

Our ref: 0490534

13 April 2010

Vivien Rickard
Principal Heritage Advisor
Wellington City Council
WELLINGTON
By email

Dear Vivien

Heritage Grants

- 1 You have asked us to provide you with an opinion regarding the ability of the Council to utilise the Council's Built Heritage Incentive Fund (**Fund**) to provide grants to holders of leasehold interests in properties where the underlying fee simple interest is held by a Council Controlled Organisation (**CCO**). In particular, you provided details of properties where the certificate of title records Wellington Waterfront Limited as the holder of the fee simple interest in the properties.

Background

- 2 The Fund was created as a result of the Council's Built Heritage Policy 2005 (**Policy**), replacing the previous Building Safety Fund and Heritage Fund. According to the Policy, the aim of the Fund is to 'provide a more flexible approach to encourage the conservation of the city's significant listed heritage buildings'.
- 3 There is no statutory obligation for Council to have a heritage fund. The Fund was introduced at Council's discretion to encourage the retention and protection of heritage buildings. In particular, the economic return from those buildings can be threatened if they are declared earthquake prone under the Building Act 2004, due to the cost of strengthening work. As the Fund is not based in statute, the Council generally has discretion as to how to distribute the Fund, subject to general compliance with the terms of the Policy (as addressed further below).

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Who can apply for a grant?

4 The Policy is silent as to who can apply for grants under the Fund. However, the Fund Application Guide (**Guide**) states:

The applicant is the owner or part owner of the heritage building or object (e.g. a private owner, charitable trust including church organisations). The Crown, Crown entities, District Health Boards, Community Boards, Council Controlled Organisations and Council Business units are not eligible for funding.

5 Though it is not explicit from the terms of the Policy, we understand that the reason for the exclusion in the second sentence above is that those bodies are already funded from the public purse. It would be a pointless exercise for the Fund to provide a grant to a Council business unit to complete work. Such an internal transfer of public funds would reduce the public money available to private owners for funding.

6 In respect of the opinion that you have requested, two questions arise from the funding criteria set out in the Guide:

6.1 Is the holder of a leasehold interest in the underlying land on which the building is situated an 'owner or part owner of the heritage building'?

6.2 If the answer to the first question is yes, does the fact that the fee simple interest in the land on which the heritage building is situated is held by a CCO bar a grant being made?

7 We address each of these questions below.

Is the holder of a leasehold interest an owner or part owner?

8 We note that neither the Policy nor the Guide provide a definition of 'owner' or 'part owner'.

9 Given that holders of leasehold interests have a right of exclusive possession of the relevant land and buildings (and, in certain circumstances, maintenance obligations), we see no reason to exclude the holders of leasehold interests from the definition of owner or part owner of heritage buildings when it comes to assessing applications for grants from the Fund. Another way of looking at this ownership structure is that the holder of the fee simple interest (in this case, Wellington Waterfront Limited) has no right of occupation (or associated legal obligations) in respect of the associated building. This reinforces our interpretation that the owner for the purposes of the Policy should include those with a leasehold interest in the building.

10 We note that our interpretation is consistent with the objectives of the Fund, which includes providing 'a more flexible approach' to encourage the conservation of the city's significant listed heritage buildings. If the Council were to adopt a contrary interpretation, this would have a detrimental impact on the ability of the Fund to achieve its objectives, as it would also exclude many building owners simply because Council holds the underlying fee simple interest in the land.

Does the fact that the fee simple interest is held by a CCO bar a grant being made?

- 11 We note that the Guide states that CCOs are not eligible for funding.
- 12 However, we are of the view that neither the Policy nor the Guide bar the Council from making a grant from the Fund in respect of an application made by the holder of a leasehold interest in a heritage building (where the fee simple interest is held by a CCO). Our reasoning is that in such a situation a CCO would not be the applicant seeking a grant from the Fund nor would it be a direct beneficiary of any resulting grant (ie. it would not receive the funding).
- 13 Moreover, by providing grants to the holders of leasehold interests in heritage buildings, the Council will ensure that the Fund will be available to achieve its objectives in respect of a greater number of buildings in the city.

The Council's ability to deviate from its own policy

- 14 We have concluded that the Council can interpret its Policy and Guide in such a way as to issue grants from the Fund to holders of leasehold interests in heritage buildings. However, even if that interpretation is disputed we note that the Council has discretion when implementing its policies. By way of example, *Westhaven Shellfish Ltd v Chief Executive Ministry of Fisheries & Others* [2002] 2 NZLR 158 noted:

While the Chief Executive can state a policy, the decision makers must keep their ears open . . . They must indicate, or at least reserve a power to depart from the policy and a willingness to exercise that power.

- 15 Accordingly, while Guide seeks to limit the type of applicants that may seek a grant from the Fund, the Council is not bound to slavishly follow the Guide - particularly where deviation from the Guide will achieve better outcomes in terms of fulfilling the objectives of the Policy and the Fund.

Please do not hesitate to contact us should you have any questions or comments regarding the above.

Yours sincerely



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