

HERITAGE AND ARTS COMMITTEE AGENDA

WEDNESDAY 7 MARCH 2012

AT 9AM

IN COMMITTEE ROOM 1, CIVIC OFFICES, 53 HEREFORD STREET

Committee: Councillor Helen Broughton (Chairperson),
Councillors Sally Buck, Barry Corbett, Yani Johanson, Glenn Livingstone.

**General Manager
Strategy and Planning**
Michael Theelen
Tel: 941-8281

**General Manager
Community Services**
Michael Aitken
Tel: 941-8607

Committee Adviser
Warren Brixton
Tel: 941-8439

- PART A - MATTERS REQUIRING A COUNCIL DECISION**
- PART B - REPORTS FOR INFORMATION**
- PART C - DELEGATED DECISIONS**

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- PART A 7. REQUEST FOR AMENDMENT TO CONSERVATION COVENANTS FOR HERITAGE INCENTIVE GRANTS**

NOTE: AT THE CONCLUSION OF THE MEETING AN INFORMAL BRIEFING WILL BE HELD ON HERITAGE BUILDING MATTERS

HERITAGE AND ARTS COMMITTEE 7. 3. 2012

1. APOLOGIES

2. DEPUTATIONS BY APPOINTMENT

3. ARTS UPDATE

A report will be tabled at the meeting.

4. HERITAGE BUILDING RECOVERY UPDATE

A verbal report will be provided at the meeting.

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5. CONSERVATION COVENANT CONSENTS – REQUEST FOR DELEGATED AUTHORITY FOR MINOR WORKS

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| General Manager responsible: | General Manager, Strategy and Planning Group |
| Officer responsible: | Programme Manager, District Planning |
| Author: | Brendan Smyth, Architecture, Heritage & Urban Design |

PURPOSE OF REPORT

1. The purpose of this report is to recommend to the Heritage and Arts Committee that it sub-delegate to the General Manager Strategy and Planning its power to approve heritage conservation covenant consent applications where the proposed works are of a minor nature. The proposed changes to the covenant consent procedures are being sought in order to streamline the process for building owners and to avoid duplication through the covenant consent and resource consent processes.

EXECUTIVE SUMMARY

2. The 4 September 2010, the 22 February 2011 and the 13 June 2011 earthquakes, and associated aftershocks, resulted in many heritage buildings in Christchurch being damaged. Although many buildings were demolished because of significant damage, in many instances the damage sustained was minor in nature such as damaged timberwork, glazing, buckling of timber floors and cracked masonry. Where the heritage building has a conservation covenant registered on the Certificate of Title under the current provisions all repairs, no matter how small, require the consent of the City Council. These works will also require a resource consent from the City Council, a process which will involve the thorough analysis of the proposed works and their effect on the heritage fabric.
3. The earthquakes have created the need for a wide variety of unanticipated repair works to be undertaken on heritage buildings to return them to their pre-earthquake status. It is not known exactly how many buildings with conservation covenants will require repairs of a minor nature but it is likely to be a significant number. Works of a minor nature are defined as those that do not alter the original appearance of the building, internally or externally, and do not involve building extensions or partial demolitions. Works of a minor nature can include structural alterations and enhancements to the seismic performance of the building where these additions can be concealed within the walls, floors, ceilings and other voids of the building. They can also include the reconstruction of small portions of the structure such as chimneys and the replacement of building materials like for like where the original material has been damaged beyond repair.
4. It is recommended that for reasons of administrative expediency that the Heritage and Arts Committee should sub-delegate to the General Manager Strategy & Planning the power to give conservation covenant consents where the works meet the parameters outlined above and can be considered as having a minor impact on the heritage fabric.

FINANCIAL IMPLICATIONS

5. There are no financial implications arising from a covenant consent.

LEGAL CONSIDERATIONS

6. Grant recipients must agree to the registration of a heritage covenant against the Certificate of Title for their land before the grant is made. In general terms the purpose of a heritage covenant is to provide a legal mechanism to ensure that the Council grant is only expended on the restoration of the building in question and to create a legal obligation on the part of the owner not to demolish that building for a fixed period (limited covenant) or in perpetuity (full covenant). The covenant also requires that consent be gained from the Council for alterations to the building. The covenant document includes provisions and procedures for reclaiming the grant in the event of a breach of the conditions of the covenant. Breach is clearly defined in the documents and does not include demolition or damage to the building following an event such as an earthquake.

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7. The power to manage and enforce the Council's powers under heritage covenants has been delegated from the Council to the Heritage and Arts Committee. Under clause 32 of Schedule 7 of the Local Government Act 2002 the Heritage and Arts Committee may sub-delegate its powers to an officer of the Council.

CONSULTATION FULFILMENT

8. As the sub-delegation of powers proposed to be granted to the General Manager Strategy and Planning are administrative in nature, it is not considered that there are any persons who will be effected by or have an interest in the proposed decision of the Committee. Accordingly it is not considered that any obligation to consult on the proposed decision arises

STAFF RECOMMENDATION

That the Heritage and Arts Committee sub-delegates its power to "approve or decline any application made pursuant to a conservation covenant or other legal instrument entered into for heritage purposes (excluding an application for consent for demolition)" to the General Manager Strategy and Planning PROVIDED THAT the sub-delegated power shall be limited to the approval or decline of building repairs and alterations of a minor nature arising from the Canterbury Earthquakes. For the purposes of this resolution "repair or alterations of a minor nature" means works that effect or outcome of which will not alter the original appearance of the building, internally or externally, and which do not involve building extensions or partial demolitions. Such works may include:

- (a) Structural alterations and enhancements to the seismic performance of the building where these can be concealed within the walls, floors, ceilings and other voids within the building;
- (b) The reconstruction of small portions of the structure such as chimneys and the replacement of building materials like for like where the original material has been damaged beyond repair, and;
- (c) The General Manager Strategy And Planning will report to the Council six monthly on the exercise of this delegation.

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6. CANTERBURY EARTHQUAKE HERITAGE BUILDING FUND TRUST COVENANT

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| General Manager responsible: | General Manager, Strategy and Planning Group |
| Officer responsible: | Programme Manager, District Planning |
| Author: | Philip Barrett Heritage Response Team, Team Leader |

PURPOSE OF REPORT

1. The purpose of this report is twofold. To recommend to the Heritage and Arts Committee that it:
 - (a) approves the Canterbury Earthquake Heritage Building Fund Trust (CEHBF) standard but amended conservation covenant form to be registered against the Certificate of Title to the recipient's property in favour of the Council following CEHBF agreeing to make a grant; and
 - (b) to sub-delegate to the General Manager Strategy and Planning its power to approve heritage conservation covenants that are subject of a grant by the CEHBF.

EXECUTIVE SUMMARY

Conservation Covenant

2. In return for heritage grants the Council requires that grant recipients agree to the registration of a heritage covenant against the Certificate of Title to their land before the grant is made. In general terms the purpose of a heritage covenant is to provide a legal mechanism to ensure that the Council grant is only expended on the restoration of the building in question and to create a legal obligation on the part of the owner not to demolish that building for a fixed period (limited covenant) or in perpetuity (full covenant). The covenant also requires that consent be gained from the Council for alterations to the building. The covenant document includes provisions and procedures for reclaiming the grant in the event of a breach of the conditions of the covenant. Breach is clearly defined in the documents and does not include demolition or damage to the building following an event such as an earthquake.
3. The power to manage and enforce the Council's powers under heritage covenants has been delegated from the Council to the Heritage and Arts Committee. The Heritage and Arts Committee has the delegated authority to "enter into conservation covenants under section 77 of the Reserves Act 1977 or other appropriate legal instruments for the protection of buildings, places and objects which are the subject of a grant by the Canterbury Earthquake Heritage Buildings Fund and on such terms and conditions as the Committee thinks fit from time to time". Under clause 32 of Schedule 7 of the Local Government Act 2002 the Heritage and Arts Committee may sub-delegate its powers to an officer of the Council.
4. Conservation covenants are taken in favour of the Council, not the CEHBF although both organisations must agree to the covenant wording, Council as the legal party and CEHBF as the funding source. This is because the CEHBF is expected to have a relatively short life, whereas it is expected that the benefit of the covenants associated with its grants will run for some considerable number of years. Thus, it is not the CEHBF that approves conservation covenants but Council. The recommendation that conservation covenant approval is delegated to the General Manager Strategy and Planning is because once Council has approved the conservation covenant wording, approvals can be given promptly and the covenant registered on the Certificate of Title securing additional protection for the building.
5. In conjunction with Ferne Bradley, the solicitor acting for the CEHBF Trust and a trustee of the CEHBF, the Legal Services Unit has drafted a standard form of heritage covenant for use in relation to grants made by the CEHBF. The form of that heritage covenant is attached to this report as **Attachment 1**.

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6. The Heritage and Arts Committee is asked to approve the form of this heritage covenant as the standard form to be used in conjunction with grants made only by the CEHBF Trust. The draft heritage covenant form is in substantially the same form as the Council's standard full heritage covenant form used in conjunction with Heritage Incentive Grants made by the Council. However, minor amendments have been required to reflect that grants are to be made by the CEHBF rather than the Council.
7. There are three clauses that the CEHBF have requested be amended in departure from the Council's standard full heritage covenant form, and these are marked up in the copy of the proposed covenant form attached to this report. The three clause changes are discussed under legal considerations in subsection 11 below and are associated with: Insurance (11(f)), costs (11(i)) and breach (11(j)). The proposed minor changes reflect the concerns that grant recipients have risen in the post earthquake circumstances and have sought that the covenant be aligned with.
8. Should the Committee approve the conservation covenant as recommended, neither the CEHBF nor the Council will allow any further amendments. In part, this can be achieved by advertising the covenant on the Council's website and clearly indicate that grants \$150,000 or above shall be subject to the advertised covenant document. In this way the Council heritage officers are able to discuss with and advise an applicant prior to lodgement with the CEHBF and avoid complicated negotiations following grant approval that commonly seek to reword the covenant document in favour of the recipient.

Delegation of Powers

9. The recommendation to delegate to the General Manager Strategy and Planning the powers to approve conservation covenants is recommended because:
 - (i) the CEHBF is an independent trust, empowered under its Deed to approve or decline a grant and to require conservation covenants, it is not therefore a Council matter other than the Council being a party to the covenant.
 - (ii) the Council is a founding partner of the CEHBF and is represented via a Councillor being a trustee.
 - (iii) the CEHBF Deed expressly allows for conservation covenants and that the Council will be a party until covenant ceases to have any effect.
 - (iv) the CEHBF grant funding source is not entirely Council derived. While the Council may have contributed some public funding from the Heritage Incentives Grants to assist start-up, the transfer of the funds to the Trust removes the Council ability to influence its expenditure.
 - (v) the delegation will help to streamline the process enabling efficient functioning of the grant process and allow the speedy transfer of funds to the recipient and the building project that is often subject to strict timeframes.

FINANCIAL IMPLICATIONS

10. There are no financial implications of approving the attached covenant form other than the normal costs that may be associated with monitoring the covenant. These are officer costs and are reflected in annual budgets. Grants made in respect of the proposed covenant form will be funded and made by the CEHBF, not the Council.

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LEGAL CONSIDERATIONS

11. As with the Council's standard full heritage covenant form used for Heritage Incentive Grants, the essential elements of the proposed covenant form are as follows:
 - (a) a cash grant is made by CEHBF to assist with the funding of certain defined earthquake related works.
 - (b) in return for the grant a heritage covenant is registered against the Certificate of Title to the property concerned.
 - (c) the grant is only to be expended on the specified works and the works must be completed within a set period of time.
 - (d) the owner agrees not to demolish, modify, alter or make any addition to the exterior or interior of the buildings, nor to build any additional buildings on the site or alter the buildings setting, without the Council's consent.
 - (e) the owner is required to maintain the building.
 - (f) the owner is required to insure the building. The usual Council provisions are generally proposed to apply, but the CEHBF has requested that the covenant form expressly acknowledges that an inability of the owner to obtain insurance due to insurance being unavailable will not render the owner in breach of the covenant terms. In the current insurance environment that amendment is reasonable.
 - (g) in the event the building is completely destroyed the covenant ceases to have any effect. However, if the building is only partially destroyed, the owner is required to apply the insurance proceeds to repair and reinstate the building.
 - (h) the owner is not permitted to subdivide the site on which the building is built without the consent of the Council.
 - (i) the costs of preparation and registration of the covenant are borne by the Council, but in all other respects each party is required to bear their own costs in relation to negotiation and execution of the covenant. The CEHBF has requested that clause 10, that deals with costs, be amended as indicated on the draft covenant attached. The amendment clarifies the situation that the cost of removing the covenant lies with the owner. It also states that the Council should not unreasonably refuse to remove the covenant when the covenant ceases to have any further effect in preserving heritage. When a covenant ceases to have effect is determined by clause 5 in the context of damage or destruction of the building.
 - (j) if the Owner breaches the covenant term, then the amount of the grant is required to be repaid to the Council, but if the CEHBF is still in existence then the Council must then pay those monies to the CEHBF. The CEHBF has requested that clause 16, which deals with breach, be slightly altered as indicated on the draft covenant attached. Unaltered, the clause would provide that the covenant would potentially continue in effect irrespective of whether the grant was required to be repaid. However, the CEHBF amendment would provide that the covenant would end when the grant was repaid in full.
12. Overall, the Legal Services Unit considers the proposed amendments to be relatively minor and considers that they may be accepted by the Committee.

ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

13. Aligns with Level of Service, Activity 1.4 Heritage Protection, facilitating (in part) the protection of heritage.

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Do the recommendations of this report support a level of service or project in the 2009-19 LTCCP?

14. Not applicable.

ALIGNMENT WITH STRATEGIES

15. Not applicable.

Do the recommendations align with the Council's strategies?

16. Not applicable.

CONSULTATION FULFILMENT

17. The proposed form of standard Conservation Covenant for CEHBF grants has been developed by the Legal Services Unit in conjunction with Ferne Bradley, the solicitor acting for the CEHBF and a trustee of the CEHBF.

STAFF RECOMMENDATION

That the standard form of Conservation Covenant attached to this report be approved for use by the Council in respect of Canterbury Earthquake Heritage Building Fund Trust grants that require full covenants; and

That Committee's power to enter into conservation covenants under section 77 of the Reserves Act 1977 or other appropriate legal instruments for the protection of buildings, places and objects which are the subject of a grant by the Canterbury Earthquake Heritage Buildings Fund be sub-delegated to the General Manager Strategy and Planning.

**FULL CONSERVATION COVENANT
PURSUANT TO SECTION 77 RESERVES ACT 1977**

THE OWNER

**CHRISTCHURCH CITY COUNCIL
THE COUNCIL**

**CANTERBURY EARTHQUAKE HERITAGE
BUILDINGS FUND GRANT**



CIVIC OFFICES • 53 HEREFORD STREET • PO BOX 73013 • CHRISTCHURCH
NEW ZEALAND • TELEPHONE (03) 941-8999 • FAX (03) 941-6441

AGREEMENT dated this day of 20

BETWEEN CHRISTCHURCH CITY COUNCIL (the "Council")

BETWEEN OWNER (the "Owner")

THE PARTIES AGREE AS FOLLOWS:

1. BACKGROUND

- 1.1 The Owner is the registered proprietor of the land described in the First Schedule ("the Property").
- 1.2 As a result of the circumstances shown in the Second Schedule, it has been agreed:
 - (a) that the Owner will enter into the covenants in the Council's favour as set out in the Third Schedule;
 - (b) that the Owner will be bound by the general terms and acknowledgements as set out in the Fourth Schedule;
 - (c) that, notwithstanding anything else, the items or structures listed or recorded (if any) in the Fifth Schedule shall not be subject to the terms of this Covenant.

2. NOW THIS DEED WITNESSES that

- 2.1 The Owner covenants with the Council as set out in the Third Schedule and the Fourth Schedule.
- 2.2 Notwithstanding anything else, the parties agree that the items or structures listed or recorded (if any) in the Fifth Schedule shall not be subject to the terms of this Covenant.

THE COMMON SEAL of the)
CHRISTCHURCH CITY COUNCIL)
was hereto affixed in the presence of:)

_____ Mayor/Councillor

_____ Authorised Officer

SIGNED by the said
Owner
by its directors:

) _____
) **Name**
) _____
) **Name**

SIGNED by the said
Owner
in the presence of:

) _____
) _____
) _____

Signature of Witness: _____

Full Name of Witness: _____

Occupation of Witness: _____

Address of Witness: _____

FIRST SCHEDULE

The Property

1. The Owner is registered as proprietor of an estate in fee simple in the property known as "Name" located at Address, Christchurch and comprised in Computer Freehold Register CT XXX subject to registered mortgage XXX.4 to BNZ Finance Limited ("the Property"). (In this Covenant that land, together with the buildings on the land, are jointly and severally referred to as "the Property").

OR

1. The Owner is registered as proprietor of an estate in fee simple in the property known as "Name" located at Address, Christchurch (also known as Address Street, Christchurch) the legal description of which is set out below ("the Property"). (In this Covenant that land, together with the buildings on the land, are jointly and severally referred to as "the Property").

Legal Description

Lot 3 DP XXX CT XXX subject to Certificate XXX, Mortgage XXX.3 to ANZ National Bank Limited and Mortgage XXX.4 to XXX.

OR: *[2B=Use Background A below if the agreement relates to some, not all, of the buildings on the land and a survey plan must be prepared and lodged at LINZ in these circumstances:]*

1. The Owner is the registered proprietor of the property at Christchurch known as [3A=Name of Property] located at [3B=Address of Property], Christchurch, being all the land comprised in Computer Freehold Register [4=computer freehold register number]. The land as shown are marked ["A" or "B"] on Deposited Plan [Plan Number] is referred to in this Covenant as "the Property".

SECOND SCHEDULE

Circumstances

1. Section 77 of the Reserves Act 1977 provides that the Council may enter into a covenant with the owner of any property to provide for its management so as to preserve the heritage value of that property.
2. The Owner has made an application to the trustees of the Canterbury Earthquake Heritage Buildings Fund ("the Trust") for a grant in respect of the Property, which grant has been approved by the Trust subject to the Owner entering into this covenant in favour of the Council.
3. In consideration of the payment of a grant of \$xxx inclusive of GST (if any) ("the Grant") by the Trust to the Owner and in further consideration of the mutual covenants contained in this covenant and the payment of the sum of \$1.00 by the Council to the Owner (the receipt of which is hereby acknowledged by the Owner) the Owner has agreed to enter into this Covenant in favour of the Council.

THIRD SCHEDULE

Covenants

EARTHQUAKE REPAIR WORKS

1. The Owner, and the Trust have agreed to repair, temporary protection, seismic upgrade and Building Code compliance works to be undertaken by the Owner in respect of the Property as specified in the Sixth Schedule hereto ("the Earthquake Repair Works").

COVENANTS

2. The Owner covenants with the Council:
 - 2.1 to within **2 months** undertake the Earthquake Repair Works;
 - 2.2 that the Owner will within **2 years** of the date of this Covenant expend not less than the sum of the Grant in and towards the completion of the Earthquake Repair Works and to use the Grant solely for these purposes. The Owner shall provide the Council with written evidence of such expenditure upon demand;
 - 2.3 subject to Clause 2.4, to maintain and conserve the Property; and without limiting the generality of the foregoing the Owner will not damage, demolish, alter, remove or add to, or permit to be damaged, altered, demolished, removed or added to, in whole or in part any buildings or any setting of any buildings on the Property;
 - 2.4 that:
 - (i) any proposed demolition, modification, alteration of or addition to the exterior or interior of the buildings on the Property; or

- (ii) any proposed construction of additional buildings on the Property; or
- (iii) any proposed demolition, modification, alteration or addition to the setting of any buildings on the Property;

will require the prior written consent of the Council (in addition to any resource consent required the Resource Management Act 1991 or any Building Consent required under the Building Act 2004) PROVIDED THAT nothing in this clause 2.4 shall apply to the Earthquake Repair Works. The Council shall have full discretion whether to grant that consent and may impose such reasonable conditions to its consent as the Council thinks fit.

3. When exercising its discretion under clause 2.4 the Council may have regard to, without limitation, all or any of the following matters:
 - 3.1 the extent to which the proposed works could potentially compromise heritage values (as those words are understood by reference to the relevant policies and rules contained in the Christchurch City Plan or Banks Peninsula District Plan);
 - 3.2 the degree of the proposed loss of heritage fabric, including the incremental affect of any previously approved works;
 - 3.3 the likely impact of any proposed changes to the setting of the buildings on the Property on the heritage values of the Property;
 - 3.4 the ability of the proposed works to be reversed at a subsequent date;
 - 3.5 the likely effect of the proposed works on visual appearance;
 - 3.6 the necessity or otherwise of the proposed works as a means of ensuring that the Property may continue to have an economic use;
 - 3.7 the extent to which the proposed works are deemed necessary to assist in the long term conservation of the Property;
 - 3.8 the likely effect of the proposed works on structural integrity and earthquake resistance, including the incremental effect of any previously approved works;
 - 3.9 the relevant provisions of the ICOMOS New Zealand Charter for the conservation of places of cultural heritage value applicable from time to time (“the Charter”);
 - 3.10 any other matter that may appear relevant to the Council in the circumstances.
4. The Owner acknowledges that the Council shall have no responsibility or liability to the Owner in respect of the Grant or the payment of the Grant by the Trust to the Owner.
5. The Owner acknowledges that:
 - (a) “building(s)” means not only the physical structure but also extends to include those fixtures, fittings, light fittings and electrical switches and sockets which form part of the heritage fabric. Any chattels, plant, fixtures,

fittings and equipment owned by any tenants of the Property are excluded from the definition of “buildings” for the purposes of clauses 2.4 and 3 of the Third Schedule; and

- (b) “setting” shall have the same meaning given to those words by the Christchurch City Plan or Banks Peninsula District Plan. The maintenance of any landscaping on the Property including the replacement of plant species with similar plant material is not considered to be a matter requiring consent in terms of Clause 2.4 of the Third Schedule.
- (c) “heritage fabric” shall have the same meaning given to those words by the Christchurch City Plan or the Banks Peninsula District Plan as appropriate.

FOURTH SCHEDULE

General Terms and Acknowledgements

OWNER’S USE OF THE PROPERTY

1. The Council agrees that, subject to the covenants in the Third Schedule, the Owner may use the Property for any purpose which:
 - 1.1 is a compatible use not resulting in any change to the heritage values of the Property, or involves changes which are substantially reversible or changes which will have only a minimum impact on those values; and
 - 1.2 complies with the relevant provisions of the Resource Management Act 1991, the Building Act 2004 and any other relevant legislation.

MAINTENANCE

2. The Owner will at its own expense maintain the Property in good and substantial repair and condition, having regard to its heritage values. The Owner further agrees that all maintenance and conservation work undertaken on heritage fabric will be executed in a manner consistent with the provisions of the Charter, the Christchurch City Plan or the Banks Peninsula District Plan as are applicable and only after obtaining all necessary regulatory consents under the Resource Management Act 1991 and/or the Building Act 2004 (if any).

INSURANCE

3. The Owner agrees to maintain a comprehensive policy of insurance on the Property to its full replacement value, including demolition fees and architects fees. The Owner shall use best endeavours not do or allow anything to be done which would prejudice that insurance policy or cause it to lapse. If the Owner is unable to arrange insurance to full replacement value because of the age or state of the property the Owner will not be in breach of its obligations under this clause while maintaining a comprehensive insurance policy on a full indemnity basis. If the Owner is unable to arrange insurance

or any aspect of insurance (such as earthquake cover) on either a full replacement or indemnity basis because of any general withdrawal of insurance companies from providing insurance in Canterbury then providing the Owner has used its best endeavours to try to arrange such insurance, and continues to do so, the Owner shall not be in breach of its obligations under this clause.

DAMAGE TO OR DESTRUCTION OF PROPERTY

4. In the event the Property or any part thereof is damaged or destroyed from any cause whatsoever, the Owner agrees to notify the Council immediately.
5. Should the Council in its own discretion determine that the Property has been completely destroyed or damaged, then the obligations of the Owner (save the Owner's obligations under Clauses 16 and 17 of this Fourth Schedule) and the Council under this Covenant in respect of that part of the Property so damaged or destroyed shall immediately cease. Any termination pursuant to this clause shall be without prejudice to the rights of either party against the other.
6. Should the Council in its own discretion determine that the Property has been partially destroyed or damaged but the heritage values of the Property have not been lost, or the heritage fabric has been damaged and it is practicable or desirable to repair, restore or reinstate the heritage fabric, and:
 - 6.1 the Owner's policy or policies of insurance shall not have been invalidated or payment of the policy moneys refused in consequences of some act or default of the Owner; and
 - 6.2 all the necessary permits and consents (including any resource consent required under the Resource Management Act 1991 and/or building consent required under the Building Act 2004) shall be obtainable;

THEN the Owner shall with all reasonable speed expend all the insurance moneys received by the Owner in respect of such damage towards repairing such damage or reinstating the Property but the Owner shall not be liable to expend any sum of money greater than the amount of the insurance money received. Any repair or reinstatement shall be subject to the provisions of clauses 2, 3 and 5 of the Third Schedule to this Covenant.
7. If any necessary permit or consent referred to in clause 6.2 of this Fourth Schedule shall not be obtainable, or the insurance monies received by the Owner shall be inadequate for the repair or reinstatement (other than by reason of a failure on the part of the Owner to insure the Property as provided for in clause 3 of this Fourth Schedule) then the obligations of the Owner and Council under this Covenant in respect of that part of the Property so affected shall cease but without prejudice to the rights of either party against each other.

SUBDIVISION

8. The Owner will not undertake any subdivision, within the meaning of Section 218 of the Resource Management Act 1991, of the Property without the prior written consent of the Council (in addition to any subdivision consent required under that Act) notwithstanding such subdivision may fully comply with the relevant provisions of the Christchurch City Plan or Banks Peninsula District Plan. The Council shall have full discretion whether to grant the consent and may impose such reasonable conditions to its consent as the Council thinks fit. When exercising its discretion the Council may have regard to, without limitation, all or any of the following matters:
 - 8.1 the probable effect of the subdivision proposal, and associated works, on heritage values;
 - 8.2 the desirability or otherwise of the subdivision proposal as a means of assisting in the long term conservation of any part of the Property;
 - 8.3 the necessity or otherwise of the proposed subdivision as a means of ensuring that the Property may continue to have an economic use; and
 - 8.4 any other matter which may appear relevant to the Council in the circumstances.

COUNCIL INSPECTIONS

9. The Owner will allow the Council access to inspect the Property at all reasonable times and upon reasonable notice for the purpose of ensuring compliance with the provisions of this Covenant. In exercising its rights of inspection the Council will cause as little inconvenience as possible to any occupant or tenant of the Property.

COSTS

10. The parties agree that the costs of preparation and registration of this Covenant shall be borne by the Council, but in all other respects each party shall bear their own costs in relation to the negotiation and execution of this Covenant. The Owner shall pay the costs of removing this Covenant following a request to do so by the Owners to the Council, which the Council shall not unreasonably refuse to do once this Covenant ceases to be of any further effect in preserving heritage and all matters under it have been fully resolved between the parties.

MISCELLANEOUS

11. The Owner acknowledges that, upon registration, this Covenant shall be binding upon successors in title (Section 77(4) of the Reserves Act 1977).
12. Where there is more than one Owner, this Covenant will bind each owner jointly and severally.
13. Where the Owner is a company this Covenant will bind a receiver, liquidator, statutory manager or statutory receiver and, where the Owner is a natural person, will bind the Official Assignee, and in either case will bind a mortgagee in possession.

14. The reference to any Act or charter in this Covenant extends to include any amendment to or re-enactment of that Act or revision of that charter.
15. In any case where Council is required to give a consent under this Covenant, such consent shall not be binding unless given in writing and signed under written delegated authority to bind the Council in that regard.

BREACH

16. If the Owner shall be in breach of any of the terms of this Covenant then the Owner will immediately pay to the Council (and if the Trust is still then in existence the Council will hold those monies as trustee for the Trust, but not otherwise) an amount equal to the Grant or any part of it PROVIDED THAT the parties acknowledge that any part payment by the Owner to the Council under this Clause 16 shall not have the effect of terminating this Covenant and the parties' obligations under this Covenant shall continue at the option of the Council until the grant has been fully repaid whereupon it shall cease.
17. If the sum referred to in clause 16 is not paid to the Council within 20 working days of receipt of a notice by the Owner from the Council requiring payment then the Council may charge interest on the amount not so paid at the default interest rate, calculated on a daily basis, from the due date for payment until the date of actual payment. The default interest rate shall be the Bank of New Zealand base rate on the due date of payment plus 5 per cent per annum.

NOTICES

18. Any notice under this Covenant may be given as provided in the Property Law Act 2007 and in any event shall be deemed sufficiently served if:
 - 18.1 it is actually received by the addressee or its authorised representative; or
 - 18.2 sent by post or fax to the addressee's last known service address in New Zealand; or
 - 18.3 in the case of a body corporate sent to its registered office.

Any notice sent by post shall be deemed to have been served on the day following the posting.

DISPUTE RESOLUTION NOTICE

19. In the event of any dispute or difference arising between the parties at any time as to the interpretation of this Covenant, or as to any matter or thing arising out of or in connection with this Covenant, either party may give to the other written notice adequately identifying the subject matter of that dispute or difference. The giving of this notice will be a condition precedent to the commencement by either party of proceedings (whether by way of mediation, arbitration or litigation) in respect of any

dispute or difference. This clause does not, however, limit the right of either party to seek urgent interlocutory relief by way of Court proceedings.

MEDIATION

20. Within 14 days from the date of service of the notice referred to in clause 19 of the Fourth Schedule either party may give written notice to the other party that it requires the dispute or difference to be referred to mediation. Upon receipt by the other party of that notice the dispute or difference (unless meanwhile settled) will then be referred to mediation pursuant to clause 21 of the Fourth Schedule.
21. Within 7 days of service of the notice referred to in clause 19 of the Fourth Schedule the parties will agree upon the Mediator to be appointed. If the parties are unable to agree, either party may request the President of the New Zealand Law Society to appoint a Mediator:
 - 21.1 the dispute or difference will be the subject of mediation for a period of 28 days (or such longer period as agreed by the parties) from the date upon which the Mediator accepts appointment;
 - 21.2 neither party will be entitled to commence or maintain any action in respect of the dispute without the consent of the Mediator during that period;
 - 21.3 each of the parties will promptly carry out such reasonable steps as may be requested by the Mediator;
 - 21.4 the parties acknowledge that the purpose of any exchange of information or documents or the making of any offer during mediation is to be taken only as an attempt to settle the dispute. No party may use any information or documents obtained during mediation for any purpose other than in an attempt to settle a dispute;
 - 21.5 after the expiration of the time established by or agreed under clause 21.1 of the Fourth Schedule, any party which has complied with the provisions of clauses 19 to 21 (inclusive) of the Fourth Schedule may in writing terminate the mediation and refer the dispute to arbitration or commence Court proceedings;
 - 21.6 each party shall bear their own costs in relation to any mediation. The costs of the Mediator shall be borne by the parties in equal shares.

ARBITRATION

22. A dispute referred to arbitration shall be referred to the arbitration of a single arbitrator if the parties can agree, or if they cannot agree within 14 days to a single arbitrator appointed by the President for the time being of the New Zealand Law Society at the request of either party, and shall be conducted in accordance with the provisions of the Arbitration Act 1996.

THE COUNCIL ACTING AS TERRITORIAL AUTHORITY

23. The Owner acknowledges that:

23.1 the Council, in its capacity as a territorial authority, is required to carry out its statutory consent functions under the Resource Management Act 1991 and the Building Act 2004 in accordance with the provisions of those statutes;

23.2 the granting by the Council of any consent or approval by the Council as territorial authority under either of those Acts shall not of itself be deemed to be a consent or approval by the Council (in its capacity as grantee) under this Covenant;

23.3 the Council is bound by statutory obligations to exercise its powers, including discretionary powers and duties under either of those Acts without regard to any relationship it may have with the Owner under this Covenant.

INDEMNITY

24. The Owner shall pay the Council's legal costs (as between solicitor and client) of and incidental to the enforcement or attempted enforcement of the Council's rights, remedies and powers in this Covenant and shall in addition to the Owner's obligations under Clauses 16 and 17 of the Fourth Schedule, indemnify the Council against all claims and proceedings arising out of a breach by the Owner of any of its obligations set out in this Covenant.

FIFTH SCHEDULE

Items or Structures Excluded

The items or structures listed below or shown on the plan attached to this Fifth Schedule shall, notwithstanding anything else, not be subject to the terms of this Covenant:

[NOTE: Either complete a list of excluded items here or attach a plan showing such items immediately following this page.]

SIXTH SCHEDULE

Earthquake Repair Works

[NOTE: If no specific works are required pursuant to clause 2 of the Third Schedule then record "Nil" here, otherwise list the specific works required.]

HERITAGE AND ARTS COMMITTEE 7. 3. 2012

7. REQUEST FOR AMENDMENT TO CONSERVATION COVENANTS FOR HERITAGE INCENTIVE GRANTS

| | |
|-------------------------------------|--|
| General Manager responsible: | General Manager, Strategy and Planning Group |
| Officer responsible: | Programme Manager, District Planning |
| Author: | Brendan Smyth, Architecture, Heritage & Urban Design |

PURPOSE OF REPORT

1. The purpose of this report is to consider changes to the current form of heritage conservation covenants that are associated with the Council's Heritage Incentive Grant scheme. The report has arisen out of concerns of the Heritage & Arts Committee that Council grant funds appear to be unable to be recovered if the building is demolished without the Council's consent (i.e., CERA processes) and where insurance funds have been paid out to the building owner for the full value of the building and have not been used to repair the building.

EXECUTIVE SUMMARY

Background

2. The 4th September 2010, the 22nd February 2011 and the 13th June 2011 earthquakes, and associated aftershocks, resulted in many heritage buildings in Christchurch being damaged and demolished. Some of these building's owners have been the recipient of a Heritage Incentive Grant and a conservation covenant had been registered on the Certificate of Title as is the normal process.
3. The existing covenant form allows no ability for the Council to ask for repayment of a grant from insurance proceeds received by a landowner as a consequence of the demolition of a building due to a force majeure event such as an earthquake. The existing covenant permits the Council to recover a grant where a landowner has demolished the covenanted building in breach of his/her obligations under the covenant, but not in circumstances of demolition through no fault of the landowner. Therefore, the proposal to recover grants from insurance proceeds could not apply to existing covenants, and could only apply to new covenants.
4. The primary purpose of heritage incentive grants is to fund restoration works, and in return for financial support the recipient grants a covenant in favour of the Council not to demolish, either for a specified period or in perpetuity. If those works are completed and the building retained by the landowner, then the Council's requirements are met. A covenant does not create an interest in the land or transfer a share of the property to the Council.
5. The options available to the Council are to either leave the current covenant provisions unaltered, or to alter those provisions to require repayment in certain circumstances.

Analysis of Seeking Grant Refunds after a Force Majeure Event

6. Under the current form of covenant, the occurrence of a force majeure type event which totally destroys the building will bring the obligations of the parties under the covenant to an end (Conservation Covenant Fourth Schedule clause 6), and whilst the heritage values might be totally lost, the existing covenant does not require repayment of the grant. The covenant recognises that the heritage values have been lost and provides that the arrangement should therefore come to an end. This is the basis upon which heritage incentive grants have been made for some years.
7. Alternatively, it is possible to amend the standard form of covenant to apply to future grants to provide that repayment is required, and this may potentially release funds for further heritage works on other buildings. If this approach was considered appropriate, then the process for recovering the funds in the event of a refusal to repay would also need to be considered. The Council could include provisions that one would typically see in a mortgage instrument, including a 'power of sale', which could be used to empower the Council to sell the underlying land to recover the grant if that was required. Council could sue for recovery of the debt and state it's clear intention to do so in the document. However, this may result in the need to

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undertake costly legal processes and potentially negative publicity if given effect to. While this may result in returned funds to benefit other heritage projects, there remains the potential that potential recipients may be less likely to accept funding on these terms. Inserting the above clauses would subtly shift funding from a grant based funding to more of a loan/mortgage based funding and may have an unintended negative effect.

8. The points below show that such changes may lead to a number of adverse outcomes for the owners of heritage buildings. These outcomes could also result in a reluctance on the behalf of owners to enter into any such agreement with Council and hence to own, retain and maintain heritage buildings.
9. Not all heritage buildings will have full replacement insurance cover, some, possibly many, may only have indemnity cover. If indemnity cover applies, then the insurance proceeds may be a relatively small sum and may be insufficient to fund the grant repayment to Council.
10. One intention of insurance is to enable the building to be repaired or replaced if necessary. Any deduction from those insurance proceeds could negatively impact on the ability of the landowner to rebuild (or repair) the building in an appropriate manner. Heritage buildings tend to have high build costs due to the generally high level of craftsmanship; high cost or rare materials such as stone and native timbers; and complex architectural detail. This can be an onerous responsibility with substantial financial implications for the owner. If similar high quality buildings are desired to replace those lost in events such as earthquakes then seeking grant repayment will be likely to act as a disincentive and encourage low cost, low quality building replacements and repairs.
11. The amount of the original grant may not necessarily equate to value. The value of the building or property may not necessarily have been increased by an amount equal to the grant. Grants frequently fund works which stabilise, strengthen and maintain the existing fabric and provide for systems such as fire sprinklers, items that are considered by many occupants to be standard rather than items to pay higher rents for. Heritage buildings are frequently high cost buildings to own, operate and maintain and can be difficult to lease as alterations to facilitate energy efficiency, for example and modern use may not be possible. The owners of heritage buildings are rarely seeking, or are able to gain, high financial returns from their buildings. It may be unfair to simply require repayment of the full grant from the insurance proceeds where higher rental returns were not generated by the grant.
12. The longer that a grant has been awarded to an owner the more difficult it will be to assess the repayment sum, if any, that should be made to the Council by the building owner. The Council and the City generally will have had the benefit of the building being upgraded for the period of time since the work was completed. Hence the amount of repayment should logically be reduced in proportion to the period of time since the work was undertaken. There is also the issue of inflation reducing the value of the grant with time. A Limited Covenant that provided protection for a stated number of years would be simpler to deal with than a full covenant but would still present these issues.
13. Building owners will more than likely be in a difficult position following a major force majeure event and the sudden demand that they repay a grant will possibly be seen as a harsh requirement which may influence their decision in favour of demolition. At the very least it will impose an unwelcome request in a time of heightened stress for building owners when pressure is already present from insurance companies and government organisations such as CERA.

FINANCIAL IMPLICATIONS

14. If the standard conservation covenant form was amended to require grant repayment in certain circumstances then, in respect of future grants, such an amendment may produce additional funds which could be applied to future grants.

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LEGAL CONSIDERATIONS

15. In return for heritage grants the Council requires that grant recipients agree to the registration of a heritage covenant against the Certificate of Title to their land before the grant is made. In general terms the purpose of a heritage covenant is to provide a legal mechanism to ensure that the Council grant is only expended on the restoration of the building in question and to create a legal obligation on the part of the owner not to demolish that building for a fixed period (limited covenant) or in perpetuity (full covenant). The covenant also requires that consent be gained from the Council for alterations to the building. The covenant document includes provisions and procedures for reclaiming the grant in the event of a breach of the conditions of the covenant. Breach is clearly defined in the documents and does not include demolition or damage to the building following an event such as an earthquake.

CONSULTATION FULFILMENT

16. If the Committee was minded to alter the current form of heritage covenant to require the repayment of grants from insurance proceeds as discussed in this report, consideration will need to be given to the appropriate level of public consultation required before that is done.

STAFF RECOMMENDATION

That the Heritage and Arts Committee retains the current form of conservation covenant consent and does not attempt to seek repayment of all or portions of grants in the event of the building being demolished other than in the event of a breach as outlined in the current covenant form.