

## MEMORANDUM

**TO:           The Mayor and Councillors of the Christchurch City Council  
              ("Council")**

**FROM:       M E Parker, counsel on behalf of the Malvern Hills Protection Society  
              ("the Society")**

- [1]    This has been prepared for your consideration in anticipation of the Society being granted speaking rights at the meeting of Council scheduled for Wednesday 7 November 2007.
- [2]    This Memorandum is to support the Society's concern regarding reported loan and security arrangements between Central Plains Water Limited ("CPWL") and certain lenders whom it understands comprise Dairy Holdings Limited, Willsden Farm Limited and Clovernook Farm Limited.
- [3]    This Council has apparently given its approval to such loan and security arrangements. That is of concern to the Society, given that this Council's involvement in the Central Plains Water Trust ("the Trust") is as one of two settlors (the other being Selwyn District Council) that have set up the Trust as being charitable under the Charitable Trusts Act 1957 and whose objects comprise the following:
- (a)    *to encourage, support and facilitate sustainable development of the water resources of the Regions for the benefit of the inhabitants;*
  - (b)    *to provide and facilitate opportunities for agricultural and horticultural diversity in the Regions;*
  - (c)    *to provide and facilitate education to the inhabitants of the Regions in relation to water issues affecting the Regions;*

(d) *to appropriately balance enhancement of economic benefits to Regions with enhancement of ecological, social and recreational values for the Regions.*

- [3] The Objects of the trust are expressly said to “*not include or extend to any matter or thing which is or shall be held or determined to be non-charitable*” (Clause 4.3 of the Trust Deed; emphasis added).
- [4] Accordingly, that this Council is required to give its approval to funding arrangements of CPWL leads the Society to conclude that not only is the Council’s position as a creditor affected by the arrangements but, as disclosed in a meeting of Council on 4 October, that Trust property is directly affected by the proposed loan and security arrangements.
- [5] The assets of the Trust comprise a Trust Fund which means, according to the Declaration of Trust, principally the resource consents applied for in applications currently before the Canterbury Regional Council and Selwyn District Council. Of course these resource consents have not been received as yet but the Society is concerned that those prospective rights may form part of the aforementioned loan and security arrangements. As the Society understands it, CPWL has no assets that it can offer as security beyond its rights under the current Memorandum of Agreement it has with the Trust.
- [6] The Trust has no power to allow another entity (including an incorporated company such as CPWL, necessarily operating only in the interests of its shareholders) to use the Trust Fund as security. Indeed, even if the Trust were to contemplate using the Trust Fund, including resource consents, as security, such action would have to be incidental or conducive to the attainment of the charitable objects of the Trust. In this regard my client understands that the loan agreement with Diary Holdings Limited and others is to cover a financial shortfall and fund an appeal to the Environment Court by CPWL.

- [7] The current Memorandum of Agreement between the Trust and CPWL sets out the terms and conditions upon which the Trust will make the benefit of the resource consents exclusively available to CPWL (no other party is mentioned).
- [8] While CPWL is said to be the vehicle to raise the funds necessary to obtain the resource consents there is no provision in that Memorandum of Agreement whereby the Trust arrogates to itself, or donates to CPWL, the ability to use the resource consents as security for any loan.
- [9] Indeed, under Clause 6.1(b) of the Memorandum of Agreement (which deals with the role of CPWL prior to the issue of resource consents) that company agrees to:

*act as the vehicle to raise the funds necessary to meet the costs of applying for the Resource Consents.*

- [10] The clause goes no further than that; and there is no agreement in relation to use of the Trust Fund in that fund-raising exercise.
- [11] Of crucial interest in the Memorandum of Agreement is Clause 20 dealing with transfer or assignment of Trust interests. At Clause 20.2 it records:

*The Water Trust may not transfer or assign its interests in the Resource Consents other than for the purposes of a genuine reorganisation or restructuring of the Water Trust.*

- [12] The Society is naturally concerned that such transfer or assignments of the Trust's interest, or part of its interests, may have occurred under the loan agreement. The fact, so it is understood by the Society, that the former members of the Council obtained outside legal advice as to their potential liability in relation to aspects of this loan agreement is a cause for concern in this regard.

[13] Further, it is noted that CPWL may assign its rights under the Memorandum of Agreement without the consent of the other party where such assignment “*is pursuant to the exercise of a secured creditor’s rights pursuant to its security*” (Clause 20.1).

[14] Hence the arrangements into which CPWL is entering and the effect upon the Trust Fund, and in particular the resource consent rights, are a matter which should be available for general public scrutiny and comment. This is especially so in relation to an express charitable trust, and its rights; and particularly one where the Trust is settled by local government bodies whose legislative direction requires accountability to their communities (Section 3 – Local Government Act 2002) and are subject to principles including that each is to:

*Conduct its business in an open, transparent and democratically accountable manner.....*

(Section 14 Local Government Act 2002)

[15] Accordingly, the apparent secrecy with which the loan agreement and security relating to it has been negotiated and debated by this Council has given great cause for concern as this seems contrary to those statutory local government standards. The concerns of the Society can initially be met by the simple expedient of the Council openly making available all details relating to the loan agreement and the security to be provided therein.

[16] In addition it is incumbent upon the Council, in the view of the Society, to review this matter in some detail as there seems a clear potential for conflict of interest, given that shareholders in CPWL are associated with the lenders under the proposed loan agreement i.e. all three lenders are CPWL shareholders; and two individuals are directors of both the lenders and CPWL.

[17] The Society is mindful of, and draws to the Council's attention, recent investigations by the Auditor General into matters of conflict in at least two other South Island localities relating to local government practices or actions.

[18] There is no reason why anything to do with the Central Plains Water project should not be open to public scrutiny in light of the express purposes of the charitable Trust recorded by the settlors (this Council and Selwyn District Council) in the Declaration of Trust to act for the benefit of the present and future inhabitants of the geographical regions covered by both Councils, and not for any private interest.

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Michael E Parker

**On behalf of the Malvern  
Hills Protection Society**

7 November 2007