



18. CANTERBURY DEVELOPMENT CORPORATION LTD - RESTRUCTURING

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PURPOSE OF REPORT

1. To provide information to Councillors with regard to a proposal to re-structure Canterbury Development Corporation Ltd.

EXECUTIVE SUMMARY

2. Canterbury Development Corporation Ltd. (CDC) is a Council organisation. All of the shares in the company are owned by Canterbury Development Corporation Trust (CDC Trust).
3. The CDC Trust was established for general charitable and economic development purposes.
4. In 2010 the High Court ruled that neither CDC or CDC Trust qualified for registration as charities under the Charities Act 2005. This meant that the CDC Trust is currently an invalid purpose Trust.
5. As a result the Trust's assets are held for the Council, the settlor of the Trust.
6. To rectify the situation it is proposed that the Trust's assets are vested in a Council-Controlled Organisation (CCO) established by the Council in 2011.
7. A similar situation exists with Canterbury Economic Development Fund Trust (CEDF) and its trustee, Canterbury Economic Development Trustee Ltd. (CEDF Trustees). Both organisations are part of the CDC group.
8. The proposal is discussed in further detail in this report.

FINANCIAL IMPLICATIONS

9. The only asset owned by the CDC Trust is all of the shares in CDC. These will vest in the CCO for nil consideration.
10. There are no tax issues arising from structuring the transaction in this way. There are no imputation credits and the forfeiture of any tax losses that may have accrued since 1 July 2008, when CDC Trust lost its charitable status, will not be a significant issue.
11. It is proposed that a similar process be adopted to vest the assets of CEDF Trustee in another CCO. The only activity of the company is to act as the Trustee of CEDF. The CCO will operate as a subsidiary company of CDC..
12. This transaction will also be for nil consideration, with no particular tax issues arising from it. The CCO will continue to invest in start up companies and joint ventures as CEDF Trustee currently does.
13. Staff in the Council's corporate finance unit are working with CDC staff on the financial information required to effect the transfer of shares from CDC Trust to the CCO. No issues of concern to the Council have been raised in the course of this work.
14. As a result of the High Court decision in 2010 the activities undertaken by CDC and CEDF are no longer tax exempt. In all other respects there are no financial implications for the Council as a result of the proposed vesting of assets.

LEGAL CONSIDERATIONS

15. In 2009 a review of the governance structure of CDC was carried out as part of the Council's regular audit programme.

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16. The review concluded that given CDC's importance for delivery of the Council's economic objectives a governance structure should be put in place that provides:
 - (a) appropriate levels of governance at both CDC and the Council
 - (b) regular (at least six monthly) reporting of performance
 - (c) political representation at the most appropriate level
 - (d) consideration should be given to CDC residing under the CCHL governance structure, subject to appropriate commercial, political and governance considerations.
17. CDC and CDC Trust were established as charitable entities, with the same objectives.
18. In 2010 the High Court ruled that neither of them qualified for registration as charities under the Charities Act 2005.
19. Principally this was because the Court found that there is some doubt about the charitable nature of purposes associated with economic development. CEDF Trustee and CEDF are in the same position.
20. The decision was not appealed. The result is that the CDC Trust is an invalid purpose Trust. The consequence of this is that the Trust's assets are assumed by law to be held for the benefit of the settlor of the Trust. This is described as a "Resulting Trust" in this case for the Council, the Settlor.
21. The Council also settled the CEDF Trust. The Trustee, CEDF Trustee, holds the assets of CEDF for the benefit of the Council.
22. This has put the Trusts in a difficult position. Last year the Trustees sought and were granted authority from the Council to hold and deal with the Trust assets in accordance with the powers conferred on them by the Trust Deeds.
23. It is proposed that the matter be dealt with as follows:
 - (a) activate two of the CCOs established by the Council in 2011
 - (b) vest the assets of the Trusts to that CCO
 - (c) prepare a statement of intent that would require the CCO and its subsidiaries to operate for the same purposes as the Trusts.
24. This process is within the powers of the CDC and CEDF Trustees.
25. It is proposed that the Council, the Trustees and the CCOs enter into deeds vesting the assets of CDC Trust and CEDF Trustee in the CCOs.
26. The directors of CDC and CEDF Trustee are the same and would remain unchanged. Those directors would also be appointed to both CCOs.
27. Constitutions have been drafted that reflect the obligations the companies have as CCOs. These will be brought to the Council for approval.
28. It is also proposed that Christchurch City Holdings Ltd monitor the activities and performance of the CCO acquiring the shares in CDC. The CCO acquiring the shares in CEDF Trustee will be included in the CDC group.
29. A memorandum of Understanding in respect of the nature and extent of the monitoring process will be entered into by the CCO, CCHL and the Council.

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30. The Council used the special consultative procedure before deciding to establish the CCOs that it is proposed to use for this transaction. Council staff undertook not to use the CCOs for any activity without the prior approval of Councillors.
31. If the shares in CDC are transferred to a CCO, CDC would become its wholly-owned subsidiary. At this stage the shares would be the CCO's only asset.
32. As CEDF is unincorporated, it is unable to own shares or issue loans. The sole purpose of establishing CEDF Trustee was for it to hold assets and enter contracts and arrangements on behalf of CEDF.
33. Section 56 of the Local Government Act 2002 (LGA 2002) requires the Council to use the special consultative procedure before it makes a decision to establish a Council-Controlled Organisation. If the shares in CDC are transferred to a CCO, CDC will itself become a CCO.
34. Sections 57-71 of the LGA 2002 apply to the subsidiaries of a CCO as if they are CCOs.
35. Section 56 is excluded from this provision. As a result the acquisition of the shares in CDC by a CCO would not trigger the requirement to comply with section 56. The CCO would be acquiring the shares in CDC, not the Council.
36. Section 78 of the LGA 2002 requires the Council to give consideration to the views and preferences of the persons likely to be affected by, or to have an interest, in a proposal or decision. It is up to the Council to determine how to achieve compliance with this section, depending on the significance of the matter.
37. It is the view of the legal services unit that given the nature of the transaction, and the reasons for it, the transfer of the shares in CDC from the CDC Trust to a CCO is not significant. The transfer is not likely to have any impact on or consequences for the well-being of the Councils district. Nor would it affect the capacity of the Council to perform its role.
38. In addition, the proposed change of shareholding in CDC would not have any effect on its current operations, which would continue as at present. The current levels of service provided by CDC and attributed to it in the 2009-19 LTCCP would not be altered if the Council were to adopt this proposal.
39. A similar situation would prevail with regard to the vesting in a CCO the interests that CEDF Trustee has in start up companies and joint ventures.

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STAFF RECOMMENDATION

It is recommended that the Council resolves to:

- (a) Adopt the proposal recommended by staff to:
 - (i) Enter into a deed with Canterbury Development Corporation Trust that will vest the assets of the Trust in an existing Council-Controlled Organisation; and
 - (ii) To enter into a similar deed with Canterbury Economic Development Trustee Ltd that will vest the assets of the company in an existing Council-Owned Organisation.
- (b) Appoint the current board of directors of Canterbury Development Corporation to the boards of the Council Controlled Organisation.
- (c) Authorise the General Manager Corporate Services and the Chief Executive to sign all documents and take such steps as required to effect and complete the vesting process.
- (d) Authorise staff to work with Canterbury Development Corporation and Christchurch City Holdings Ltd on the preparation of a Memorandum of Understanding to cover the on-going monitoring of the Council-Controlled Organisation that will own the shares in Canterbury Development Corporation;
- (e) Require staff to submit the final draft document to the Council for approval.

BACKGROUND

- 40. Canterbury Development Corporation Ltd is registered at the companies office as an incorporated company.
- 41. The current Directors are:
 - Garth Carnaby (Chairman)
 - Peter Barrowclough
 - Allan Polard
 - Grant Ryan
 - Ngairé Button (Deputy Mayor)
 - Aaron Keown (City Councillor)
- 42. All of the shares in CDC are held by Canterbury Development Trust CDC Trust.
- 43. CEDF Trustee is registered at the companies office as an incorporated company.
- 44. The current directors are the same as those for CDC.
- 45. The CDC Trust was settled by the Council in 1995 and acquired all of the shares in CDC shortly afterwards.
- 46. CEDF was settled by the Council in the same year. CEDF Trustee replaced CDC as the sole Trustee of CEDF in 2006, with the Council's consent.
- 47. Initially all organisations were Council-controlled. In 2005 they became Council organisations, with less than half of the trustees and directors being appointed by the Council.
- 48. Both Trusts were established for general charitable and economic development purposes. That status was lost following the High Court's decision in 2010.
- 49. Grants totalling \$7.4 million were included in the Council's 2009-19 LTCCP for regional economic development, business support and employment development. Of this sum CDC received \$4.147 million and CEDF \$350,000.

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50. The LTCCP noted that "the business community benefits from CDC grants, mentoring and other business development initiatives (such as emerging entrepreneur programmes)." These activities will continue, notwithstanding the restructuring of CDC.
51. A proposal for restructuring CDC was put before Councillors in 2010 and was favourably received. Staff were asked to pursue the matter further but the September earthquake, 2010 local body elections and the 2011 aftershocks intervened.