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LAND SALES AND RESERVE ACCOUNTS

1. We refer to our recent discussions around some of the issues related to “districtisation” and delegations, and in particular the Teams discussion on 6 May 2024 in which Andrew Lovelock and the writer took part. This letter seeks to respond to those matters in your follow up email sent that day.

2. Other commitments that the writer has had since we spoke means that these comments can only be at a high level, but we trust that they are of assistance. As we discuss below, more comprehensive advice is likely to require us sitting down with you and getting a clear understanding of some of the specific history around the Council’s (and Community Boards’) financial practices over the years. That in turn would allow us to firm up our views as to the extent, if any, to which those practices may constrain any future Council decision-making over financial matters generally, and the treatment of reserve accounts in particular.

3. For convenience we set out the issues from your email here:

4. Land sales:

    (a) For non-endowment land how would this be treated (decision making rights etc). For endowment land who would decide how this money is spent within the terms of the endowment under a districtised model (Council? – or would there be an expectation of a recommendation of the community board?)

    (b) How should endowment land be treated when district money has increased its value (the industrial land in Cromwell is a good example of this – without district money it would not have been re-zoned and increased in value as planning is a district function).

    (c) Likewise, how do we treat the application of endowment land where the costs will benefit the rest of the district (e.g the use of endowment land to pay for example for

Cromwell's Wastewater Treatment upgrade - as waters is districtised it means the rest of the district will benefit).

5. Reserve accounts:

   (a) In a fully districtised model (bar community & promotions grants) – how do we deal with the current reserve accounts (some of which are in deficit, others not). Can we amalgamate them – or do we need to keep separate ward accounts?

   (b) Can we use accounts to offset each other when the fees charges principle (user pays) is similar – e.g dog control is in deficit, building control is in surplus (both district functions).

6. By way of background, we do refer back to our earlier advice on Community Board issues which addressed their status and functioning in some detail and discussed the delegations which have historically been in place. We identified that Central Otago District Council appeared to be something of an outlier among Territorial Local Authorities in the level of authority it delegated to Community Boards, and the extent to which they were treated as if they were separate financial entities. We have expressed the view that the continuation of this approach is not something by which the Council is bound. We have also noted that giving too much autonomy to Community Boards could give rise to a risk of the Council failing to meet it legal obligations to have regard to the interests of the whole district in its decision making.

7. In giving that advice, we did qualify what we said by noting that, while we saw Council as free to revise its delegations, and change its financial management practices, to take a much more single-district view, there might need to be an unpacking of the history of particular assets or funds to determine whether the history had given rise to binding legal expectations as to their future use. The comments we go on to make are general in nature and need to be read subject to the possibility of specific "enforceable expectations" arguments of that kind.

8. 4(a). In addressing non-endowment land, this question reflects us having previously given advice that endowment land held for benefit of a particular geographical area under a former local government structure, needs to continue to be used for the benefit of that area - despite its amalgamation into a wider district. We see this as an exceptional position - with the benefit of non-endowment land, including the proceeds of sale of such land, to be generally available for the benefit of the wider District, as determined by the District Council following its usual processes of consultation and planning. A Community Board within whose area land was located would clearly expect to have a voice in any consultation process - and might wish to make a recommendation as to the use of such proceeds. But

we would not consider the District Council to be bound to call for a recommendation or bound to follow any that might be made.

9. So far as 4(b) is concerned, we consider that previous expenditure decisions that have led to the increase in value of endowment land do not change the endowment character of that land or mean that the proceeds of sale, or any of part them, are released from the restrictions on use that the endowment has created. However, the fact that the District has invested money in particular activity within an area, and that has resulted in an uplift in the resources available to that area, would be a relevant consideration which future funding (from District resources) was being allocated. So, while proceeds from sale of endowment land might not be able to be diverted to elsewhere in the District, overall District funding decisions could legitimately reflect the benefit of "District" money having been previously applied in the endowment area, and the extra benefits that that funding had brought to that area.

10. Similarly to 4(c), we see the key matter being to be able to demonstrate the endowment funds have been applied appropriately within the endowment area. Thereafter we do not see there being a need to strictly account, in a financial sense, for benefit that is seen as accruing elsewhere in the District. It becomes essentially a matter that the District Council may, but will not necessarily have to, allow for in other funding decisions it makes.

11. So far as 5(a) is concerned our starting point is that reserve accounts (which we understand to exist at ward level) are simply part of the assets and liabilities of the District Council. Having previously accounted for them as if Community Boards were separate legal entities is something of a historic and fictional construct which the District Council is not bound to continue and can look to unwind. That may allow surpluses and deficits to be offset, and the funds to be amalgamated. We certainly do not consider the District Council to be bound to perpetuate the ward-based approach to its financial management.

12. We do note that the dealing with the reserve accounts is something in relation to which the issue of potential enforceable expectations is most likely to be raised. A ward that, under the regime of strong delegations to its Community Board, has so managed its affairs as to generate a surplus might feel aggrieved the surplus was applied for the benefit of the wider District in the face of an expectation that it would be available for use it with in the Ward – perhaps for a specific, long-identified, purpose. We see potential (as a matter of principle at least) for the District Council being obliged to give effect to those expectations – effectively by continuing to earmark the relevant funds for that, ward-based, purpose. We do not suggest that this will apply to every, or indeed necessarily any, surplus; we simply

highlight that we cannot exclude arguments of that kind being made. Council may also need to be aware of consultation exercises or matters that feature in Council's Long Term Plan that may have been informed or influenced by the standing practices.

13. The question raised by 5(b) we see as being of a rather different kind that the others we have discussed in that it does not relate to potential offset between wards but between District funds levied for one purpose but which it may now seem would be of better use for other purposes.

14. We have, as yet, considered this question only in a preliminary way and we note that a clear answer would need to be based on a careful look at the basis on which surplus funds had originally been collected.

15. However, our immediate reaction is to have a level of concern over the thought of applying surpluses generated through fees and charges for one purpose for a purpose quite distinct from those for which they were levied. We say this because of the principle that fees and charges should reasonably reflect the cost of the service to which they relate - calling into question how any significant surplus can arise. We recognise that such surpluses may legitimately arise when there is need, say for a maintenance or similar reserves, and to allocate costs appropriately over time. However, if charges have been set with that in mind it would seem appropriate to divert them elsewhere. Conversely, if issues of that kind do not arise, the existence of a surplus may suggest that charges have been inappropriately high for a time and that the appropriate course is to lower them to see the reserves reduce.

16. These thoughts on the fees and charges issue may well be able to be refined after more specific consideration of the funds involved, their history and empowering provisions or bylaws under which they were levied.

17. We trust these preliminary comments are of assistance.

Yours faithfully
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