

Our Ref: WEL341/768

4 July 2005

O'Brien Property Consultancy Limited
Floor 3, 82 Willis Street
WELLINGTON

Attention: Peter O'Brien

Dear Sir

MASTERTON OFFICE AND DEPOT – SECTION 40 PUBLIC WORKS ACT 1981

Thank you for your letter of 13th of June 2005. We regret the delay in responding to you:

Is the Masterton Office and Depot Land Held Under The Public Works Act 1981?

Section 40 of the Public Works Act 1981 commences with the words as follows:

“(1) where any land held under this or any other Act or in any other manner for any public work –”

The above words uses the word “held” as oppose to “taken” or “acquired”. Therefore the fact that any land is purchased on the open market (as opposed to being taken under the Act) does not necessarily mean that that land is not subject to Section 40. Therefore, we believe that it is always prudent to discount the matter in which the land was acquired in terms of determining whether or not the land is subject to Section 40. The manner of acquisition becomes relevant for the subsequent parts of Section 40 as to the issue of whether or not it is “unpractical, unreasonable or unfair” to offer back the land.

The issue is whether or not land held for office and depot purposes constitute land held for a public work. In this regard, the definition of “public work” and “work in Section 2 of the Public Works Act 1981 becomes relevant. Inter alia, the definition provides as follows:

‘public work and work mean —
(a) *Every ... local work that ... any local authority is authorised to construct, undertake, establish, manage, operate, or maintain, and every use of land for any ... local work which ... any local authority is authorised to construct, undertake, establish, manage, operate, or maintain by or under this or any other Act; and include anything required directly or indirectly for any such ... local work or use.’*

As you can see the definition is extremely wide. It is clear that the Regional Council is authorised to operate or maintain the Masterton office and depot. There is no doubt in this respect. Therefore, on the face of it, the office and depot is within the definition of a public work.

There is an argument that the wide definition of “public work” and “work” are intended to allow the relevant authority to take land for all of its purposes, and that one should not apply this wide definition to existing land held by that authority. To use this argument, one would have to say that the intention of the Act is that there must be some element of “public good or purpose” before land could be regarded as being held for a public work.

We have endeavoured to find case law to support the above argument. Regrettably, we do not believe there is any case law under which it was determined that there should be a gloss placed on the definition of “public work” so that there should be an element of “public good or purpose” in its use.

There is also the counter argument that the Masterton office and depot is used for purposes secondary, related or in support to the “public good or purpose” uses. We believe that the safest course of action for the Council would be to regard the office and depot as being held for a “public work”, and therefore Section 40 of the Public Works Act 1981 applies.

Transfer to Pringle House Limited

Ordinarily, a privately owned company cannot hold a public work, and therefore any transfer to such company will require the Council to declare the office and depot to be surplus, and obviously trigger the offer back provisions in Section 40 of the Public Works Act 1981.

All the shares in Pringle House Limited are held by WRC Holdings Limited which in turn is held by the Wellington Regional Council. We believe that Pringle House Limited is a Council-Controlled Organisation within the meaning given in Section 6 of the Local Government Act 2002. As you are aware, we do not act for the Regional Council for all its legal requirements, and this issue would have been dealt with and considered by other Solicitors acting for the Regional Council, and there is no need for us to duplicate their work. However, we do not think there is any reason for us to believe that Pringle House Limited had not made the transition from the former Local Authority Trading Enterprises (“LATE”) to Council-Controlled Organisation under the new Act. You may wish to confirm this aspect with Mr Hastie, but we are reasonably sure that Pringle House Limited is or will be a Council-Controlled Organisation.

Section 2 of Schedule 9 of the Local Government Act of 2002 provides as follows.

“Modification of provisions of Public Works Act 1981

- (1) Nothing in sections 40 to 42 of the Public Works Act 1981 applies to the transfer of land to a council-controlled organisation under this Act.*
- (2) However, after the transfer, sections 40 and 41 of that Act apply to that land as if the council-controlled organisation were a local authority and the land had not been transferred under this Act..-*

The effect of the above section is obvious. The application of Section 40 of the Public Works Act 1981 would be suspended in respect to the transfer of the Masterton office and depot to Pringle House Limited. Any subsequent disposal by Pringle House Limited would require compliance with the provisions of the Public Works Act 1981.

Conclusion

We believe that it is safe for the Council to proceed to transfer the Masterton office and depot to Pringle House Limited. However, we believe that the transfer must be made on a market value basis to avoid gift duty implications. This would most likely be cost neutral to both the Council and Pringle House Limited. The Regional Council most likely would inject cash into Pringle House Limited either by way of shareholder equity or shareholder loan to enable Pringle House Limited to purchase the property from the Council.

We have not considered the issue of whether or not it is “unpractical, unreasonable or unfair” to offer back the land, as this issue is only to be dealt with at the time of the subsequent disposal by Pringle House Limited. The circumstances, and probably the law, will change by then.

We trust that the content of this letter is sufficient for your purposes. Should you have any queries, please do not hesitate to contact the writer.

Yours faithfully,
OAKLEY MORAN

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Partner

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