

CHRISTCHURCH CITY COUNCIL

INTERNAL MEMORANDUM

August 22, 2006

From: OFFICE SOLICITOR

To: GROUP MANAGER ADMINISTRATION

Copy to: Councillor Alpers
Group Manager Technical Services
Water Services Manager
Parks Manager
Environmental Planning & Policy Manager
Roading Manager
Community Manager, Beckenham Service Centre

OMBUDSMAN'S COMPLAINT RIVERLAW TERRACE

1. INTRODUCTION

You have sought my advice on matters raised in a letter from the Office of the Ombudsman to the City Manager dated 20 January 1995

You have forwarded to me previous correspondence from the Office of the Ombudsman together with a file containing the background to this matter.

In a letter dated 20 September 1994 from the Ombudsman to the City Manager, the Ombudsman advises that Mr Ken Sibley has complained that the Council has unreasonably delayed in taking action to remove an obstruction to a public road, namely Riverlaw Terrace.

There has been subsequent correspondence between the Council and the Office of the Ombudsman culminating the Ombudsman's letter of 20 January 1995. That letter refers to a number of legal decisions and you have sought my advice on whether they are relevant to the present situation.

From the material that you have forwarded to me, it is apparent that there is an unformed part of Riverlaw Terrace adjacent to the Heathcote River. This land is legal road owned by the Council and apparently has not been available for public access for many years by adjoining residents whose properties front onto Centaurus Road.

This part of Riverlaw Terrace is also crossed by two drains which I assume are controlled by the Council. The drain at the western end has vertical concrete sides with support being provided by cross beams. The drain at the eastern end does not have concrete sides but the Waste Management Unit advises it has timber banks. There are also a number of large plants such as pampas grass situated adjacent to the eastern drain. The western drain cannot be easily crossed by pedestrians and the eastern drain can only be crossed with some difficulty.

I record that I have visited the site of both drains and can appreciate the difficulties that a member of the public would encounter in attempting to walk along the road.

Apparently the Council has received complaints from members of the public as to the difficulty of access along the road and for approximately twelve months the Spreydon/Heathcote Community Board has been attempting to resolve the issue of public access along the road.

In reading the file there appear to the writer to be two separate issues involved in this matter :

- (a) a short-term issue of public access to the unformed legal road in essentially its present form; and
- (b) a long-term issue of how the Council is to manage this unformed legal road and future development of the road bearing in mind the opposition which is apparent from the adjoining landowners.

In this memorandum I intend to discuss principally the short-term issue and the legal considerations surrounding that issue.

With regard to the long-term issue, clearly I believe the residents will need to become involved and as the file indicates, there are worthwhile benefits in that from a security point of view for public using the road.

I also note in the file that there are suggestions that the Council stop the legal road under the Local Government Act 1974 whereupon it will vest in the Council as an esplanade reserve. At this point I do not intend to comment on that proposal and the views I set out below are on the basis of the legal position as it exists in relation to legal road.

I will now turn to consider the legal situation regarding the public's rights of access to road.

2. LEGAL PRINCIPLES

All roads and materials of which they are composed, with the exceptions of state highways and motorways, are owned by the Council and are under the control of the Council (ss.316 and 317 of the Local Government Act 1974).

Although the Council owns the roads in its district, these roads retain their character as highways so that this ownership by the Council is subject to the rights and passage in the highway enjoyed by the public, and separately the right of access to the highway by adjoining landowners.

These rights of passage and access apply to all legal roads in the Council's district whether or not those roads are physically formed as road and whether or not they are in actual use as roads by the public. So that the legal rights attach to what are popularly referred to as "paper roads" as much as to principal roads, such as Colombo Street, in the Council's district. The fact that a paper road may not have been used as such for many years, or at all, does not in any way derogate from the legal rights of the public to use and adjoining landowners to have access to that paper road.

The law relating to the use of the roads is a mixture of statutory provisions, principally in the Local Government Act 1974, and the common law, that is the law as developed through Court cases decided over the years.

As a preliminary point I would note that s.357 of the Local Government Act 1974 provides that it is a criminal offence for any person, not authorised by the Council or by or under any Act of Parliament, to encroach on a road by making or erecting any building, fence, ditch or other obstacle or work of any kind upon, over or under the road, or by planting any tree or shrub on the road.

Further it is an offence to place or leave on a road any timber, earth, stones or other thing or to dig up, remove or alter in any way the soil or surface of a road.

Upon conviction a person committing any of these offences is liable to a fine not exceeding \$200 and where the offences are continuing, to a fine not exceeding \$20 a day. The Court can also order that person to pay the costs incurred by the Council in removing any encroachment, obstruction or matter or in repairing any damage.

The implication of s.357 is that the Council does have a power to permit encroachments on a legal road such as structures or planting but that is a decision for the Council to make. Where no such consent has been given then an offence is committed.

The Council's powers in relation to roads have been considered by the Courts on a number of occasions and including the cases referred to in the letter from the Ombudsman's Office dated 20 January 1995.

In addition to those cases I would also refer to the Court of Appeal decision in—

Lower Hutt City Council v Attorney General ex rel Moulder (1977) 1NZLR184.

In that case the Court of Appeal stated :

"Although all streets and the soil thereof are by section 170(1) (of the former Municipal Corporations Act 1954) vested in the local corporation they nevertheless retain their character as highways so that the ownership by the corporation is in general subject to the rights in respect of highways enjoyed both by the public and by adjoining owners.

...the fact that streets are vested in and are under the control of the local authority does not entitle a council to erect or authorise the erection of a structure in a street if that structure amounts to what is technically described as a "public nuisance"...At common law a permanent construction erected upon a highway without lawful authority, and which renders the way less commodious than before to the public, is a "public nuisance" provided that the construction constitutes an appreciable interference with the traffic in the street...It may also be noted that it is no defence that the obstruction, though a nuisance, is in other ways beneficial to the public."

The question of the public's right of access to roads was recently considered by the High Court in—

Paprzyk v Tauranga District Council (1992) 3NZLR176

In that case which dealt with common law rights on the use of roads by the public, the Court stated :

"Once land is dedicated as a public road members of the public have, with certain qualifications, a right of passage over it. That general right of passage is supported by correlative duties imposed upon others not to substantially and unreasonably impede it. Effect is given to those duties by the laws of nuisance, trespass, negligence...But the ordinary citizen's common law right to use a publicly dedicated highway is not absolute. In addition to any limitations in the terms of the original dedication, it is qualified by the fact that it is a right of passage only, for the reasonable requirements of other road users, and any superimposed legislation."

3. SUMMARY OF STATUTE AND CASE LAW

From the statutory provisions, particularly s.357, and the cases referred to above and other cases, in my opinion the following propositions can be established :

- (a) The roads and materials of which they are composed are owned by the Council;
- (b) Although the Council owns the roads, the roads retain their character as highways so that the ownership by the Council is subject to the rights of the highway enjoyed by the public and rights of access to the highway by adjacent landowners;

- (c) The Council's primary function in relation to roads is to facilitate the passage which the word "highway" imports and for this purpose the roads are vested in the Council and the general powers as set out in the Local Government Act are conferred on the Council;
- (d) The fact that a road is a paper road does not affect its legal status nor the right of the public to pass and re-pass along that road;
- (e) The Council is empowered by s.357 of the Local Government Act 1974 to authorise encroachments on a legal road so long as those encroachments do not amount to a public nuisance;
- (f) What constitutes a "public nuisance" will be a question of fact to be decided upon by the Council depending upon the particular circumstances of each case. In general terms the Courts have held that a public nuisance will be established where the obstruction constitutes an "appreciable interference" to the right of the public to pass along the road.
- (g) Such a right to pass along the road exists 24 hours a day seven days a week so that the Council cannot effectively permit the public access only at certain times of the day.
- (h) If the Council is of the view that a particular situation constitutes a public nuisance then the Council does not have the authority to authorise that situation to continue so as to impede legal access to the public road and should rectify the situation.
- (i) If the Council fails to take action to remedy a situation of a public nuisance in respect of any road then any member of the public has the right to apply to the High Court for an order requiring the Council to rectify the situation.
- (j) The fact that a road is a paper road and therefore open for public access does not mean that the road must be formed for vehicular traffic. In determining what constitutes a public nuisance, the Council is entitled to take into account the fact that the road will only be used by pedestrians.

4. PRESENT SITUATION

In my opinion the existence of the two drains without any provision for a bridge over each drain so as to facilitate public access do constitute a "public nuisance" in that the absence of bridges are an appreciable interference with people using the paper road.

In Moulder's case (which I have referred to above) the Court there had to consider a situation where a local authority had blocked off a large portion of an existing formed carriageway by creating a raised and grassed area which was unusable by vehicles. The Council had done this without going through the road stopping procedures contained in the Local Government Act 1974.

The Court found that the raised grass area did constitute an appreciable interference with the use by vehicular traffic on the roads involved.

In the present situation the Council has constructed both drains and by analogy with Moulder's case in my view those drains constitute an appreciable interference to members of the public wishing to use the legal road when there are no bridges provided over the drains.

Further, there is at the present time pampas grass growing on the legal road near the eastern drain and again this does provide an appreciable interference to members of the public wishing to walk along the paper road.

The Council has a legal obligation to provide bridges over both drains and to remove the pampas grass by the eastern drain.

I appreciate that the advice I have given may not be well received by those residents adjoining the paper road. However, when they purchased their properties the information as to the existence of the road would have been readily available to them or their advisers.

Further, this short-term issue of access is not a Resource Management Act issue but is one to be dealt with by the Council under the Local Government Act and the common law. The public have existing legal rights to access over this piece of road.

This piece of road is shown as having a "road" designation on Planning Map 14 of the City Section of the Transitional District Plan so from a Resource Management Act point of view it is the district plan's intention that there be public access along this piece of road.

There is no necessity, as has been suggested by the adjoining residents, for the short-term issue to await the new district plan. If this land continues to be shown as "road" in the new plan then the residents can make submissions on that classification.

However, the Council legally cannot wait for the district plan to resolve the short-term issue of access, and as I noted above, the question of access is not a Resource Management Act issue.

Residents have suggested that a number of options must be considered by the Council before the short-term issue of access can be resolved, including an option of "no access". As will be clear from this opinion, "no access" is not an option open to the Council. Indeed the law directs the Council to provide public access.

Further, the genuine concerns by the residents such as loss of privacy and security, cannot stand against the clear legal rights the public have to access along this legal road. The situation the residents face is one similar to many property owners around the city where their properties adjoin paper roads and I believe the residents' interests would be best served by working in conjunction

with the Council to ensure that their concerns can be addressed as far as reasonably possible by the Council when public access is provided.

5. SUMMARY

I would advise that this opinion be referred to the next meeting of the Spreydon/Heathcote Community Board with a recommendation that the Council take action within a reasonable time frame, e.g. 2 months, to provide public access for pedestrians along the paper road. This will involve providing bridges across the two drains at either end of the paper road and removing some plants on the paper road itself. Clearly the Council should advise the residents before any bridging work or plant clearing is carried out.

In my view the Council has a clear legal obligation at the present time to carry out this work.

From a practical point of view the Council will also need to continue the ongoing discussions with the local residents as to the permanent development of the paper road.

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