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For: Owen Pickles

### **Transfer of Building Control Functions to Napier City Council**

We refer to your instructions (through the Department of Building and Housing) for our advice on whether (and if so how) the Chatham Islands Council (**Council**) is able to transfer its building control functions to Napier City Council.

As we understand it, it will be extremely difficult for the Council to obtain accreditation as a building consent authority under the Building Act 2004 (**BA04**). Consequently, the Council is considering transferring its functions to another territorial authority (Napier City Council). You would like advice on the matters which any such transfer agreement should cover and guidance with respect to how such matters should be addressed. You anticipate that any such transfer agreement would deal with liability, scope of services to be provided, methods of service delivery and agreement monitoring.

This report is set out in the following way:

- Executive summary
- Summary of relevant legislation including Chatham Islands Council Act 1995 (**CICA95**) and BA04
- Analysis of legislation and options
- Conclusion on options
- Possible terms of a transfer agreement under section 235 of the BA04.

At this stage, we have not included a draft transfer agreement because there are several procedural steps which the Council will need to go through before it can determine whether a transfer is the appropriate course of action.

In this report, we have also looked at any other ways in which the Council might be able to contract out its building consent functions to enable the Council to make the best decision as to the appropriate course of action.

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## 1. Executive summary

- 1.1 The Council is able to transfer its functions, duties, and powers as a territorial authority under the BA04 to another territorial authority. The Council is also able to enter into an arrangement with another building consent authority for the other authority to perform some or all of the Council's functions as a building consent authority.
- 1.2 In our opinion, the better option for the Council is to transfer its functions, duties, and powers to another territorial authority. However, before the Council can give effect to such a transfer, it will need to undertake a special consultative procedure. A special consultative procedure will take at least 6 weeks to complete.
- 1.3 At this stage, it is premature to advise on the precise nature of any terms of a transfer agreement. However, we would expect such an agreement to cover the following matters:
- Terms of Agreement
  - Purpose
  - Warranties
  - Functions, duties, and powers to be transferred
  - How transferred functions etc are to be provided
  - Reporting mechanism
  - Reviews
  - Payment
  - Liability
  - Resolution of disputes and giving of notice
  - Termination of Agreement
  - Amendment of Agreement.

## 2. Summary of relevant legislation

### *Chatham Islands Council Act 1995*

- 2.1 As you know, the Council is constituted under its own Act, the CICA95. Section 7(1) of the CICA95 provides as follows:

*Except as otherwise provided under this or any other Act, the Council has the functions, duties, and powers of –*

- (a) *a territorial authority under—*
  - (i) *the Local Government Act 2002; and*
  - (ii) *the Local Government Act 1974; and*
  - (iii) *the Local Government (Rating) Act 2002; and*
  - (iv) *the Resource Management Act 1991; and*
  - (v) *any other public Act; and*
- (b) *a regional council under the Resource Management Act 1991.*

- 2.2 Consequently, by virtue of section 7(1)(a)(v), the Council has the functions, duties and power of a territorial authority under the BA04. In this respect, we note that the Council **does not** have the functions, duties or powers of a regional council under the BA04 because of the way in which section 7(1) is drafted.
- 2.3 The CICA95 contains various provisions on the funding of the Council (including Council dues). It also adapts the application of some legislation such as the Resource Management Act 1991 and includes a specific provision for the giving of public notice as follows:

### 9 Public notice

*Where the Chatham Islands Council is required to give public notice under any Act, that public notice shall consist of—*

- (a) notices or placards affixed to a notice board that is accessible to the public without charge in Waitangi, Kaingaroa, Owenga, and Pitt Island; and*
- (b) broadcasts transmitted on not less than 2 days on radio or television received generally within the Chatham Islands Territory (with 2 or more broadcasts on each of those days), which broadcasts shall specify—*
  - (i) that the Chatham Islands Council is giving public notice; and*
  - (ii) the general effect of the notice; and*
  - (iii) each of the locations at which the public notice can be accessed under paragraph (a) of this section and each of the places at which copies of the notice can be obtained.*

### *Building Act 2004*

- 2.4 Under the BA04, there is new requirement for territorial authorities to be accredited as building consent authorities (**BCAs**). Essentially, BCAs must gain accreditation and become registered with the Department of Building and Housing before being able to perform building consent authority functions. These functions include carrying out the whole of the building consent process through to issuing the code compliance certificate.
- 2.5 However, at present, the Council may act as a building consent authority without accreditation and registration up to 30 November 2007. This is the effect of section 450 of the BA04. From 1 December 2007, the Council must be registered and accredited or make adequate provision in accordance with the BA04 as discussed below.
- 2.6 Subpart 2 of Part 3 of the BA04 deals specifically with the responsibilities of territorial authorities under the Act.
- 2.7 Section 212 provides that a territorial authority must perform the functions of a building consent authority within its district. The section states as follows:

**212 Territorial authority must act as building consent authority for its district**

- (1) A territorial authority must perform the functions of a building consent authority within its district, and for any coastal marine area (within the meaning of the Resource Management Act 1991) adjacent to its district that is not within the district of another territorial authority, in relation to—
- (a) any application for a building consent made to the territorial authority; and
  - (b) any building consent granted under that application.
- (2) Subsection (1) does not apply in the case of dams.
- (3) A territorial authority must, in performing its functions as a building consent authority,—
- (a) issue a project information memorandum before granting a building consent; and
  - (b) provide to the New Zealand Fire Service Commission a copy of every application for a building consent of a kind specified by notice under section 46.
- (4) Subsection (1)—
- (a) is subject to the territorial authority's power to transfer, under section 233, any or all of its functions, duties, or powers under this Act to another territorial authority; and
  - (b) does not apply to any function so transferred by the territorial authority.

**2.8** Section 213 sets out how the territorial authority may comply with section 212. It states –

**213 Territorial authority may make arrangements relating to functions of building consent authority**

- (1) A territorial authority may comply with section 212(1) by—
- (a) performing the functions of a building consent authority itself; or
  - (b) making arrangements for 1 or more other building consent authorities to perform those functions on its behalf; or
  - (c) a combination of the methods described in paragraphs (a) and (b).
- (2) An arrangement under subsection (1) may be made—
- (a) by contract; or
  - (b) by any other means.

**2.9** Section 214 deals specifically with liability if the territorial authority makes an arrangement relating to its building consent authority functions.

**214 How liability apportioned if territorial authority makes arrangements relating to functions of building consent authority**

*If a territorial authority makes an arrangement under section 213(1) for another building consent authority to perform all or any of the territorial authority's functions on its behalf,—*

- (a) the territorial authority is liable for the acts and omissions of the other building consent authority when the other building consent authority is acting in that capacity; but*
- (b) the territorial authority and building consent authority may apportion the liability—
  - (i) as between themselves; and*
  - (ii) as they see fit.**

**2.10** Section 215 relates to accreditation and provides as follows:

**215 Territorial authority must gain accreditation and be registered**

*A territorial authority must, for the purpose of ensuring that it complies with section 212(1),—*

- (a) apply for, and gain, accreditation under this Part; and*
- (b) apply to be, and be registered as, a building consent authority under this Part; and*
- (c) maintain that accreditation and registration at all times.*

**2.11** Sections 233 to 236 deal specifically with the transfer of functions, duties, and powers of a territorial authority. The four sections provide a process that requires the territorial authority to use the special consultative procedure as set out in the Local Government Act 2002 (**LGA02**) and also serve notice on the Minister of Building and Construction (currently Hon. Clayton Cosgrove). The parties must then agree on the terms of transfer. These sections state as follows:

**233 Transfer of functions, duties, or powers of territorial authority**

*A territorial authority may transfer 1 or more of its functions, duties, or powers under this Act to another territorial authority, except the power of transfer conferred by this section.*

**234 Procedure for transfer**

*If a territorial authority proposes to transfer any of its functions, duties, or powers under section 233, the territorial authority must—*

- (a) use the special consultative procedure in section 83 of the Local Government Act 2002; and*
- (b) serve notice on the Minister of its proposal to transfer the function, duty, or power; and*
- (c) agree with the other territorial authority to whom the function, duty, or power is to be transferred that the transfer is desirable on either or both of the following grounds:
  - (i) efficiency;*
  - (ii) technical or special capability, or expertise.**

