

**Chairperson and Committee Members**  
OPERATIONS & FINANCE COMMITTEE

16 AUGUST 2018

Meeting Status: **Public**

Purpose of Report: For Decision

## **RENEWAL OF THE AGREEMENT FOR THE UPGRADE OF THE MAHARA GALLERY**

### **PURPOSE OF REPORT**

1. This report seeks approval to renew the Agreement between the Council, the Mahara Gallery Trust and the Field Collection Trust for the upgrade of the Mahara Gallery.

### **DELEGATION**

2. The Operations & Finance Committee has delegated authority to consider this matter.

### **BACKGROUND**

3. Mahara Gallery is the District's Public Gallery, which has been located in a Council-owned building in Mahara Place since 1996. It is operated by the Mahara Gallery Trust, a charitable trust.
4. It was previously proposed to upgrade Mahara Gallery as part of an integrated development that included a new Waikanae Library. The upgrade will now proceed as two separate developments, rather than as an integrated one, and accordingly the agreement has been redrafted to reflect a stand-alone gallery project.

#### *Mahara Gallery Upgrade*

5. The Mahara Gallery Trust is seeking to provide a permanent home for the Field Collection in Waikanae. To achieve this, the Mahara Gallery needs additional space for exhibition, storage, public programming and administration, and needs to upgrade those spaces to museum standard to house and display the collection, and to be able to attract and show significant touring exhibitions and collections from other galleries.
6. Since 2009 the Council, the Mahara Gallery Trust and the Field Collection Trust have been working together to achieve the upgrade of the Gallery. This was formalised through successive agreements for the Mahara Gallery Upgrade which set out the objectives and responsibilities of the three parties involved.
7. On 23 June 2016 the Agreement was renewed for a three year period, expiring on 30 June 2019.

## ISSUES AND OPTIONS

### Issues

#### *The Upgrade Proposal*

8. The project aims to deliver a facility that will be able to provide a high-quality venue and experience consistent with its role as the District's public gallery. It will also be able to offer a secure home and museum-standard care for the Field Collection. The Field Collection is a significant collection of 44 artworks and artefacts associated with Frances Hodgkins and her family. If the Gallery is not able to provide the appropriate environment for this, the Collection may be lost to the District. The project also aims to contribute to the Waikanae Town Centres and Connectors Transformation Project and an improved built environment at Mahara Place.

#### *Existing Agreement for the Mahara Gallery Upgrade*

9. The previous Agreement for the Upgrade of the Mahara Gallery states that the Agreement will lapse if the Mahara Gallery Trust cannot confirm that committed funds for two-thirds of the estimated upgrade project cost have been secured by 30 June 2018.
10. At the present time, the Trust considers that it has committed funding of approximately \$700,000. This does not include funding from the Council, Community Board or Ministry for Culture and Heritage.
11. It is noted that the delay and uncertainty with regard to locating a site for the now shelved integrated library and gallery development has not assisted the Trust in its fund-raising programme. Funding of approximately \$250,000 has been withdrawn as a result of this delay, and the Trust has indicated that other potential funders have expressed unwillingness to contribute until greater clarity around the project has been achieved.

#### *Project Funding*

12. The most recent indicative costs of the Gallery upgrade project is \$5.205 million. This is the base amount included in the Upgrade Agreement and has been adjusted using the Local Government Cost Index (LGCI) and reflected in the 2018–2038 Long Term Plan (LTP).
13. The draft Agreement commits Council to one-third of the estimated upgrade project costs, to a budgeted total project cost of \$5.205 million (i.e. \$1.735 million). The Mahara Gallery Trust's two-thirds contribution to the total estimated upgrade project cost equates to \$3.470 million. If one-third can be anticipated to be provided by the Ministry of Culture and Heritage, then the Mahara Gallery Trust would need to raise one-third, or \$1.735 million.
14. The Council has continued to show its commitment to the upgrade of the Mahara Gallery with the project reflected in the 2018-2038 LTP.

#### *Proposed Agreement for the Mahara Gallery Upgrade (Appendix 1)*

15. An updated proposed Agreement for the Mahara Gallery Upgrade is attached as Appendix 1.

16. The proposed Agreement for the Mahara Gallery Upgrade closely follows the content of the previous agreement but has been revised to reflect the information in this report. Key dates have been extended. It has also been amended to provide for the following matters that were implied but not specific in the previous agreement:
- The Council will fund the design and consenting, as part of its total commitment, that is necessary to enable the Mahara Gallery Trust to apply for Crown funding, such as through the New Zealand Lotteries Board or the Ministry of Culture and Heritage. Council funding is provided in each year of the current triennium to align with the design and construction timetable, with construction anticipated to commence in July 2020;
  - Officers have added a clause to paragraph 6 and paragraph 42 of the proposed Agreement (Appendix 1) to allow for the possibility of Mahara Gallery Trust requiring an extended deadline for fundraising their share of the total upgrade project costs, depending on the timing of Crown agency funding rounds;
  - The Trust's funding (or acceptable guarantees) must be in place before construction commences;
  - The construction contract will be managed by the Council;
  - The completed gallery asset will be owned by the Council.
17. The Upgrade Agreement is a critical part of the Trust's on-going fundraising campaign as it demonstrates the Council's commitment and funding contribution to the upgrade project.

*Re-set the timeframe for the Upgrade Agreement*

18. Now that 2018-2038 LTP funding is confirmed, updated timelines have been set out in the proposed Agreement. These adjusted timelines recognise the Trust's fundraising programme was subject to constraints outside of its control while the proposed integrated gallery and library facility was being investigated.
19. The Mahara Gallery Trust has lodged an expression of interest (EOI) with the Ministry of Culture and Heritage's Regional Culture and Heritage Fund (RCHF). The Trust will be seeking one-third of the total funding from Crown agencies, with any shortfall being made up by a contribution from a future round of the RCHF.
20. The Trust advises that the Ministry of Culture and Heritage has indicated that there is a reasonable prospect that the Trust's application will meet the criteria for this fund. However, the Ministry is clear that it regards itself as a "funder of last resort" and that to succeed, applicants would need to demonstrate that they had sought funding from other Crown agencies which fund arts projects.

*Moving forward*

21. It is proposed that the Steering Group, originally set up for the integrated gallery and library project and chaired by Councillor Michael Scott, continue. This will facilitate confirmation of the governance, operational and funding relationships required in the Upgrade Agreement and provide clarity over future governance arrangements which is critical to the success of the project.
22. It had previously been anticipated that the Mahara Gallery Trust would confirm that it had met its fundraising target before Council gave approval for the detailed design stage to start, with ensuing resource and building consent applications and tendering for construction. However, the terms of the RCHF and other Crown agencies that fund arts projects are quite clear in that the project must be substantially advanced before a full application for funding is made, that is - *unencumbered resource consent(s) have been secured or the applicant can demonstrate a high likelihood that these will be secured without difficulty by the time that assessment has been completed.*
23. The proposed Agreement therefore enables the preliminary design work to proceed, funded by Council, which will give an understanding of high level costs so that this information can be used to re-initiate the fundraising campaign. The next stage would then be obtaining resource consents as part of the developed design stage, to enable the Trust to make a fully compliant application to the RCHF. If the Trust is successful and has met its other fundraising targets, the next decision point would be to allow tendering for construction. Council approval would be required before a tender could be accepted.
24. There are four decision points during this proposed course of action, at which Council can give approval to proceed to the next stage, or decline proceeding to the next stage, either indefinitely or until further requirements are met. The decision points are summarised below:

<b>Decision Point</b>	<b>Target Date</b>	<b>Status</b>	<b>Council approval required:</b>
<b>1</b>	30 Sept 2018	ROI and RFP processes used to identify Architect for project.	To appoint architect and proceed to preliminary design stage.
<b>2</b>	31 Jan 2019	Preliminary design agreed with high level costs identified.	For developed design and resource consent.
<b>3</b>	29 Feb 2020	Trust has achieved its funding target of two-thirds of total upgrade project costs.	To proceed to tendering for construction.
<b>4</b>	30 June 2020	Preferred tender for construction has been identified.	To confirm preferred tender and construction to commence [July 2020 onwards].

## **CONSIDERATIONS**

### Policy considerations

25. There are no policy considerations.

### Legal considerations

26. Council's Legal Counsel has reviewed the proposed Upgrade Agreement.

### Financial considerations

27. The Council has provided funding for the project in the 2018-2038 LTP.

### Tāngata whenua considerations

28. This report aligns with the tāngata whenua considerations in the Council's Strategy for Supporting the Arts (2012).

## **SIGNIFICANCE AND ENGAGEMENT**

### Degree of significance

29. This report refers to a revision of the Upgrade Agreement, reflecting a change of circumstances and a change in the timelines of the project. There is also a reconsideration of the points at which Council approval for the project to proceed is required, but in all other respects the intent of the proposed agreement is substantially the same. Therefore it is not a significant decision.

### Consultation already undertaken

30. The Council will continue to work with the Mahara Gallery Trust and the Field Collection Trust to ensure that the three parties are in agreement as the project proceeds.
31. The Mahara Gallery Trust has indicated its satisfaction with the revised Upgrade Agreement and its timelines.

### Engagement planning

32. It is likely that a full engagement plan, including community consultation, will be developed once the design is finalised.

### Publicity

33. The Council and the Mahara Gallery Trust are working together to ensure that the community is informed.

## **RECOMMENDATIONS**

34. That the Council approves the Agreement for the Mahara Gallery Upgrade attached in Appendix 1 of CS-18-341 and authorises the Mayor, one Councillor and the Chief Executive to sign on behalf of Council.

35. That the Council delegates to the Chief Executive the authority to approve minor editorial changes to the Agreement contained in Appendix 1 of CS-18-341 prior to it being signed.

<b>Report prepared by</b>	<b>Approved for submission</b>	<b>Approved for submission</b>	<b>Reviewed by Legal Counsel</b>
<b>Kat Cuttriss Libraries and Arts Manager</b>	<b>Janice McDougall Acting Group Manager Corporate Services</b>	<b>Natasha Tod Group Manager Regulatory Services</b>	<b>Tim Power Senior Legal Counsel</b>



### **Project Costs**

- 5 The Mahara Gallery Trustees have advised Council that all major funders that they have approached (including Crown funders) require the Council's commitment to the project, and to providing one-third of the funding of the project.
- 6 The Mahara Gallery Trust has until 29 February 2020 to raise its share of the project total, subject to the scheduling of funding agency rounds. Council has planned for capital and operating expenditure for the expanded Mahara Gallery, provisional upon the Mahara Gallery Trust reaching its funding goals.
- 7 The Council's commitment to this project is based on a project cost of \$5.205 million. The Waikanae Community Board's contribution of \$250,000 is included in this sum. The quantum and timing of this project cost (\$5.205 million) will be adjusted in the current and future annual plans using the Local Government Cost Index (LGCI).
- 8 The Council has included a budget in the 2018-38 Long Term Plan for increased annual operational expenditure, LGCI indexed, following the Mahara Gallery expansion. The increase will be an additional \$126,520 (inflation adjusted) in 2021/22.
- 9 The timing of these financial provisions and goals is included in the 2018/38 Long Term Plan and may be further reviewed as part of the Annual Plan processes in subsequent years, but the Council will maintain its commitment to provide one third of the Gallery's upgrade cost.

### **Joint Parties' Obligations**

- 10 The parties must meet with reasonable regularity and when reasonably requested by either party, and commit to maintaining clear and open communication and acting in good faith towards achieving this joint project.
- 11 Reach agreement on the terms for the Mahara Gallery Trust adopting the permanent and professional custodianship of the Field Collection and this must be documented as formal agreement between the parties.
- 12 Seek the Waikanae Community Board's views regarding the external design appearance and impact on Mahara Place. Ensure the exterior design complements the Town Centres and Connectors Transformation Project and, equally, ensure the project is informed by the Town Centres and Connectors Transformation Project.
- 13 Inform the Kāpiti Coast District Council, the two Trusts, Waikanae Community Board and the community regarding project progress.

### **Kāpiti Coast District Council's Obligations**

- 14 Maintain and professionally operate a Steering Group to provide project governance. This group will consist of two Elected Members, two representatives of the Mahara Gallery Trust, one representative of the Field Collection Trust and one senior staff member from Council.
- 15 Establish and professionally operate a Council-led project team, which includes members from the Mahara Gallery Trust, to design the Mahara Gallery.

- 16 Provide funding for the design work and consenting necessary as a prerequisite to Mahara Gallery Trust applying for funding from the Ministry for Culture and Heritage. This funding forms part of the Council's total funding for this project.
- 17 Reach agreement with the Mahara Gallery Trust on the design of the upgrade to the Mahara Gallery.
- 18 Reach agreement with the Mahara Gallery Trust on the construction plans for the upgrade of Mahara Gallery and any operational implications during construction, and after completion.
- 19 Be the principal in any project construction contract entered into and manage the contract.
- 20 Negotiate and agree with Mahara Gallery Trust the preferred governance, operational and funding relationships between the Council, the Mahara Gallery Trust and the Gallery staff to enable the Gallery to operate as the District's Public Gallery and document this in a formal agreement between the Council and Mahara Gallery Trust.

#### **Mahara Gallery Trust's obligations**

- 21 To lead discussions with the Field Collection Trustees regarding the requirements needed to ensure the permanent custodianship of the Field Collection by the Mahara Gallery Trust.
- 22 To provide representatives for the Steering Group and Project Team.
- 23 To advise the project team on the design requirements for the Mahara Gallery.
- 24 To review requirements and concept designs and ensure they match expectations regarding the design and the ability of the Mahara Gallery Trust to raise the necessary funds for the upgrade (enabling the designs to remain within the agreed funding envelope.)
- 25 Lead the fundraising for the Mahara Gallery building upgrade. The fundraising target should be kept to a realistic level and will, together with operational cost estimates, set design expectations for the Mahara Gallery upgrade. The parties recognise that this may be an iterative process until the design is complete.
- 26 To provide its share of project funding, or acceptable funding guarantees, to the Council prior to construction commencing.

#### **Field Collection Trust's obligations**

- 27 To support Mahara Gallery staff in the development of the requirements for their custodianship of the Field Collection.
- 28 To provide a representative for the Steering Group.
- 29 To monitor project progress to ensure that they are comfortable with the direction being taken with the regard to the design for storing and exhibiting the Field Collection.

- 30 To enter into agreement about permanent custodianship of the Field Collection by the Mahara Gallery Trust.

**Property**

- 31 The completed project will be the property of the Kāpiti Coast District Council.

**Intellectual Property**

- 32 The Council will retain ownership of the intellectual property developed under this Agreement, including the designs for the upgraded Mahara Gallery building.

**Governing Law**

- 33 This Agreement will be interpreted under and governed by the laws of New Zealand.

**Resolution of disputes**

- 34 A party may, at any time while there is a genuine dispute relating in any way to this Agreement (**Dispute**), give written notice (**Notice**) to the other party specifying the subject matter of the Dispute and requiring that the parties meet within ten Business Days after delivery of the Notice, to attempt to resolve the Dispute.
- 35 No party may issue any legal proceedings (other than for urgent interlocutory relief) relating to any Dispute, unless that party has first taken all reasonable steps to comply with clause 33.

**Confidentiality**

- 36 Except as required in the performance or enforcement of this Agreement or as required under the terms of the Local Government Official Information and Meetings Act 1987, no party will, without prior written consent of the other parties, disclose to any third party:
- a) any information disclosed by any party to another party on the express basis that such information is confidential; or
  - b) any information which might reasonably be expected by any party to be confidential in nature.

**Force Majeure / Unforeseen Circumstances**

- 37 No party (First Party) will be liable for any act, omission or failure by it under this Agreement if that act, omission or failure results directly from an event or circumstances beyond the reasonable control of the First Party, provided that:
- a) whenever the First Party becomes aware that such a result has occurred or is likely to occur, the First Party will notify the other parties by written notice accordingly;
  - b) each party will continue to use its best endeavours to perform its obligations as required under this Agreement;

- c) no party will be deemed to have accepted any liability to pay or share any extra costs which may be incurred by the other parties in complying with this clause or otherwise resulting from such act, omission or failure.

### **Partial Invalidity / Severance**

- 38 If any provision of this Agreement is or becomes invalid or unenforceable, that provision will be deemed deleted from this Agreement. The invalidity or unenforceability of that provision will not affect the other provisions of this Agreement, all of which will remain in full force and effect to the extent permitted by law, subject to any modifications made necessary by the deletion of the invalid or unenforceable provision.

### **Review of this Agreement / Amendments must be in writing**

- 39 Any party can request a review of this Agreement.
- 40 No amendment to this Agreement will be effective unless it is in writing and signed by each party.

### **Term of Agreement**

- 41 This Agreement commences on the date signing is completed by all three parties and will continue until 30 June 2021 unless terminated earlier under clause 41 or by any of the parties giving three (3) months' notice in writing. In the case of an earlier termination, the remaining two parties may seek to reach a new agreement. The parties will seek ways to maintain the information and services available to the community after the termination of this Agreement.
- 42 The parties agree that the Trust is expected to confirm committed funding for the two thirds of the project cost by 29 February 2020, subject to the scheduling of funding agency rounds. The Agreement will lapse at this time if the Trust has not achieved the target and there are no legitimate extenuating circumstances which have intervened to prevent the target being reached.
- 43 In the event that the project will be ready to proceed to construction during the term of this Agreement (30 June 2021) the Agreement will be renewed for a further term if necessary until the earlier of 30 June 2022 or completion of the project.

***Executed as an Agreement***

**SIGNED** on the \_\_\_\_\_ day of \_\_\_\_\_ 2018

The common seal of **MAHARA GALLERY** )  
TRUST BOARD was hereunto affixed in the presence of : )

\_\_\_\_\_  
Les Holborow  
**Chairman**

\_\_\_\_\_  
.....  
**Trust Member**

Signed on behalf of the **FIELD COLLECTION TRUST** by:

\_\_\_\_\_  
.....  
**Trust Member**

The common seal of **KĀPITI COAST DISTRICT** )  
**COUNCIL** was hereunto affixed in the presence of: )

\_\_\_\_\_  
K. Gurunathan  
**Mayor of Kāpiti Coast District**

\_\_\_\_\_  
Wayne Maxwell  
**Chief Executive**  
**Kāpiti Coast District Council**

\_\_\_\_\_  
Cr .....  
**Councillor of Kāpiti Coast District**