, and is owned and operated by the Council. The wastewater plant consists of two oxidation ponds situated west of Franz Josef and next to the Waiho River. An infiltration gallery discharges treated wastewater into the river.
- 2.3 There is a history of problems associated with the wastewater plant, including ongoing non-compliance with the terms of its discharge consent and concerns about flood risk.
- 2.4 Because of Franz Josef's flood-prone and earthquake-prone location, the Council and the Franz Josef community as a whole are also facing difficult decisions about the long-term future of the town.
- 2.5 In this Part, we describe these and other challenges the Council was facing when it decided to carry out the work.

### **The flood-prone Waiho River**

- 2.6 The Regional Council has described the Waiho River as “among the most difficult New Zealand rivers to manage”. The riverbed is building up with gravel and sediment at a rapid rate. This process, referred to as “aggradation”, reduces the capacity of the river's channels when flooded and makes the river very hard to predict and control. The river can switch course rapidly under flood conditions and quickly threaten neighbouring properties and land.
- 2.7 Many studies have tried to understand the dynamic nature of the flood hazards posed by the Waiho River. In 2014, the Council commissioned a report that focused specifically on the risks to the wastewater plant. The report found that:
  - the location of the wastewater plant made it extremely vulnerable to damage by large floods;
  - there was a very high chance that by 2019 the Waiho River would break its banks and inundate the wastewater plant, and a reasonable chance that this would happen before 2016; and
  - ongoing aggradation could eventually lead to the river carving a permanent channel through the site of the wastewater plant.

## **Wastewater treatment plant flooded in March 2016**

- 2.8 The wastewater plant was protected from the Waiho River by a raised access road that followed the natural curve of the land and riverbed. Because it was raised, the access road provided some river protection, but it was not a stopbank.
- 2.9 In March 2016, the flood risk became a reality. The Waiho River flooded and burst its banks near the wastewater plant. The river swept through the wastewater ponds and nearby properties, and 186 people had to be evacuated. Sewage flowed into the river. The ponds were severely affected by the flood. Council staff estimated “near 80% damage to the earthworks and the treatment process”.
- 2.10 Immediately after the flood, NZTA rebuilt the breached section of the raised access road.

## **Environment Court orders a replacement plant in November 2016**

- 2.11 For several years, the wastewater plant had been periodically discharging non-compliant effluent into the Waiho River. The wastewater plant was often overloaded due to increased tourism to Franz Josef. There were also ongoing problems with the infiltration gallery.
- 2.12 The Regional Council had issued several abatement notices and, in 2015, took enforcement action against the Council for continued non-compliance. The enforcement action resulted in an Environment Court order in November 2016 that required the Council to, among other things, have a fully operational replacement plant by 30 April 2018.

## **Options for a new wastewater treatment plant**

- 2.13 By the time the Environment Court order was made, the Council had already received a detailed report from Opus International Consultants Limited (Opus) on options for a new wastewater plant.
- 2.14 The report compared several options based on either oxidation ponds or a compact “high rate wastewater treatment plant” at different locations. The report recommended a mechanical plant located out of the flood hazard zone and very close to the residential/commercial-zoned area of the town.
- 2.15 The Council received the Opus report not long before the October 2016 local government elections. Public interest in what needed to be done about upgrading the wastewater plant was high. The Council decided to wait until after the local government elections before deciding how to respond to the report.

## The long-term future of Franz Josef – the Tonkin + Taylor report

- 2.16 At the same time as the Council was considering what to do about its wastewater plant, broader discussions were also taking place in the community about how to respond to the significant flood and earthquake risks faced by Franz Josef.
- 2.17 In March 2017, the Regional Council, with funding from central government, had engaged Tonkin + Taylor Limited and Ernst & Young to identify and assess options for managing the flood and earthquake risks (the Tonkin + Taylor report). A wide range of options were explored, including moving the town to Lake Mapourika. These broader discussions complicated the decisions that needed to be made on how to fix the town's immediate wastewater problems.
- 2.18 The Council received a confidential draft of the Tonkin + Taylor report in June 2017 just before it made the decision we are inquiring into. The report was made public in October 2017. The published report presented three packages of options. All options involved relocating the wastewater plant.

## Summary

- 2.19 In summary:
- The Waiho River is notoriously flood-prone and difficult to manage.
  - Because the wastewater plant is located next to the river, it was at permanent risk of flooding.
  - The wastewater plant was flooded in March 2016, causing significant damage to the plant and expense and disruption to the community.
  - As a result of ongoing non-compliance issues, the Environment Court ordered the Council to decide on a replacement for the wastewater plant by the end of 2016, and to have a fully operational replacement wastewater plant by 30 April 2018.
  - Because of the flood risk, the Council's consultant engineers had advised that the wastewater plant had to be replaced by a plant outside of the flood hazard zone.
  - The Tonkin + Taylor report into managing the natural hazard risks faced by Franz Josef had also recommended relocating the wastewater plant.
  - The Council had decided to postpone making a decision about the wastewater plant pending the outcome of the local government elections in October 2016.

# 3

## The new Council's approach to Franz Josef's wastewater problems

- 3.1 The local government elections in October 2016 resulted in a largely new group of elected members.
- 3.2 The wastewater plant, and options for a new plant, had been hot topics in the election. The Council, after the October 2016 elections, was immediately faced with decisions about the wastewater plant.
- 3.3 The Environment Court order that was issued in November 2016, just after the elections, required the Council to decide on a replacement for the wastewater plant by the end of that year. There were decisions that needed to be made in the short term as decisions about the replacement plant were being made and implemented. How should the immediate non-compliance issues be addressed? And what, if anything, needed to be done to protect the current wastewater plant from the Waiho River?
- 3.4 Some significant staff changes also took place during the first half of 2017.
- 3.5 In this Part, we describe:
  - the Council's early discussions and decisions on both long-term and short-term solutions for the wastewater plant between October 2016 and June 2017; and
  - the staff changes at the Council that occurred during this time.
- 3.6 This information provides useful context for understanding later events and the Council's decision on 5 July 2017.

### **Westland District Council's choice of oxidation ponds instead of a mechanical plant**

- 3.7 A Council meeting was held on 24 November 2016 where Council staff presented a report outlining various options for a replacement wastewater plant.
- 3.8 Based on the report that had been prepared for the Council by its consultants, Opus, Council staff recommended a new, high-rate, mechanical plant. The Council rejected this recommendation on the grounds that it was too expensive. The Council decided that lined oxidation ponds were the preferred option for a replacement wastewater plant.
- 3.9 Although the Council's decision to go with oxidation ponds went against expert advice, it was consistent with earlier community feedback, which generally supported oxidation ponds.
- 3.10 According to media reports of the meeting, the Council's discussion focused on oxidation pond options and touched on the need for better river protection at the current site. However, the Council did not decide on the location of the ponds or any river protection work. A few days after the Council's meeting, members of the Franz Josef community were told that Council staff were working on possible locations and would be consulting with the community.

- 3.11 There is evidence to suggest that, at this point, some elected members were already considering the option of expanding the wastewater plant at its current site and building a stopbank to protect it.
- 3.12 In the run-up to the local body elections, the current Mayor had advocated for adding another pond to the existing wastewater plant and building river protection. He had provided cost estimates for this work in a Facebook post, which included estimates supplied by potential contractors. Two of the named contractors had also been elected to the Council in October 2016 (Councillor Graeme Olson and Councillor Durham Havill).
- 3.13 A staff email dated 14 November 2016 records that “elected members have a view about building a stopbank around the ponds and then consider the site [to be] future safe”. However, it was not clear from the email who the elected members were or how many of them were in favour of this option.

### **Discussions on short-term issues facing the current wastewater treatment plant**

- 3.14 Elected members continued to discuss the wastewater plant and possible river protection work in the months that followed. However, it is unclear exactly what was discussed or agreed. The relevant minutes from meetings between December 2016 and April 2017 are often vague and without accompanying reports or papers.
- 3.15 Through a combination of the minutes and information we received from staff and elected members, we can surmise, in general terms, that during this period:
- The Council was concerned that the current wastewater plant required remedial work and it wanted to keep some oversight of this work.
  - Councillor Havill, in his role as responsible for the Three Waters portfolio, often took a leading role in discussions at the Council table, including updating the Council on the ponds. Councillor Havill was also involved in getting quotes for work.
  - The Mayor and Councillor Havill visited the wastewater plant regularly and raised concerns about the flood risk directly with staff.
  - At its meeting on 15 December 2016, the Council discussed the need for river protection for the wastewater plant. The Council agreed that to consult with affected members of the community about “extending the rock wall” as a priority and the implications for their rates. It is not clear what extending the rock wall would involve, or what consultation, if any, took place with the community.

## Plan to strengthen existing embankment and build new infiltration gallery

- 3.16 At a meeting on 22 June 2017, Council staff presented a report to the Council to advise it on planned work at the wastewater plant.
- 3.17 The report provided background information on the problems facing the wastewater plant, including the history of non-compliance with resource consents, the Environment Court order, the damage caused by the March 2016 flood, and problems with the infiltration gallery.
- 3.18 The report informed the Council about upcoming actions on the wastewater plant as follows:
- The existing ponds will be maintained (this will include strengthening the existing damaged stop bank) and a new infiltration gallery will be developed.*
- This action will ensure compliance with the current resource consent and will leave Council with the ability to consider adding enhanced treatment methods to the wastewater at the ponds.*
- Future decisions on the pond locations and other treatment options can be made once final decisions are made on the future growth direction of Franz Josef.*
- 3.19 The report did not seek approval or direction from the Council. The report was simply presented for information. This might have been because it was anticipated that the work would fall within the Chief Executive's financial delegation. If there was any discussion at the Council meeting about the nature of the work required, this was not recorded in the minutes.

## The Mayor's statement about proposed work

- 3.20 The day before the 22 June 2017 Council meeting, the Mayor had said publicly that machinery would be working in the riverbed the following week, building a gravel wall to protect the ponds and access to them.
- 3.21 It is not clear what the basis for these statements was, as the report presented to the Council the next day did not describe the work the Council was proposing to carry out in this way. The focus of the report was on protecting the ponds and addressing compliance concerns in the short term, while decisions were being made about the future of Franz Josef and the location of the ponds in the long term. The report talked about strengthening the existing damaged stopbank, not building a gravel wall.
- 3.22 Correspondence between the Council's then Acting Chief Executive and a member of the Franz Josef community the day after the Council meeting also shows that Council staff were anticipating repairs to the existing flood embankment, not a new wall.

## Staff changes during the first half of 2017

- 3.23 The first half of 2017 saw some significant, and sometimes turbulent, Council staff changes and resignations.
- 3.24 In February 2017, the Council's then Group Manager: District Assets, who was responsible for managing the Council's infrastructural assets (including wastewater), went on leave after the Serious Fraud Office started an investigation. His position remained vacant until late May 2017, when an Acting Group Manager was appointed. The Group Manager: District Assets resigned in June 2017.
- 3.25 In April 2017, the Council's Chief Executive resigned. An Acting Chief Executive was immediately appointed. He was an experienced Chief Executive and had previously been the Council's Chief Executive between 1998 and 2012. The Acting Chief Executive continued in the role until November 2017, when a new permanent Chief Executive started.
- 3.26 Other staff resignations about this time included the Council's Three Waters engineer.
- 3.27 The resignations of the Group Manager: District Assets and the Chief Executive are not directly relevant to our inquiry. However, we mention them because they were unsettling for staff and the Council. It might have also affected the continuity of advice to the Council on the wastewater plant.

## Summary

- 3.28 In summary, by late June 2017:
- The Council had rejected advice from external consultants and staff to replace the oxidation ponds with a mechanical plant. The Council decided to stick with the option of lined oxidation ponds. However, the Council had not yet decided whether these would be located at the same site as the current wastewater plant or elsewhere.
  - Some elected members, including the Mayor, supported the idea of expanding the wastewater plant at the current location and building a stopbank for flood protection.
  - The Council had discussed the need for protecting the current wastewater plant.
  - The Council was anticipating work to the existing flood embankment (that is, the raised access road) and infiltration gallery, while longer-term decisions were being made about the future of the wastewater plant. Council staff had described this work as strengthening or repairing the existing flood embankment.
  - There had been some significant staff resignations during the first half of 2017. However, by late June, an Acting Chief Executive had been in office for three months and an Acting Group Manager: District Assets had been appointed. However, the Council did not have a full complement of asset management staff.

# 4

## Events leading up to Westland District Council's decision

- 4.1 In this Part, we describe events that occurred in late June to early July 2017 in the days leading to the Council's decision on 5 July 2017 to carry out urgent work.
- 4.2 We outline how a few elected members became concerned about the risk of an imminent flood and went about finding a solution.
- 4.3 There are no written records of these events. The following account is therefore based solely on the recollections of those involved, primarily the Mayor and Councillor Havill.

### Concern about imminent flood risk

- 4.4 At some point before the end of June 2017, one of the elected members, Councillor Graeme Olson, contacted the Mayor and Councillor Havill. He told them he had seen that the Waiho River was aiming towards the wastewater ponds and that, if the Council did not act quickly, they would lose the ponds the next time the river flooded.
- 4.5 On approximately 1-2 July, the Mayor and Councillor Havill took a helicopter ride over the Waiho River to view the situation. Their assessment was similar to Councillor Olson's. They believed the river had shifted to the north and was now moving directly towards the ponds. They told us they recognised the risk to Franz Josef and to tourism in the area if the river burst its banks near the wastewater plant again.

### The Mayor and Councillor Havill's proposed solution

- 4.6 Following the helicopter ride, the Mayor and Councillor Havill discussed what could be done to protect the ponds. We were told that Councillor Havill's proposal was for a straight stopbank, approximately 120 metres in length and higher than the existing flood embankment that protected the wastewater plant. The Mayor supported this idea and asked Councillor Havill to source contractors for the job.
- 4.7 Councillor Havill first contacted the only locally based contractor with a large bulldozer. After some discussion, this contractor said that he was not available to do the work.
- 4.8 Councillor Havill then approached his brother, Geoff Havill, who is an employee of Blakely Mining Limited (Blakely Mining). Through his private business interests, Councillor Havill also had an existing business relationship with the Director and owner of Blakely Mining, Edward Blakely.
- 4.9 Councillor Havill told us that Blakely Mining had a Caterpillar D11 bulldozer that had been working at a gold mine on the West Coast and was in Greymouth for repairs. He said he understood that the bulldozer was to return to Christchurch

after the repairs were finished. The company gave Councillor Havill a confirmed hourly rate for the bulldozer, an estimate of the hours needed to do the work, and the cost for shifting the bulldozer to Franz Josef.

- 4.10 Councillor Havill then sought a second contractor to place “rock armour” (or “rip rap”) on the stopbank to protect it from erosion from the river. Councillor Havill approached MBD Contracting Limited (MBD) and negotiated a price for this work.

### **The Mayor announces the proposed work on Facebook**

- 4.11 On 2 July 2017, the Mayor announced the work he and Councillor Havill had planned in a video posted on his Facebook page. In the video, the Mayor and Councillor Havill described the work, and said that equipment, including a “big bulldozer”, would be on site the next week.
- 4.12 They described the work as including:
- straightening the existing flood embankment, raising its height, and placing rock armour on it;
  - building a “very big soakage pit”; and
  - needing to build a much larger third pond.
- 4.13 On the video, the Mayor said that the Regional Council had “been good” and that they had said that anything the Council did in the river was “not a problem”.
- 4.14 The Regional Council told us that the Mayor’s Facebook post was the first it knew about the work.

### **The Acting Chief Executive advises that Council approval is necessary**

- 4.15 About the same time as the Facebook post, the Mayor and Councillor Havill met with the Council’s Acting Chief Executive. They told him that the Council would be hiring Blakely Mining to do the work and that, based on Councillor Havill’s discussions with the contractors, the cost of the work was estimated to be \$1.3 million.
- 4.16 We understand that the amount quoted was based on information provided to Councillor Havill by Blakely Mining and MBD. We also understand that it was intended to cover all of the work outlined in the Mayor’s video posted on his Facebook page (see paragraph 4.12).
- 4.17 The Acting Chief Executive told the Mayor and Councillor Havill that the amount quoted for the work exceeded his financial delegation and that Council approval was needed.

- 4.18 The Acting Chief Executive called an extraordinary meeting of the Council for 5 July 2017 to discuss and approve the proposed work.

### **Our observations on the events leading up to the Council's decision**

- 4.19 It appears that the Mayor, Councillor Olson, and Councillor Havill were genuinely concerned about the flood risk posed by the Waiho River and wanted to protect the Council and the community's assets.
- 4.20 The Mayor and Councillor Havill reached their own view that urgent action needed to be taken and what that action should be. No Council staff or river engineers were involved in their assessment.
- 4.21 After deciding what needed to be done, Councillor Havill approached contractors directly and negotiated arrangements with those companies. These discussions were done verbally and there are no records from the time. No Council staff were involved.
- 4.22 The work the Mayor and Councillor Havill announced on the Mayor's Facebook page went further than flood protection. It included expanding the wastewater plant to address problems with its capacity and infiltration gallery. It was essentially a proposal to develop the wastewater plant at its current site and build improved river protection.

## Westland District Council's decision on 5 July 2017

- 5.1 An extraordinary meeting of the Council was held on 5 July 2017 to discuss the concerns that had been raised about an imminent flood risk and the Mayor and Councillor Havill's proposed solution.
- 5.2 A report was prepared for the meeting by the Acting Chief Executive.
- 5.3 The meeting was attended by all but two of the elected members. The Acting Chief Executive and the Group Manager: Corporate Services also attended. No staff from the Council's District Assets Team were asked to attend.
- 5.4 In this Part, we describe:
- the information provided to elected members for the meeting;
  - what they discussed; and
  - what they approved.

### Information provided to the elected members

- 5.5 The report that the Acting Chief Executive prepared for the Council's meeting largely repeated information from the report that had been prepared for the Council's previous meeting on 22 June. That report had advised elected members about proposed work at the plant, including a plan to strengthen the existing flood embankment and to build a new infiltration gallery.
- 5.6 Attached to the Acting Chief Executive's report was a confidential version of the Tonkin + Taylor report (see paragraphs 2.17 and 2.18).
- 5.7 On the immediate situation facing the wastewater plant, the Acting Chief Executive's report stated only that:
- *The bed of the Waiho River is continuing to aggrade, and its current level is close to the level of the land upon which the ponds are located.*
  - *The infiltration gallery needs to be upgraded and enhanced.*
- 5.8 The report recommended that the Council approve the development of a new infiltration gallery and maintenance of the flood embankment at an estimated cost of \$1.3 million. It did not describe what work was needed to "maintain the flood embankment". There is no reference to the type of work that had been announced in the Mayor's Facebook video (that is, straightening the embankment, raising its height and adding rock armour, or building a third pond).
- 5.9 The Council was told that this work would be funded "from the \$1.5 million allocated to the Franz Josef Waste Water Treatment project". This was a reference to a funding allocation for "Franz Josef – New WWTP" in the Council's 2017/18 annual plan.

- 5.10 The report stated that the approval was needed urgently because “specialised machinery (a D11 bulldozer) is currently available on the West Coast, and is intended to be relocated back to Canterbury this week.”
- 5.11 The report went on to explain that machinery “of this size is required to undertake the proposed work in a cost and time efficient manner.” The report did not discuss whether there were other methods or options available to address an imminent flood risk.

### **What the elected members discussed**

- 5.12 The Council’s discussion on the work is not recorded in detail but, based on the meeting minutes, appears to have been wide ranging. The minutes record that the following topics were discussed:
- *The current risk and protecting Council’s assets*
  - *Funding*
  - *Shifting the sewerage ponds*
  - *The potential for a flood*
  - *The options for Franz Josef*
  - *Extension of the Rating District*
  - *Providing assurance to the Franz Josef Community*
  - *The importance of having the infrastructure available to cater for the large amounts of tourists in Franz Josef/Waiau.*

### **What the elected members approved**

- 5.13 At the end of its discussion, the Council approved the work as recommended, which was simply to:
- develop a new infiltration gallery; and
  - maintain the flood embankment.
- 5.14 Councillor Havill declared a conflict of interest and did not participate in the decision, although he was involved in the discussion leading up to the decision.
- 5.15 The other elected members were obviously aware of the video the Mayor had posted on his Facebook page. We were told by some members that the Council resolution was passed on an assurance that the work the Council carried out would be limited to maintenance of the existing flood embankment and that it would not go as far as building a new wall. This assurance was not recorded in the minutes.

## Our observations on the Council's decision

- 5.16 Our detailed comments on the Council's decision-making process and its obligations under the Local Government Act 2002 are in Part 9. At this stage, we make the following observations.
- 5.17 Very little information is provided about what the proposed work was going to involve. The brief description of the work in the report and minutes appears to be the same as work that had already been planned and outlined to the elected members at the Council's meeting on 22 June 2017, although there is no direct reference to this earlier planned work.
- 5.18 Council staff had not been involved in the planning or design of the proposed work, and no engineering advice had been sought or received. It is not clear whether all of the elected members were aware of this when they were asked to approve the work.
- 5.19 The decision to carry out the work was made without consulting the Regional Council or other parties that might be affected by the work (such as iwi and NZTA).
- 5.20 There was no business case, risk assessment, or analysis of alternative options.
- 5.21 There does not appear to have been any discussion of what consents, if any, might be needed for the work under the Resource Management Act 1991. There is no reference to the work being considered emergency works under that Act.
- 5.22 The report the Acting Chief Executive prepared for the meeting briefly touched on the risks posed by the Waiho River and the minutes from the meeting show that the elected members were concerned about the potential risks to the wastewater plant. However, the stated urgency appears to have been more about the availability of the bulldozer than an imminent flood risk.
- 5.23 The Council was asked to provide its urgent approval for the work on the understanding that the bulldozer was available for only a short time before it needed to return to Canterbury. Despite this apparent urgency, the bulldozer remained in Franz Josef for many months after completing the stopbank work.

# 6

## How the work was carried out

- 6.1 Events moved quickly following the Council's decision. The bulldozer arrived on site on 8 July 2017 (three days after the Council meeting) and work started on 14 July 2017.
- 6.2 The work was carried out in two stages:
- The first stage involved using the bulldozer to shift riverbed gravel to build a stopbank.
  - The second stage involved completing the stopbank and placing rock along the river side of the stopbank to protect it from erosion.
- 6.3 The work took about four months to complete. It resulted in the construction of 700 metres of rock-protected stopbank on the bank of the Waiho River, and raising the level of a 250-metre length of the existing flood embankment. The proposed work on the infiltration gallery was not carried out during this time but we understand it has since been completed.
- 6.4 In this Part, we describe how the work was carried out and some of the issues and concerns that arose along the way, in particular:
- discussions between the Council and the Regional Council about the steps the Council needed to take to comply with the Resource Management Act;
  - apparent confusion or misunderstanding about the scope of the work; and
  - a proposal the Mayor put forward part-way through the implementation process to use the bulldozer to carve out a new pond for the wastewater plant.

### **Appointing Westroads Limited to act as head contractor**

- 6.5 On 6 July 2017, the day after the Council meeting, the Acting Chief Executive called the General Manager of Westroads Limited (Westroads) to ask that Westroads act as head contractor for the work.
- 6.6 Westroads is a wholly owned subsidiary of the Council. It operates as a general contractor, specialising in water utilities maintenance, roading, waste management, and parks and reserves.
- 6.7 We discuss Westroads' role and contracting arrangements in Part 7.

### **West Coast Regional Council's request for information about plans for the work**

- 6.8 On the same day (6 July 2017), the Chief Executive of the Regional Council emailed the Council to say he had seen the Mayor's Facebook post (from 2 July 2017), and asked for clarification of the Council's intentions.

- 6.9 He said that, when the two Councils had last discussed the matter, the Council had been planning only minor work to ensure that the oxidation ponds operated as best they could while a more permanent solution was arrived at.
- 6.10 He said that the Regional Council understood the Council's decision to carry out flood protection work but needed to understand the scope of what the Council was planning so that the Regional Council could advise what consents were needed and provide advice (if required) about stopbank design.
- 6.11 He also pointed out that there was potential for the Council to operate under the Regional Council consent that allowed rock extraction from the riverbed. His email ended: "Keen to help where we can and make sure that things are done within the bounds of the RMA, really want to be on the same page and avoid any issues that could arise from any proposed works."
- 6.12 In his response, the Council's Acting Chief Executive explained that the Council had agreed "to repair the wall" and "to restore a working disposal gallery". He said the Council's sole intent was to protect what the Council had there and to make it compliant, and that the ponds would need to be there for at least three years and up to at least 10 years, depending on the options chosen from the Tonkin + Taylor report.
- 6.13 The two Chief Executives agreed to meet.

### **Concern raised about bulldozer working without a consent**

- 6.14 Their meeting took place on 10 July 2017. We were told that the Mayor joined the meeting for a time. It was agreed that, following the meeting, the Council would submit a plan for the work.
- 6.15 In the meantime, the bulldozer had already arrived on site. On 12 July, the Regional Council sent a reminder about the agreement the Council had made to submit a plan. On 14 July, the bulldozer began work.
- 6.16 On 16 July, the Mayor posted three videos on Facebook of the bulldozer in action. According to the Mayor in the first video, the bulldozer had been on site for a couple of days and the basis of the wall was starting to be formed. The first and third videos show both Councillor Havill and the Mayor on site.
- 6.17 On the same day (16 July), in response to a concern from a member of the community, one of the elected members emailed the Acting Chief Executive to ask him to confirm whether the Council had a consent for the work.

- 6.18 The Mayor, rather than the Acting Chief Executive, replied to this email. He said the Chief Executive of the Regional Council had advised that the Council could use the Regional Council's consent, which was in permanent place for river work.
- 6.19 Further discussions took place the following day (17 July 2017) between the two Councils. Later that day, the Chief Executive of the Regional Council emailed his staff and copied in staff at the Council. The email said that the Mayor had confirmed that, once the Council had finished the gravel base for the work, it would stop work and wait until the design work for the stopbank had been done and consents sorted before carrying out any further work.
- 6.20 It was also noted in the email message that the Council's Acting Group Manager: District Assets was now involved in the project and that he would be going to Franz Josef the next day with consultants from Opus. They planned to meet with Regional Council staff later that same day to discuss next steps.

### **West Coast Regional Council asks for the bulldozer work to stop**

- 6.21 On 19 July 2017, staff from the Regional Council visited the site and asked the bulldozer operator to stop work.
- 6.22 In an email to the Council, the Chief Executive of the Regional Council said this was because the Regional Council had not yet received a plan for the work. He explained that:
- Even if the Council was proceeding with the work under the "emergency works" provisions in the Resource Management Act, it was still required to notify the Regional Council and apply for the necessary consents.
  - A key point of the consent process was engaging with potentially affected parties, namely Te Runanga o Makaawhio, the Department of Conservation, and NZTA.
  - In regard to NZTA, the consultation would need to cover "tying into their asset" (that is, joining the Council's stopbank to the existing NZTA stopbank) and undertaking work adjacent to the NZTA stopbank.
- 6.23 The reference to the emergency works provisions in the Resource Management Act is a reference to section 330 of that Act. The significance of section 330 is that, if properly invoked, it allows a local authority to take preventive or remedial action (for example, to prevent loss of life or serious damage to property) without first obtaining a resource consent, although a consent must be obtained retrospectively. Carrying out work that requires a consent without first obtaining one is otherwise unlawful.

- 6.24 As well as reminding the Council of its obligations under the Resource Management Act, the Regional Council also asked for assurances about the scope of the work the Council was planning to carry out under the emergency works provisions. The Chief Executive explained that this was because the bulldozer driver had told Regional Council staff that, once he had finished work on the stopbank, he would be moving to the site of the wastewater plant to begin work there.
- 6.25 By inference, we understand this to mean that the Regional Council wanted confirmation that the work the Council was planning to carry out in reliance on the emergency works provisions (and therefore without first obtaining a resource consent) was the work necessary to prevent the wastewater plant from flooding – not, for example, work related to upgrading the wastewater plant itself.
- 6.26 The Chief Executive of the Regional Council suggested that, as a way forward, the Council’s Acting Group Manager: District Assets should come to the Regional Council’s offices the next morning to work through the plan with Regional Council staff, including river engineers.
- 6.27 The Mayor sent a response to this email in which he accused the Regional Council of failing to act to protect important assets from flooding and of hiding behind the Resource Management Act. He said that, if the ponds flooded again, the Regional Council would be held responsible.

### **Westland District Council prepares plan and design**

- 6.28 On 20 July, the day after Regional Council staff had asked the bulldozer driver to stop work, the Council’s Acting Group Manager: District Assets met with Councillor Havill to discuss his design for the work and to prepare a written plan. Up to this point, there was no plan for the work, and the proposed design for the stopbank had not been committed to paper.
- 6.29 Following this meeting, the Acting Group Manager: District Assets prepared a drawing detailing the earthworks design of the stopbank, which he sent through to the Regional Council later that night.
- 6.30 The completed drawing showed a new straight stopbank connecting with the existing NZTA stopbank and extending 700 metres downriver, past the wastewater ponds and with rock armour on the stopbank’s river side. We were told that the drawing was for the purpose of resource consent application, but by default it became the construction design.
- 6.31 Some modifications were later made to Councillor Havill’s original stopbank design as the result of discussions with Regional Council staff.

## **Consultation with the New Zealand Transport Agency**

- 6.32 On 21 July 2017, the Acting Group Manager: District Assets emailed NZTA to request permission to “tie” the Council’s new stopbank to NZTA’s existing stopbank.
- 6.33 NZTA approved the Council’s plans on 27 July, subject to certain conditions and design modifications. These included:
- the Council ensuring that the existing floodbank was raised to the same level as the Council’s new stopbank; and
  - the Council continuing to raise the whole stopbank in response to rising riverbed levels.

## **Notification of emergency works**

- 6.34 On 21 July, the Chief Executive of the Regional Council emailed the Acting Group Manager: District Assets to confirm that the Council was required to notify the Regional Council, in writing, of the emergency works within seven days of the work commencing. The Council then had 20 days within which to apply for resource consent.
- 6.35 On 24 July, the Council formally notified the Regional Council that it had “initiated emergency works in the Waiho River to protect Westland District Council owned utility and roading infrastructure, including the Franz Josef wastewater treatment plant” and that the work was being done under section 330(1)(b) of the Resource Management Act (as emergency works).

## **Project Manager appointed**

- 6.36 In late July 2017, the Acting Chief Executive contacted a former employee of the Council to ask for his help with the project. The former employee had previously worked as Operations Manager at the Council and is a qualified engineer. On 27 July, the Mayor, Councillor Havill, and the Acting Group Manager: District Assets met with the former employee to discuss help the Council needed with putting contracts in place and with the Council’s application for a resource consent. Up to this point, there was nothing in writing with either Westroads (the Council’s appointed head contractor) or either of the companies subcontracted to carry out the work.
- 6.37 The former employee was appointed as Project Manager and started work on 31 July.

## Concerns raised about the scope of the work and the procurement process

- 6.38 A Council meeting was held on 27 July 2017. This was the first Council meeting since the 5 July 2017 decision.
- 6.39 By this time, questions were already being asked by members of the community and elected members themselves about the Council's procurement process and about why a new stopbank was being built, rather than the Council simply working to strengthen the existing floodbank.
- 6.40 The minutes of the 27 July meeting recorded that the Council discussed progress on the work at this meeting. However, no detail of that discussion is recorded in the minutes.
- 6.41 According to a report in the *Hokitika Guardian*, concerns were raised at the meeting by several of the elected members about both the scope of the work and the Council's procurement process.
- 6.42 The *Hokitika Guardian* also reported that the Mayor advised at the meeting that an estimate had been sought for carving out a new oxidation pond at the site of the wastewater plant.

## The Mayor's proposal to use the bulldozer to carve out a third pond

- 6.43 On 1 August 2017, the Mayor emailed the other elected members to tell them the Council had received a quote of \$100,000 for the bulldozer to carve out a new three-hectare pond at the site of the wastewater plant.
- 6.44 He said the work would need to be carried out within the next five days, as the bulldozer was due to head to Wanaka after that and that, if the Council went ahead with building a third pond now, this meant the total cost of the protection work, including the new pond, would still be less than the \$1.3 million approved by the Council at the 5 July meeting.
- 6.45 He said that a new pond could be completed and properties protected for under \$2 million. He compared this to the figures quoted in the Opus report for alternative pond sites that started at upwards of \$3.75 million.
- 6.46 In response to questions from some of the elected members, the Mayor sent out another email in which he said the decision to carve out a new pond was not a "done deal" and that he was seeking a consensus from the elected members for this work. He said there were potential cost savings to the Council in carrying

out the work while the bulldozer was on site but that, if there was no consensus among the elected members, a special meeting would need to be called or the work postponed until a later date.

- 6.47 On 3 August, the Regional Council notified the Council that it would need to submit an application for resource consent by 21 August 2017. At the same time, the Regional Council asked the Council to confirm that the work it was doing under the emergency works provisions of the Resource Management Act would be limited to the earthworks required to form a gravel bank, and that it would not include rock armouring or the creation of more oxidation ponds.
- 6.48 On 4 August 2017, discussions took place between Council staff and the Project Manager and a meeting was held between the Acting Chief Executive, the Mayor, and Councillor Havill. Following these discussions it was agreed that the proposed creation of an additional pond would be outside the scope of the work agreed to by the Council at its 5 July 2017 meeting.
- 6.49 The Mayor emailed the other elected members to say that there was no consensus for his idea of using the bulldozer while it was at the site to carve out a third pond, and that if a decision was made in the future that the ponds were to be extended in their current location, this would be a separate project.
- 6.50 On 15 August, the Council confirmed to the Regional Council that the emergency works would not include the creation of more oxidation ponds but that it would include rock armouring.

### **Westland District Council applies for retrospective resource consent**

- 6.51 On 18 August, the Council submitted its application for a retrospective resource consent. The application stated that the purpose of the work was to prevent flooding of land behind the stopbank, including existing and proposed wastewater treatment infrastructure and developments on private property.
- 6.52 On 7 September, the Regional Council notified the Council that its application for resource consent could proceed without public notification. However, the Council would need written approval from the Department of Conservation, [NZTA], and Te Runanga o Makaawhio.

### **Completion of the work**

- 6.53 The work was completed in early November 2017.
- 6.54 The Council has told us that it has subsequently received a resource consent for the work.

## Unauthorised work at the wastewater treatment plant

- 6.55 In May 2018, part way through our inquiry, we were told that the bulldozer, which, contrary to expectations, was still in Franz Josef, had carried out earthmoving work at the wastewater plant site and cleared some vegetation.
- 6.56 At this point, Council staff were well advanced on a project for an improved pond system at the current wastewater plant site. However, the Council was yet to formally approve the project and consult the community. We wanted to understand why work at the site had begun.
- 6.57 When we asked for an explanation, the Council confirmed that the bulldozer “had entered the site of the wastewater plant and cleared some vegetation”, but said that “it had not been instructed by Council staff to do so”. We were told that very little damage had been done and that it had been decided not to pursue the matter further. We were also told that the Council had not received any invoice or made any payments for this work.
- 6.58 It seemed inherently unlikely to us that the company that owns the bulldozer, or the bulldozer driver, would have carried out work without having been instructed by someone at the Council to do so. So we asked more questions to try to find out who, if not Council staff, had instructed the bulldozer driver to do the work and whether any elected members were involved.
- 6.59 The Council’s response was that it did not know who had instructed the bulldozer driver, but we were told again that instructions had not come from Council staff and that there had been no previous discussions between Council staff and Blakely Mining (the employer of the bulldozer driver). We were told the Council was “unsure” whether any elected members had been involved in any discussions with Blakely Mining about this work.

## Our observations on the way the work was carried out

- 6.60 Our detailed comments on the way the work was carried out are in Part 9. At this stage, we make the following observations.
- 6.61 Work proceeded on the ground before any plans or designs had been drawn up, before any contracts were entered into, and before the Council had confirmed with the Regional Council what consents the Council would need under the Resource Management Act. As a result, staff from both Councils had to work in “catch up” mode after the work had already begun to ensure that the design and construction of the stopbank would be “fit for purpose” and would qualify for resource consent.
- 6.62 It is not clear who was actually managing the work on the ground during the early stages.

- 6.63 We found no evidence of the Council turning its mind to its obligations under the Resource Management Act until the work was already under way. In particular, we found no evidence of the Council seeking advice on the extent to which it could rely on the emergency works provisions of the Resource Management Act or the Regional Council's existing resource consent until the work was already under way.
- 6.64 There is disagreement among the elected members about the scope of the work the Council had decided to carry out. The minutes of the Council meeting on 5 July 2017 record that the Council had resolved to maintain the existing flood embankment and develop a new infiltration gallery. The day after the Council meeting, when asked to clarify the Council's intentions, the Acting Chief Executive told the Regional Council the sole intent was to protect what the Council had there and make it compliant. This is consistent with what is recorded in the minutes of the meeting. In the event, the Council built a new 700-metres-long stopbank. Several of the elected members have told us this was not what they agreed.
- 6.65 The bulldozer, which the Council had been advised was available for only a short time, remained at the site for at least seven months after the work had been completed. In May 2018, the bulldozer was used to carry out work at the site of the wastewater plant. It is not clear what the purpose of this work was or who authorised it. The Council was still in the process of deciding whether the wastewater plant should remain at its current location.
- 6.66 The Council told us that no Council staff were involved in instructing the bulldozer driver to carry out this work, but has been unable to confirm whether any of the elected members were involved in the unauthorised work.

## The contracting arrangements

- 7.1 The work was carried out in two stages:
- The first stage involved using a Caterpillar D11 bulldozer to shift riverbed gravel to build a stopbank.
  - The second stage involved completing the stopbank and placing rock along the river side of the stopbank to protect it from erosion.
- 7.2 The first stage was carried out by Westroads, as head contractor, using two subcontractors – Blakely Mining and South Island Plant Hire Limited (South Island Plant Hire).
- 7.3 The second stage was carried out by MBD under a direct contract with the Council.
- 7.4 In this Part, we explain:
- how these contractors were appointed to carry out the work;
  - the contracting arrangements entered into by the Council; and
  - how the contracts were managed.

### **The first stage: Westroads Limited appointed to act as head contractor**

- 7.5 We were told that, the day after the 5 July Council meeting, the Acting Chief Executive called the General Manager of Westroads to ask it to act as “head contractor” for the work.
- 7.6 Westroads is a wholly owned subsidiary of the Council. It operates as a general contractor, specialising in water utilities maintenance, roading, waste management, and parks and reserves.
- 7.7 The appointment of Westroads had not been discussed at the Council meeting. We were told that the appointment was necessary because there were no Council staff with capacity to manage the work at the time.

### **Terms of the contract with Westroads Limited**

- 7.8 It is not clear what the Council asked Westroads to do at the time it was appointed. There are no records of their discussions and a written contract was not entered into until 11 September – by which time the work Westroads was responsible for had already been completed. For the time that Westroads was appointed as head contractor for the work, the agreement it had with the Council was verbal only.

- 7.9 Under the terms of the contract that was retrospectively signed, the agreement between Westroads and the Council was:
- Westroads was required to provide a Caterpillar D11 bulldozer for the purpose of building a gravel stopbank as shown in a drawing attached to the contract. (The drawing was the one made by the Acting Group Manager: District Assets on 21 July, after talking to Councillor Havill).
  - The Council was required to pay an “all-inclusive” hourly rate for the provision of the bulldozer, plus “actual and reasonable transport, establishment, and disestablishment costs and costs of setting out the work”.
  - The parties agreed a nominal schedule of machines hours needed to complete the work and a time frame within which it needed to be completed.
  - The Council was responsible for obtaining the necessary resource consents for the work.
- 7.10 Because the contract was signed retrospectively, it is not clear whether the contract accurately recorded the parties’ understanding of their respective responsibilities at the time the work began or what was recorded simply reflected what happened in practice.

### **The subcontracts**

- 7.11 Two different companies were involved in the subcontracting arrangements. They were Blakely Mining, one of the companies Councillor Havill had spoken to when the Mayor asked him to source contractors for the work, and South Island Plant Hire.
- 7.12 Those we spoke to – including Westroads – were not able to explain the relationship between these two companies or which of them had actually been contracted to carry out the work. We were not provided with any written contracts with either company. Apart from one invoice – from South Island Plant Hire to Westroads – there is nothing in writing with either company.
- 7.13 The general assumption among those we spoke to seems to be that Westroads contracted Blakely Mining to carry out the work. However, it was South Island Plant Hire that invoiced Westroads for the work, not Blakely Mining.
- 7.14 Our understanding is that the bulldozer is owned by South Island Plant Hire but is operated by Blakely Mining. Our assumption is that Westroads effectively subcontracted the work to South Island Plant Hire, and that South Island Plant Hire had a separate arrangement with Blakely Mining in relation to hiring the bulldozer driver. However, because there are no written contracts, the arrangements between Westroads, Blakely Mining, and South Island Plant Hire are unclear.

## Payment terms

- 7.15 We understand the rate South Island Plant Hire charged Westroads for the bulldozer was the rate Councillor Havill had negotiated when he spoke to Blakely Mining.
- 7.16 Westroads on-charged the amount invoiced by South Island Plant Hire to the Council and added a 5% management fee. We were told this was Westroads' standard management fee. The management fee was not recorded in the head contract between the Council and Westroads and appears to have taken the Council by surprise.

## The second stage: Appointment of MBD Limited

- 7.17 The second stage of the work involved completing the earthmoving work, including correcting the slope of the stopbank and placing rock along the river side of the stopbank to protect it from erosion.
- 7.18 As noted in Part 6, by the time the first stage of the work was complete (9 August 2017), the Council had appointed a Project Manager. The Project Manager's responsibilities included putting in place and managing the necessary contracts. Westroads' involvement therefore ended once the first stage of the work was complete. The second stage was managed by the Project Manager.
- 7.19 The contractor appointed to carry out the second stage of the work was MBD. We were told that MBD is one of the leading companies on the West Coast involved in the supply and placement of rock. MBD also owns a nearby quarry at Whataroa. MBD was one of the companies approached by Councillor Havill when sourcing contractors for the work.

## Terms of the contract with MBD Limited

- 7.20 The Council entered into a written contract with MBD on 31 August 2017.
- 7.21 Under the contract, the Council agreed to pay MBD an all-inclusive rate per tonne for the supply and placement of rock, and an all-inclusive rate per hour for the hire of excavators and a dump truck. Our understanding is that these rates are the rates Councillor Havill had agreed with MBD.
- 7.22 The contract described the work to be done, including drawings and the payment terms. The basic format of the contract between the Council and MBD was the same as the one between the Council and Westroads, but it was much more comprehensive.

- 7.23 The contract identified the personnel at MBD who would be responsible for the work and their respective roles and responsibilities for matters such as health, safety and the environment, traffic management and site supervision, compliance with the contract specifications, and quality control. It also included a detailed contract management plan.
- 7.24 MBD began work on 4 September 2017 and the work continued into early November 2017.

## **Our observations on the contracting arrangements**

### **No competitive process**

- 7.25 There was no competitive process for sourcing contractors for the first stage or the second stage of the work. In effect, the contracting arrangements the Council entered into simply reflect the arrangements made by Councillor Havill when he first approached Blakely Mining and MBD before the Council meeting.
- 7.26 A competitive tender or request for proposal process is the most obvious way an organisation can ensure that it is getting value for money when buying goods or services. There are circumstances in which adopting a competitive process might not be possible or necessary – for example, when work is highly specialised and there is only a limited pool of potential suppliers, when council staff have recently tested the market and have a good understanding of the availability of suppliers and what constitutes competitive pricing, or when the work is urgent and there is no time to test the market.
- 7.27 In this case, it is unclear whether the Council's decision not to carry out a competitive procurement process was justified.
- 7.28 In the case of the first stage of the work, this is because it appears the Council simply accepted the advice of the Mayor and Councillor Havill that the work was urgent and that a bulldozer of the type and size operated by Blakely Mining was needed to do the job. No advice was sought from Council staff or external advisers to verify either of these points. Council staff were also not consulted about the availability of other suppliers that might be capable of carrying out the work or whether the quotes Councillor Havill had received for the work were competitive.
- 7.29 As a result, it is unclear whether the Council's decision not to carry out a competitive process was justified.
- 7.30 The second stage of the work did not begin until two months after the Council made its decision. That meant the Council had time to at least seek comparative quotes or expressions of interest from other potential contractors, even if the work was considered urgent.

- 7.31 The Council gave us several reasons why it did not do this. It told us that MBD owns the only local source of rock, other suppliers of rock would have been more expensive, and the Council would not have got such a good deal if it had followed a tender process because MBD would have known it was the only company that would tender and could have priced accordingly.
- 7.32 There was general agreement among those we spoke to that MBD is one of the leading contractors on the West Coast and that Councillor Havill obtained a good price from MBD for the rock armour work. However, there are other suppliers of rock and contractors on the West Coast, including the Regional Council.
- 7.33 Therefore, as with the first stage of the work, it is not clear whether the Council's decision not to carry out a competitive process for the second stage was justified.

### **Appointment of Westroads**

- 7.34 With hindsight, it is not clear what benefit the Council received from appointing Westroads to act as head contractor.
- 7.35 Under the terms of the contract Westroads and the Council entered into retrospectively, Westroads was appointed to act as the head contractor and was responsible for providing the bulldozer and getting the stopbank built. However, it is not clear whether the arrangement recorded in the contract records the parties' understanding at the time, or what was actually happening "on the ground".
- 7.36 Westroads had not been involved in planning the work or negotiating with the subcontractors, and the arrangements it entered into with the Council and the two subcontractors appear to simply reflect what Councillor Havill had agreed with Blakely Mining.
- 7.37 It is also unclear what Westroads did in a practical sense. We heard different views about this. Westroads said that it acted as the Council's "eyes and ears" in Franz Josef. Others told us that Westroads did not end up doing anything. Despite the different views, and the lack of certainty about the contracting arrangements, it appears Westroads was, for a short period, acting as an intermediary between the Council and the bulldozer driver, and keeping an eye on how the work was progressing.
- 7.38 By the end of July 2017 though, the Council had contracted an engineer to oversee the stopbank work, including the bulldozer work, and to manage the contracts. Westroads was no longer required. Westroads was involved, in a practical sense, for only 2-3 weeks.
- 7.39 We were told that Westroads was appointed because it was the Council's normal practice to appoint Westroads to carry out work of this type and because there

were no council staff available at the time to manage the work. It is also possible that, when the Acting Chief Executive first approached Westroads, the intention was for Westroads to have a bigger role in managing the work. However, once the Council appointed its own Project Manager, Westroads' involvement was no longer considered necessary.

- 7.40 The appointment of Westroads might have made sense in the short term but, with hindsight, it is not clear what benefit the Council got from appointing Westroads to act as head contractor for the work or, conversely, how much Westroads understood about what it was being asked to do and the nature of the risk it was undertaking.

#### **Lack of written contracts for the first stage of the work**

- 7.41 The first stage of the work, involving Westroads, Blakely Mining, and South Island Plant Hire, was carried out without any written contract between Westroads (as head contractor) and the Council. There were also no written contracts entered into with either of the subcontractors or any written records (such as emails or draft documents) of any matters relating to the negotiation of these arrangements.
- 7.42 The lack of written contracts, or indeed any sort of agreement in writing, during the first stage of the work meant that, had something gone wrong (for example, in relation to the quality of the work or a breach of the Resource Management Act), it would have been difficult to determine who was legally liable.
- 7.43 The lack of written contracts for the first stage of the work might also be a problem after completion of the work. As there are no written contracts with either subcontractor, should any problems arise with respect to the quality of the work that was carried out, it is unclear what recourse (if any) either the Council or Westroads will have.

## The end result

- 8.1 In this Part, we briefly summarise what the work achieved, how much it cost, how the Council intends to fund it, and what is now happening with a replacement wastewater plant.

### Improved flood protection

- 8.2 The work resulted in the construction of 700 metres of rock-protected stopbank on the bank of the Waiho River, and the raising of the level of a 250-metre length of the existing flood embankment.
- 8.3 We were told that the new stopbank provides improved flood protection for the wastewater plant and other property adjacent to the stopbank. The Council and the Regional Council staff we spoke to believe the new stopbank will provide 10-20 years of flood protection for the wastewater plant at its current location.

### Costs

- 8.4 The work, including the development of a new infiltration gallery, had been estimated to cost about \$1.3 million. Based on information provided to us, the Council spent \$1,228,151 (excluding GST) on contractors for the new stopbank.
- 8.5 This figure does not include the cost of the Council's Project Manager, costs associated with its application for retrospective resource consent, or the cost of developing the infiltration gallery. The infiltration gallery had been part of the original scope of the work but was not completed at the time.
- 8.6 The Council is responsible for the ongoing maintenance and, where necessary, the raising of the new stopbank to compensate for rising riverbed levels.

### How the stopbank has been paid for

- 8.7 The Council has paid for the new stopbank using funds originally allocated to the Franz Josef Waste Water Treatment Project. The Council had allocated \$1.5 million to this project in the 2017/18 financial year, which was to be funded by a loan.
- 8.8 The Council's original plan was for the loan used for a new wastewater plant to be serviced and repaid by means of a targeted wastewater rate on the Franz Josef community.
- 8.9 As part of the 2018 review of the Council's long-term plan, elected members were alerted to the need to consider a special targeted rate on properties that directly benefited from the stopbank. However, this idea does not appear to have progressed.

- 8.10 In the absence of a special targeted rate, the loan used to pay for the new stopbank is currently serviced by all properties in Westland connected to the Council's wastewater system.

### **Update on upgrade of wastewater treatment plan**

- 8.11 With the new flood protection in place, the Council has pursued the idea of keeping the wastewater plant in its current location and upgrading it.
- 8.12 In December 2017, it was announced that the Council would receive \$1.9 million from the Tourism Infrastructure Fund on the basis of this proposal.

## Our overall findings

- 9.1 It is clear from all those we spoke to that there was genuine concern about the Waiho River and the risk it posed to the wastewater plant and neighbouring properties. The flood risk had been known for many years, but it was increasing over time due to ongoing riverbed aggradation. At the same time, the Council needed to decide on both short-term and longer-term solutions for the wastewater issues in Franz Josef.
- 9.2 It is important to acknowledge the complexity of the challenges the Council was facing, the real threat posed to the wastewater plant by the Waiho River, and the fact that the decision to take steps to manage the flood risk was a decision the Council was entitled to make. It is not what the Council decided to do that has concerned us in our inquiry, but the way that decision was made and carried out.
- 9.3 We have already identified many of our concerns in this report. In this Part, we have summarised our overall findings and concerns:
- The scope of the work – whether the work that was carried out went further than what was authorised.
  - The Council’s decision-making process – whether it was up to the standard required of public organisations.
  - The involvement of the Mayor and Councillor – whether, as elected members, they involved themselves inappropriately in operational matters.
  - Councillor Havill’s conflicts of interest.

### The scope of the work

- 9.4 Our first major concern relates to the scope of the work and whether, in constructing a new stopbank, the Council has gone further than what was envisaged in the resolution that authorised the work.
- 9.5 The minutes of the Council’s 5 July meeting record that the Council approved work to “maintain the flood embankment” (that is, the raised access road) and “develop a new infiltration gallery” for the wastewater plant. The completed work involved building a significant 700-metres section of new stopbank. No work was carried out at the time in relation to the infiltration gallery.
- 9.6 We heard different opinions among elected members about whether the new stopbank was authorised by the Council’s resolution. Some believe it was. Others disagree and objected at the time to the extent of the work.
- 9.7 We accept that there might have been an element of genuine confusion about what the Council was proposing to do. This was in part because the option of building a stopbank had previously been raised at the Council, and in part because of the urgency with which the decision was made. The messages being sent to the

community by the Mayor's Facebook page about the scope of the proposed work might also have led to confusion.

- 9.8 However, in our view, the extension the Council built to the existing floodbank went well beyond the ordinary meaning of "maintenance" of an existing asset – which is what the resolution authorised.
- 9.9 The resolution did not expressly authorise either a new stopbank or an increased height for the existing floodbank. We accept that a maintenance design could involve some extensions (both linear and vertical) to the existing floodbank. However, the language of the resolution, and the details in the report that was provided to the Council to explain and support the proposed work, do not provide any basis for a significant extension to the floodbank or the construction of a new stopbank.
- 9.10 A secondary but nonetheless important point is that other work that was approved as part of the same resolution and that was necessary to ensure that the wastewater plant complied with the conditions of its resource consent (namely, the development of the infiltration gallery) was not carried out at the time. Therefore, it had to be carried out, presumably using other funds, at a later date.
- 9.11 Whether the construction of a stopbank was properly authorised, and whether it was the right thing to do, are questions that probably no longer have any practical relevance. The stopbank has been built and, even though some of the elected members voiced their objections at the time, the decision to build it has, in effect, been endorsed by the Council. The point has also been repeatedly made to us that, so far at least, it has achieved its intended purpose of protecting the wastewater plant from flooding.
- 9.12 None of this makes what the Council did right. A decision to carry out urgent work to maintain an existing asset and to ensure that it is legally compliant is fundamentally different in nature and scope from a decision to build a significant new asset, although the amount of money involved in this case might have been the same.
- 9.13 The construction of a stopbank, by its nature, required engineering input, an assessment of the potential impact on other parts of the river, and consultation with affected parties. It also triggered potentially different legal requirements under both the Local Government Act and the Resource Management Act, and there were issues that needed to be considered about ongoing maintenance costs.
- 9.14 Had the Council intended from the start to build a new stopbank, these and other relevant matters should have been fully considered at the time the decision was being made, not only after work was already under way. We do not accept

that doing things properly would have slowed the construction process in any significant way.

- 9.15 Acting outside the scope of a council decision is a serious matter. A council is a collective decision-making body. Unless given explicit authority to do so, neither council staff nor individual elected members of a council (including the Mayor) have any authority to make commitments or to take executive action on behalf of a council or to vary the decision a council has made.
- 9.16 Acting outside of the scope of a council decision also triggers potentially serious legal consequences for both the council and any individuals involved. A detailed analysis of these consequences is beyond the scope of this report, but it is worth highlighting some of the main ones. They include:
- Legal proceedings to injunct the council.
  - Potential invalidation of the council's insurance cover.
  - For individuals involved (staff or elected members), if their actions result in civil or criminal proceedings being brought against the council, for example, under the Resource Management Act, potential personal liability.
  - If individuals are found to be personally liable, potential "disavowal" of their actions by the council, meaning the council could refuse to indemnify them in respect of any legal costs or penalties they incur on the grounds that their actions were not authorised by the council in the first place.

### **Westland District Council's decision-making process**

- 9.17 Our second major concern relates to the Council's decision-making process.
- 9.18 Our assessment about whether the Council's decision-making process was adequate has been complicated by the fact that, as already noted, there is disagreement within the Council about what the Council's decision actually was (that is, whether it was a decision to carry out urgent maintenance work on an existing asset or a decision to build what was arguably a significant new asset).
- 9.19 Whatever the decision though, the process the Council followed when making it was, in our view, inadequate both at the time, and even more so, in retrospect, once the scope of the Council's undertaking became clear. We also have doubts about whether the Council's decision-making process complied with the requirements of the Local Government Act.
- 9.20 Any good decision-making process involves at least these basic stages:
- identifying that a decision needs to be made;
  - gathering relevant information to better understand the situation;

- identifying options; and
  - weighing the evidence and choosing a preferred option.
- 9.21 For councils, these stages are not just good practice or “nice to haves”. They are explicit legal requirements. The Local Government Act sets out several principles and requirements for good decision-making that all councils are required to comply with. These include:
- The principle that a council should conduct business in an open, transparent, and democratically accountable manner.
  - The principle that a council should provide opportunities for Māori to contribute to decision-making processes.
  - The requirement for a council to seek to identify all reasonably practicable options and assess their advantages and disadvantages.
  - The requirement for a council to consider the views of those likely to be affected by, or interested in, the decision.
- 9.22 Councils are also required to have a Significance and Engagement Policy that sets out how they will assess the significance of each decision, and how and when communities will be engaged on different types of decisions.
- 9.23 These requirements apply to every decision a council makes – big or small. The Local Government Act recognises the need for proportionality and gives councils broad discretion to decide how to comply in a way that is proportionate to the significance of the particular decision. But councils must turn their mind to how they will comply with each of the requirements.
- 9.24 It is not uncommon to hear decision-making requirements in the Local Government Act and other similar legislation being dismissed as unnecessary regulation or “red tape”. Public sector decision-making requirements can cause particular frustration for those who are used to running their own businesses or being answerable to only a relatively small group of shareholders or other stakeholders.
- 9.25 But public sector decision-making is different. Public organisations are accountable to the communities they serve and, as we have said in other reports, every public organisation is exercising public power. The essence of the rule of law is that public power must be exercised in accordance with the law. Complying with the requirements of the Local Government Act and any other legal requirements when making decisions is not optional.
- 9.26 For councils, being able to demonstrate that decisions are being made lawfully and for the benefit of the community is all the more important because the

council is collecting and spending the community's money, and because the only opportunity the community has to exercise control over those making decisions on its behalf is at the triennial local government elections.

- 9.27 The discipline imposed by the decision-making requirements of the Local Government Act is therefore essential in holding local authorities to account. These requirements are, in effect, the building blocks for democratic and responsible decision-making in local government.
- 9.28 Many of the concerns we have about the Council's decision-making process in this case have already been identified in our report. It is not necessary for us to repeat all of them in detail here. However, it is worth repeating the main ones.
- 9.29 The Council did not seek or receive any expert advice to inform its decision. For example, advice on the nature and immediacy of the risk facing the wastewater plant or whether the proposed work was an efficient or effective response to that risk.
- 9.30 There is no evidence that other options for emergency measures were considered, even if those options were only about reducing the risk in the short term.
- 9.31 There was no business case to support the work.
- 9.32 The work had potentially significant consequences for other organisations, property owners, and local iwi. However, the Council did not talk to or consult anyone about the plan until after it had been approved.
- 9.33 There is also no record of the Council considering the views of those likely to be directly affected by, or interested in, the decision – in particular, NZTA and the Regional Council.
- 9.34 There is no record of the Council considering its decision-making obligations under the Local Government Act, including its significance and engagement policy, during the course of its decision. However, we recognise that the failure to consider the significance and engagement policy might have been because, at the time, not all those making the decisions realised that the proposed work was potentially significant.
- 9.35 There is no record of the Council turning its mind to whether it could rely on the emergency works provisions of the Resource Management Act to justify carrying out the work without first obtaining a resource consent. However, that failure might have been because not all those making the decisions were aware of the scope of the proposed work and the implications this had in terms of the Council's compliance with the Resource Management Act.
- 9.36 We acknowledge that the Council clearly had a wide-ranging discussion before making its decision. We also acknowledge that some of the issues the Council would have needed to take into account before making its decision are likely to

have been canvassed during that discussion or at previous Council meetings, where issues relating to the wastewater plant and/or flood risk were discussed.

- 9.37 However, the fact remains that the Council cannot provide adequate evidence to us or the community that a proper and lawful process was followed and that, when making the decision to carry out the work, all relevant factors were taken into account and all relevant options considered and weighed. In our view, where their money is being spent, the community is entitled to better than that.

### **Involvement of the Mayor and Councillor Havill**

- 9.38 Our third major concern relates to the role played by the Mayor and Councillor Havill in driving the decision to build the stopbank and sourcing contractors to build it.
- 9.39 There was a general acceptance, based on expert advice, that the Waiho River posed a significant and increasing flood risk to the wastewater plant as a result of aggradation of the river. However, the assessment that there was an imminent flood risk that needed to be addressed as a matter of urgency was made by two of the elected members — the Mayor and Councillor Havill. It was the Mayor and Councillor Havill who then came up with the proposed solution — a stopbank — and Councillor Havill who sourced and negotiated arrangements with potential contractors.
- 9.40 Therefore, it was effectively on the basis of the views of two of the elected members that the Council committed \$1.3 million for what become reasonably major infrastructure work.
- 9.41 The close involvement of elected members in driving and implementing the Council's decision to build the stopbank has led to inevitable concerns about the blurring of lines between governance and management. As we discuss in more detail in the next section, these concerns have been particularly acute in the case of Councillor Havill, because of his close personal connections with some of those subsequently engaged by the Council to carry out the work.
- 9.42 Any number of good practice guides make the point that, for an organisation to function well and to be able to account properly to its stakeholders, there needs to be a clear distinction between those governing the organisation and those managing it. This principle applies generally across all sectors and all types of organisations.
- 9.43 The role of managers is to carry out the day-to-day operations of the organisation. The role of the governing body is to ensure that systems and processes are in place that shape, enable, and oversee the management of an organisation.

- 9.44 In practice, the separation between governing bodies and management might not always be black and white. For example, when an organisation is facing particularly challenging issues, it might be necessary and appropriate for the governing body to become more closely involved in operational matters.
- 9.45 However, the general rule is that clear roles and responsibilities make the differing interests of management and governance transparent and foster effective decision-making. There is a need to guard against the risk of those governing becoming too closely involved in operational decisions because it limits their ability to then hold management to account.
- 9.46 The Local Government Act draws a clear distinction between the roles of governance and management. The role of elected members is to govern, not to manage. Elected members have no executive authority, except as specifically delegated to them, and have no authority to instruct council staff or those carrying out work on behalf of the council.
- 9.47 The Mayor and Councillor Havill told us that when they became concerned there was an imminent flood risk, the reason they had to get personally involved and take on the role of sorting out the problem was because the matter was urgent and there were no staff available at the time to deal with it. We do not accept this.
- 9.48 We acknowledge the disruption at the Council resulting from the resignations of the previous Chief Executive and the Group Manager of the District Assets Team. We also acknowledge that the District Assets Team was under-resourced at the time. However, by early July 2017, when these events took place, the Council had an experienced Acting Chief Executive who had been in his role for three months and who was a former Chief Executive of the Council. The Council also had an Acting Group Manager: District Assets, who had been in the role for two months.
- 9.49 It is not clear to us why the Mayor and Councillor Havill did not simply refer their concerns, proposed solution, and names of potential contractors to the Acting Chief Executive, and leave it to him and Council staff to determine (a) whether the work was necessary, (b) what needed to be done, and (c) who should be engaged to do it. We do not accept that it was necessary or appropriate for the Mayor or Councillor Havill to involve themselves in the way that they did, however well-intentioned they might have been.
- 9.50 It is often in the nature of those elected to local government that they have knowledge, skills, and experience that might be of value to the Council, coupled with a strong sense of community service and a drive to fix problems and improve the well-being of the communities they represent. These attributes are to be welcomed and encouraged. We have no issue with elected members sharing their

knowledge, experience, and connections with Council staff, where it is in the interests of the community to do so.

- 9.51 However, members of the Council are elected to govern, not manage. They must be conscious of the line between governance and management and be aware when they are crossing it. This is not just for the sake of the Council, but for their own sake. Elected members need to be aware at all times that their functions are limited to collective governance, and that none of them (including the Mayor) has any executive authority except in instances where Council specifically delegates that authority.
- 9.52 Elected members who overstep the line between governance and management risk not only undermining relationships within the Council, and the ability of the Council to account effectively to the community. They also risk personal liability for their actions.

### **Councillor Havill's conflicts of interest**

- 9.53 Our fourth major concern relates to Councillor Havill's conflicts of interest.
- 9.54 Councillor Havill is a long-standing business associate of Edward Blakely, who is the Director and owner of Blakely Mining, one of the subcontractors for the work. Councillor Havill's brother was the driver of the bulldozer. Councillor Havill is also a part owner of Aratuna Freighters Limited, which is one of the main suppliers of fuel to companies on the West Coast, including Blakely Mining and MBD.
- 9.55 It is Councillor Havill who, along with the Mayor, made the call that emergency works were necessary and that the bulldozer operated by Blakely Mining was needed to do the work.
- 9.56 When these views were subsequently presented to the Council for discussion and approval, Councillor Havill declared a conflict of interest. Although Councillor Havill took part in the discussion, he did not take part in the vote. Despite declaring a conflict of interest and stepping aside from the decision, concerns have persisted that people close to him have benefited from contracts he effectively negotiated.
- 9.57 Allegations about conflicts of interest involving elected members of local authorities are a matter of particular concern to this Office because – aside from a general interest in matters relating to good governance and probity – the Auditor-General has a specific role in investigating concerns about financial conflicts of interest.
- 9.58 Financial conflicts of interest are governed by the Local Authorities (Members' Interests) Act 1968. Under that Act, an elected member who discusses or votes on a matter in which they have a financial interest, risks committing a criminal offence and, if convicted, is automatically disqualified from office. The Act also

prohibits elected members from benefiting financially from contracts with their council, except in specific circumstances.

- 9.59 Part of our inquiry, therefore, required us to consider whether Councillor Havill had breached the Local Authorities (Members' Interests) Act and, if so, whether prosecution was warranted.
- 9.60 We have concluded that the nature of Councillor Havill's conflicts of interest in this case were not financial, and that he did not breach the Local Authorities (Members' Interests) Act. This is because the concept of a financial interest in this Act applies only where it can be shown that the elected member personally stands to lose or gain financially, either directly or indirectly (for example, through a business they own). We found no evidence in our inquiry that Councillor Havill stood to gain any personal financial advantage as a result of his involvement in the procurement process.
- 9.61 Nonetheless, Councillor Havill did have conflicts of interest of a non-financial nature as a result of people close to him standing to gain financially. This means that, even though he declared a conflict of interest, his close involvement in the procurement process remains a matter of concern.
- 9.62 As already explained, that concern has to do with the fact that Councillor Havill is a member of the Council's governing body, not its management or operational staff. Elected members are there to govern, not manage, and need to understand the difference and when they are crossing the line.
- 9.63 In Councillor Havill's case, however, respecting the line between governance and management was all the more important because of his connections with the companies involved and the concerns those connections would inevitably trigger. Those concerns were compounded by the fact that there was no form of competitive tender process, and that the contracts that were awarded simply recorded the terms Councillor Havill had negotiated. To all intents and purposes, Councillor Havill negotiated and entered into contracts with people he knew on behalf of the Council.
- 9.64 We accept that, in offering his expertise and business connections, Councillor Havill was genuinely motivated by a desire to act in the community's interests, and believed his solution for addressing a long-standing problem was the right one. However, that does not justify him involving himself in the way that he did.
- 9.65 In particular, we do not accept that it was necessary or appropriate for him to approach any of the contractors directly, or that Council staff could not have managed the procurement process without his personal involvement.

- 9.66 Councillor Havill's failure to recognise the concerns his involvement would inevitably trigger has caused concern within the community about the fairness of the Council's contracting processes, and led to speculation that the contracts that were awarded were awarded on the basis of personal connections, rather than on merit.
- 9.67 Whether these concerns are valid or fair to any of the companies and individuals involved is another matter, and to some extent, beside the point. For an entity exercising public power and spending public money, it is not enough for its decision-making processes to be fair. They must also be seen to be fair.
- 9.68 If a council wishes to retain the community's confidence, it must understand the importance not just of behaving fairly, but of being seen to behave fairly.
- 9.69 By failing to recognise and understand this important principle and the concerns his involvement would cause, Councillor Havill has unfortunately undermined the trust and confidence some members of the community have in their Council. He has also risked both his own reputation and that of the Council.

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