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11 June 2015

Property & Facilities Manager
Central Otago District Council
PO Box 122
ALEXANDRA 9340

For [redacted]

[redacted]

COUNCIL ENDOWMENT LAND

We refer to the various questions arising in relation to where an endowment purpose is "for Borough funds" and as a consequence of the local government reorganisation in 1989 the boroughs no longer exist.

We previously provided an opinion in a letter of 22 December 1992 related to the present inquiry.

Further to the information set out in that previous opinion, we now deal with the additional questions as follows:

1. There has been nothing subsequent to December 1992 either by way of legislation or decisions of the courts that requires any reconsideration of that earlier opinion.

   We do observe that subsequent to 1992, the Waitara Leaseholders Association case, referred to in our letter of 27 May 2008, did confirm the strictness of boundaries to be applied to land held in trust or as an endowment. Also, although sections 140 and 141 of the Local Government Act 2002 which were central to the opinion of 27 May 2008 are not directly relevant to the opinion of 22 December 1992, those sections are understood to be significant if a sale of endowment land is being considered. Consequently, we note that there has been the amendment (27 November 2010) to section 141, which repealed the requirement to identify in what was then referred to as the LTCCP, endowment land for which there was a proposal to sell.

2. We agree that land held for borough purposes or the proceeds of sale can only be used for the benefit of what may be considered to be the former borough. That does raise the issue of what may now be considered the "borough".

   We consider that what is to be deemed the area of, such as, what would have been the Cromwell borough, is to be accepted as still evolving. Therefore, it is the area from time to time covered by the community of Cromwell or the area that can be regarded as if it was the town of Cromwell.

3. To the extent that a wider area may obtain some benefit from the use of an endowment, we consider that does not prevent the use of an endowment for, such as, funding an upgrade of a major hall that may service a wider area. It is likely to often be the case that it is not

possible to totally ring-fence the area that will benefit from the use of endowment funds. In our opinion it is the primary purpose of the use of the funds which is the test as to what is lawful.

Illustrations of how other local authorities have regarded specific endowment funds and how there may indirectly be a wider benefit appears from the attached resolution of the Queenstown Lakes District Council dated 8 October 2013 and the extract from the Waipa District Council 10-year plan 2012-2022 (page 319).

4. For a purpose, such as, a water scheme -

   To the extent that there are identifiable specific costs for servicing an area beyond what may be considered to be the "borough" then those costs could not be covered by a restricted endowment fund. Consequently, not covered would be direct costs for piping beyond the "borough" and identifiable additional costs for the pumping, treatment, maintenance and procurement of water.

5. An endowment for "betterment of borough funds" -

   An endowment fund is one that is effectively a trust fund. And we note that "betterment" may instead be read as "improvement". We observe that the use of the term "betterment of borough funds" appears quite singular. Related expressions are more often – "for use of the district", "in aid of borough funds", "for town improvement" and "improve borough services".

   Unless the endowment stipulates otherwise, the accumulation of income within the fund does not have to be held in perpetuity. Otherwise, while the fund may continue to improve to the extent it increases in value, it achieves no material benefit for the relevant area.

   The purpose of an endowment is usually considered to be to ensure that capital, whether land, funds or money, is set aside so as to be preserved intact (sometimes referred to as a permanent endowment). Income should be available for a considerable period of time, presumably in perpetuity, as an assured source of income. Accordingly, interest can be used as long as there is a benefit to the relevant area. The use of capital would be an exception to the general rule and would require a specific direction in the endowment (may be referred to as an expendable endowment).

6. For land held for endowment purposes whether the sale proceeds have to be put back into retaining land or can be used for a purpose in accordance with the endowment –

   Sections 140 and 141 provide a code for the sale of endowment land.

   While section 140(3) sets out that property must be retained for the purpose for which it has been vested, that is subject to section 140(4)(b) under which, unless there is an express prohibition, the Council may sell the property and use the proceeds for a purpose identified in accordance with section 141. There is also the provision s140(4)(a) for the Minister to approve additional or different purposes.

   Under section 141 there is no requirement to purchase another property. What is required is a use that is consistent with the purpose of the endowment. It will usually be the case that to be consistent with the purposes of the endowment, the purchase of another property is necessary, but each situation depends on the individual wording of the endowment. That opinion has earlier been expressed in our letter of 27 May 2008 as a requirement for the retention of value by way of either the purchase of other property or at least an enhancement of the value of other property.

We note that under the Local Government Act 1974 (section 230(4)) there was, by comparison, a specific requirement to purchase other land (copy of s230 **attached**).

7. We also consider the following documents may be relevant to endowment funds: Central Otago District Council policies –

   Pages 1 and 6 of the Investment Policy (July 2009)

   Pages 24 and 25 of the LTP 2015-2025 (para 8).

8. By way of a further illustration of the administration of an endowment fund (in addition to what is referred to in clause 3 above) we **attach** -

   Reported release of the Tasman District Council in relation to the Port Motueka Endowment Fund

   You will see a reference to the endowment fund having been ruled as "no longer valid" but for the purpose of this being illustrative that is not relevant.

If there is any further commentary you require we shall be pleased to hear from you.

Yours faithfully
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desired at the hall and the report sought the Council's approval for these works to be undertaken using the funds carried forward.

> **On the motion of Councillors Cocks and Battson the Council resolved that the proposed upgrade work on the deck, storage shed and kitchen of the Glenorchy Hall be approved, with the maximum amount to be spent to be $26,000 plus GST.**

4. Arrowtown Community and Sports Centre Request for Support

A report from Ruth Stokes (General Manager Operations) discussed options for the Council making a financial contribution to a project to construct a new sports facility and to reposition the rugby ground on Jack Reid Park. The report noted that $700,000 was sought but recommended that the Council limit its cash contribution to $400,000 in addition to the direct costs of repositioning the rugby field. The report also recommended that the Council's cash contribution come from the Arrowtown Endowment Fund, meaning that there would be no effect upon rates.

Some concern was expressed about allocating this amount of public money towards a community project and whether such a contribution would create an expectation amongst other community groups who wished to develop new facilities of similar levels of support.

Councillor Perkins expressed support for the project, noting that it would provide a useful alternative to the Athenaeum Hall. Councillor Stamers-Smith supported the project and the proposed funding stream, noting that it effectively cost the Council nothing.

On the motion of Councillors Perkins and Stamers-Smith it was resolved:

1. **That the Council endorse a $500,000 contribution to the Arrowtown Community and Sports Centre Incorporated proposal to construct a new facility at Jack Reid Park and reposition the rugby field;**
2. **That the Council $500,000 contribution to the Arrowtown Community and Sports Centre Incorporated comprise:**
   a) **The direct costs associated with repositioning of the rugby field including tree removal and shifting ancillary services;**
   b) **The cash difference between the direct costs and $500,000 to be made available to support the construction of the new facility at Jack Reid Park; and**
   c) **That the cash difference be funded by the Arrowtown Endowment Fund;**

Proposed Disposal of Endowment Land and Use of Endowment Funds

As a result of the Local Government reorganisation in 1989 and subsequent property purchases Waipa District Council currently holds 69 properties "in trust" for the benefit of the people of the district. We hold cash within separate Cambridge, Te Awamutu, Pirongia and District-wide Endowment Funds. The money in the funds is available pending future property purchases or development, and the funds may be used to offset external debt. Any internal lending of this type would be at an interest rate based on council's Cost of Capital and would be repaid to the endowment account on an annual basis.

The Local Government Act 2002 places restrictions around how the properties are dealt with, especially when we are contemplating the disposal of the properties and the use of the funds generated from the disposal.

The proceeds of any sale will be reinvested, including for the development of community facilities for the long term benefit of the district. We will seek approval from the Minister of Local Government under section 140(4) (a) (ii) of the Local Government Act 2002 in situations where the original purpose for which a property was vested in council differs from the purpose to utilise the proceeds arising from the subsequent sale of that property. An example of this is the proposal to use a combined total of around $1.6 million of Te Awamutu and District-wide endowment funds to build a new Te Awamutu library. Fuller disclosure of the use of these endowment funds and the project itself is provided in the Key Projects section of this plan (refer to pages 44-59).

Previously we were required to identify properties considered for disposal and include them in their Long Term Plan. A recent amendment to the Local Government Act 2002 removes this requirement. However Waipa District Council has decided that it is in the interest of Waipa District residents that where council is contemplating the sale of any endowment property then these will be identified within the plan. The table below describes these properties.

A full list of endowment properties including location maps is available and can be found on our website (www.waipadc.govt.nz).

Location	Legal Description	Land Area (HA)
Addison St	Allotment 8, Town of Cambridge West	1.6187
Burns St	Allotment 199, Town of Cambridge West	0.215
Cnr Burns St/Thompson St	Lot 2, DPS 52341	1.054
899 Maungatautari Rd (ex Geck Farm)	Lot 2, DPS 89441	40.58
Cnr Taylor/Vogel/King St	Lot 1 DP 423118	0.4318
Cnr Taylor/Vogel/King St	Lot 2 DP 423118	0.4086
312 Roche St	Lot 9, DPS 35638	0.0513

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Port Motueka Endowment Fund's future secure

August 16th, 2012
[TDC press release]

Tasman District Council's Corporate Services Committee resolved today to continue to "ring fence" the Port Motueka Endowment fund and to use it to benefit the Motueka harbour and Motueka Coastal area.

"This resolution should give the users of the area and local ratepayers confidence, particularly after the 2009 High Court decision that said the endowment fund was no longer valid and therefore the funds could be put to general use beyond the original mandate, said Tasman Mayor Richard Kempthorne.

"In making our decision we took into account the history and original purpose of the 95 year old account and believed, despite various amalgamations and changes in local governance, the funds were generated in Motueka using Motueka property for the specific purpose of maintaining the assets for the benefit of the whole District.

"The Council has maintained the endowment fund as a separate account since the High Court decision in 2009 to enable the decision-making process we have been through today. As a result it is a purely a matter of putting the policies and processes in place to meet the objectives of the fund."

These policies and processes will be presented in draft at the next Corporate Services Committee.

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[230 Sale or exchange of council land (*Repealed*)

(1) Except as provided in subsections (3) to (7) of this section, and subject to any other provision of this Act and to the provisions of any other enactment, the council, pursuant to a resolution made after notice has been given in accordance with subsection (2) of this section, may sell any land vested in the Corporation of the district, or exchange any such land, and in respect of any such exchange may give or receive any money for equality of exchange.

[[(1A) In the case of any land that was, immediately before the commencement of this subsection, subject to the Harbours Act 1950 and held by a local authority as an endowment, or on trust, for harbour-related purposes,—

(a) The land may not be sold without the prior written consent of the Minister; and

(b) The Minister may give that consent unconditionally or subject to such conditions as the Minister thinks fit; but

(c) Nothing in this subsection requires that the money received from the sale of such land be applied for the purpose of purchasing other land for harbour related purposes.]]

(2) Public notice of the time and place of the meeting at which the resolution is to be submitted to the council and of the purport of the resolution (including the name of and number in the road, or some other readily identifiable description of the land) shall be given not less than 14 clear days before the date of the meeting, but no such notice shall be necessary in any case where the land is sold to any person who wishes to build a house thereon for the personal occupation of himself and his family or of occupying with his family any house already on the land.

(3) Where any land vested in the Corporation of the district is sold or exchanged pursuant to subsection (1) of this section then, in any case where under subsection (2) of this section public notice is required to be given, the District Land Registrar shall, before registering the transfer of title to the land, be satisfied, by a certificate endorsed on the memorandum of transfer and signed by the [[principal administrative officer]] of the council or by a solicitor of the High Court, that public notice complying with subsection (2) of this section has been properly given.

(4) Where any land so sold or exchanged was at the time of the sale or exchange vested in the council in trust or as an endowment for any purpose or purposes, whether by or pursuant to any Act or any deed of trust or otherwise howsoever, then, notwithstanding anything in the instrument creating the trust or endowment, but subject to subsection (8)(d) of this section, all money received by the council upon the sale or exchange shall as soon as practicable be applied in or towards the purchase of other land to be held for the same purposes as the land so sold or exchanged or in accordance with subsection (5) of this section.

(5) The Minister may, subject to subsection (8) of this section, authorise the council to apply all or part of the money so received in or towards the purchase or other acquisition of other land to be held for such other purposes as the Minister specifies.

(6) If any land to which subsection (4) of this section applies is sold then, unless the Minister otherwise consents,—

(a) The land shall not be sold for a price that is less than the capital value of the land, as determined by [[a registered valuer in accordance with the Rating Valuations Act 1998]] not earlier than 6 months before the date of the sale:

(b) In the case of leased land to be sold to the lessee, the land shall not be sold for a price that is less than the unimproved value of the land plus the value of any improvements not formerly made by or purchased by the lessee, that price being determined by [[a registered valuer in accordance with the Rating Valuations Act 1998]] not earlier than 6 months before the date of the sale:

(c) In the case of an exchange, the total of—

(i) The capital value of the land received in exchange, as determined by [[a registered valuer in accordance with the Rating Valuations Act 1998]] not earlier than 6 months before the date of the exchange; and

(ii) Any money received by the council by way of equality of exchange,—

shall not be less than the capital value of the land given by the council in exchange, as determined by [[a registered valuer in accordance with the Rating Valuations Act 1998]] not earlier than 6 months before the date of the exchange:

(d) In the case of an exchange between the council and the lessee of leased land, the total of—

(i) The value of the land received by the council in exchange, as determined by [[a registered valuer in accordance with the Rating Valuations Act 1998]] not earlier than 6 months before the date of the exchange; and

(ii) Any money received by the council by way of equality of exchange,—

shall not be less than the unimproved value of the land given by the council in exchange, plus the value of any improvements not formerly made by or purchased by the lessee, as determined by [[a registered valuer in accordance with the Rating Valuations Act 1998]] not earlier than 6 months before the date of the exchange.

[[(6A) For the purposes of any determination by [a registered valuer] under subsection (6) of this section the [Rating Valuations Act 1998] shall be read as if the following definition of the term "improvements" had been substituted for the definition of that term set out in section 2 of that Act:

"**Improvements** means all work done or material used at any time on the land by the expenditure of capital or labour by any owner or occupier thereof in so far as the effect of the work done or material used is to increase the value of the land, and the benefit thereof is unexhausted at the time of valuation:

Provided that the reclamation of land from the sea shall not in any case be deemed to be improvements either of the land reclaimed or of any other land: Provided also that work done or material used on or for the benefit of any land by the expenditure of capital or labour by any owner or occupier thereof in the provision of roads or in the provision of water, drainage, or other amenities in connection with the subdivision of the land for building purposes shall not be deemed to be improvements after the land has been sold or another person has taken actual occupation of the land (whether by virtue of a tenancy for not less than 6 months certain or not):."]]

[[(6B) For the purposes of any determination by [a registered valuer] under subsection (6) of this section the term **unimproved value**, in relation to any land, means the sum which the owner's estate or interest in the land, if unencumbered by any mortgage or other charge, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose, and if no improvements had been made on the land.]]

(7) Notwithstanding anything in subsection (4) of this section, the council may apply all or part of any money received under that subsection for or towards the provision of earthworks, grassing, drainage, tree planting, fencing, or protection of any land vested in the council as an endowment, or for or towards any other improvement of any kind of any such land that the council considers necessary for the proper use of the land as an endowment.

(8) Nothing in this section shall be deemed—

(a) To authorise the council to deal with any public reserve within the meaning of the Reserves Act 1977 otherwise than in accordance with that Act:

(b) To authorise the council to deal with any land taken or otherwise acquired under [[the Public Works Act 1981]], except in accordance with that Act:

(c) To apply to the sale or exchange of any land by the council pursuant to the power conferred by section 345 [[or section 572(3)]] of this Act or to any express power of sale or exchange conferred by any other Act:

(d) To authorise the sale or exchange of any land vested in the council in trust or as an endowment if the sale or exchange of the land is prohibited by the instrument creating the trust or endowment.]

Editorial Note

Section 10(1)(a) Local Government Amendment Act 1979 (1979 No 59) deems Parts 2 to 17 of this Act to be a consolidation of the enactments repealed, as from 23 June 1977, by s 8(1) Local Government Amendment Act (No 3) 1977 (1977 No 6).

Ambit: The broad purpose of the section is to make the full council accountable for any decision to sell council land. The policy of the section is to vest the power to sell land in the full council, making it quite clear that no individual council officers or subcommittees may do so. That fortifies the view that the full council has to consider the point of principle, ie whether the land should be sold at all. The section gives the council a power of sale in general terms subject to one restraint only: the passing of the necessary resolution after public notice. Subject to that precondition Parliament has not circumscribed the power in any way, neither as to price, method, terms, nor otherwise. That suggests Parliament was not intending the focus of s 230(1) to be wider than sale simpliciter: *Travis Holdings Ltd v Christchurch CC*