

1. CONSERVATION ISSUES AND THE DRAFT DEED OF LEASE FOR THE ROBERT MCDUGALL GALLERY

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INTRODUCTION

At the Strategy and Finance Committee meeting on Monday 12 August 2002 further information was requested regarding the conservation of the Robert McDougall Gallery ("the McDougall") and its heritage features. In particular, information was requested as to whether a conservation covenant is necessary or whether dealing with the conservation issues in the lease of the McDougall is sufficient.

Since the 12 August 2002 Strategy and Finance Committee meeting, further information has also been sought with regard to the lease terms and conditions generally and in particular the lease terms and conditions which deal with the heritage status of the McDougall.

Firstly, this report deals with the heritage aspects of the McDougall by detailing the aims and objectives of a conservation covenant, discussing the advantages and disadvantages of having a separate conservation covenant for the McDougall and proposing how the conservation issues can be adequately dealt with in the lease of the McDougall.

Secondly, this report details the draft lease proposed by the Legal Services Unit for the McDougall. The draft lease has been prepared in consultation with the Property Unit and the Heritage Team within the City Development Group.

A report regarding the Council seminar held on 28 March 2003, about the Museum's use of the Robert McDougall Gallery and progress regarding the Local Bill on the Gallery being promoted by the Council is being separately considered by the Strategy and Finance Committee in the May 2003 round of committee meetings.

1. Heritage Issues

(a) Heritage Status

The McDougall has a category I classification under the New Zealand Historic Places Trust register of classified buildings and is listed in Group 1 of the list of protected buildings in the Christchurch City Plan.

(b) Aims and Objectives of a Conservation Covenant

Conservation covenants have generally been used by the Council in situations where a third party is the registered proprietor of the property (ie not the Council) and the owner is given a grant by the Council for the restoration of the building, eg Warner's Hotel.

In return for the Council grant, the Council and the owner enter into a conservation covenant under section 77 of the Reserves Act 1977, which places restrictions on the owner as to what they can and cannot do with the building, due to the heritage significance of such building. The conservation covenant is then registered on the certificate of title to the property and binds subsequent successors in title to the property.

The Council's standard conservation covenant places obligations on the registered proprietor of the property in relation to:

- Prohibiting additions and alterations without the prior written consent of the Council (such consent being able to be given at the Council's sole and absolute discretion);
- Ensuring the use of the property is consistent with the heritage values of the property;
- Ensuring maintenance is carried out having regard to the heritage values of the property;
- Ensuring the property is insured;
- Prohibiting subdividing the property without the prior consent of the Council;
- Allowing the Council to inspect the property upon reasonable notice;
- Allowing public access to view the property.

By placing the above restrictions on the registered proprietor of the property the conservation covenant aims to ensure that the heritage significance of the relevant property is maintained and sustained for the future as far as possible.

(c) Advantages and Disadvantages of Having a Conservation Covenant for the McDougall

Advantages

It is arguable that an advantage of having a conservation covenant for the McDougall is that it would be registered against the certificate of title to the land on which the McDougall sits. Therefore any subsequent registered proprietors would have notice of the conservation covenant and would be bound by its provisions. However, as the Council intends to remain the registered proprietor of the McDougall, there is no notable advantage to having the conservation covenant registered against the certificate of title. If in the future the Council decides to transfer ownership of the McDougall to a third party, a conservation covenant could be entered into at that stage with the third party.

Disadvantages

The lease for the McDougall would need to be entirely consistent with the conservation covenant to avoid any potential for inconsistencies and it would need to be read in conjunction with the conservation covenant document. This is undesirable as it would be time consuming to read the two documents together rather than all the provisions being incorporated into one document. There is also potential for confusion if two documents have to be read in conjunction with each other.

In the conservation covenant usually a third party as owner of the property is the covenantor and the Council is covenantee, placing covenants on the owner in dealing with the property. However in this situation where the Council is the registered proprietor of the McDougall, it would need to be both the covenantor and the covenantee in the covenant document, and so the lease would need to state that the tenant must abide by the provisions of the conservation covenant as if it were the covenantor. This is a difficult way of achieving a result which could be achieved by dealing with the conservation issues directly in the lease.

(d) How the Conservation Issues Can be Dealt with Adequately in the Lease

A number of miscellaneous matters which are dealt with in the standard conservation covenant would normally be covered by a lease document. These are:

- Insurance;
- Dispute resolution;
- Indemnities;
- Inspections by the Landlord (ie Council);
- Use of the property;
- Maintenance costs.

All of these matters are covered in the draft lease of the McDougall. The other matters which are covered by a conservation covenant (see paragraph 1(b) above) have also been incorporated into the draft lease for the McDougall. However, as the tenant is not the registered proprietor of the McDougall and no grant of funds is involved, some items which are normally documented in a conservation covenant are not relevant. For example there is no need to have a clause in the lease stating that the tenant cannot subdivide the property, as only the registered proprietor of a property can subdivide a property, nor is there a need for a clause regarding how the Council's grant of funds may be expended on the McDougall.

It is also intended that the Conservation Plan for the McDougall will be attached as Appendix D to the lease. In addition clause 10.1(a) of the Second Schedule of the lease provides that the tenant must have regard to the heritage values of the property when maintaining the premises. Further, clause 10.1(f) provides that if any damage occurs to a significant heritage feature, as identified in the conservation plan, then the tenant must refer the matter to the Council which may specify the tradespersons to do the repair and the method and materials to be used. This does not however, affect the tenant's obligations to meet the cost of the repair.

(e) Summary of Heritage Issues

As the McDougall is remaining in Council ownership the need for a conservation covenant being registered against the title is diminished. A separate conservation covenant does not have any advantages in this situation, as the relevant conservation issues can be dealt with efficiently and effectively in the lease of the McDougall, to ensure that the heritage significance of the McDougall is maintained and sustained while the McDougall is leased. To have the conservation issues dealt with in the lease avoids, firstly the potential for inconsistencies between the lease and conservation covenant; secondly a more time consuming process of having to read the two documents in conjunction with each other and lastly, having to use a somewhat 'false' mechanism of the Council as covenantor and covenantee and then binding the tenant into the covenantor's obligations through the lease document. In the writer's view the conservation issues can be effectively dealt with in the lease document.

2. **The Draft Lease**

(a) Lease a Draft Only

A draft lease has been prepared by Council officers to form the basis of negotiation with the Museum Trust Board. At this stage only very preliminary discussions have been entered into with Anthony Wright (Director of the Canterbury Museum) regarding the lease terms and conditions. The draft lease is intended as a starting point for negotiation between the Canterbury Museum Trust Board (the "Museum") and the Council. As the lease has effectively been put on hold until the enactment of the Christchurch City Council (Robert McDougall Gallery) Land Vesting Bill 2002, negotiations regarding the lease terms and conditions have not yet been implemented.

(b) Important Points Regarding the Draft Lease

The Legal Services Unit would like to point out the following provisions of the draft lease.

First Schedule

- Term - the term has been drafted as an initial term of 20 years plus a first right of renewal of 15 years and a second right of renewal of 14 years 364 days. This term is consistent with the Robert McDougall (Land Vesting) Bill 2002 ("the Bill") in which clause 7(3) states that no lease (including rights of renewal) may be for a term of 50 years or longer.
- Business Use - the business use has also been drafted so that it is consistent with clause 6(1) of the Bill, which states the purpose for which the land on which the gallery sits, is to be held ie "for the display of art and decorative arts and crafts and ancillary purposes".
- Rent - the Council have had the McDougall rent appraised independently by Simes Valuation Ltd. The rent charged is of a "commercial" nature and reflects current "market" conditions. Given that the Council funds approximately 90% of the Canterbury Museum's operating costs, it could be suggested that a "peppercorn" rent would be appropriate. We believe that this would not be appropriate for the following reasons:
 - Transparency - by charging a commercial rental, the Museum's costs reflect the true cost of its operations and if the Council makes a grant to the Canterbury Museum Trust Board to cover these additional costs, then the full amount of the Council's support to the Museum may be important in discussions with neighbouring territorial authorities or Central Government over any requests for additional funding for the Museum.
 - If the Council makes a grant to the Canterbury Museum Trust Board to cover the additional costs, then this amount can be claimed by the Council as a deduction for income tax purposes.

Second Schedule

The lease is based on a standard Auckland District Law Society Lease (Third Edition 1993 (2)) which is the most common form of lease for commercial tenancies. The amendments made to this standard form of lease are generally the usual amendments the Legal Services Unit requests when entering into a commercial type of lease.

Special Conditions

- Clauses 1 and 2 - these clauses clarify that if there is a conflict between the lease, the Asset Management Plan (referred to in special condition 9) or the Conservation Plan, then the provisions of the lease shall prevail, and in any conflict between the first and second schedules and the special conditions, the special conditions shall prevail.
- Clause 3 - this clause states that the public are to have access to the McDougall during the hours of Museum operation. The Museum may charge a reasonable fee for access. In addition, this clause states that the Gardens' entranceway must be kept as an entrance and exit to the McDougall during the hours of operation except when the Botanic Gardens are closed.
- Clause 6 - after considering submissions regarding the future use of the McDougall the Robert McDougall Subcommittee recommended that the centre court in the McDougall should be made available "for community art, craft and similar displays and musical performances" (refer to Strategy and Finance Committee report of 22 August 2002). Upon further consideration and upon the request of the Museum the Subcommittee at its meeting of 6 August 2002, reconsidered this matter and concluded that the Museum should be able to have the discretion as to where in the McDougall or the Canterbury Museum the community use should be. In addition, the Subcommittee advised that such use by community groups should be managed by the Museum at its discretion, but with an obligation on the Museum to report to the Council regarding such use when requested and as a minimum, annually. Clause 6 has been drafted to reflect these intentions. In addition clause 6 states that where the Museum is to licence an area of the McDougall to a community group, it must enter into a temporary licence to occupy agreement with that group in the form attached to the lease as Appendix F.
- Clauses 12 and 13 - as detailed earlier in this report these clauses deal with the conservation issues. If the Museum wishes to make any additions or alteration to the McDougall then (in addition to obtaining any necessary building and resource consents) the Museum must obtain the written consent of the Council as landlord. The Council as landlord has sole and absolute discretion whether or not to grant such consent and upon such conditions as it thinks fit. This allows the Council the flexibility to consider any conservation issues when deciding whether or not to consent to proposed additions or alterations.
- Clause 16 - the lease is for the entire land comprised in certificate of title CB24A/544 (ie the land on which the McDougall sits). However part of the land contained in this title is Botanic Gardens land (refer to the plan attached as Appendix G to the lease). Originally it was intended that only that part of the title on which the McDougall and the carparks sit should be leased to the Museum. However a lease of part of the land contained in one certificate of title for a period of 20 years or longer (with or without renewal/s) constitutes a "subdivision" under the Resource Management Act 1991 (section 218). The Museum has requested that the lease be for a term in excess of 20 years. Council officers therefore considered whether a subdivision of the land in CT CB24A/544 could be undertaken in order to lease only that part of the land contained in CT CB24A/544 on which the McDougall and carparks sit. While such a subdivision is possible (costing approximately \$7,000) it would take approximately four months to complete and officers consider that the matter can be dealt with adequately by way of the lease provisions. Therefore, the lease has been drafted so that all of the land contained in CT CB 24A/544 is leased to the Museum (so as to avoid any subdivision issues) and the "Gardens area" is dealt with in clause 16 of the special conditions. This clause 16 is acknowledgment and agreement by the Museum that the public shall have the right to pass over and use the Gardens area as part of the

Botanic Gardens. In addition it shall be the Council's responsibility to maintain such garden area.

- Clause 17 (acknowledgement) - this clause has been inserted as an acknowledgement by the tenant that the McDougall is primarily designed for two dimensional art pieces. However, in the event that three dimensional art pieces are displayed the tenant agrees to use its reasonable endeavours to prevent damage, ensure that the original spatial form of the gallery spaces within the building are respected and that the circulation and interconnection of the gallery spaces are not unreasonably hindered. This clause also ensures that all the gallery spaces within the McDougall are open to the public during the hours of operation.
- Clause 18 (termination clause) - the Property Manager has recommended that the Council have the right to terminate the lease at its sole discretion, any time after the first term of 20 years (and not before) on giving three years' notice of its intention to do so.

The rationale for this is:

- Art galleries were historically used for display of art works only; now their spaces are used for cafes, concerts, lectures, cultural programmes, travelling exhibitions, virtual reality experiences, interactive displays, retail etc. Who knows how they will reinvent themselves over the next 50 years and what space requirements the "new" gallery will need.
- The Central Library is a classic in-house example of the above trend where the original space served its purpose for 15 years; an additional floor was added three years ago and currently the establishment is pushed for space.
- Twenty years of permanency allows the Museum adequate time for funding pay-backs and future planning.
- Clause 19 (sustainable practices) - this clause has been inserted as an acknowledgement and agreement by the Museum to use its reasonable endeavours to carry out its rights and obligations under the lease in a resource efficient and waste minimising manner. This is consistent with the Council's 'Target Zero' initiative, pursuant to which the Council aims to work with Christchurch businesses to reduce environmental impacts by encouraging those businesses to conduct their business in an environmentally sustainable way.

CONCLUSION

It is submitted that the conservation and heritage issues with regard to the McDougall can be sufficiently dealt with in the lease and having a separate conservation covenant for the McDougall would have no advantages for the Council.

The draft lease proposed by the Legal Services Unit has yet to be discussed in detail with the Museum and negotiations are still to take place. The Committee's comments and suggestions regarding the draft lease are welcomed. It is anticipated that following negotiations with the Museum the Legal Services Unit and the Property Manager will report to the Property and Major Projects Committee on the progress of the negotiations; an updated form of the lease and any issues the negotiations may have raised.

- Recommendation:**
1. That a conservation covenant not be entered into for the Robert McDougall Gallery.
 2. That the relevant heritage conservation provisions be incorporated in the lease of the McDougall Gallery to the Canterbury Museum Trust Board, to the satisfaction of the Senior Heritage Planner and Director of Legal and Secretariat Services.