

Funding Agreement

Parties

Suburbs Rugby Football Club Incorporated

Christchurch City Council

Date:

Parties

- (1) Suburbs Rugby Football Club Incorporated (Incorporation Number 219637) ("the **Trust**")
- (2) Christchurch City Council (the "**Council**")

Background

- A. The Coronation Hall ("the **Hall**") was damaged by fire in 2015. The Hall is currently owned by the Council. The Council and the Trust have agreed to complete works on the Hall. The Council will complete repairs to the areas of the Hall damaged by fire and the Trust will complete further improvements the Hall. Following the completion of the Works Council will transfer ownership of the Hall to the Trust.
- B. It is intended that the Works on the Hall will be completed by one contractor under a single contract, however for the purposes of determining cost allocation between the Council and the Trust the Works will be split into two portions being the Council Works and the Trust Works. Council will be responsible for the cost of the Council Works and the Trust will be responsible for the cost of the Trust Works.
- C. The parties acknowledge that there are benefits in having Council manage the whole of the Works such as continuity of contractors and Council's available project management resources. Council will therefore manage the Trust Works which would otherwise be the responsibility of the Trust.
- D. Council acknowledges that the Trust is making a significant investment in the Hall and the parties therefore agree to work together in partnership in relation to the Trust Works to deliver an outcome satisfactory to the Trust.

Agreement

1. The Contribution

- 1.1 The Trust will pay to the Council a funding contribution equal to the Actual Cost of the Trust Works (**Contribution**).
- 1.2 The Contribution will be paid as follows:
 - (a) the Trust will, prior to the Council instructing a contractor for the Works, either:
 - (i) pay to the Council the Estimated Contribution, time being of the essence or;
 - (ii) Provide a solicitor's undertaking as to proof of funds sufficient to meet the Estimated Contribution and instruct that solicitor to pay monthly to the Council upon request, an amount sufficient to meet the following month's anticipated progress payment claims to be submitted by the contractor in relation to the Trust Works.
 - (b) as soon as reasonably practicable following completion of the Works, Council will notify the Trust in writing of the Actual Costs and the amount of any Difference (from the Estimated Contribution) and, if required by the Trust, will provide supporting evidence of the Actual Costs; and

- (c) if the Actual Costs:
 - (i) exceed the Estimated Contribution, the Trust will pay the Difference to Council; or
 - (ii) are less than the Estimated Contribution, Council will pay the Difference to the Trust,in either case within 20 Business Days of the date of the notice under clause 1.2(b).

1.3 For the avoidance of doubt, the Trust will be responsible for all costs associated with the Trust Works including any cost overruns, notwithstanding that Council will manage the construction of the Trust Works.

1.4 The parties agree and acknowledge that the Contribution is not transferrable or to be used for any other purpose.

2. Conditions of Contribution

2.1 Capital Project Management

- (a) Council will be responsible for arranging and managing the Works in accordance with the Scope, including providing project management services, and procuring design, consenting and construction services and best practice warranties.
- (b) The parties will establish a project governance group to direct the Council's project manager to deliver the Trust Works in accordance with the Scope (**Group**). The Group will comprise:
 - (i) one representative appointed by the Trust; and
 - (ii) one representative appointed by Council, being Kelly Hansen, Team Leader Parks.who will meet as required to review, monitor and direct the project manager in relation to the Works and approve any variations to the Trust Works.
- (c) The unanimous consent of all of the members of the Group will be required for any variations to the Trust Works, however the Council shall not unreasonably withhold consent to any variations.
- (d) Unless otherwise agreed, Council will use its reasonable endeavours to procure fixed prices for the provision of each consultant's services for the Trust Works. If any consultants are to be contracted for both the Council Works and Trust Works, the Council will ensure any estimates or quotes contain separate cost allocations between the Council Works and Trust Works. On receipt of the estimate or quote for each of the consultant's services for the Trust Works, the Council will provide those estimates to the Trust for acceptance.
- (e) Unless otherwise agreed, Council will use its reasonable endeavours to procure tenders for the construction phase of the project on a fixed price basis and will provide a report to the Trust as soon as reasonably possible with its recommendation for the preferred contractor. The Trust may appoint one representative as an observer to the Council's procurement process for the contractor.
- (f) Except in the case where urgent work is required for health and safety reasons, Council must not authorise any variations to the scope of the services or the works in relation to the Trust Works under any contracts with consultants, contractors or suppliers that would materially increase the amount of the Contribution without the prior written consent of the Trust in writing (not to be unreasonably withheld).

2.2 Application of Contribution

- (a) The Council must apply the Contribution solely to the Trust Works and must return to the Trust any portion of the Contribution, plus any GST payment related to the Contribution, not used for the Trust Works.
- (b) The Council must, in completing the project and applying the Contribution and any agreed further funding from the Trust:
 - (i) act within the law and meet all applicable legal obligations;
 - (ii) act with honesty and in good faith and ensure the wider interest, status, circumstances and reputation of the Trust is respected and given full consideration at all times; and
 - (iii) carry out its responsibilities with the due skill care and diligence expected from a local authority undertaking activities of a similar nature.

2.3 Warranties and Defects

- (a) Following Practical Completion Council will, where possible, arrange to transfer any warranties provided by consultants and contractors to the Trust.
- (b) Council will be responsible for managing any claims against consultants and contractors in respect of defects in the design or construction of the Trust Works which arise prior to Final Completion. If pursuing any claim in relation to the Trust Works is likely to result in cost to Council that is more than minor, the Trust will reimburse the Council for any costs involved in pursuing the claim. Council will seek the Trust's approval before pursuing any such claim for which the Trust will be reimbursing Council. In the event that a claim arises in respect of both the Council Works and Trust Works that cannot be adequately separately identified, the parties will meet to discuss a fair method of cost apportionment. In the event the parties cannot reach agreement on a method of cost apportionment, the provisions of clause 12 will apply.

3. No Warranty

- 3.1 The Council does not provide any warranty whatsoever as to the timing of completion of the Works, particularly related to the impacts of weather and ground conditions, provided that Council shall use its reasonable endeavours to deliver the Hall in accordance with the indicative timeline to be agreed.

4. Payment

- 4.1 All payments to be made by the Trust under this Agreement must be paid to the bank account designated by Council from time to time, plus GST (if any) in cleared funds and without set off (except as provided by this Agreement).

5. Representatives and Meetings

- 5.1 The Trust and the Council will each appoint a representative, as specified below (or as notified in writing from time to time to the other party) who will be authorised to give and receive all directions and instructions in connection with the matters set out in this Agreement. As at the date of this Agreement, the appointed representatives are as follows

The Trust

Role: Jayson

Name:

Email:

Ph:

Council's Representative:

Role: Manager Parks and
Asset Management

Name: Kelly Hansen

Email: Kelly.Hansen@ccc.govt.nz

Ph: 027 544 4746

- 5.2 The Trust's Representative and the Council's Representative agree to meet at such times as reasonably required by either party in order to discuss the matters set out in this Agreement.
- 5.3 Both parties' Representatives will make themselves reasonably available to attend such meetings, at their own cost.

6. Intellectual Property

- 6.1 Except as expressly provided in this Agreement, neither party has the right to use the other party's name or their logos, trademarks or other intellectual property in any manner.

7. Force Majeure / Seismic Activity

- 7.1 Neither party will be responsible for any act, omission or failure to fulfil its obligations under this Agreement if such act, omission or failure arises from any cause reasonably beyond its control, which includes floods, earthquakes and other acts of God but excludes any industrial actions or business trading risk.

8. Insurance

- 8.1 The Council must:
- (a) Maintain a comprehensive contract works insurance policy for the Works against the Insured Risks until Practical Completion;
 - (b) pay the premium for the insurance taken out, when due.
- 8.2 For the purposes of this clause, "**Insured Risks**" means loss, damage or destruction resulting from fire, flood, explosion, lightning, earthquake, storm and any other risks which the Council reasonably determines.
- 8.3 All insurance proceeds received by Council in relation to the Hall must be applied by Council to the reinstatement of the Hall, unless otherwise agreed in writing with the Trust. If such reinstatement of the Hall is not possible for any reason and Council is to receive a cash settlement from its insurer for the Hall, Council will pay the proceeds of the insurance to the Trust. In accordance with the terms of Council's policy, these proceeds will be based on a reasonable estimate of the cost that would have been incurred had reinstatement been carried out (which may not necessarily be the same amount as the amount contributed by the Trust for the Facility).

9. Confidentiality

- 9.1 For the purposes of this clause, "Confidential Information" means all information relating to the other party or the other party's business of which a party becomes aware by virtue of its relationship with the other party under this Agreement and any other agreement between the parties, and shall include the matters set out in this Agreement.
- 9.2 The parties agree that any Confidential Information pertaining to this Agreement, remains strictly confidential and is not to be disclosed to any other party except in the circumstances where:

- (a) the Confidential Information is already in the public domain (otherwise than by breach of this clause);
- (b) a party is required to release the Confidential Information by any statutory or regulatory obligation (including the Council's obligations under the Local Government Official Information and Meetings Act 1987), or by any judicial or arbitration process;
- (c) the other party has consented in writing to the disclosure of the Confidential Information; or
- (d) the disclosure of Confidential Information is to an independent auditor as required in accordance with this Agreement.

10. Termination

10.1 The Council may immediately terminate this Agreement, either entirely or in part, by written notice to the Trust if one or more of the following events occurs:

- (a) the construction of the Hall is unable to be substantially completed for any reason beyond the reasonable control of the Council;
- (b) The Trust commits a material breach of this Agreement and fails, after receipt of written notice requesting remedy of the breach within a reasonable timeframe, to remedy that breach within that timeframe.

10.2 The Trust may terminate this agreement by written notice to Council if:

- (a) Council commits a material breach of this Agreement and fails, after receipt of written notice from the Trust giving particulars of the breach and requesting remedy of the breach within a reasonable timeframe, to remedy that breach within that timeframe;

11. Consequences of Termination

11.1 On termination of this Agreement under clause 10.1(a):

- (a) the Council shall be under no liability to the Trust or any other person to pay any compensation or damages for any loss that the Trust may suffer arising out of termination of this Agreement. No penalties or cancellation charges shall be payable by the Council;
- (b) the parties agree to meet and negotiate in good faith the amount of the Contribution that should be retained by the Council in recognition of any Contribution utilised prior to termination. The Council must immediately refund to the Trust the agreed amount of unutilised Contribution. If the parties cannot agree then clause 12 shall apply;
- (c) the parties will each immediately deliver to the other all documentation and property in their possession or control that belongs to the other party; and
- (d) the obligations set out in clause 15.7 will continue to apply.

11.2 On termination of this Agreement under clause 10.2:

- (a) the parties agree to meet and negotiate in good faith the amount of the Contribution that should be retained by the Council in recognition of any Contribution utilised prior to termination. The Council must immediately refund to the Trust the agreed amount of unutilised Contribution. If the parties cannot agree then clause 12 shall apply;

12. Ownership and Lease

- 12.1 Upon completion of the Works, Council will sell the Hall to the Trust for the sum of \$1.00, receipt of which is hereby acknowledged, and grant to the Trust a ground lease in respect of the Hall.
- 12.2 The parties will enter into an agreement to lease contemporaneously with this Agreement recording the obligations in clause 12.1 above.

13. Dispute Resolution

- 13.1 Without limiting the application of the sub-clauses below relating to dispute resolution, in the event of a dispute, disagreement or difference of opinion ("Dispute") arising under the Agreement as to:
- (a) the meaning or application of any part of the Agreement; or
 - (b) any other matter touching or concerning the Agreement,
- the parties shall actively and openly endeavour to amicably settle such Dispute themselves, with a view to achieving prompt resolution.
- 13.2 A party claiming that a Dispute has arisen must give written notice to the other party, specifying the nature of the Dispute. On receipt of such a notice, the parties shall endeavour to resolve the Dispute amicably and expeditiously, with a view to achieving prompt resolution.
- 13.3 If the parties do not resolve the Dispute within 10 Business Days of receipt of a notice given under the sub-clause above, a party may, by written notice to the other, refer the Dispute to mediation on the following terms:
- (a) a single mediator be appointed. If the parties fail to agree on a mediator within 14 days, on request of any party, the President of the New Zealand Law Society or the President's nominee shall appoint the mediator;
 - (b) the parties must cooperate with the mediator in an effort to resolve the dispute;
 - (c) the mediator may engage an appropriately qualified expert to give an opinion on technical matters. The cost will be a mediator's cost under 14.3(f).
 - (d) if the dispute is settled, the parties must sign a copy of the terms of the settlement;
 - (e) if the dispute is not resolved within 10 Business Days after the mediator has been appointed, or within any extended time that the parties agree to in writing, the mediation must cease;
 - (f) each party must pay a share of the mediator's fees and costs, including travel, room hire and refreshments;
 - (g) the parties agree that written statements given to the mediator or to one another, and any discussions between them, or between them and the mediator during the mediation are not admissible in any legal proceedings.
- 13.4 Pending the settlement of any Dispute, the parties shall continue to perform all their obligations under the Agreement except neither party shall be obliged to pay any money which is the subject of the Dispute.
- 13.5 Neither party may commence any court proceedings relating to a Dispute unless it has complied with the sub-clauses above relating to dispute resolution and mediation, except where either of them seeks urgent interlocutory relief (e.g. temporary or provisional decisions or judgements).

- 13.6 This clause shall not apply to disputes involving third party claims against Council arising out of the performance of this Agreement.

14. Notices

- 14.1 All communications under this Agreement which are required to be in writing, shall be sent by mail with postage prepaid or by hand delivery to the Address for Notices set out below or such other address as a party has notified in writing.

Council: 53 Hereford Street, Christchurch 8011
PO Box 73016, Christchurch 8154

The Trust: 77 Rempstone Drive, Halswell
Christchurch 8025

Subject to the following sub-clause, notice given in person is deemed to be served upon delivery or by post five (5) Business Days after the date of posting. Any notice served on a non-Business Day is deemed to have been served on the first Business Day after that day.

- 14.2 The Council shall only be deemed to have received delivery of a notice upon the Council acknowledging in writing receipt of the notice (this arrangement is reciprocal for both parties to the agreement).

15. General

15.1 The Council as Regulatory Body

- (a) The Trust acknowledges that the Council, in terms of its regulatory function as a Local Authority, is obliged to and shall act as an independent Local Authority and not as a party to this Agreement. The Trust shall have no right or claim against the Council in its capacity as a party to this Agreement as a result of any lawful action or decision made by the Council in the performance of its regulatory function except in the case of bad faith in its capacity as a party to this Agreement.
- (b) Any decision of the Council acting in its regulatory capacity shall not be construed as an approval of the Council as a party to this Agreement or as a variation unless otherwise expressly agreed.

15.2 Governing Law and Jurisdiction

This Agreement is governed by the laws of New Zealand. The parties agree to submit to the non-exclusive jurisdiction of the Courts of New Zealand.

15.3 Severability

In the event that any one or more of the provisions contained in this Agreement is declared invalid by an order, decree or judgment of any Court of competent jurisdiction, this Agreement will be read as if such provision had not been inserted. Where this action results in undue hardship on either party or constitutes a substantial deviation from the general intent and purpose of the parties as reflected in this Agreement, a variation rectifying such anticipated consequences will be entered into by the parties.

15.4 Entire Agreement

- (a) This Agreement constitutes the entire agreement between the parties relating to the subject matter and replaces all prior agreements or undertakings whether oral or written.
- (b) Each party, except to the extent qualified herein, confirms that on entering into this Agreement it has not relied upon any statement, warranty or other representation made or information supplied by or on behalf of the other party.

15.5 Variations

This Agreement cannot be amended, modified or varied except in writing signed by the Council's Representative and the Trust's Representative.

15.6 Waiver

No right under this Agreement shall be deemed to be waived except by notice in writing signed by each party. A waiver will not prejudice rights in respect of any subsequent breach.

15.7 Continuing Obligations

The provisions of the following clauses shall continue in force notwithstanding the termination or cancellation of this Agreement: Intellectual Property; Confidentiality; Consequences of Termination; Dispute Resolution.

15.8 No Partnership

Nothing in this Agreement constitutes the parties as partners or as agents for each other. No party has any authority to bind the other or act on its behalf except to the extent expressly provided for in this Agreement.

15.9 No Assignment

The Trust may not assign its rights or obligations under this Agreement without the prior written consent of the Council.

15.10 Costs

Each party shall bear its own costs (including legal costs) of and incidental to the negotiation, preparation and execution of this Agreement.

15.11 Conflict

In the event of any conflict between this Agreement and any of the Schedules to this Agreement or any other documents in relation to the development of the Facility, this Agreement shall take precedence.

16. Definitions and Interpretation

16.1 Definitions

In this Agreement unless the context otherwise requires:

- (a) **Actual Costs** means all actual project costs incurred by Council for the Trust Works, including for project management, design, planning, consenting and construction;
- (b) **Scope** means the project scope and pricing estimates set out in Schedule One;

- (c) **Business Day** means a day on which registered banks are open for business in Christchurch excluding Saturdays, Sundays and public holidays in Christchurch;
- (d) **Contribution** has the meaning given to it in clause 1.1;
- (e) **Council Works** means that part of the Scope which is the financial responsibility of Council as set out in Schedule One.
- (f) **Difference** means an amount equal to the difference between the Actual Costs and the Estimated Contribution;
- (g) **Estimated Contribution** means the estimated cost of the Trust Works as estimated by Council's contracted quantity surveyor (including any contingency included in that estimate) plus any additional consultant's costs, Council project management costs and the cost of any necessary consents for the Trust Works not included in the quantity surveyor's estimate.
- (h) **Trust Works** means that part of the Scope being the financial responsibility of the Trust as set out in Schedule Two.
- (i) **Hall** means the building known as the Coronation Hall located on Spreydon Domain at 71 Domain Terrace, Christchurch.
- (j) **Group** means the project governance group to be established in accordance with clause 2.1(b);
- (k) **GST** means Goods and Services Tax in terms of the Goods and Services Tax Act 1985 at the rate prevailing from time to time;
- (l) **Local Authority** means any City, District and Regional Councils with responsibility in relation to the Hall.
- (m) **Practical Completion** means when the Works are completed except for minor omissions and minor defects which in the opinion of the Council:
 - (i) the Contractor has reasonable grounds for not promptly correcting;
 - (ii) do not prevent the Works from being used for their intended purpose; and
 - (iii) rectification of which will not prejudice the convenient use of the Works.
- (n) **Works** means all works included in the Scope attached at Schedule One and encompasses both the Council Works and the Trust Works.

16.2 Interpretation

In this Agreement unless the context otherwise requires:

- (a) A Business Day shall be deemed to commence at 9:00 am and to terminate at 5:00 pm New Zealand time (standard time or summer time, as appropriate);
- (b) References to "**parties**" refer to parties in this Agreement and include successors and permitted assigns;
- (c) References to "**Council**" and "**the Trust**" include references to their employees, agents, consultants and contractors;

- (d) References to "**persons**" include references to companies, partnerships, associations, trusts, Council-Controlled Organisations, Government Departments and Local Authorities;
- (e) Headings and emphasis are for convenience only and shall not affect interpretation;
- (f) Words importing the singular include the plural and vice versa and words importing a gender include any gender;
- (g) References to clauses and schedules are references to clauses of and schedules to this Agreement;
- (h) A covenant or agreement on the part of two or more persons binds them jointly and severally;
- (i) Where a party's approval is required pursuant to any provision of this Agreement, that approval is not to be arbitrarily withheld or delayed;
- (j) All monetary amounts are stated exclusive of GST and in New Zealand dollars unless stated otherwise;
- (k) A reference to a statute includes a reference to any regulation, ordinance or by-law made under that statute and extends to any statute, regulation, proclamation, ordinance or by-law varying, consolidating or replacing the same;
- (l) A reference to a document includes an amendment or supplement to, or replacement or notation of that document;
- (m) Where the day on or by which anything to be done is not a Business Day, that thing must be done on or by the following Business Day; and
- (n) No rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this Agreement or any part of it.

Execution

Signed by **Suburbs Rugby Football Club Incorporated:**

Authorised Person's signature

Authorised Person's signature

Authorised Person's full name

Authorised Person's full name

Signed by **Christchurch City Council** by:

Authorised Person's signature

Authorised Person's signature

Authorised Person's full name

Authorised Person's full name

SCHEDULE ONE

Council Works

Schedule Two
Trust Works

