

Appendix A: Document one

From: John Robson [mailto:john@clearthink.net]

Sent: Wednesday, 24 March 2021 3:19 PM

To: stuart.crosby@boprc.govt.nz

Cc: N Mahuta (MIN) <n.mahuta@ministers.govt.nz>; phil.wilson@aucklandcouncil.govt.nz; anne.tolley@tauranga.govt.nz; 'Marty Grenfell' <marty.grenfell@tauranga.govt.nz>

Subject: Tauranga City Council

To: Stuart Crosby, President, LGNZ

Copy: Nanaia Mahuta, Minister of Local Government

Phil Wilson, President, SOLGM

Anne Tolley, Chair, TCC Commission

Marty Grenfell, Chief Executive, TCC

Stuart,

I am writing to you in your capacity as President of LGNZ, an organisation with a vision of
“Local democracy powering community and national success.”

As you know, we no longer have local democracy in Tauranga. Ironically, at least in part,
because of democracy.

The 2019 election delivered Tauranga a mix of Councillors that was both ‘politically’
diverse, and relatively inexperienced (in both governance and LG), and a Mayor with no LG
experience at all, to the point that he did not understand the

role of a Mayor, specifically s41A(1)(a) of the LGA.

This democratically delivered situation was always going to be challenging, but when the Mayor declared that he was unwilling to fulfil the first requirement of his position, I believe that LGNZ, given their role and vision, should have

actively 'leaned in' rather than take what appears to have been a relatively neutral position.

I understand, more than most, that the Mayor had a reputation in some quarters as both a difficult, and litigious, individual, but that is not a justification for key stakeholders not getting involved. I would argue that his 'reputation',

if believed to be true, was even more reason for active intervention.

That being said, I am happy to put on record that when LGNZ was eventually asked by Elected Members to 'lean in', you (and Mike Reid), responded quickly and positively, meeting with us all, and providing what I regard as clear and sage

guidance which I heard as "seek more time and professional advice".

Sadly by the time you were invited in, the situation was dire (the Minister having indicated her preference for a Commission), and, unfortunately, your guidance was ignored by an inexperienced acting Mayor (preferring the advice of Cr.

Baldock), with the result that a rushed and amateur response was sent to the Minister. It is a matter of record that I refused to sign the acting Mayor's letter.

But I did act upon your guidance. Specifically, I sought the professional opinion of Russell McVeagh re the Minister's decision to impose a Commission, which I have attached.

Stuart, I will let the RMV opinion (with which I concur) speak for itself, but would add the following:

I believe that if my colleagues had followed your guidance, or preferably, had sought it much earlier, and taken professional advice, we might still have local democracy in Tauranga.

While it may come with

some risk, I believe there is a case to be made for LGNZ to actively promote itself as the first port of call when relationship issues arise with Elected Members.

That being said, I believe that

LGNZ need to be more proactive in situations such as that of Tauranga, and, indeed, I hear that LGNZ is being more proactive in the current Wellington 'situation'. Many in the sector were aware of the situation in Tauranga, and I know more than a few

were actively discussing the behaviour of the Mayor, but no-one acted. Again, I understand the complexity of the unusual politics of the situation, with you being a former Mayor of Tauranga, the President of LGNZ and a Councillor of a SmartGrowth partner,

but I believe that, generally, the upsides of proactivity would significantly outweigh the downsides.

At the very least, once it appears Central Government may get involved, I believe there is a critical role for LGNZ in proactively providing guidance on Ministerial intervention.

As is clear from the RMV advice, the choice of intervention in Tauranga sets a worrying precedent for the LG sector. Not only are there serious questions about whether the legal grounds were met, the Minister's decision was, as you know, heavily influenced

by the concerted campaigns of self-serving sectional interests, with few questions asked, and the input of ratepayer groups explicitly rejected. Not exactly a 'local democracy' exemplar.

One obvious implication of being 'first port of call' and 'more proactive' is the concomitant need to increase the resources of LGNZ. However, given the significant costs (tangible and intangible) of the

alternatives used recently by Tauranga (and others) absent an LGNZ option, I feel a BCR would favour LGNZ stepping up. I would argue strongly that

the type and quality of independent 'opinion' I obtained from Russell McVeagh should be freely and generally available to the LG sector. Sadly, I believe that part of my colleagues' reluctance to seek professional advice was because of the political

optics of the cost of so doing.

I believe that LGNZ, and SOLGM, need to do more in terms of promoting a deeper and wider understanding of 'local democracy', both within the LG sector, and among the wider public. A brief foray into

the media space (both mainstream and social) suggests that most people (including Council-beat journalists) have little or no understanding of the roles and responsibilities of Mayors and Councillors, and the complementary roles and responsibilities of Chief

Executives and their Council 'machines'.

Of even more concern to me personally is that there is little understanding of the complex relationship, as currently legislated, between Local Government and Central Government, even, self-evidently, at

Ministerial level. It is widely accepted that there are significant flaws in the current 'system',

the 'flaw du jour' being the infrastructure funding 'model'. This flaw played (and continues to play) a major role in both Tauranga's situation, and the Minister's arguments for imposing a Commission.

The fact that the Minister was either unaware of, or, worse, chose to ignore, Tauranga's real issues (as identified by, among others, the Productivity Commission, Infrastructure New Zealand, and LGNZ),

of which the poor behaviour of some Elected Members was merely a symptom, is deeply concerning to me.

For an ill-informed Minister to use that poor behaviour as an excuse to

unilaterally impose inequitable infrastructure funding costs on the residents of Tauranga does not bode well for the current discussions on the Future of Local Government, which should be deeply concerning for LGNZ.

Stuart, in closing, I would summarise by saying there is much that can be learned from recent events in Tauranga. From where I sit, everything points to an existential challenge for local democracy.

If LGNZ's vision is truly as currently stated, you have much work to do.

Regards,

John Robson

Councillor

Released under the Official Information Act 1982

23 February 2021

To: John Robson
From: Public Law & Policy Team

Subject: Public law perspective on appointment of a Commission to Tauranga City Council

1. INTRODUCTION AND SUMMARY

- 1.1 You have asked us to provide our legal opinion on the decision of Hon Nanaia Mahuta, Minister of Local Government, ("**Minister**") under the Local Government Act 2002 ("**LGA**") to appoint a Commission to Tauranga City Council ("**Council**") ("**Minister's Decision**") dated 18 December 2020.¹
- 1.2 Of the six local authority intervention options available to the Minister under the LGA, the appointment of a Commission is the most intrusive, where a Commission effectively replaces elected members and for a considerable period, contrary to the underlying democratic process. The Council had asked the Minister to appoint a Crown Manager and Crown Observer and this was also the initial recommendation of the Review and Observer Team ("**Observer Team**"), appointed by the Council, in its report dated 16 November 2020 ("**Observer Team Report**").
- 1.3 Given the seriousness of the intervention level selected by the Minister, you have asked us to analyse the Minister's Decision and consider the extent to which it complies with the statutory framework and applicable administrative law principles. We note that you are not seeking, and we do not provide, a detailed assessment of the prospects of success for a legal challenge. Further, for the purpose of this advice, we have assumed that the threshold for a less intrusive Ministerial intervention under the LGA has likely been met. That is, our focus has been on the decision to intervene at the Commission level.
- 1.4 Following our review of the applicable law and relevant materials, we have identified several issues with the Minister's Decision from a public law perspective. We note that the Minister is required to exercise judgement after considering a range of relevant criteria under the LGA. It is also relevant that the councillors have had an opportunity to respond to the Minister's intention to appoint a Commission. Nevertheless, notwithstanding these factors, the issues we have identified raise important legal questions. In brief, and based on the reasons and analysis set out in the Department of Internal Affairs ("**DIA**") briefing papers provided to the Minister:

¹ In this advice reference to the "Minister's Decision" is a reference both to the initial decision letter to notify an intent to appoint a Commission dated 4 December 2020 and the final decision letter dated 18 December confirming the earlier intention and reasons.

- (a) The Minister is prohibited under the LGA from appointing a Commission unless alternative lesser interventions (here, a Crown Manager) would be unlikely to prevent impairment of local government. There appears to have been a failure to properly assess this question, contrary to the statutory requirements.
- (b) Further, the DIA's advice to the Minister indicates that a Crown Manager was a viable option. For example, a key reason given for intervention was that the Council had not demonstrated an ability to deliver a robust, draft long-term plan ("LTP") for public consultation that set rates at a realistic level. DIA advice stated that a Crown Manager could direct the Council to make certain decisions and could, accordingly, take the lead in "ensuring that the LTP is robust and adequately address the underlying growth and development issues facing the Council".
- (c) While the Minister can exercise judgement and there is a subjective element to the test (the Minister is required to believe on reasonable grounds that a lesser intervention would not prevent impairment of local government), failure to undertake an assessment or to make a decision based on reasonable grounds is an error of law.
- (d) We note that courts may be more reluctant to interfere with a statutory power which involves subjective assessment (for example, reasonable belief). However, courts are also more willing to intervene in decisions in a context where the consequences are serious. Given the severe consequences of the Minister's Decision (the effective removal of elected members) and the statutory scheme (where the appointment of a Commission specifically requires the Minister to first consider lesser interventions) we consider a court could expect a more rigorous assessment of alternatives to have been undertaken by the officials / Minister in order for the threshold for a Commission intervention to be met.
- (e) More broadly, there are questions about the standard of the information provided by the DIA to the Minister in support of the intervention, particularly in relation to the Council's ability to progress the LTP (the information includes inconsistencies and omits important relevant information, including that on 15 December, the Council adopted the LTP scenario recommended by the Council executive). In order to properly exercise a statutory power of decision, the Minister is required to be adequately informed of the relevant considerations. If the officials' advice to the Minister is flawed or inadequate, this may impact on the lawfulness of the Minister's Decision.
- (f) There also appears to have been a failure by the Observer Team to comply with its terms of reference that relate to fair process. The Observer Team Report recommended the appointment of a Crown Manager and Crown Observer. The Observer Team subsequently advised the DIA that it had changed its recommendation to an appointment of a Commission. While the terms of reference required the Observer Team to give councillors 14 days' notice of any final recommendation, we understand that councillors were unaware of the change in recommendation until after the Minister made a final decision. The failure to give notice to the councillors raises questions about the validity of Observer Team's

revised recommendation and has potential implications for the validity of the Minister's Decision.

1.5 We set out below our advice which covers:

- (a) the background, the relevant statutory framework and the applicable administrative law principles;
- (b) legal issues we have identified with the DIA papers and Minister's Decision with reference to the applicable law.

1.6 The relevant statutory provisions and list of matters to be considered for intervention decisions (published in the Gazette) are set out in **Appendix A**.

2. BACKGROUND

2.1 We set out below the timeline of relevant events. A summary of the DIA advice, Council Response and Minister's Decision is set out in **Appendix B** and discussed in further detail below.

DATE	ACTION
13 August 2020	<ul style="list-style-type: none"> • DIA writes to the Council citing media articles and correspondence regarding "significant conflict among elected members" and seeks an explanation as to steps the Council is intending to take.
21 August 2020	<ul style="list-style-type: none"> • Council resolves to appoint an Observer Team.
2 September 2020	<ul style="list-style-type: none"> • The Observer Team's chair (and member) is appointed by elected members. Terms of reference are agreed. • Two other members are appointed subsequently.
7 September 2020	<ul style="list-style-type: none"> • Observation period begins.
16 November 2020	<ul style="list-style-type: none"> • Observer Team Report released. Identifies significant governance problems, and infrastructure and funding challenges. • Recommends the appointment of a Crown Manager and Crown Observer.
20 November 2020	<ul style="list-style-type: none"> • Council holds a meeting to consider the Observer Team Report and resolves to accept the recommendation. • Council writes to the Minister requesting the appointment of a Crown Manager and a Crown Observer.
24 November 2020	<ul style="list-style-type: none"> • Observer Team writes to DIA advising it that, following its observations of the Council's behaviour at the 20 November meeting, it has changed its recommendation and now considers that a Commission should be appointed.

DATE	ACTION
27 November 2020	<ul style="list-style-type: none"> DIA advice on options for Crown interventions presented to the Minister ("DIA November Advice").
2 December 2020	<ul style="list-style-type: none"> Minister decides that Crown intervention is necessary and decides that a Commission is the most appropriate form of intervention.
4 December 2020	<ul style="list-style-type: none"> Minister gives notice to the Council of her intention to appoint a Commission. Council have until 18 December to provide a response.
14 December 2020	<ul style="list-style-type: none"> Council responded to the letter, asking the Minister not to appoint a Commission, and maintains that a Crown Manager and Crown Observer should be appointed.
15 December 2020	<ul style="list-style-type: none"> Council vote to endorse LTP option recommended by the Council executive (one of four options).
17 December 2020	<ul style="list-style-type: none"> DIA provide advice on the appointment of a Commission ("DIA December Advice").
18 December 2020	<ul style="list-style-type: none"> Minister's final decision confirms her position to appoint a Commission and a letter is sent to the Council.
2 February 2021	<ul style="list-style-type: none"> Appointed Commissioners announced.

3. STATUTORY FRAMEWORK FOR INTERVENTION

Overview

- 3.1 The powers of the Minister to act in relation to local authorities are contained in Part 10 of the LGA. These powers allow her to assist local authorities or intervene in their affairs where certain statutory criteria are met.
- 3.2 The Minister has a range of assistance and intervention options that vary according to the nature and scale of aid required to address the problem. These include powers to:
- (a) require information from a local authority;²
 - (b) appoint a Crown Review Team, which can investigate an issue and make recommendations;³
 - (c) appoint a Crown Observer, which may assist a local authority to address the issue, monitor its progress and make recommendations;⁴

² LGA, s 257.

³ LGA, s 258.

⁴ LGA, s 258B.

- (d) appoint a Crown Manager, which can direct the local authority to act in certain ways, and may make recommendations;⁵
- (e) appoint a Commission, which supplants the elected members entirely;⁶ and
- (f) call a general election.⁷

3.3 We discuss below the Commission and Crown Manager options being the two viable options identified by the DIA, and noting that a Crown Manager / Crown Observer intervention was the option first recommended by the Observer Team and requested by the Council.

Statutory threshold for appointing a Commission

Appointing a Commission

3.4 Appointment of a Commission is the most invasive option under Part 10 of the LGA. Once appointed, the Commission takes over the local authority functions and councillors remain in office in name only. The councillors no longer receive salaries or have any statutory powers.⁸ The Commission can remain in power for a term decided by the Minister, and the Minister is able to postpone a subsequent election. A general election follows the end of a Commission term.

3.5 A Commission can be appointed without meeting additional criteria if the Council requests an appointment, a local authority refuses to comply with a direction of an appointed Crown Manager, or if a previously appointed Crown Manager, Crown Observer or Crown Review Team recommend that a Commission be appointed. If none of these criteria apply, a Minister can only appoint a Commission under section 258F(1)(a) which requires that the Minister believe on reasonable grounds, that:⁹

- (a) a significant problem relating to the local authority is impairing or likely to impair the good local government of the local authority's district or region;¹⁰
- (b) the local authority is unable or unwilling to effectively address the problem; and
- (c) the problem is such that a lesser form of intervention (specifically a Crown Review Team, Crown Observer or Crown Manager) would be unlikely to prevent the consequences of the significant problem.

3.6 The requirement to consider other lesser options is unique to the Commission option. It demonstrates a recognition in the LGA that the appointment of a Commission is the most severe intervention with significant implications for local democracy.

⁵ LGA, s 258D.

⁶ LGA, s 258F.

⁷ LGA, s 258M.

⁸ LGA, s 254(4).

⁹ LGA, s 258F(1)(a).

¹⁰ The terms "significant" and "problem" for the purposes of Part 10 are defined in s 256 of the LGA. For current purposes "significant problem" is defined as meaning circumstances or failures that undermine the ability of a local authority to perform effectively, in a way that will have actual or probable adverse consequences for residents and ratepayers. For the purposes of s 258F(1)(a), a "significant problem" can also be one that is endangering, or likely to endanger, the public health or safety of the people within the local authority's district or region (LGA, s 258F(a)(i)(B)) – this ground does not apply here.

Crown Manager

- 3.7 The grounds for appointing a Crown Manager are broadly similar to those for a Commission with the notable exception that there is no requirement to consider lesser options.¹¹
- 3.8 Once appointed, a Crown Manager has the power to direct the Council to make certain decisions but would not replace councillors. More specifically, a Crown Manager may:¹²
- (a) direct the local authority to act to address the problem; and
 - (b) make recommendations to the Minister as to any necessary further actions, including to appoint any other Ministerial body.
- 3.9 When a Crown Manager is appointed, a local authority must co-operate so that the Crown Manager may fulfil their terms of reference, comply with their directions and respond to reasonable requests for information.¹³
- 3.10 There is no limit on the subject matter for directions other than that it should be covered in the terms of reference.¹⁴ The power is broad enough for the Crown Manager to be able to direct the Council to take specific actions and / or make specific decisions – and arguably this would extend to decisions relating to the LTP.
- 3.11 Council compliance with Crown Manager directions is a critical aspect of its operation, and we note that in the event a local authority refuses or is unable to comply with a Crown Manager, the Minister may appoint a Commission.¹⁵ As noted above, in this circumstance, the process detailed above at paragraph 3.5 is bypassed entirely. This gives the Minister the ability to appoint a Crown Manager in the first instance, while reserving the ability to quickly appoint a Commission if needed.

Further elements of the decision-making process

- 3.12 In addition to the statutory threshold, the Minister is required to consider two other factors when making a decision on intervention. Those are:
- (a) a list of matters published by the Minister in the *Gazette* that are relevant to a decision of this nature ("**Ministerial Guidance**"), reproduced at **Appendix A**,¹⁶ and
 - (b) the Council's response to the initial decision, including whether the Council has been able to satisfy the Minister that the reasons for appointing a Ministerial body do not exist, or that the Council is effectively addressing the problem.

¹¹ We note that this option was requested by the Council which is a sufficient basis for the appointment (other statutory thresholds so not then need to be met – although would likely have been met): LGA, s 258D(1)(a) and (b).

¹² LGA, s 258D(4) and (5).

¹³ LGA, s 258D(6).

¹⁴ LGA, s 258D(4)(a).

¹⁵ LGA, s 258F(1)(b).

¹⁶ See LGA, s 258O. The current list of matters relevant to an intervention action were published in the *Gazette* on 4 April 2018: see New Zealand Gazette, *Notice Regarding Ministerial Powers of Local Government Assistance and Intervention*, dated 28 March 2018, published 4 April 2018, <https://gazette.govt.nz/notice/id/2018-go1558>.

- 3.13 The Ministerial Guidance includes a set of guiding principles, matters likely to be considered as detracting from the ability of a local authority to give effect to the purpose of local government, and types and sources of information the Minister is likely to consider when making a decision under Part 10.
- 3.14 When determining the kind of intervention to deploy, the Minister is required "to have regard to" the Ministerial Guidance.¹⁷ While the Minister can determine what weight, if any, to place on any factor, she is required to consider all matters.

Decision process

- 3.15 Before making an appointment under Part 10, the Minister must notify the local authority of her intention to appoint a Ministerial body and invite a response under s 258Q.¹⁸
- 3.16 At this point, the local authority has an opportunity to satisfy the Minister that the reasons for the intervention do not exist, that they are effectively addressing the problem or that a different Ministerial body should exist. This is a critical step that enables the local authority to provide new information that will persuade the Minister that the appointment should not be made or an alternative pursued.
- 3.17 The legislation requires the Minister to allow a minimum of 10 working days for the local authority to respond (the Minister retains discretion to set a longer response period). Once the date for responding has passed (the LGA does not require that a response is received in fact), the Minister must notify the local authority of her decision in writing.

4. ANALYSIS

Relevant administrative law principles

- 4.1 The exercise of a statutory power of decision by the Minister is subject to administrative law principles and challenge by way of judicial review. The basic principles require the decision maker to act in accordance with the law, fairly (in accordance with natural justice principles) and reasonably. The specific grounds of judicial review within these three categories are numerous and overlapping. We expand on some principles below that are relevant to the Minister's Decision.

Unlawfulness

- 4.2 A decision maker must act consistently with a statutory power and a failure to do so is an error of law. This includes having proper regard to statutory criteria. While a decision maker may need to exercise judgement and discretion, it is still necessary to act in terms of the criteria laid down in legislation.¹⁹ A court may be more hesitant to intervene where a statutory requirement is set out in subjective terms (for example "if satisfied"). However, this

¹⁷ LGA, s 258P(1).

¹⁸ Except where the local authority has requested the intervention or in emergency situations: see s 258Q(3).

¹⁹ *New Zealand Fishing Association Inc v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 5 44 (CA) at 561.

does not prevent a court from considering whether there is an objective basis for a position reached.²⁰

Context and intensity of review

- 4.3 It is well established that the context of a statutory power of decision is relevant to a court's approach to statutory interpretation and its willingness to interfere in the exercise of a discretion. Relevant contextual factors include the subject matter, and the gravity and consequences of a decision.

Proper inquiry / reliance on flawed reports

- 4.4 When exercising a power of discretion, a decision maker is expected to be *adequately* informed as to the relevant considerations.²¹ The information does not need to be conclusive or all-embracing but must be sufficiently comprehensive and reliable to enable a decision to be made on an informed basis.²² A Minister's decision can also be invalidated if officials fail to provide fair, accurate or adequate information.²³ In essence, a decision that is based on inadequate or misleading information is not a reasonable exercise of a discretion. In relation to a statutory threshold, the adequacy of the information may impact on whether the statutory requirements are met. As set out above, contextual factors may result in a court undertaking a more intense review of the adequacy of information considered by the Minister.

Inadequate assessment

- 4.5 In our view, the degree of consideration given to alternative lesser options by the Minister, as evidenced by the proactively released DIA advice, does not meet the statutory requirement in the LGA. Further, the information in the DIA advice indicates that, if such an assessment was undertaken, the threshold for intervention at a Commission level would not be met. The DIA advice discussed below is summarised in **Appendix B**. In particular:
- (a) The relevant test to be met by the Minister before appointing a Commission was whether the appointment of a Crown Manager / Crown Observer would be unlikely to prevent the consequences of a "significant problem" relating to the local authority, the consequences being that the problem "is impairing or is likely to impair the good local government of the local authority's district or region".²⁴
- (b) We consider this test presents a high bar, where the word "impair" in this context indicates a serious impact on the Council's ability to function as local government. With reference to the statutory context, "impairing good local government" necessarily means something more than meeting the definition for "significant problem" (being a lessened ability to give effect to the purpose of local government

²⁰ *Cunneen v Commissioner of Police* HC Wellington CP625/91, 24 September 1992.

²¹ *Auckland City Council v Minister of Transport* [1990] 1 NZLR 264 (CA) at 303 where Richardson J notes that a Minister's duty "to exercise [his] discretion on reasonable grounds necessarily requires that the Minister be adequately informed as to the relevant considerations and that he take them into account".

²² *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 (HC) AT [11].

²³ See for example *Air Nelson Ltd v Minister of Transport* [2008] at [40], [51], [53].

²⁴ LGA, s 258F(1)(a)(i).

together with adverse outcomes for ratepayers and residents).²⁵ If Parliament considered that these issues were sufficient to appoint a Commission, it would have required only that the "significant problem" definition be met in order for a Commission to be appointed. It also must mean more than an inability to address a significant problem or failure to acknowledge a significant problem, these being thresholds for lesser interventions under the LGA.²⁶ Impairment of good local government is an additional level of severity reflecting the serious consequences for democracy and councillors if a Commission is appointed.

- (c) The test then provides that, if appointment of a Crown Manager is likely to prevent consequences that amount to impairment of local government, then appointment of a Commission is not an option for the Minister. It is not sufficient for the Minister to believe a Commission could address problems more effectively or better than a Crown Manager. If appointment of a Crown Manager is likely to prevent the most serious impacts — even if there are remaining issues with the Council — then appointment of a Commission is prohibited.
- (d) On the basis of the DIA advice released with the Minister's Decision, there appears to have been no serious assessment of the less severe option of appointing a Crown Manager against this statutory test. Nor is there any such assessment referred to in the Minister's Decision.
- (e) We also note that based on information in the DIA's advice, the appointment of a Crown Manager / Crown Observer would likely prevent impairment of local government. The DIA November Advice puts forward the Crown Manager intervention as a viable option. In particular DIA stated that this option:
- (i) would provide the Council with an opportunity to improve behaviour and decision making "with the support of high calibre appointments to the role of Crown Manager and Crown Observer";²⁷
 - (ii) in relation to the LTP (which was is a key issue identified in the Observer Team Report and DIA advice), means that a Crown Manager can direct Council decisions and would "take the lead in ensuring that the LTP is robust and adequately addresses the underlying growth and development issues facing the Council";²⁸
 - (iii) would allow the Crown Observer to oversee enhanced governance training for elected members and support better decision-making processes.
- (f) The need to finalise the LTP by June 2021 appears to have contributed to a view that intervention was required. However, we note that the timing of decisions for the LTP was considered by the DIA to be workable with a Crown Manager / Crown Observer, with the DIA commenting that if a Crown Manger was appointed, a

²⁵ LGA, s 256.

²⁶ See thresholds for Crown Review and Crown Observer at LGA, ss 258 and 258B.

²⁷ At [38].

²⁸ At [36].

review could be undertaken in March 2021 and a Commission appointed if the situation was not improved.

- (g) Critically, the only substantive risk identified by officials for using the Crown Manager option was that councillors might not comply with the direction of a Crown Manager. Given the councillors are required by statute to comply with the direction of a Crown Manager (and would be acting unlawfully if they did not comply), and that the Council had requested this intervention, we consider this to be a weak reason for rejecting the Crown Manager option. We also note that failure to comply with a direction of a Crown Manager is a standalone ground for appointing a Commission. This demonstrates that Parliament envisaged a Commission could be an appropriate option in the event of non-compliance – that is, the possibility of non-compliance should not be a reason in itself for rejecting the Crown Manager option. The DIA appeared to agree with this position. It stated that the risk of non-compliance with a direction could be mitigated by the appointment of a Commission in March 2021.
- (h) The DIA identified a number of risks associated with the appointment of a Commission that did not apply to the Crown Manager / Crown Observer intervention. The risks included that the Commissioners could become disengaged from the community and there could be uncertainties about the return to local democracy at the end of the Commission appointment. The DIA also highlighted the risk of re-emergence of governance issues at the end of the Commission's term. This is arguably a significant risk given governance issues were a key aspect of the identified problem. It reflects that, without councillors in place, it would be difficult to achieve meaningful governance reforms / processes / training that could then carry over to new councillors. It is relevant that the Crown Manager / Crown Observer option would have actively addressed these issues. Further, the mitigations noted by the DIA for the Commission risks were nonspecific and questionable in terms of effectiveness.²⁹
- (i) The lack of robust consideration of alternatives to appointing a Commission is heightened when viewed in the light of the published Ministerial Guidance. For example, there appears to have been no assessment of the impacts on the democratic process and no cost / benefit analysis of each available option (as an appointment of a Commission can involve significant cost). There are additional issues around transparency when the Observer Team's change of recommendation was not communicated.

4.6 We note that the lesser intervention criteria require the Minister to believe on "reasonable grounds" and that courts may be less willing to intervene given this subjective element. However:

- (a) It is still necessary for a proper assessment to be undertaken on whether the lesser intervention would likely prevent impairment of local government. As noted above, the DIA advice does not include a specific assessment.

²⁹ For example mitigation noted by the DIA for these risks included "encouraging strong nominations to come forward" in the next election and "raising awareness of what good governance looks like".

- (b) Notwithstanding the subjective wording, there must still be a reasonably objective basis for reaching a view on alternative options and the available information suggests that a Crown Manager was a viable option under the applicable test.
- (c) Importantly, we consider a court would likely be willing to adopt a more intensive approach to review a decision to appoint a Commission given the gravity and consequences of the decision. In particular, the appointment impacts on local democracy where elected members are effectively replaced with Government appointees. There are also serious impacts for individual councillors whose jobs and incomes are lost. The gravity of the decision is reflected in the statutory scheme, where lesser options must be considered only in the instance of a Commission appointment. This statutory requirement also reflects principles applied at common law, where a court will expect alternative options to be explored where a decision has serious consequences.
- (d) Accordingly, while the Minister must exercise judgement after considering a range of factors and then reasonably believe lesser interventions will not prevent impairment of local government, we consider a court would likely expect a robust assessment of lesser interventions to have been first undertaken and also require there to be good reasons for believing a Crown Manager would not be sufficient.

Adequacy of information provided by DIA

- 4.7 A second distinct issue with the Minister's Decision is its reliance on information and analysis supplied by the DIA that appears inadequate, including inconsistencies and omission of important relevant factors in relation to the LTP.
- 4.8 The LTP appears to be a key driver for intervention. The specific focus of the DIA is the extent to which the LTP will enable a scenario that delivers optimum infrastructure spend which also requires significant rate increases. Specifically:
 - (a) The DIA December Advice states that the LTP strategy approved by the Council was sub-optimal and would only deliver a partial implementation of its approved strategic direction.
 - (b) However, critically, the DIA omits to explain to the Minister that the Council was progressing the LTP in accordance with the LGA requirements and timelines, and as part of this process, on 15 December 2020, it selected one of four LTP scenarios, being the option recommended by the Council executive. The Council executive provided the Council with detailed analysis and recommended Scenario C (where A reflected the least capital investment and D the most) and this was the scenario the Council approved.
 - (c) Further, the DIA's criticism of the Council decision is inconsistent with the DIA's (and Observer Team's) criticism that councillors too often get absorbed in the details of a decision and fail to trust or follow on advice from the Council executive (which negatively impacts on their ability to set a strategic direction).

- (d) We also note that the DIA's view that the Council's decision in relation to the LTP is deficient, does not reflect the Council's decision-making role under the LGA as it suggests that the only decision available to the Council is one which would result in the highest rate increase. Under the LGA, local authorities are required to strike a balance between the city's priorities and the community's expectations (including around rate increases) when reaching a view on the LTP direction to present to the community for consultation. It is arguably unreasonable and / or inconsistent with the LGA for the DIA to form a view that a scenario which provides for the greatest level of investment (and highest rate increase) is the only option.
- (e) The DIA also criticises the Council for not voting "unanimously" on the LTP plan. This fails to reflect the nature of local government decision-making, with councillors voting in accordance with their political views and political mandate. While it might be preferable that LTP matters have unanimous or near-unanimous support, there is no requirement for this. To the contrary, disagreement is a normal part of a functioning democracy.

4.9 Overall, given the above, we consider arguments could be made that the information provided by officials in relation to the LTP is incorrect, misleading or insufficient for the purpose of making the decision that a Commission should be appointed (including forming the view that a Crown Manager would be ineffective at addressing the issue). Given that the Minister's Decision relies on this advice, it is arguable that the Minister's Decision is also flawed. As noted above, the reasonable exercise of a discretion requires that the Minister is properly informed and that the decision is based on fair, accurate and adequate information.

4.10 We provide a more detailed summary of the Council LTP process and DIA response in **Appendix C**.

Observer Team Report

4.11 The Observer Team Report appears to have failed to follow its terms of reference in relation to its revised recommendation.

4.12 In particular, the terms of reference required that the Observer Team provide a final report to the Council which must include any final recommendations to the Council, the DIA, or the Minister and that in relation to any recommendation to the DIA or Minister, the Council must have at least 14 days' notice of the content of the recommendations.³⁰

4.13 The Observer Team Report, delivered to Tauranga City Council on 16 November 2020, concluded that the Council would be unlikely to make the necessary changes without external help. It recommended that the Council request assistance from the Minister in the form of a Crown Manager and Crown Observer, citing a "mix of continued democratically elected representation and Crown assistance" as providing the best chance of addressing the behaviour and performance issues.³¹

4.14 Subsequent to this recommendation being made, the Observer Team made a revised recommendation to the DIA, recommending the appointment of a Commission. The Council

³⁰ *Terms of Reference: Appointment of Review and Observer Team to the Tauranga Council*, at [25(c)].

³¹ At [86].

was not notified in accordance with the terms of reference and was not made aware of the revised recommendation before the Minister made her final decision.

- 4.15 The provision of the revised recommendation breached the terms of reference in two ways:
- (a) the final recommendation to the DIA and Minister was not included in the final report; and
 - (b) the Council was not provided with any notice of the recommendation, let alone 14 days.
- 4.16 Notice of a recommendation to the DIA or Minister was a fair process requirement which enabled the Council to respond before a recommendation was conveyed. If the Council had been notified it would have then had an opportunity to persuade the Observer Team to retain its initial recommendation (which in turn could have led to a different decision by the Minister). At the very least, the Council would have been able to address the revised recommendation in communications with the DIA and the Minister, including in its Council Response.
- 4.17 The breach of the terms of reference could result in the revised recommendation being set aside by a court on natural justice grounds and / or because it breached the Council's legitimate expectation that the terms of reference would be followed.
- 4.18 The integrity of the revised recommendation could potentially impact on the integrity and validity of the Minister's Decision to the extent the Minister was influenced by the revised recommendation. The revised recommendation is not mentioned in the DIA advice or Minister's Decision but it could be assumed that the revised recommendation influenced the Minister's Decision, particularly where the Minister is required to have regard to the Observer Team's recommendations and the Minister's Decision reflected the revised recommendation.
- 4.19 While providing extra time to respond to the Observer Team's changed recommendation may not have altered the Minister's final decision, this is a clear process failure. In our view, the Minister should have provided the Council with time to respond to the change in recommendation.

Council response

- 4.20 We note that the statute provides an opportunity to persuade the Minister why an alternative option should be selected and that the Council Response did not make fulsome arguments on this point and / or refer to the relevant statutory test. While a range of other points were set out in the Council Response, the Minister decided that the Council Response had not provided grounds to change her decision.
- 4.21 It is likely that a court would take account of the fact the Council had a statutory opportunity to respond and could be less willing to intervene in the Minister's Decision as a result. Further, irrespective of the Council's Response, the Minister is still required to meet the statutory threshold

- 4.22 In terms of context, we note that the Council was granted the minimum statutory timeframe for providing a response and that this timing coincided with a key stage in the LTP process. In addition, as noted above, the Council believed that the Observer Team had recommended an appointment of a Crown Manager / Crown Observer and, accordingly, may have believed that the Minister would be more open to the Crown Manager / Crown Observer intervention. These are factors that could also be considered by a court.

5. CONCLUDING COMMENTS

- 5.1 Ministerial interventions under the LGA are significant, and in practice, have only been used in the most pressing circumstances. While the regime has been more permissive since amendments in 2012, there has only been one appointment of a Commission (to the Kaipara District Council) since the reforms were brought into force.³² In those circumstances, there was a significant failure in governance that had resulted in an extremely indebted council and a series of rate strikes that were undermining the ability of the council to meet community needs, in what was characterised by the Auditor-General as an effective loss of control.³³ Notably, the Minister had initially appointed a Review Team to inquire into the matter, before appointing a Commission.
- 5.2 The practice to date indicates that there is a high bar for intervention, and the appointment of a Commission (the most invasive intervention) is, rightly, a tool to be rarely used. It is concerning that the Minister's Decision appears to have been made without the full consideration of alternatives and where grounds for rejecting alternatives do not appear to have been made out. More broadly, it is a concern that the willingness to substitute elected members with Government appointees in these circumstances will provide a precedent for intervention in the future.

³² To Kaipara District Council, but note that a Commission was re-appointed after the expiry of the initial term in 2015.

³³ Office of the Auditor-General *Inquiry into the Mangawhai community wastewater scheme* (November 2013) at 9.

APPENDIX A

RELEVANT STATUTORY PROVISIONS AND MINISTERIAL GUIDANCE

258B Minister may appoint Crown Observer

- (1) The Minister may appoint a Crown Observer to a local authority if—
- (a) the Minister believes, on reasonable grounds, that a significant problem relating to the local authority exists and—
 - (i) the appointment of a Crown Observer is necessary to enable, or better enable, the local authority to effectively address the problem; or
 - (ii) the appointment of a Crown Observer is necessary to enable, or better enable, the Minister to monitor the local authority's progress in addressing the problem; or
 - (iii) a Ministerial body currently or previously appointed to the local authority has recommended the appointment; or
 - (b) the Minister has received a written request from the local authority to do so.
- (2) Before the observation period begins, the Minister must give notice of the appointment—
- (a) to the local authority, in writing; and
 - (b) by notice in the Gazette; and
 - (c) by public notice.
- (3) Each notice must comply with section 258S.
- (4) A Crown Observer must, to the extent authorised by his or her terms of reference,—
- (a) assist the local authority to address the problem; and
 - (b) monitor the local authority's progress in relation to the problem; and
 - (c) make recommendations to the Minister on whether the Minister should take further action in relation to the local authority, including whether the Minister should appoint any other Ministerial body to the local authority; and
 - (d) ensure, as far as practicable, that the existing organisational capability of the local authority is not diminished.
- (5) If applicable, and to the extent authorised by its terms of reference, a Crown Observer must also assist the local authority with, and monitor progress on, any related matter as recommended by a Ministerial body currently or previously appointed to the local authority.
- (6) A local authority must—
- (a) co-operate with a Crown Observer so that he or she may fulfil his or her terms of reference; and
 - (b) comply with any reasonable request of the Crown Observer to provide any relevant information that the local authority holds.
- (7) A Crown Observer must produce a final report that complies with section 258U, as soon as practicable after an observation period ends.
- (8) This section is subject to section 258Q.

258D Minister may appoint Crown Manager

- (1) The Minister may appoint a Crown Manager to a local authority if—
- (a) the Minister believes, on reasonable grounds, that a significant problem relating to the local authority exists, and—
 - (i) the nature or extent of the problem is such that the local authority is unlikely to effectively address the problem without the appointment of a Crown Manager; or

- (ii) for no good reason, the local authority has not adequately implemented a recommendation of any other Ministerial body in relation to the problem; or
- (iii) a Ministerial body currently or previously appointed to the local authority has recommended the appointment; or
- (b) the Minister has received a written request from the local authority to do so.
- (2) Before the management period begins, the Minister must give notice of the appointment—
 - (a) to the local authority, in writing; and
 - (b) by notice in the Gazette; and
 - (c) by public notice.
- (3) Each notice must comply with section 258S.
- (4) A Crown Manager must, to the extent authorised by his or her terms of reference,—
 - (a) direct the local authority to act to address the problem; and
 - (b) make recommendations to the Minister on whether the Minister should take further action in relation to the local authority, including whether the Minister should appoint any other Ministerial body to the local authority; and
 - (c) ensure, as far as practicable, that the existing organisational capability of the local authority is not diminished.
- (5) If applicable, and to the extent authorised by its terms of reference, a Crown Manager must also direct the local authority on any related matter as recommended by a Ministerial body currently or previously appointed to the local authority.
- (6) A local authority must—
 - (a) co-operate with a Crown Manager so that he or she may fulfil his or her terms of reference; and
 - (b) comply with the directions of a Crown Manager; and
 - (c) comply with any reasonable request of a Crown Manager to provide any relevant information that the local authority holds.
- (7) A Crown Manager must produce a final report that complies with section 258U, as soon as practicable after a management period ends.
- (8) This section is subject to section 258Q.

258F Minister may appoint Commission

- (1) The Minister may appoint a Commission to a local authority if—
 - (a) the Minister believes, on reasonable grounds, that—
 - (i) a significant problem relating to the local authority—
 - (A) is impairing, or likely to impair, the good local government of the local authority's district or region; or
 - (B) is endangering, or likely to endanger, the public health or safety of the people within the local authority's district or region; and
 - (ii) the local authority is unable or unwilling to effectively address the problem; and
 - (iii) the problem is such that appointing a Crown Review Team, a Crown Observer, or a Crown Manager to the local authority is unlikely to prevent the consequences described in subparagraph (i); or
 - (b) the local authority refuses or is unable to comply with a direction of a Crown Manager given under section 258D(4); or
 - (c) the Minister believes, on reasonable grounds, that a significant problem relating to the local authority exists and a Ministerial body currently or previously appointed to the local authority has recommended the appointment; or
 - (d) the Minister has received a written request from the local authority to do so.
- (2) Before the Commission begins its term, the Minister must give notice of the Commission's appointment—
 - (a) to the local authority, in writing; and

- (b) by notice in the Gazette; and
- (c) by public notice.
- (3) Each notice must comply with section 258S.
- (4) A Commission must perform the functions and duties and exercise the powers of the local authority, and its members, under this Act and any other enactment,—
 - (a) to the exclusion of the members of the local authority; but
 - (b) subject to—
 - (i) section 258H; and
 - (ii) any limits on its authority set out in the terms of reference.
- (5) To avoid doubt, a Commission—
 - (a) must perform any functions or exercise any powers directly conferred on the mayor or chairperson, or any other member, of a local authority by or under any enactment; and
 - (b) may exercise all the powers of the local authority to set, assess, and collect rates and charges within the district or region and expend their proceeds; and
 - (c) may appoint members of the local authority to a committee or subcommittee established under Schedule 7 of this Act.
- (6) A Commission must also, to the extent authorised by its terms of reference,—
 - (a) make recommendations to the Minister on whether the Minister should take further action in relation to the local authority, including whether the Minister should appoint any other Ministerial body to the local authority; and
 - (b) if applicable, implement the recommendations of a Ministerial body currently or previously appointed to the local authority.
- (7) A Commission must ensure, as far as practicable, that the existing organisational capability of the local authority is not diminished.
- (8) A Commission must produce a final report that complies with section 258U, as soon as practicable after the term of the Commission ends.
- (9) This section is subject to section 258Q.

258Q Notice to local authority of proposed appointment of Ministerial body

- (1) Before appointing a Ministerial body, the Minister must—
 - (a) give the local authority concerned written notice that he or she intends to make the appointment; and
 - (b) state in the notice the reasons for the proposed appointment and the proposed terms of reference; and
 - (c) give the local authority an opportunity to satisfy the Minister of the following matters, as applicable, by a date specified in the notice, being no earlier than 10 working days after the date on which notice is given to the local authority:
 - (i) the reasons for making the appointment do not exist;
 - (ii) the local authority is acting effectively to address the problem;
 - (iii) for any other reason, the appointment should not be made;
 - (iv) a different Ministerial body should be appointed.
- (2) The Minister must—
 - (a) notify the local authority, in writing, if he or she decides not to appoint a Ministerial body; or
 - (b) act under section 258(2), 258B(2), 258D(2), or 258F(2) in any other case.
- (3) This section does not apply if—
 - (a) the local authority has requested the Minister to make the appointment; or
 - (b) the problem in relation to which the Minister intends to make the appointment relates to the consequences of a state of emergency and the Minister believes, on reasonable grounds, that the public health or safety of the people within the local authority's district or region is, or is likely to be, endangered.

Ministerial Guidance

Notice Regarding Ministerial Powers of Local Government Assistance and Intervention

Background

Section 258O of the Local Government Act 2002 ("Act") requires the Minister of Local Government ("Minister") to publish in the New Zealand Gazette a list of matters relevant to determining what action, if any, to take under subpart 1 of Part 10 of the Act, which relates to Ministerial powers of assistance and intervention in relation to local authorities.

The Minister may consider any relevant information in addition to the matters set out in this notice.

The Minister may also, pursuant to section 258N of the Act, consult any person, group or organisation on any aspect of the decision whether to provide assistance or to intervene, including on the development of the terms of reference for a Ministerial body, and on the selection of the Ministerial appointees.

Taking into account a broad picture of a local authority's circumstances, the final decision, whether to act or otherwise, rests with the Minister.

List of matters to which the Minister must have regard

(a) Guiding Principles

In making decisions under Part 10 of the Act and determining what action, if any, to take under Subpart 1 of Part 10 of the Act, the Minister is likely to adopt the following guiding principles:

- Ministerial action should be informed by the purpose of local government and the role of, and principles relating to, local authorities, as set out in Subparts 1 and 2 of Part 2 of the Act;
- local authorities' accountabilities is to their ratepayers and residents;
- elections are the primary mechanism for communities to express satisfaction or dissatisfaction with elected representatives;
- Ministerial assistance or intervention should have regard to:
 - what the local authority has done, is doing, or plans to do about the problem; and
 - the costs of benefits of assistance or intervention;
- Ministerial assistance or intervention should be proportionate to:
 - the nature and magnitude of the problem;
 - its potential consequences; and
 - its duration to date and its likely duration if not addressed;
- Ministerial assistance or intervention should endure for only as long as necessary to resolve the problem and provide for a transition back to normal democratic processes; and
- Ministerial decisions regarding assistance or intervention should be transparent.

(b) Matters likely to detract from the ability of local authorities to give effect to the purpose of local government

- The matters or circumstances relating to management or governance of local authorities that the Minister considers are likely to detract from the ability of local authorities to give effect to the purpose of local government within their districts or regions are:
 - financial mismanagement; and/or

- a significant failure in service delivery; and/or
- dysfunctional governance, which includes:
 - failure or breakdown of key relationships; and/or
 - serious capability deficiencies of elected members or the chief executive, of the local authority.

(c) Types and sources of information

When making decisions under Part 10 of the Act, the Minister is likely to consider the following types and sources of information:

- *Plans or reports from the local authority, which are voluntarily supplied, required under section 257 of the Act or any other enactment, or requested under any enactment;*
 - *audit reports, including assessment of the accuracy and adequacy of financial reporting required by Regulations made under section 259 of the Act; and*
 - *reviews, reports or communications from any person, group or organisation.*

Released under the Official Information Act 1982

APPENDIX B
SUMMARY OF MINISTER'S DECISION

1. SUMMARY OF MINISTER'S DECISION

Initial decision

- 1.1 The Minister's initial decision was informed by, and reflected, the DIA November Advice, along with the recommendations of the Observer Team (which she is required to take account of by the Ministerial Guidelines).
- 1.2 The DIA November Advice relied heavily on the observations of the Observer Team Report, and largely restated the Observer Team's findings although does not refer to its revised recommendation. The DIA made the following additional comments:
- (a) The Council had a total project capital requirement of \$4.3 billion over the next 10 years, needed to give effect to the Smart Growth Strategy³⁴ and contractual commitments to introducing a rate-funded waste collection service, which would require rates increases.
 - (b) The resignation of the Mayor created a lack of experienced leadership at a critical time.³⁵
 - (c) Other councils had reacted in more constructive and positive ways to similar issues, notably the Invercargill City Council (which recently resolved to appoint two independent active observers).
- 1.3 The DIA November Advice proceeded to outline three options, being the appointment of a Crown Manager and Crown Observer to support the Council, the appointment of a Commission to govern the Council, and the calling of a general election. The DIA effectively ruled out the general election option.³⁶ It provided a high-level overview of the Crown Manager / Crown Observer (option 1) and Commission (option 2) as both being viable, without recommending to the Minister which of the two options should be selected.
- 1.4 In relation the Crown Manager / Crown Observer option:
- (a) The DIA stated that this option would provide the Council with an opportunity to improve behaviour and decision making "with the support of high calibre

³⁴ A collaboration between local authorities and tangata whenua in the Bay of Plenty Region, as well as central government, to set a strategic direction for growth and development in the area.

³⁵ We note for completeness that s 41A(2) of the LGA provides that one of the key roles of the mayor is to lead the development of the LTP.

³⁶ The DIA makes minimal comments in relation to a general election, noting there are significant risks associated with this option (including cost and the destabilising effect for the community, particularly as it relates to the timing for the LTP).

appointments" to the role of Crown Manager and Crown Observer. In relation to the LTP (which was a key issue identified in the Observer Team Report and DIA advice), the DIA stated that a Crown Manager could direct Council decisions and would "take the lead in ensuring that the LTP is robust and adequately addresses the underlying growth and development issues facing the Council".³⁷ It noted that a Crown Observer would oversee enhanced governance training for elected members and support better decision making processes. The DIA also identified that a Commission could be appointed in March 2021 as a backstop measure, if the Minister considered progress on the LTP at that time had not been made.

- (b) The only substantive risk identified by the DIA in relation to a Crown Manager was that the councillors might refuse to follow directions and it was noted that this risk could be mitigated by then appointing a Commission in March 2021. Other identified risks include a lack of clarity amongst the Council as to their role expectations moving forward, adverse media or political reaction to appointments, and reputational risks to the Crown – the first which the DIA noted could be addressed by clear terms of reference and communication, with the remaining generic risks being equally applied by the DIA to the appointment of a Commission).

1.5 In relation to the Commission option:

- (a) The DIA stated that "this approach provides the Council with an opportunity to establish an LTP that best addresses the Council's substantial infrastructure and funding challenges through the support of high calibre appointments to the Commission". The DIA noted that the Commission could appoint councillors to committees so it could still obtain input from elected representatives.
- (b) Risks identified were that Commissioners could become disengaged from the community, uncertainties about the return to local democracy at the end of the Commission appointment, and the re-emergence of governance issues at the end of the Commission's term. The other risks identified were media / reputational risks which were also identified for the appointment of a Crown Manager / Crown Observer (as noted above). The mitigation noted for these risks included "encouraging strong nominations to come forward" in the next election, "raising awareness" of what good governance looks like and "establishing appropriate communication channels" for community engagement.

1.6 In relation to the Commission option, the DIA November Advice did not analyse whether or how lesser interventions could avoid impaired local government as required in the LGA (noting that small parts of the DIA November Advice were redacted on the basis of legal privilege). To the extent there was any analysis of lesser options, the Crown Manager and Crown Observer interventions were presented as viable options for addressing the problems (as set out above).

³⁷ At [36].

- 1.7 The Initial Decision of the Minister was that a Commission should be appointed. Her decision stated that she believed an alternative Crown intervention would not be sufficient, but no specific reasoning is provided in support of this conclusion.

Final decision

- 1.8 Under the statutory process, the Minister's final decision is made after consideration of the Council's objection. It was informed by, and reflected, the original DIA November Advice, the Council Response and the further DIA December Advice.

- 1.9 The Council Response restated the collective commitment of the councillors, referred to the work done and noted ongoing work to deliver a robust LTP. It did not include any discussion of the thresholds for the appointments of a Commission but did restate their position that the option selected should be a Crown Manager and Crown Observer.

- 1.10 The DIA December Advice:

- (a) considered that the Council had failed to provide "evidence as to the form of the agreement that elected representatives have made" to make the necessary changes to improve the working relationships in the Council;³⁸
- (b) referred to decisions made by the Council in relation to the LTP on 15 December 2020 (discussed further below) and advised the Minister that the Council had not committed to substantially addressing the identified investment challenge, noting that if the Council was committed to delivering a robust LTP, it would have unanimously supported an LTP scenario that would deliver a greater level of investment;³⁹
- (c) concluded that matters had not changed such that the original assessment should be revisited;
- (d) did not provide any further explanation as to why alternative intervention methods would not address the particular issues identified;
- (e) supported the Minister's original decision to appoint a Commission by stating the Council Response had not provided new information that justified a change of her decision.

- 1.11 The Minister's final decision was dated 18 December 2020 and confirmed her initial decision to appoint a Commission on the basis that the Council had not provided grounds to change her decision.⁴⁰ In particular, she stated she had not seen evidence of the changes needed to address key issues. No reference is made to the Council's request for the lesser intervention of a Crown Manager / Crown Observer.

³⁸ See Appendix B to DIA December Advice, at [6].

³⁹ See Appendix B to DIA December Advice at [9] – [13].

⁴⁰ Under the LGA, the Council response must satisfy the Minister of the matters set out in s 258Q(1)(c)).

APPENDIX C

FURTHER COMMENTS AS TO INCONSISTENCY OF DIA ADVICE

1. ACCEPTANCE OF SCENARIO C WITHIN BOUNDARIES OF REASONABLE DECISION MAKING

1.1 Scenario C, as set out in the document Long-Term Plan 2021/31 - Update and Working Draft ("**Working Draft Paper**"), seeks to establish an LTP that meets baseline opex and capex requirements, covers critical and high priority projects, and partially implements the approved strategic direction. We understand that the rates impact of Scenario C is ranged at a cumulative increase over 1-3 years of between 38% and 51%. Scenario C was recommended by management and the bulk of the advice provided in the Working Draft indicated a preference among advisors for Scenario C.⁴¹

1.2 It is arguable that the Council's acceptance of Scenario C does not demonstrate an inability to execute good governance to such a degree that a Commission should be appointed. As a critical tool of local government, developing a LTP is one of the central functions of the Council. The content of a LTP is dictated by s 96(3) and Schedule 10 of the LGA, which prescribe the LTP's purpose and the mandatory sections. However, as it relates to the detailed content and / or strategic direction of the LTP, the LGA only provides that the Council act in a manner as it considers on reasonable grounds to be appropriate, having regard to:⁴²

- (a) principles of good decision making as set out in in ss 77-81 of the LGA (including, for example, the requirement to seek to identify all reasonably practicable options);
- (b) consultation principles, as set out in ss 82-84 of the LGA;
- (c) the effect of the LTP under the LGA as set out in ss 96 and 97 of the LGA; and
- (d) certain financial management obligations in s 101 of the LGA, including that the Council manage its finances "prudently and in a manner that promotes the current and future interests of the community" and that there is "adequate and effective provision" in the LTP to meet the expenditure anticipated by that LTP.

1.3 On the information available to us, it is not clear that the Council was acting contrary to these statutory requirements when it resolved to approve Scenario C for the purposes of progressing the LTP draft. We make the following observations:

⁴¹ As at the date of this memo, we have not reviewed the meeting minutes of the 14 December 2020 meeting, as they are not yet publicly available.

⁴² LGA, s 93(8) and (9).

- (a) The Council has had access to a range of material to inform its decision, including the Working Draft Paper.
- (b) The Working Draft Paper explicitly considered the issues raised by s 101 (financial management obligations), and sought to explore and explain the balance between prudent financial management and the current and future needs of the community. Each of the scenarios presented a differing balance of those competing objectives. We note in particular that s 101(1) only requires the Council to "promote" the current and future interests of the community, not to, in fact, achieve all current and future interests.
- (c) While the Council clearly has immediate and pressing concerns that arise from the current make-up of the Council, Tauranga's critical situation as it relates to its funding and financing capacity is not a short-term issue, and shortfalls in financial management cannot be attributed entirely to the current Council. The growing pressure on Tauranga's finances has created a difficult decision that requires judgment, and there will necessarily be disagreement (including inside the Council, among the public and in the central Government) as to the appropriate course of action.
- (d) The purpose of consulting on the LTP (to occur in April 2021) is to present the community with an opportunity to react to, and provide a view on, the scope of the LTP. That is, the matter is not set in stone at this stage.

1.4 In particular, we note comments from Audit NZ about the extreme circumstances in which local councils are preparing LTPs this year, where COVID-19, climate change, water quality and infrastructure are all placing a significant strain on local government resources. Audit NZ acknowledges that:⁴³

All councils will face conflicting priorities across a range of areas, from a decrease in revenue to the affordability of services and planned capital expenditure programmes. Councils will need to assess these priorities against their community's expectations for rates increases and levels of service, while still remaining financially prudent.

1.5 That is, there is acknowledgement in central government that all local government bodies have a significant balancing act to carry out in this round of LTP drafting. There is no expectation that local governments fix all outstanding issues - there is a balance that must be struck, having regard to the expectations of council constituents and the difficult domestic and global circumstances. Notably, the DIA advice does not mention the effect of COVID-19 on the Council's decision-making regarding rates.

⁴³ See: <https://auditnz.parliament.nz/good-practice/ltps/ltps-consultation>.

2. DECISION TO ACCEPT SCENARIO C BASED ON OFFICIAL ADVICE

2.1 Significantly, a key criticism of the councillors raised by both the DIA and the Observer Team is their apparent inability to make strategic decisions without getting involved in operational details or questioning official advice. For example, the Observer Team Report noted:⁴⁴

- a tendency to be focused on operational detail rather than to be operating at the more strategic level that is required of those in governance roles; and
- [a reluctance] to trust and accept professional advice and an inclination to want to dive into operational detail.

2.2 This criticism forms one of the reasons for which the Observer Team has recommended governance training, supported by a Crown Manager and Crown Observer, and was reiterated in DIA advice. However, there is a clear inconsistency between this criticism and the DIA's further criticism of the Council in the context of its decision to accept Scenario C, where such acceptance is based on official advice and recommendations. This appears to indicate the DIA disagrees with the content of the Council's decision, as opposed to the Council's ability to reach that decision in a way expected of them by the statutory context, and has used its disagreement with the content as evidence that the Council is not committed to "delivering a robust LTP"

⁴⁴ At [40].