

MEMORANDUM OF UNDERSTANDING

between

Dunedin City Council

and

Hereweka/Harbour Cone Management

Trust Board Incorporated

Memorandum of Understanding

Date:

2014

Parties

1. **Dunedin City Council** a Territorial Authority under the Local Government Act 2002 ("Council")
2. **Hereweka/Harbour Cone Management Trust Board Incorporated** a Charitable Trust settled on the 2nd day of October 2014 under the Charitable Trusts Act 1957 ("Trust")

Background

- A. The Council owns the land at 1299 Highcliff Road, Dunedin comprised and described in the Certificates of Title attached as Schedule 1 and known as Harbour Cone ("the Land").
- B. The Council commissioned a management plan for the Land dated May 2012 ("the Management Plan"). The primary purpose and vision of the Management Plan is to maintain the working landscape and enhance landscape, ecological, recreation, cultural and heritage values of the Land.
- C. The Council steering committee charged with developing an appropriate management model for the Land determined that the best vehicle to manage the Land in accordance with the Management Plan would be an independent charitable trust.
- D. The Trust was settled on the 2nd day of October 2014 by the Council as Settlor and Mike Lord, Neville Peat, Doctor Jill Hamel, Paul Pope, Lala Athene Frazer, Kevin Neill and Helen Davidson ("the Trust Deed").
- E. The Council and the Trust now wish to enter into this Memorandum of Understanding ("MOU") to record their respective roles and obligations in relation to the Land.

The Parties Hereby Agree as Follows

1. Appointment of the Trust

- 1.1 The Trust expressly acknowledges and agrees that, in carrying out its roles and obligations as set out in this MOU, it is at all times acting as a special agent (and not a general agent) of the Council strictly in accordance with the principles of the laws of agency and in doing so shall not in any way hold itself out to any persons as the owner of the Land.
- 1.2 The Council accordingly appoints the Trust as its special agent to manage the Land in accordance with the Management Plan and this MOU, and the Trust accepts the appointment.
- 1.3 The Trust, in carrying out its roles and obligations as special agent for the Council under this MOU, shall always act in good faith to ensure that the vision of the Management Plan is achieved for the overall benefit of the Council, the Trust and the wider community.

2. Roles of the Trust

2.1 The Trust is appointed by the Council pursuant to this MOU:

- a. To oversee and co-ordinate implementation of the Management Plan;
- b. To initiate projects and activities relating to the Land;
- c. To ensure that projects and activities are undertaken in a manner consistent with the Management Plan;
- d. To be responsible for the day to day management of the Land;
- e. To ensure that the Land and all improvements thereon are properly maintained;
- f. To liaise with, and be the first point of contact for, the Lessee and any future lessees of the Land;
- g. To jointly lead, with Council, any required review of the Management Plan (A review must be initiated within 10 years of the date of the existing management plan, the exact date to be agreed between the Trust and Council);
- h. To make recommendations to the Council in respect to any proposed actions referred to in clause 8); and
- i. To undertake fundraising activities and to control the distribution of such funds to the various projects and activities undertaken in respect to the Land.

3. Obligations of the Trust

3.1 In carrying out its roles pursuant to this MOU the Trust must:

- a. Act in a manner that best advances the aims and objectives of the Management Plan;
- b. Comply with all lawful requirements;
- c. Act in a manner which will benefit the reputation of both the Trust and the Council; and
- d. Comply with all applicable health and safety legislation, regulations and codes of practice.

4. Obligations of the Council

4.1 Council shall have the following obligations:

- a. To appoint two trustees of the Trust, in accordance with the provisions of the Trust Deed;
- b. To provide a one-off establishment grant of \$5,000.00;
- c. To contribute \$500.00 per annum for general running costs of the Trust, such amount to be adjusted by CPI annually;
- d. To approve the revised Management Plan following each review referred to in clause 2.1g;

- e. To receive, and if necessary provide comment on, the Plan referred to in clause 6; and
- f. To provide support from any Council departments/staff on a case by case basis as determined by the Council in its sole discretion.

5. Lease

- 5.1 The parties acknowledge that the Land is presently leased to Brendon Cross ("the Lessee") pursuant to a Deed of Lease dated 24 November 2010 ("the Lease").
- 5.2 The Lease is due to expire on 31 March 2016 ("the Expiry Date") and there is no right of renewal contained in the Lease.
- 5.3 At least six months prior to the Expiry Date (i.e. no later than 30 September 2015) the Trust shall, if it believes that continuing to lease all or part of the Land best advances the aims and objectives of the Management Plan, contact the Lessee to determine whether or not the Lessee wishes to enter into a new lease with the Council of all or part of the Land following expiry of the existing Lease. If the Lessee does wish to enter into a new lease with the Council, the Trust shall negotiate the terms and conditions of such new lease with the Lessee and then make a recommendation to the Council in accordance with clause 8.1a.

6. Plan

- 6.1 The Trust will provide the Council with a written annual plan by the 31st of October in each year (the Plan"), such Plan to:
 - a. Describe the projects and activities to be undertaken by the Trust for the following year, and explain how they are consistent with the aims and objectives of the Management Plan;
 - b. Indicate how the Trust intends to fund each project and activity;
 - c. Identify any matters for which Council approval is or may be required;
 - d. Identify any matters likely to require support from the Council (whether financial, administrative or other).
- 6.2 Within a reasonable time after receiving the Plan, the Council will (to the extent deemed necessary by Council in its sole discretion) discuss its contents with the Trust and provide comment.

7. Reporting

- 7.1 No later than the 31st of October in each year the Trust will give the Council a comprehensive written report on the management of the Land during the preceding year, such report to be in a form and in such detail as reasonably required by the Council and notified to the Trust

8. Recommendations and Approvals

- 8.1 The Trust shall make recommendations to the Council in respect to any of the following matters, acknowledging that such matters can only be authorised and implemented by Council as registered proprietor of the Land:
- a. Any proposed lease of the Land (whether in whole or in part), or any variation/renewal of any existing lease;
 - b. The obtaining of any building consents, resource consents and/or any other consents, licences or permits in the Council's name relating to the Trust's proposed activities;
 - c. Registration of a QEII open space covenant on any one or more of the Certificates of Title comprising the Land; and
 - d. Any other matter requiring authorisation of the Council as registered proprietor of the Land.
- 8.2 Unless otherwise agreed by the Council and the Trust, ownership of any permanent structures installed on and/or affixed to the Land shall upon completion vest in the Council.

9. Communications

- 9.1 The Trust will notify the Council of any matter relating to the Land and/or the Trust's management of the Land which:
- a. Involves an unresolved dispute between the Trust and any lessee of the Land;
 - b. Involves an unresolved dispute between the Trust and any contractor;

10. Insurance

- 10.1 Council's Public, Statutory and Employers Liability insurance policies will be extended to insure the activities of the Hereweka/Harbour Cone Management Trust Board. (Note: this insurance does not include cover for Trustee liability).

11. Review and Variations

- 11.1 There will be an annual review by the Council and the Trust of the working of this MOU and any matters contained herein.
- 11.2 Either Party may give notice at any time in writing of any amendments proposed to this MOU. Such notice shall set out the reasons for change(s) requested. No amendment shall be permitted unless approved by both Parties and recorded by way of a written variation signed by both Parties.

12. Disputes

- 12.1 Subject to available time and the exigencies of the situation, should any dispute arise between the Council and the Trust, then such dispute shall be discussed as quickly as possible by the Council and the Trust (on a without prejudice basis) in an attempt to

resolve the dispute amicably. If it appears that the matter cannot be resolved amicably by discussion between the Parties, then the matter in dispute shall, subject to available time and the exigencies of the situation, pass to mediation in accordance with clause 12.2 below.

- 12.2 Subject to available time and the exigencies of the situation, should any dispute not be resolved by amicable discussion in accordance with clause 12.1 above, then the Council and the Trust shall make all reasonable attempts in good faith to choose and appoint a mediator to endeavour to bring the dispute to a mutually acceptable conclusion as quickly as possible, the mediator to have the power to establish such procedure as he or she thinks fit.
- 12.3 If after the procedures in clauses 12.1 and 12.2 above have been followed (or if available time and the exigencies of the situation do not allow those procedures to be followed wholly or in part) and there remains any dispute between the Council and the Trust, the dispute shall be referred to the award of a single arbitrator to be agreed upon between the Council and the Trust and in default of their agreement to be appointed by the President for the time being of the New Zealand Law Society or the President's nominee.
- 12.4 Every stage of the arbitration shall be carried out as expeditiously as possible to ensure minimum delay and the quickest reasonably achievable outcome at minimum reasonable cost.
- 12.5 In the case of any breach or threatened breach of this MOU, nothing in this clause 12 shall prevent any party seeking relief from any Court of competent jurisdiction, including (but not limited to) a temporary or permanent injunction, specific performance or a declaration.

13. Termination

- 13.1 This MOU may be immediately terminated by the Council giving a termination notice in writing:
- a. If there is a significant default on the part of the Trust and that default has not been remedied to the reasonable satisfaction of the Council within 14 days of a written notice requiring rectification of the default having been given by the Council to the Trust.
 - b. Where there has been a repeated or persistent default not amounting to a significant default but at least two notices in writing requiring rectification of the default having been given at least thirty (30) days apart by the Council to the Trust and the default has been left unremedied or has been repeated.
 - c. Without any previous notice in writing, in the event of the Trust abandoning its duties.
 - d. Without any previous notice in writing, if the Trust commits an act of bankruptcy or makes or enters into any arrangement or composition with its creditors or is the subject of a liquidation order by the Court or a receiver is appointed.
- 13.2 For the purposes of this clause 13, a significant default means a default where there has been or is reasonably likely to be a material and significant impact on the value or state of the Land.

- 13.3 This MOU may be terminated by the Trust if the Council fails, after the Council has been given 30 days' notice in writing after default, to make any payment or funding contribution due to the Trust.

14. Consequences of Termination

- 14.1 Upon termination of this MOU for whatever reason, the Trust shall:
- a. Deliver up to the Council all records, contracts, other papers or property of any kind used in or relating to the Trust's management of the Land;
 - b. If and when required by the Council, assign to the Council all of its rights under all or any contracts in the name of the Trust relating to the Land;
 - c. Co-operate with the Council in the transfer of information and disposition of work in relation to any projects and/or activities current and incomplete at the date of termination of this MOU;
 - d. Comply with all other reasonable requests from the Council.
- 14.2 Any pre-existing liability of one Party to the other shall continue, and each Party's rights and remedies in relation thereto shall continue unaffected by any termination.

15. Partner Representatives

- 15.1 The Reserves and Recreation Team Leader of the Council or his/her nominee will liaise with the Trust.
- 15.2 [REDACTED] of the Trust will liaise with the Council.

16. Assignment

- 16.1 The appointment by the Council of the Trust pursuant to this MOU is personal to the Trust and may not be assigned or transferred in any manner without the prior written consent of the Council (which consent may be withheld at the sole discretion of the Council).
- 16.2 If however the Trust (with the consent in writing of the Council) assigns or transfers the whole or any part of its roles and obligations under this MOU, then the obligations of the Trust in respect to such assignment/transfer as set out in this MOU will cease forthwith from the effective date of the assignment/transfer.

17. Limitation of Trustee Liability

- 17.1 Subject to the provisions of clause 17.3 the Trustees of the Trust ("the Trustees") enter into and execute this MOU and covenant whether expressly or impliedly as Trustees of the Trust solely but no further and not in their personal capacity or otherwise and with the intent to bind only the person or persons for the time being filling the office of trustee during their holding such office and not thereafter.
- 17.2 Subject to the provisions of clause 17.3, the liabilities and obligations of the Trustees hereunder (if any) whether for payment of any sum or performance or observance of any covenant or provision herein contained or implied shall at all times and for all purposes be

counted not as an unlimited personal liability or obligation but only as a liability or obligation to pay any moneys and/or perform and observe any covenant and provision out of and so far as will extend to the assets of the Trust and coming into the hands of the Trustees in the course of their administration of the Trust.

17.3 Where the Council incurs any loss as a result of breach of Trust by any Trustee due to misfeasance on the part of that Trustee this limitation of liability will not apply to that Trustee and that Trustee will be personally liable to the Council to the extent the Trust assets do not satisfy all that Trustee's obligations to the Council.

18. Entire Agreement

18.1 This MOU constitutes the entire agreement between the parties as to its subject matter and supersedes and cancels any previous agreement, understanding or arrangement whether written or oral.

19. Indemnity

19.1 The Trust will indemnify the Council and will keep the Council fully indemnified in respect of any claim, loss, damage or expense of whatever nature incurred by the Council by reason of any breach of this MOU by the Trust.

19.2 The Council will indemnify the Trust and will keep the Trust fully indemnified in respect of any claim, loss, damage or expense of whatever nature incurred by the Trust by reason of any breach of this MOU by Council.

Executed

THE COMMON SEAL of THE DUNEDIN CITY COUNCIL was hereto affixed in the presence of: }

Mayor

Councillor

Signed by **Hereweka/Harbour Cone Management Trust Board Incorporated** as Trust by:
