WENDY
ALDRED KC

1 June 2026

By email only

[redacted]
Central Otago District Council
Alexandra

[redacted]

CENTRAL OTAGO DISTRICT COUNCIL – CROMWELL ENDOWMENT LAND

1. I refer to your letter dated 22 April 2026 seeking my opinion as to the Council's rights and obligations in relation to land vested in the former Borough of Cromwell by Crown grant on 3 November 1881 and our subsequent discussions.

2. Specifically, you have asked me to review the relevant legislation and other documentation and provide my opinion as to whether the land in question (referred to as the **Crown Grant Land**) and associated income is held / received by the Council for the benefit of the current township of Cromwell only (which reflects the legal advice received by the Council from its external lawyers), or for the benefit of the Central Otago district as a whole.

3. Relatedly, you have asked me to consider whether ss 140 and 141 of the Local Government Act 2002 (**LGA 2002**) relating to endowment property apply with respect to the Crown Grant Land.

4. I have summarised my opinion and recommendations in the conclusion to this advice from paragraph 71.

Background

5. On 18 October 1877, the town of Cromwell was proclaimed a borough under s 15 of the Municipal Corporations Act 1876 (**MCA 1876**). Part XIII of that Act provided for Reserves and Endowments. Section 350 provided that the Governor in Council could, at the request of the borough council, reserve any of the waste lands of the Crown within the relevant provincial district "for the purpose of granting the same to the Corporation [of the borough]." The Governor was then required to lay before Parliament a description of land so reserved and unless both houses disapproved, could thereafter:[1]

[1] Municipal Corporations Act 1876, s 351 [emphasis supplied].

Stout Street Chambers
Level 6, Huddart Parker Building
1 Post Office Square, Wellington 6011
P +64 499 5021
M +64 21 419 800
E wendy.aldred@stoutstreet.co.nz

> … grant such land or so much thereof as he thinks fit, to the Corporation of the borough in trust, either for the use and enjoyment of the inhabitants of the borough, or as sites for public buildings or other special uses, *or as an endowment in aid of the borough funds*. …

6. On 3 November 1881, a grant of land was made by the Governor to the Cromwell Borough corporation (in the name of the Mayor, Councillors, and Burgesses of the Borough of Cromwell, their Surveyors and Assigns):2

> … upon trust as an endowment in aid of the Borough funds.

7. The original Crown Grant Land was shown in the plan endorsed on the Grant and the historic certificate of title, which shows an equivalent metric area of approximately 397ha in total. You have supplied documents and maps which demonstrate, in summary, that the extent of the land has been significantly reduced over the years through sales of the land. The area of land remaining comprises, by my calculation, 133.4310ha.

8. The Crown Grant Land was thereafter held by the Cromwell Borough until the borough was dissolved by the Local Government (Otago Region) Reorganisation Order 1989 (**Otago Reorganisation Order**), which came into effect on 1 November 1989. Pursuant to clause 77(1) of the Otago Reorganisation Order:

> All property, real and personal, vested in the corporation of any former authority [including the Cromwell Borough Council] and situated in the Central Otago District is hereby vested in the corporation of the [newly established] Central Otago District Council, subject to all existing encumbrances.

9. Clause 78 of the Otago Reorganisation Order provides:

> Any reference, express or implied, to any former authority in any instrument or other document, or in any entry or record made in any register in relation to any property vested in the Central Otago District Council by clause 77 of this order shall, unless the context otherwise requires, be read as a reference to "The Central Otago District Council".

Advice received by the Council

10. You supplied me with copies of various advice from the Council's solicitors (Galloway Cook & Allan) between 1992 and 2025 considering the Council's ability to deal with the Crown Grant Land and any proceeds of sale of the land. My understanding of the advice is, in summary:

    10.1. The vesting of all the Borough's property in the Council under clause 77 of the Otago Reorganisation Order did not displace the original statutory trust to which

[2] Grant no 20740.

the land was subject due to the qualification at the end of the clause, "subject to all existing encumbrances."

10.2. The deeming provision in clause 78 (which would require the reference to the Cromwell Borough corporation in the Crown grant to be read as referring to the Council) does not apply due to the application of the proviso "unless the context otherwise requires," the context being the statutory trust created by the Crown grant, which would be inconsistent with application of the land or funds generated by it for the benefit of any area other than that occupied by the township of Cromwell.

10.3. Consequently, any proposed sale of the Crown Grant Land will be subject to the requirements of ss 140 and 141 of the LGA 2002, as the land remains vested in the Council upon trust and/or as an endowment under s 140(2).

Land held subject to "statutory trusts"

11. The nature of the interests and obligations conferred on authorities that hold land subject to "statutory trusts" has been considered in various cases. A review of the case law demonstrates (as you would expect) the paramountcy of the relevant statutory scheme in determining the extent of any restrictions on the owner.

New Zealand authorities

12. In *Wellington Harness Racing Club Inc v Hutt City Council*,[3] Hammond J considered land at Hutt Park that had been granted to the superintendent of the province of Wellington. The Governor's power to grant the land to the superintendent was conferred by the Public Reserves Act 1854, which provided that land so granted "may hereafter be reserved or set aside for purposes of Public Utility within the said Province." The superintendent of the relevant province was then, under s 5, to hold the land "upon Trust for the Public Service of such Province for the purposes specified in the grant." Thereafter, s 8 prescribed that that the specific purposes for which any such lands were held could be changed and appropriated for other and different purposes of public utility, provided that the change was authorised by an Act or ordinance of the relevant provincial council.

13. The Governor's grant, dated 16 June 1866 (made expressly under the authority of the Public Reserves Act 1854), stated the land was granted "In trust as a Race Course and for purposes connected therewith." The Provincial Council passed a local Act in 1866 (the Hutt Public Park and Race Course Act 1866) which provided for management of the land by trustees.

14. The 1866 Act was repealed in 1907 by the Hutt Park Act, which provided that the land was now "vested in trust for recreation purposes in a joint standing committee of the [Hutt area] Councils." That Act went on to provide that the land vested in and was held by the

[3] *Wellington Harness Racing Club Inc v Hutt City Council* [2004] 1 NZLR 82 (HC).

committee "subject to the tenancies, easements, and rights to which the land is on that date subject" and discharged the existing trustees from all liabilities in or about the execution of the trusts upon which they held the land. In 1982, further local legislation provided that the land was vested in the Lower Hutt City Council "as a reserve for recreation purposes under and subject to the Reserves Act 1977."

15. The plaintiff argued that the 1866 Crown grant set up a trust "in what might be termed the technical, equity sense (or private law sense)"[4] and that nothing that had happened since in the legislation had extinguished the trust. Hammond J stated:

> [61] To my mind, this is a specific statutory scheme in which the word "trust" has been employed, but in the sense and within the provisions of the 1854 Act. There is a "trust" in the sense that the superintendent could not turn the land to his own account, or even to an improper purpose in the hands of the province. But I find it impossible to see how there could be an independent, free-standing trust in the equity sense, somehow standing apart from the provisions of the very statute which enabled the grant. The argument is simply inconsistent with the statute, and even incongruous. …

16. In *New Plymouth District Council v Waitara Leaseholders Association Inc*,[5] the Court of Appeal considered the High Court's findings as to the legality of the Council's decision to offer historic endowment lands to the Crown for inclusion in the Crown's offer of settlement of Te Atiawa's historic grievances, subject (*inter alia*) to the prior enactment of settlement legislation "that provides for the land to vest free of all statutory trusts, restrictions and other reservations." Harrison J in the High Court had held that the land was held on trust by the Council for specified statutory purposes under 1940 local legislation, and further, that the Council's decision was unlawful because it had failed to act in accordance with its duties as a trustee in resolving to sell the land to the Crown.

17. The Court of Appeal upheld the High Court's conclusion that endowment land held by a local authority for specified statutory purposes is subject to a statutory trust of a public character, but it found that does not necessarily impose on the council all the obligations of a charitable trustee, stating:

> [40] Clearly land held by a local body under statute as an endowment must be utilised for the purposes for which it was endowed, and the owner's power to deal with the land may be circumscribed in other ways as well (there may be a statutory prohibition against sale, for example). In that general sense, such land is held "on trust", and the owner must meet such obligations in respect of that land as are imposed specifically, or by necessary inference, in the relevant enactment. Whether the relevant statute uses the word "trust" or not, land held in this way may properly be described as being held subject to a statutory trust – see *Auckland City Council v The King* [1941] NZLR 659 at 665-7. By "statutory

[4] At [55].
[5] *New Plymouth District Council v Waitara Leaseholders Association Inc* [2007] NZCA 80.

> trust" we mean that the land is held on the terms contained in the statute, whether express or implicit. We do not mean that the local body will be subject to all the obligations of a trustee holding property under an ordinary trust.

And further, at [43]:

> The precise extent of the holder's obligations in any particular case will depend on the terms of the statute under which the land is held, assessed in the context in which the issue arises. The holder of the land will be required to meet those obligations that arise expressly or by necessary inference from the relevant statute.

18. In short, the extent of any continuing obligations on the holder of endowment land will depend on the terms of the statutory regime governing the land, rather than on a presumption that it is subject to the full duties of a trustee (in the equitable sense) in every respect.[6]

19. In *Napier Public Health Action Group Inc v Minister of Conservation*,[7] the High Court considered the status of land that had been vested in the Borough of Napier as a reserve under the Public Reserves Act 1881 in the context of a challenge of the Council's proposed sale of the land. The land had been vested in the Borough "in trust as a site for a hospital and grounds." In 2004, the Minister of Conservation revoked the reserve status of part of the land by Gazette notice, and the Crown then entered into an agreement to sell it. The key issue was whether revocation of reserve status also terminated the statutory trust, allowing the land to be disposed of.

20. In summary, Heath J found that the land was no longer subject to a statutory trust due to the application of s 11E of the Health Sector (Transfers) Act 1993, which expressly specified the consequences of revocation of a reservation of a health sector reserve, including the circumstances in which the former reserve would be remain subject to any reservations or trusts affecting it, namely where the trusts arose independently of the land's statutory reserve status.[8] Because the trust in the case before him arose out of the land's reserve status and not independently of it, the statutory trusts had been terminated by the application of s 11E and could lawfully be sold.

---

[6] At [66], the Court of Appeal held that the Council's decision was not unlawful, noting that there was "no requirement that the Council act within the framework of the 1940 Act when it seeks to have the restrictions imposed by that Act removed."

[7] *Napier Public Health Action Group Inc v Minister of Conservation* [2007] 3 NZLR 559 (HC).

[8] Section 11E(6)(b) relevantly provided that in the case of revocation of the reservation of a health sector reserve, the relevant land "is subject to any reservations or trusts affecting that land arising from Acts (other than the Reserves Act 1977 or any other Act by which the former status as a reserve was conferred or confirmed), Provincial Ordinances, wills, deeds or other instruments."

Overseas case law

21. In terms of Commonwealth authorities, these again tend to underscore the importance of statutory context when considering the status of such statutory trusts.[9]

22. The judgment of the New South Wales Court of Appeal in *Catholic Metropolitan Cemeteries Trust v Attorney-General (NSW)*[10] is interesting for the Court's obiter comments to the effect that where a trust is created by a statute which is later repealed, the question of whether the trust could survive the repeal turned on whether the trust was a charitable trust recognised in equity or merely a statutory trust (ie a trust created by, or authorised by, a statute for a public purpose which is not charitable). The question was important because "if what has been created is a creature of statute, as opposed to a trust recognised by equity, then it can scarcely survive the statute's repeal".[11] Ultimately, the Court held that the legislation and proclamations gave rise to a charitable trust which continued in existence notwithstanding later legislation. However, interestingly for present purposes, the Court considered that:[12]

> … if there were merely a statutory trust, such that the sole source of the obligation that the land be held for the purpose stated in [the relevant provision] was that section, then that obligation cannot survive the repeal of the section.

The effect of the Crown grant

23. In the present case, the MCA 1876 provided expressly for the Crown to grant land to boroughs "upon trust as an endowment in aid of the Borough funds," with the terms of the Crown grant in the present case confirming this statutory purpose. Applying the principles recognised by the courts as set out above, the land was accordingly held by the Cromwell Borough corporation on those terms: *Waitara Leaseholders* (CA).[13]

24. The reference to the land vesting "upon trust as an endowment" is likely to be held to impose on the Borough as grantee an obligation "to ensure that the capital, whether land, funds or money, so set aside should be preserved intact and that the income derived therefrom should be available for a considerable period of time or perhaps in perpetuity as an assured source of income."[14] In the present case, the fact that the MCA 1876 did not

---

[9] See, for example, *R (Day) v Shropshire Council* [2023] UKSC 8, [2023] AC 955. The United Kingdom Supreme Court considered the status of land acquired by the Council under the Public Health Act 1875 and Open Spaces Act 1906 for the purpose of providing recreation land/open space to the public. Such land is treated as being subject to a statutory trust in favour of the public, and members of the public have a right to go onto the land for the purpose of recreation. The Council sold the land subject to the statutory trust to a private developer without following the necessary consultation procedure, but the Court relevantly held that simple transfer of the land subject to the statutory trust into private ownership was not sufficient to extinguish the trusts. Those rights would only be extinguished if the local authority complied with the bespoke procedure set out in the legislation.
[10] *Catholic Metropolitan Cemeteries Trust v Attorney-General (NSW)* [2024] NSWCA 30, (2024) ALR 33.
[11] At [152].
[12] At [225].
[13] *Waitara Leaseholders*, above n 5, at [40] and see paragraph 13 above.
[14] *Auckland City Corporation v The King* [1941] GLR 456.

prohibit sale of the Crown Grant Land, coupled with the reference to the purpose of the endowment being to aid (or supplement) the Borough funds, would support an interpretation that permitted sale of the land provided sale proceeds were retained or reinvested to preserve the value of the endowment. This is consistent with the advice that the Council's solicitors have provided.

25. In your instructions, you have suggested that "in aid of the Borough funds" is referable to Part IX of the MCA 1876 (headed "Of the Borough Fund"). This part of the Act provides that "the Borough Fund" consists of monies of various kinds received by the Borough and held in its account ("The Borough Fund Account"). The monies described as constituting the Borough Fund include "all rents and profits from property vested in the Corporation" and a general catch-all "all other moneys which may become the property of the Corporation of the borough." I agree with your analysis in this regard and with your conclusion that "the phrase 'borough funds' in the Crown grant is a generic term that referred generally to the funds of the corporation of the Borough of Cromwell in its bank account."

26. Accordingly, the effect of the Crown grant was to vest the land in the Borough corporation to provide income for the Borough, subject to the capital (the land or sale proceeds) being retained by the Borough corporation in perpetuity. The grant placed no express restriction on how such income could be used once the funds were paid into the Borough's bank account.

The effect of subsequent local government legislation

27. It is necessary to consider the nature of the obligations imposed on the Cromwell Borough in respect of the Crown Grant Land by the successive Municipal Corporations Acts, each of which repealed the former. The reason for this is that due to the statutory source of the Crown grant and its associated conditions, it is important to consider whether any subsequent enactment had the effect of extinguishing those conditions or the manner in which the land was held by the Borough, even prior to the 1989 reorganisation of local government. The discussion regarding *Catholic Metropolitan Cemeteries* above demonstrates that where land is held by a local authority on trust for a particular statutory purpose, but which is not a trust in an equitable sense, the statutory limitation on purpose (and therefore use or disposal) may not survive repeal. I assume, however, the NSW Court of Appeal would have excepted from this comment cases where subsequent legislation expressly preserved existing "trust" purposes.

The Municipal Corporations Act 1886

28. The MCA 1886 provided for the continuation of existing borough corporations and contained a broad provision in s 23(1) providing that the Corporation of each such borough "shall, *in respect of all property, rights, claims, obligations, liabilities, contracts, and engagements, and for all purposes whatsoever, in law or equity*, be deemed to be the same Corporation as that existing in such place before its constitution as a borough under this Act."

The Municipal Corporations Act 1908

29. Under the MCA 1908, again, pre-existing boroughs were continued under s 5, which provided:

> The Corporation of each city and borough as subsisting on the coming into operation of this Act shall be the same Corporation under this Act, and shall continue to have its existing name and common seal, *and shall retain its property and liabilities, and all existing contracts and engagements of such Corporation shall be enforceable by and against it*.

30. I note that the scope of the rights and obligations of the local authority preserved by this section is not as expansive as s 23(1) of the former 1886 Act, which referred to "all rights, claims and obligations". It would not be a natural extension of the reference to "contracts and engagements" to hold it to encompass the preservation of any special purposes imposed by way of statutory trust However, I think that the continuation provision of s 5 read as a whole would probably be regarded by a court considering the matter as continuing the Corporation's ownership of the Crown Grant Land subject to the existing trust.

The Municipal Corporations Act 1933

31. The 1933 Act contained substantially the same continuation provision as s 5 of the 1908 Act (set out above).

32. Additionally, it provided at s 156 (Council may sell or exchange lands vested in Corporation) that:

> (2) Where any land so sold or exchanged was at the time of such sale or exchange vested in the Corporation in trust for any particular purpose or purposes, whether by or pursuant to any Act or any deed of trust or otherwise howsoever, all moneys received by the Council upon such sale or exchange shall be applied in or towards the purchase of other lands to be held for the same purposes as affected the lands disposed of, and all lands received in exchange shall be held for the purposes that affected the land given in exchange.

33. Section 156(4) prohibited (*inter alia*) the sale or exchange of land held for any particular purpose, if the sale of the land was prohibited by the instrument creating the trust.

The Municipal Corporations Act 1954

34. Under the MCA 1954, boroughs were continued under s 4. Where a new borough was constituted under that Act, s 7 provided:

> (a) The Corporation of the borough shall, in respect of all property, rights, powers, authorities, claims, obligations, liabilities, contracts, and engagements,

> and for all purposes whatsoever, be deemed to be the same Corporation as that existing in that area at the time of its becoming a borough: […]

35. The powers of sale of endowment land in s 150 were in relevant respects identical to those contained in s 156 of the MCA 1933.

36. The MCA 1954 was the last of the Municipal Corporations Acts, which were replaced by the Local Government Act 1974. The MCA 1954 survived until its repeal by the Local Government Amendment Act (No 3) 1977.

The Local Government Act 1974

37. The enactment of the Local Government Act 1974 (**LGA 1974**) did not immediately repeal the MCA 1954, but this was effected by the Local Government Amendment Act (No 3) 1977. That Act contained a set of transitional provisions in s 9 which deemed every territorial authority existing at the commencement of the Act to be a district constituted under Part 2 of the LGA 1974 and provided, *inter alia*, at subs (4)(a) that

> The Corporation of each district as subsisting at the commencement of this Act shall be the same Corporation under the principal Act (LGA 1974) and, subject to the provisions of the principal Act as amended by this Act shall retain its property and liabilities and powers, and all existing contracts (including contracts of service) and engagements of the Corporation shall be enforceable by and against it.

And, at subs (6):

> Every reference to the Corporation of a borough or city under the style of "The Mayor, Councillors, and Citizens of the Borough (or City) of open [Name] in any Act, regulation, order, or by law, or in any agreement, deed, instrument, certificate of title, application, notice, or document whatsoever, shall, after the commencement of this Act, be read as a reference to that Corporation under the style of "The [Name of borough or city] Borough (or City) Council".

38. Following the amendments to the LGA 1974 effected by the Local Government Amendment Act (No 3) 1977, with respect to the sale or exchange of land, s 230 of the LGA 1974 provided that subject to subs (3) and (4), the Council could by resolution sell or exchange land vested in the corporation of a district and:

> (3) Where any land so sold or exchanged was at the time of the sale or exchange vested in the Corporation of the district in trust for any particular purpose or purposes, whether by or pursuant to any Act or any deed of trust or otherwise howsoever: (not being land vested in the Corporation as an endowment for the general purposes of the district), all money received by the council upon the sale or exchange shall be applied in or towards the purchase of other land to be held for the same purposes as affected the land disposed of, and all land

received in exchange shall be held for the purposes that affected the land given in exchange.

(4) The council, with the consent of the Minister, and subject to such terms and conditions as the Minister thinks fit, may sell or exchange any land vested in the Corporation of the district as an endowment for the general purposes of the district. Nothing in subsection (1) or subsection (2) or subsection (3) of this section shall apply with respect to the sale or exchange of any such land. …

39. Section 230 differed from s 156 of the MCA 1954 and its predecessors in carving out an exception for land held as an endowment for "general municipal purposes" and providing that with the Minister's consent, such land could be sold with no restrictions on the use of the proceeds of sale.

40. I have not been able to locate any indication that following the enactment of the Local Government Amendment Act (No 3) 1977 there was any further amendment until the 1989 Otago Reorganisation Order affecting the legal status of the Cromwell Borough Council and its Corporation. In short, the above survey of the relevant continuation provisions of the successive local government legislation between 1876 and 1989, indicates the likely position is that the Cromwell Borough corporation held the Crown Grant Land for the purpose specified in the Crown grant (an endowment in aid of borough funds) and the land and any proceeds of sale had to be dealt with accordingly.

The Local Government Act 2002

41. The enactment of the LGA 2002 continued and broadened the Council's ability to request Ministerial approval to authorise uses of endowment property (or income from that property) that differed from the purpose of the vesting, providing no limitation on endowment property in respect of which the Minister could grant approval (compare s 230 LGA 1974, which only allowed for this where the endowment land was held for general municipal purposes).

The effect of the Otago Reorganisation Order

42. As to the effect of the Otago Reorganisation Order, I note, as a starting point, that s 35(1) of the LGA 1984 (as amended by s 2 of the Local Government Amendment Act (No 2) 1977) required the Commission to include in the scheme any applicable provisions from Schedule 2 of the Act, which included (relevantly):

3. All property, real and personal, vested in the Corporation of the district of an abolished local authority, subject to all existing encumbrances, shall vest in the Corporation of its successor.

This was the statutory underpinning of clauses 77 and 78 of the Otago Reorganisation Order.

Clause 77 "subject to all existing encumbrances"

43. As noted above, clause 77 vests all property of the Cromwell Borough corporation in the corporation of the Council, "subject to all existing encumbrances." In terms of whether a statutory trust of the kind at issue should be considered an "encumbrance" as that term is used in the Otago Reorganisation Order, the judgments I have located considering the proper construction of "encumbrance" tend to emphasise the context-specific nature of the word:

43.1. In Australia, it has been said that "encumbrance" is not a word of fixed legal meaning. It has been described as "protean, a word which takes its precise meaning from its context".[15] In the context of a will, for example, "encumbrance" has been interpreted to include all the debts and expenses of an estate (secured and unsecured).[16] In other contexts it has been given a narrower meaning of a security interest in, charge or other liability attaching to a property.[17]

43.2. Canadian courts have similarly noted that "encumbrance" has no technical meaning and is to be interpreted according to the context in which it is found.18 By its "generally accepted definition it comprehends … 'every right to or interest in the land which may subsist in third persons to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance'".[19]

44. The most extensive judicial discussion of the meaning of "encumbrance" I have been able to identify in the New Zealand case law is the High Court's decision in *Hodge v Applefields Ltd*, which dealt with the term as used in the Land Transfer Act 1952.[20] In that case the Court considered the appropriate definition of "encumbrance" in this context was:[21]

> … any memorial on the title, which interferes with any otherwise lawful use of the land [by] the registered proprietor, by creating a charge or interest over the land for the benefit of another.

And:

> I do not accept the term "encumbrance" is exclusively limited to monetary obligations. I accept Mr Atkinson's submission that it is any obligation, running with the land, enforceable against, or in relation to the land, and not just in personam.

---

[15] *Vicinity Funds Re Ltd v Commissioner of State Revenue (No 4)* [2024] VSC 658 at [154] citing *Harry v Valuer General (SA)* (1975) 12 SASR 446 (SASC) at 450.
[16] *Wallace v Love* (1922) 31 CLR 156.
[17] *Commissioner of State Revenue v Bradney* (1996) 96 ATC 5130 (VSC).
[18] *Clark v Raynor* (1922) 65 DLR 425 (NSCA) at 439.
[19] At 439.
[20] *Hodge v Applefields Ltd* HC Christchurch CP44/96, 6 December 1996.
[21] At 9 per Hansen J.

45. On appeal the Court of Appeal in *Hodge* confirmed that "an unencumbered estate in fee simple" in the context of the Land Transfer Act "must mean a title which does not have registered against it memorials evidencing interests which derogate from the unrestricted enjoyment of ownership in fee simple".[22] The judgments in this case demonstrate that, in keeping with the usual principles of statutory interpretation, the Court will take a purposive and contextual approach to the meaning of the term, based (in *Hodge*) on the context of the land transfer legislation.

46. In the present case, the relevant statutory context is provided by the LGA 1974 as it applied at the relevant time, and the Otago Reorganisation Order issued pursuant to that Act. The provisions of the LGA 1974 governing the reorganisation were inserted into the principal Act by the Local Government Amendment Acts (No 2) 1977 and (No 3) 1988 and provide no guidance as to construction of the term.

47. The overall purpose of the LGA amendments was to give the Local Government Commission a free hand (following the 1988 amendments) to prepare schemes of reorganisation that could effect radical change or confirm the existing system of local government (it opted for the former). Accordingly, the Act provided for matters that should or could be included in reorganisation schemes in a fairly general way, with the detail left to the Local Government Commission and the contents of the Orders in Council. The upshot is that the Act does not provide much by way of context or purpose that could assist with the proper construction of "encumbrance" as it is used in clause 77.

48. There is an argument available to the Council that if Parliament had intended to ensure that statutory trusts applying to endowment land conferring rights and duties on a local body survived the dissolution of that body and revesting of its assets, even to the extent of confining the relevant rights and duties in respect of the endowment to the area formerly represented by the dissolved local body, it would have provided expressly for that outcome. An example of this is provided by s 358 of the MCA 1876, which provided expressly for the consequences of dissolution of boroughs on existing trusts:

> All public reserves or other property held in trust by the Corporation of the borough shall, after the dissolution of its Corporation, be held by the Corporation of the county, subject to the same trusts and uses as theretofore, and to any laws for the time being in force as to the alteration or termination of such trusts and uses."

49. Further, it could be argued that in the absence of an express provision of this kind, it would make little sense to hold that in circumstances where the Borough itself has been abolished "an endowment in aid of Borough funds" could continue as an enforceable obligation, capable of being held to constitute an encumbrance on the land.

[22] *Applefields Ltd v Hodge* (1998) 3 NZ ConvC 192,726 (CA).

50. Against that, however, as the Council's solicitors have argued, the term "encumbrance" is broad and could be construed as encompassing an obligation in the nature of a statutory trust.

51. As you mentioned during our conversation on 26 May 2025, I note also that in the Waitara Leaseholders case, the courts implicitly accepted that land that had been vested in the former Waitara Borough Council as an endowment for specified public purposes of the prevention of erosion and other maintenance and works relating to the Waitara River became vested (post-reorganisation) in the New Plymouth District Council for the same purposes. There is no discussion in either of the Waitara judgments of the effect of the relevant Reorganisation Order, but there is an implicit acceptance that the dissolution of the Borough Council and revesting of its property in the District Council did not abolish the endowment/statutory trust purposes for the holding of the land.

52. In short, I consider that the statutory trust survived the revesting and continues to apply to the Crown Grant Land.

Clause 78 proviso "unless the context otherwise requires"

53. As noted above, clause 78 has the effect of requiring all references to the former local authorities "in any instrument or other document, or in any entry or record made in any register" to be read as references to the Council "unless the context otherwise requires."

54. The phrase "unless the context otherwise requires" is generally employed in the interpretation sections of statutes. In this regard, the relevant context has been treated judicially as relating to the statute "rather than something extraneous."[23]

55. Regarding clause 78 of the Reorganisation Order, the relevant context for the purposes of the proviso must be taken to refer to the relevant legal and factual context surrounding the entry of the name of the former authority on the relevant record, as well as the consequences of the application of the proviso.

56. In this case, I do not consider the purpose of the original grant (being in aid of the Borough funds) supplies a sufficiently compelling contextual reason to depart from the general rule in clause 78, given that the intention of clause 77 that all property of the former authorities in the newly constituted Central Otago district be vested in the Council from the date of the Otago Reorganisation Order coming into effect.

57. In practical terms, the original purpose of the endowment has been superseded by the new regime, which is premised on a single, larger authority having control over all of the real and personal property of the former authorities and applying that property and income from it in a manner consistent with its responsibilities for all wards and communities within the Central Otago district. Accordingly, I would argue that there

[23] See *AFFCO New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212 at [58]–[65] per Arnold J.

would be no good reason for the Crown Grant Land (or sale proceeds retained as capital) to be reserved for the benefit of the area associated with the former Cromwell Borough.

58. There is also a practical argument, perhaps based partly on fairness, that the grant in this particular case was no more than a Crown gift to the Cromwell area to supplement its income from rates. Accordingly, it could be argued that the Cromwell township should not retain this benefit by virtue of a quirk of historical Crown land practice, when the moneys held by other former borough corporations prior to reorganisation have all "gone into the district pot" upon dissolution of those boroughs. While I do not have a full understanding of the factual picture in relation to the revesting of borough assets from November 1989, as a general proposition this makes sense to me.

59. I note that in our discussion last week you helpfully noted the potential application of s 32 of the Legislation Act 2019. Section 32(1)(b) of that Act provides that the repeal or amendment of legislation does not affect an existing right, interest, title, immunity, duty, status, or capacity. This could be said to compel the result that the Otago Reorganisation Order (in abolishing the Cromwell Borough Council and vesting its property in the new CODC) does not affect the nature of the rights and obligations under the statutory trust created by the Crown grant.

60. However, I consider that the relevant legislative context (to which s 9 makes s 32 – and the whole of Part 2 of the Legislation Act – subject), as discussed in paragraphs 57 and 58 above, precludes that conclusion. Further, such an interpretation would make no sense because following reorganisation the Cromwell Borough corporation (being the holder of the relevant rights and duties under the terms of the Crown grant) no longer existed.

61. Accordingly, I consider there is a good argument in favour of the Council treating all references to the Cromwell Borough in the relevant instruments and land records as references to the Council.

62. I should note at this point that the particular statutory purpose of the Crown grant in the immediate case (simply to supplement the former Borough funds) is highly relevant to this conclusion, and that in the case of endowments specified to be for purposes directly affecting a particular locality or benefitting a group of citizens defined by reference to a locality, the context could require a different result.

63. For example, where other lands granted by the Crown are held in trust for more geographically specific purposes (as in the Waitara River example discussed above) the likely result, applying the analysis above, would be that the land would be retained for that specific trust (e.g. lands endowed for the specific purpose of protecting a particular Central Otago waterway).

64. A further example might be the kind of grant considered by the English Supreme Court in the Shropshire case, discussed at note 9 below. That case tends to suggest that where the purpose of an endowment of land is to provide a recreational area for the citizens of the particular borough, a Court will be less likely to set aside that precise purpose without

express statutory extinguishment. Applying this principle to the present circumstances, I consider a court faced with the kind of factual situation in Shropshire may be more likely find that the proviso to clause 78 ("unless the context otherwise requires") would apply to preclude reading references to a previous borough or its citizens as a reference to the new wider district.

65. I should add that depending on the prevalence of more particular kinds of grant throughout the district such as those discussed in the two preceding paragraphs, it could be argued that an unfairness to Cromwell would result in not upholding the original purpose of the Crown Grant as it was made – being to confer a financial benefit on that particular township.

66. However, on the basis of the information available to me, I consider the better view is that following reorganisation, the reference to "the Borough funds" in the Crown grant should be read as meaning "the Council's funds" which the Council may apply for district purposes and not solely for the benefit of the Cromwell area/township.

Application of s 140 and s 140 of the Local Government Act 2002

67. You have asked me to consider the application of ss 140 and 141 of the LGA 2002, which apply to property vested in a local authority in trust or as an endowment. I note these provisions are the equivalent of the former s 230 LGA.

68. In short, if one accepts the arguments suggested above in favour of the Council owning the Crown Grant Land (and capital raised through previous dispositions) subject to an endowment to enhance District Council funds, then ss 140 and 141 will apply.

69. However, assuming the Council wishes simply to retain the Crown Grant Land and use the proceeds for purposes consistent with the endowment purpose as adjusted by the effect of clause 78 (in aid of Council funds) then there is no requirement for Ministerial authorisation.

70. If the Council wishes to sell or exchange any of the Crown Grant Land, it can do so, subject to compliance with:

    70.1. s 141(1)(a) (which would require, in effect, any sale proceeds or land received in exchange to be retained to maintain the endowment capital in accordance with the purpose of the grant); and

    70.2. the requirement of s 141(1)(c) to notify the Minister for Land Information and the Minister in Charge of Treaty Negotiations of the proposed sale or exchange.

Conclusion

71. I have concluded there is a sound argument available to the Council that it has, since 1 November 1989, held the Crown Grant Land "on trust as an endowment in aid of Council funds" and that accordingly the Council may apply the income received from the land to

district-wide purposes. Specifically, I consider that the application of clause 78 of the Otago Reorganisation Order would have the effect of deeming the references to the former Cromwell Borough to mean the Council. On the information available, I do not consider it is likely that a court considering the matter would hold the relevant legal and factual context compels the conclusion that the land remains held only for the benefit of the township of Cromwell.

72. However, given the value of the Crown Grant Land (which I understand is significant) and its associated income streams to the Council, I would recommend that the Council take appropriate steps to clarify the position rather than proceeding on the basis that it can now treat the land as its own, subject to an endowment for the enhancement of general Council funds.

73. As I have noted, while I consider the arguments for that position are sound, I do not consider the position taken by the Council's solicitors to be completely unarguable. Further, there may be evidential matters relating to other land holdings in the Central Otago district that could be relevant to the approach I have taken to the application of clause 78 of the Otago Reorganisation Order (see above, paragraph 65).

74. The options available to the Council, assuming it wishes to proceed to confirm its rights in respect of the Crown Grant land would be either:

    74.1. to promote legislation (presumably the Council would want any amendment simply to confirm that the remaining Crown Grant Land is vested in it without restrictions, even if on a "for the avoidance of doubt" basis); or

    74.2. to apply to the High Court for a declaration confirming the legal position in favour of the Council's ability to apply the income from the Crown Grant Land for district purposes. In my view, this would be a suitable case to seek a declaration under s 4 of the Declaratory Judgments Act 1908.

75. I would be happy to discuss these options with you following your consideration of this advice. An advantage of legislative amendment is that the Council may wish to consider including other endowment lands in the district, whereas the declaratory relief available in litigation will necessarily be restricted to the particular scenario before the Court (although of course some more general clarification of the law may be provided, which would presumably be of assistance in relation to other endowment landholdings).

76. Thank you for your instructions.

Yours faithfully,

WAldred

Wendy Aldred KC